

Meeting

MEMORANDUM NO. 20 (1960)

Subject: Study No. 23 - Rescission of Contracts

Attached as Exhibit I is a proposed statute on rescission of contracts. Several policy questions are involved in addition to the technical problem of drafting. The statute is discussed in the Comment attached as Exhibit II.

Respectfully submitted,

Joseph B. Harvey,
Assistant Executive Secretary

The people of the State of California do enact as follows:

SECTION 1. Section 1689 of the Civil Code is amended to read:

1689. A ~~[party-to-a]~~ contract not in writing may be rescinded by agreement of the parties ~~[may rescind the same in the following cases only:~~

~~1.---If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party;~~

~~2.---If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part;~~

~~3.---If such consideration becomes entirely void from any cause;~~

~~4.---If such consideration, before it is rendered to him, fails in a material respect, from any cause;~~

~~5.---By consent of all the other parties; or~~

~~6.---Under the circumstances provided for in sections 1785 and 1789 of this code] .~~

SEC. 2. Section 1690 of the Civil Code is amended to read:

1690. ~~[WHEN STIPULATIONS AGAINST RIGHT TO RESCIND DO NOT DEFEAT IT,~~
A stipulation that errors of description shall not avoid a contract, or shall be the subject of compensation, or both, does not take away the right of rescission for fraud, nor for mistake, where such mistake is in a matter essential to the inducement of the contract, and is not capable of exact and

entire-compensation.]

A contract in writing may be rescinded by a contract in writing, or by an executed oral agreement, and not otherwise.

SEC. 3. Section 1691 of the Civil Code is repealed.

SEC. 4. Section 3406 of the Civil Code is amended to read:

3406. The rescission of a contract may be adjudged, on the application of a party aggrieved, in the following cases only:

[1--In-any-of-the-cases-mentioned-in-Section-1689] (1) If the consent of the party seeking to rescind, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he seeks rescission, or of any other party to the contract jointly interested with such party; [ex,]

(2) If, through the fault of the party as to whom he seeks rescission, the consideration for his obligation fails, in whole or in part;

(3) If such consideration becomes entirely void from any cause;

(4) If such consideration, before it is rendered to him, fails in a material respect; from any cause;

[2,] (5) Where the contract is unlawful, for causes which do not appear in its terms or conditions, and the parties were not equally in fault; [ex,]

[3,] (6) When the public interest will be prejudiced by permitting it to stand. [,] ; or,

(7) Under the circumstances provided for in Sections 39, 1785, 1789, 1930, and 2314 of this code, Section 2470 of the Corporations Code, and Sections 331,

338, 359, 447, 1904, and 2030 of the Insurance Code.

SEC. 5. Section 3407 of the Civil Code is amended to read:

3407. [~~RESCISSION-FOR-MISTAKE.~~] (1) Rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

(2) A stipulation that errors of description shall not avoid a contract, or shall be the subject of compensation, or both, does not take away the right to have rescission adjudged for fraud, nor for mistake, where such mistake is in a matter essential to the inducement of the contract, and is not capable of exact and entire compensation.

SEC. 6. Section 3408 of the Civil Code is amended to read:

3408. [~~COURT-MAY-REQUIRE-PARTY-RESCINDING-TO-DO-EQUITY.--On-adjudging the-rescission-of-a-contract,-the-Court-may-require-the-party-to-whom-such relief-is-granted-to-make-any-compensation-to-the-other-which-justice-may-require.]~~
Subject to the provisions of Section 3409, before making application in any pleading to have the rescission of a contract adjudged, a party aggrieved must:

(1) Give the other parties to the contract prompt notice of his intention to make such an application upon discovering the facts which entitle him to do so if he is free from duress, menace, undue influence, or disability; and

(2) Restore to the other party everything of value which he has received under the contract or offer to restore the same upon condition that the other party do likewise, unless the latter is unable or positively refuses to do so.

SEC. 7. Section 3409 is added to the Civil Code to read:

3409. When an application is made in any pleading to have rescission adjudged:

(1) Relief shall not be denied because of a failure to give or delay in giving notice of intention to rescind or because of delay in asserting the right of rescission, unless such failure or delay has been substantially prejudicial to the other party;

(2) Relief shall not be denied because of a failure to restore or offer to restore the benefits received under the contract, unless such failure has been substantially prejudicial to the other party.

