

Date of Meeting: June 13-14, 1958

Date of Memo: June 4, 1958

Memorandum No. 4

Subject: Study No. 23 - Rescission of Contracts.

Attached are four items relevant to this subject:

- A. Pages 31 through 39 of Mr. Sullivan's report which contain his suggestions for legislative changes and his comments thereon.
- B. A memorandum which I prepared some time ago making various suggestions for changes in the statutes proposed by Mr. Sullivan (these are minor changes, nearly all of them relating to language rather than substance; most are designed simply to carry out in greater detail the substance of Mr. Sullivan's proposal that all references to unilateral out-of-court rescission be eliminated from the codes).
- C. Certain proposals for legislative changes made by Mr. Levit together with his comments thereon.
- D. A memorandum which I have prepared suggesting certain modifications of Mr. Levit's proposals; these are explained below in this memorandum.

It will be necessary, I believe, to have each of these items before you both in considering what follows in this memorandum and when this study is

under discussion at the June meeting.

Mr. Sullivan's study demonstrates that there are presently two kinds of legal proceedings in California relating to rescission of contracts. One is a "legal" action brought to recover benefits which the plaintiff has bestowed upon the defendant and which the defendant has failed to return to the plaintiff after the plaintiff has rescinded a contract between them by his unilateral out-of-court act. The other is an "equitable" action to obtain a court decree rescinding a contract; this action proceeds on the theory that the contract is in existence until the court's decree terminating it is entered. Mr. Sullivan pointed out that the existence of these two legal proceedings, based on two different theories of how a contract is brought to an end, have caused no little confusion in California law and have resulted in injustice in some cases. The principal problems arise out of the fact that under the present law such matters as whether there is a right to jury trial, whether the plaintiff must give notice of rescission and offer to restore the benefits which he has received before filing the action, what statute of limitations applies, what the effect of delay in acting may be, whether the provisional remedy of attachment is available, whether an action for rescission may be joined with other contract actions, etc., depends on whether the remedy sought by the party desiring to terminate a contract is the "legal" or the "equitable" remedy available to him.

Mr. Sullivan recommended that the ambiguities, anomalies and traps for

the unwary which presently exist in this area be eliminated by appropriate legislation. On the desirability of this, I do not understand there to be any disagreement. The question which has arisen is how the objective is to be accomplished.

It seems to me that one of two alternatives must be chosen: (1) eliminate one of the existing legal proceedings and modify the other so that it will incorporate all of the desirable elements but none of the defects of both existing actions or (2) retain both existing actions but modify both so that they have so many elements in common as to eliminate the confusion and injustice which arises out of their present dissimilarity.

Mr. Sullivan's proposal (Item A attached) is the first one suggested. He would eliminate the present "legal" action based on the theory that a contract can be rescinded by the unilateral out-of-court act of one of the parties to it and would provide that rescission can be accomplished only by the decree of a court. At the same time he would modify the present "equitable" action to incorporate a number of features which it does not presently have - right to jury trial, right of attachment, etc.

Previous discussions of Mr. Sullivan's proposal by the Commission indicate that there is a sharp division of opinion about it. Some members of the Commission are distressed at the thought of eliminating unilateral out-of-court rescission; others believe that unilateral out-of-court rescission has little if any utility from a practical point of view even if it be conceded that in theory the act puts an end to the contract and there is not sufficient reason for retaining it to justify doing so at the expense of destroying the neat and clean cut revision of the law in this

area suggested by Mr. Sullivan.

At the March meeting Mr. Levit undertook to draft revisions of existing law which would preserve out-of-court rescission while eliminating the problems that have existed in the past. His proposals are set forth in Item C attached. I understand that Mr. Levit rejects Mr. Sullivan's proposal but I am not clear which of the following he is proposing:

- (1) Eliminate the present "equitable" action to obtain a rescission and retain only the present "legal" action with some modifications; or
- (2) Retain both the present "legal" action and the present "equitable" action but make them so similar that most of the problems which have arisen out of their dual existence in the past would be eliminated.

If the first of these alternatives is what Mr. Levit is proposing it would mean, of course, that a contract could be rescinded only by an out-of-court act of the party desiring its termination and that the function of a court would be limited to that of entertaining an action for recovery of benefits bestowed by the rescinding party when the other party refuses to give them up and/or for a declaratory judgment that the out-of-court rescission was effective in those cases where the rescinding