SEC. 8. Section 3410 is added to the Civil Code to read:

3410. On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

SEC. 9. Section 3411 is added to the Civil Code to read:

3411. Where a release is pleaded in an answer to a claim asserted in a pleading, the party asserting the claim may serve and file a reply stating a claim to have the rescission of the release adjudged. If a reply is served and filed, the court shall determine separately whether the rescission of the release should be adjudged and whether the party asserting the claim for which the release was given is otherwise entitled to judgment upon the claim. If the party asserting the claim is found not to be entitled to rescission of the release, the release shall be accorded such effect as it may be entitled as a defense to the claim. If the party asserting the claim is entitled to rescission

of the release, rescission of the release shall be adjudged, and the release shall be accorded no effect as a defense to the claim; but the court shall enter a separate judgment in favor of the party who pleaded or introduced the release in the amount of the value of any benefits which were conferred by said party upon the party asserting the claim in exchange for the release.

SEC. 10. Section 3411.5 is added to the Civil Code to read:

3411.5. When a party to an action seeks to have the rescission of a contract adjudged, the issues so raised shall be tried by the court without a jury.

SEC. 11. Section 1773 of the Civil Code is amended to read:

1773. REMEDIES OF UNPAID SELLER. (1) Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of the goods, as such, has:

* * *

(d) A right to [~~rescind~~] have the rescission of the sale adjudged as limited by this act.

* * *

SEC. 12. Section 1781 of the Civil Code is amended to read:

1781. [~~WHEN-AND-HOW-THE-SELLER-MAY-RESCIND-THE-SALE,~~] (1) An unpaid seller having a right of lien or having stopped the goods in transitu, may [~~rescind-the-transfer-of-title~~] foreclose his lien and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should

make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) The ~~{transfer-of-title-shall-not-be-held-to-have-been-rescinded-by-an-unpaid-seller}~~ right of an unpaid seller to resume the property in the goods under paragraph (1) of this section shall not be held to have been exercised until he has manifested by notice to the buyer or by some other overt act an intention to ~~{rescind}~~ exercise such right. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to ~~{rescind}~~ resume the property in the goods shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right ~~{of rescission}~~ to resume the property in the goods was asserted.

SEC. 13. Section 1785 of the Civil Code is amended to read:

1785. ~~{WHEN-SELLER-MAY-RESCIND-CONTRACT-OR-SALE.}~~ Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may ~~{totally rescind}~~ have the rescission of the contract or the sale adjudged in accordance with the provisions Article 5, Chapter 2, Title 3, Part 1 of Division fourth of this code, beginning with Section 3406 ~~{by-giving-notice-of-his-election-re-to-de-to-the-buyer}~~.

SEC. 14. Section 1789 of the Civil Code is amended to read:

1789. REMEDIES FOR BREACH OF WARRANTY. (1) Where there is a breach of warranty by the seller, the buyer may, at his election:

* * *

(d) [~~Rescind-the-contract-to-sell-or-the-sale-and~~] [] Refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller, and recover the price or any part thereof which has been paid and have the rescission of the contract adjudged under the provisions of Article 5, Chapter 2, Title 3, Part 1 of Division fourth of this code, beginning with Section 3406.

(2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(3) Where the goods have been delivered to the buyer, he can not [~~rescind~~] have the rescission of the sale adjudged if he knew of the breach of warranty when he accepted the good, [~~or-if-he-fails-to-notify-the-seller-within-a-reasonable-time-of-the-election-to-rescind,~~] or except as provided in Section 3409 of this code if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and [~~rescinding-the-sale~~] having the rescission of the sale adjudged.

(4) Where the buyer is entitled to [~~rescind-the-sale~~] refuse to receive the goods, or if the goods have already been received, to return them and to have the rescission of the sale adjudged, [~~and-elects-to-do-so,~~] the buyer shall cease to be liable for the price upon returning or offering to return the goods.

If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5) Where the buyer is entitled to ~~[rescind-the-sale]~~ return the goods and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by Section 1773.

* * *

SEC. 15. Section 39 of the Civil Code is amended to read:

39. A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, ~~[is-subject-to-rescission,]~~ may be adjudged rescinded as provided in the Chapter on ~~[Rescission]~~ Specific Relief of this Code.

SEC. 16. Section 1566 of the Civil Code is amended to read:

CONSENT, WHEN VOIDABLE. A consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties, in the manner prescribed by the Chapter on Rescission [7] or rescission may be adjudged in the manner prescribed by the Chapter on Specific Relief of this Code.

SEC. 17. Section 1930 of the Civil Code is amended to read:

1930. When a thing is let for a particular purpose the hirer must not use it for any other purpose; and if he does, he is liable to the letter

for all damages resulting from such use, or the letter may ~~[treat-the contract-as-thereby-rescinded]~~ have the rescission of the contract adjudged in the manner prescribed by the Chapter on Specific Relief.

SEC. 18. Section 2314 of the Civil Code is amended to read:

2314. ~~[RESCISSIION-OF-RATIFICATION.]~~ The rescission of a [A] ratification may be ~~[rescinded]~~ adjudged when made without such consent as is required in a contract, or with an imperfect knowledge of the material facts of the transaction ratified, but not otherwise.

SEC. 19. Section 2470 of the Corporations Code is amended to read:

2470. (a) Subject to the provisions of subdivision (b) of this section, rescission of the transfer of a certificate may be ~~[rescinded]~~ adjudged, and possession thereof ~~[reclaimed]~~ recovered, in any of the following cases:

(1) If the endorsement or delivery of the certificate was procured by fraud or duress.

(2) If the endorsement or delivery of the certificate was made under such mistake as to make the endorsement or delivery inequitable.

(3) If the delivery of the certificate was made without authority from the owner.

(4) If the delivery of the certificate was made after the owner's death or legal incapacity.

(b) The right to ~~[rescind]~~ have the rescission of the transfer of a certificate adjudged and ~~[reclaim]~~ to recover the possession thereof does not exist in either of the following cases:

(1) If the certificate has been transferred to a purchaser for value, in good faith, without notice of any facts making the transfer wrongful.

(2) If the injured person has elected to waive the injury or has been guilty of laches in endeavoring to enforce his rights.

(c) Any court of appropriate jurisdiction may enforce specifically the right to [~~reclaim~~] recover the possession of the certificate or to [~~rescind~~] have the rescission of the transfer thereof adjudged and, pending litigation, may enjoin the further transfer of the certificate or impound it.

SEC. 20. Section 331 of the Insurance Code is amended to read:

331. Concealment, whether intentional or unintentional, entitles the injured party to [~~rescind~~] have the rescission of insurance adjudged.

SEC. 21. Section 338 of the Insurance Code is amended to read:

338. An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to [~~rescind~~] have the rescission of the insurance adjudged.

SEC. 22. Section 359 of the Insurance Code is amended to read:

359. If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to [~~rescind~~] have the rescission of the contract adjudged from the time the representation becomes false.

SEC. 23. Section 447 of the Insurance Code is amended to read:

447. The violation of a material warranty or other material provision of a policy, on the part of either party thereto, entitles the other to ~~rescind~~ have the rescission of the policy adjudged.

SEC. 24. Section 650 of the Insurance Code is amended to read:

650. Whenever a right to ~~rescind~~ have the rescission of a contract of insurance adjudged is given to the insurer by any provision of this part, notice of intention to exercise such right ~~may~~ must be ~~exercised~~ given ~~at any time previous~~ prior to the commencement of an action on the contract.

SEC. 25. Section 1904 of the Insurance Code is amended to read:

1904. In marine insurance, if a representation by the insured is intentionally false in any respect, whether material or immaterial, the insurer may ~~rescind~~ have the rescission of the entire contract adjudged.

SEC. 26. Section 2030 of the Insurance Code is amended to read:

2030. An insurer is entitled to ~~rescind~~ have the rescission of a contract of fire insurance adjudged upon an alteration in the use or condition of the subject matter insured from that to which it is limited by the policy, when such alteration is made without the consent of the insurer by means within the control of the insured, and increases the risk.

SEC. 27. Section 338 of the Code of Civil Procedure is amended to read:

338. Within three years:

* * *

8. An action to have the rescission of a contract adjudged and to recover for benefits conferred pursuant to said contract. Where the ground for rescission is fraud, or mistake, the cause of action to have a rescission adjudged shall not be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

SEC. 28. Section 537 of the Code of Civil Procedure is amended to read:

537. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, in the following cases:

1. In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this State, and is not secured by any mortgage, deed of trust or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless [~~y-provided,--that~~ ~~sa]~~ . An action upon any liability, existing under the laws of this State, of a spouse, relative or kindred, for the support, maintenance, care or necessities furnished to the other spouse, or other relatives or kindred, shall be deemed to be an action upon an implied contract within the term as used throughout all subdivisions of this section. An action to have the

rescission of a contract adjudged and to recover a money judgment for the value of benefits conferred under such contract shall be deemed to be an action upon an implied contract within the term as used throughout all subdivisions of this section.

* * *

SEC. 29. Section 427 of the Code of Civil Procedure is amended to read:

427. The plaintiff may unite several causes of action in the same complaint, where they all arise out of:

1. Contracts, express or implied. An action to have the rescission of a contract adjudged, shall be deemed to be an action upon an implied contract within that term as used in this subdivision of this section.

* * *

SEC. 30. Section 112 of the Code of Civil Procedure is amended to read:

112. Justice courts shall have original jurisdiction of civil cases and proceedings as follows:

(a) In all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to five hundred dollars (\$500) or less, except cases at law which involve the title or possession of real estate or the legality of any tax, impost, assessment, toll or municipal fine, or actions for the rescission of a contract;

* * *

EXHIBIT II

COMMENT ON PROPOSED STATUTE

LOCATION OF PROPOSED STATUTES. The consultant recommended that the statutes providing for judicial rescission be located in Sections 1689 et seq. of the Civil Code. The reason given was that these sections, which presently deal with out of court rescission, are more extensive than the Sections 3406 et seq., which deal with judicial rescission; therefore, the amendments could be less extensive. The proposed statute does not carry out this recommendation. Sections 1689 et seq. of the Civil Code are in a portion of the Code which deals with the rights of parties to affect their legal relationships without judicial action. Sections 3406 et seq. of the Civil Code are in a portion of the Code dealing with judicial action and specific relief. Section 3274 provides:

As a general rule, compensation is the relief or remedy provided by the law of this State for the violation of private rights, and the means of securing their observance; and specific and preventive relief may be given in no other cases than those specified in this Part of the Civil Code.

Therefore, the provisions for judicial rescission have been placed in the part of the Code dealing with specific relief.

SECTIONS 1 - 3. The Commission has made no decision on the rights of the parties to the contract to rescind a contract by mutual consent. The consultant recommended that out of court rescission should be accomplished "only when all of the parties have agreed to rescind and such agreement has been executed."

The proposed language of the consultant is similar to that in present Civil Code Section 1698, which provides that a contract in writing can be modified by a contract in writing or by an executed oral agreement. In D. L. Godbey & Sons v. Deane, 39 Cal.2d 429 (1952), the Supreme Court held that this means executed by one party only, and execution by both parties of the modification agreement is not required. It is possible that the same construction would be given to the consultant's language; but we can't be sure. Therefore, it is possible that the result of such an enactment would be that the parties could orally rescind a written agreement, and if one party executed his part of the rescission agreement he could enforce the rescission agreement against the other party. The same rule would be applicable to the rescission of oral agreements. But the parties could not rescind a contract by written agreement.

Logically, I can see no reason why the rules for the out of court rescission of written contracts should be any different than the rules for out of court alteration of written agreements. To clearly accomplish this, the same language

should be used. Therefore, in Section 2 of the proposed statute, I have adapted the language of Section 1698 of the Civil Code, dealing with alteration, to the rescission of contracts by mutual agreement. Incidentally, this should close a loophole in existing Section 1698. The courts have held that a written agreement may be orally rescinded and an oral agreement substituted therefor, even though a written agreement cannot be altered except by written agreement or executed oral agreement. This seems to put a premium on the form of the words used by the parties rather than the substance of what they are doing. To make the rules in regard to rescission and alteration by out of court agreement uniform will tend to eliminate this situation.

Some dissatisfaction has been expressed with the provisions of Section 1698, and it may be that they should be modified. This, however, is not within the scope of the present study. If the section is modified, the rescission rule should also be modified. Until it is, it seems to me the rules should be the same.

In Section 1 of the statute, it is provided that an oral agreement may be rescinded by the agreement of the parties. This is the existing rule, and I could see no reason to change it. The problems of proof are no different than those involved in proving the original oral agreement. The consultant does not discuss the reason he believes a different rule should be applicable.

Provisions of Sections 1689 - 1691 which deal with the grounds of rescission rather than the procedure for effecting unilateral rescission have been transferred to Sections 3406 et seq. of the Civil Code.

SECTION 4. This section is amended to include the grounds for rescission contained in Section 1689. "By consent of all the other parties," now contained in Section 1689, has been omitted in view of the proposals made in Sections 1 and 2.

The cross reference subdivision of the section has been broadened considerably for the reasons that will appear in subsequent sections. Specific consideration of the sections referred to should be deferred until the subsequent amendments are considered.

SECTION 5. Subdivision (1) is presently in Section 3407. Subdivision (2) contains a rule presently in Section 1690.

SECTIONS 6, 7, AND 8. The present Section 3408 has been moved to Section 3410. The proposed Section 3408, together with Section 3409, embody the policy decision of the Commission to require a notice of intention to rescind. However, failure to give such notice does not deprive a party of the right to request rescission unless prejudice has been caused the other party.

In these sections the requirement of notice has been made a condition precedent to the right to request rescission

"in any pleading." This was done so that a person who has discovered grounds for rescission may not, by inaction, cause the other party to perform in the belief that no objection to the contract will be raised, and then raise the issue in a defensive pleading when enforcement is sought. This portion of these sections has not been considered as a policy matter by the Commission.

In drafting Sections 3408 and 3409, the phrase contained in the consultant's draft and in prior Commission drafts (from which much of these sections was borrowed), "whether such relief would formerly have been denominated legal or equitable," has been left out for the reason that it did not seem to add anything of value. Only one remedy will be left, and it doesn't seem to make much difference what it was formerly called whether we say so or not.

SECTION 9. This section contains the consultant's proposed section on the rescission of a release. No policy decision has been made on this question.

SECTION 10. This section expresses the Commission's policy determination that the right to jury trial does not exist in rescission actions. The Commission may wish to consider whether it is necessary to include such a provision inasmuch as the legal action to enforce out of court rescission has been eliminated, and only a right to obtain specific relief remains. The section has been included, though, so that there will be no doubt about the matter.

SECTIONS 11, 12, 13 AND 14. These sections amend certain provisions of the Uniform Sales Act which give a right to unilateral out of court rescission. Decisions of policy are involved in all of the proposed changes as the changes will eliminate the "uniformity" of these provisions of the Sales Act.

Section 1773 merely lists the remedies of an unpaid seller. Subdivision (1)(d) is amended to indicate that one of his remedies is to have the rescission of a contract adjudged, and that the remedy of the "right to rescind the sale" does not exist. No cross reference to this section is made in Section 3406 as this section does not specify the circumstances under which a seller has a right to have the sale rescinded.

The language of Section 1781 has been amended, but I believe the substance is not changed. Language indicating that the seller may "rescind the transfer" and "resume the property in the goods" has been changed to language indicating that he may "foreclose" his unpaid seller's lien and "resume the property in the goods." Perhaps the underlying logic of the Commission's basic policy decision should result in more extensive amendment. Although an unpaid seller may give notice that he is "foreclosing his lien" and "resuming the property in the goods," he cannot tell whether he has validly done so until a court so decides. The question before the court will be whether the underlying grounds existed or not. The seller

can bring a legal action for the breach to recover damages. The seller can also forego this remedy and sue to rescind the sale under Section 3406 for a material breach. Thus, the duality is maintained.

This duality is probably not as serious here as it is generally. The section is based upon the supposition that the seller is unpaid and still has the possession of the goods. If he sues at all, it will probably be for damages for the breach. If the buyer sues, it will be for damages for the seller's breach. Thus, as a practical matter, the legal action only is involved here.

From the present language of Section 1781, it is not clear that a strict rescission is involved. The seller is given the right to resume the property in the goods and yet sue for damages for breach. Hence, it appears that the underlying sale or contract to sell is not being rescinded, but is being enforced. The seller is merely given a right to levy on the goods in order to minimize his own loss. Thus, the proposed amendment, by eliminating the reference to rescission, may clarify the section. No cross reference to this section is made in Section 3406 because "rescission" has been deleted here.

Section 1785 is amended to indicate that there is no out of court rescission. Cross reference is made in Section 3406.

Section 1789 is also amended to eliminate unilateral out of court rescission. The Commission may wish to delete

Subdivision (4). The subdivision, even as amended, seems to create a liability on the part of the seller upon the buyer's notice. This creates a duality in the application of the statute of limitations as well as other problems. The situation seems to be fairly well covered by Subdivision (2). If the buyer has not received the goods, he may refuse to accept them. If the seller disagrees, he will have to sue and the action will be for the buyer's breach. If the buyer returns or offers to return the goods, the seller will either repay the price or he won't. If he does, there is no problem. If he doesn't, the buyer will have to sue, and he might as well request rescission at that time as well as the price that he has paid, for the issue involved will be whether he had the right to rescind and refuse the goods, not whether he did so. If the seller in accepting the return of the goods indicates that he agrees to the rescission, the buyer would have a simple legal action for the money paid as the seller breached his agreement to rescind.

SECTIONS 15, 16, 17 AND 18. These are isolated provisions of the Civil Code giving a right of rescission. They have been amended to indicate that the right is to have rescission adjudged in accordance with Section 3406, et seq. Cross references have been included in Section 3406, except for Section 1566 as that is fully covered by Section 3406 (1) as proposed.

SECTION 19. The amendment here proposed involves a section of the Uniform Stock Transfer Act. The logic of the

original policy decision seems to indicate that unilateral out of court rescission should be eliminated here, too.

Section 2471 of the Corporations Code (not amended) provides that although the transfer of a certificate has been rescinded, if the transferee still has the certificate and transfers it to a bona fide purchaser, the purchaser acquires a good title to the certificate and the shares represented thereby. As this is unchanged, the proposed change in Section 2470 will not result in any far-reaching change in the substance of the Stock Transfer Act. However, the change will mean that our act is no longer uniform.

SECTIONS 20 THROUGH 26. These sections propose amendments to a number of Insurance Code provisions which provide for unilateral rescission. Cross references have been included in Civil Code Section 3406 to all of these provisions except Section 650, which is a special section indicating when the right to rescind an insurance contract must be exercised.

The grounds for rescission, as provided in the Insurance Code, have not been changed, but the amendments indicate that the aggrieved party's right is to have the rescission adjudged rather than to rescind.

There are a number of related provisions in the Insurance Code which have not been amended in the present proposal. They provide that certain breaches or events "avoid" the policy or prevent "the policy from attaching to the risk." Among such provisions are Sections 448, 449, 1903, 2071 and 6010. I have

not included these provisions as they seem to make the policy void from its inception -- or from the specified event. Hence, rescission is not really involved. From a policy viewpoint, it might be desirable to make some adjustment in some of these sections, for if taken literally, an insurance company would not have to comply with the notice provisions to have the policy rescinded. It could return the premiums when a claim is filed (or so many of the premiums as have been paid within the statute of limitations period) and insist that the policy was void ab initio. However, no attempt at adjustment of these sections was made here because the study is concerned with rescinding existing contracts and not with revising the law relating to insurance.

SECTION 27. This contains the Commission's decision at the January meeting to apply a three year statute of limitations to rescission actions.

The Commission may wish to reconsider the desirability of providing a shorter limitations period for rescinding a contract than exists for enforcing the contract. A person who has parted with nothing under a contract may give the notice required by Section 3408 promptly upon discovery of the other party's fraud and return whatever he received under the contract. If the other party waits for three and one-half years, he may find that he can recover damages for breach of contract and the defendant will be unable to set up the fraud.

This is indicated in Bradbury v. Higginson, 167 Cal. 553 (1914). There, an action was brought to recover \$600 rent due under a lease. The defendant answered that a material matter had been omitted from the lease by mistake, and that plaintiff had failed to comply with the lease as it should read. For this failure, the defendant sought rescission. The court held that to grant the relief sought by the defendant, it would have to first reform the instrument for mistake. As more than three years had gone by since the discovery of the mistake, such relief could not be granted, and the plaintiff had the right to enforce the lease as the statute had not run on that claim yet.

As a matter of policy, it seems that a person, who has entered into a contract through fraud or mistake, who has given notice that he repudiates the contract and has returned what he has received has done all that he should be expected. He should not be deprived of his defense because the plaintiff has a longer statute of limitations. As the defendant gave prompt notice, the plaintiff could not be prejudiced by the defendant's failure to sue for rescission as the plaintiff knew the defendant's position. Even if the defendant did not give notice, if the plaintiff was in no way prejudiced by the failure, there does not seem to be any good reason to cut off the defendant's defense of fraud prior to the time the plaintiff's right to enforce the contract is cut off.

SECTION 28. This embodies the Commission's recommendation that the provisional remedy of attachment should be available in rescission cases when a money judgment is sought.

SECTION 29. This embodies the consultant's recommendation that an action to rescind a contract may be united in the same complaint with unrelated contract causes of action. The Commission has made no decision on this matter.

SECTION 30. This contains the consultant's recommendation that the Superior Court and Municipal Court only should have jurisdiction over rescission actions. The proposed section is the consultant's. It probably is not necessary to amend this section, for there is no other provision relating to Justice Courts giving them jurisdiction to adjudge the rescission of a contract, and the other amendments will abolish the legal action to enforce unilateral rescission. However, to eliminate any doubt, it is probably a good idea to include this amendment.

The Commission should be cognizant of the fact that this will force the victims of petty frauds (as mentioned at the January meeting) to go to the Municipal Court or the Superior Court for relief.

No policy decisions have been made upon this matter as yet.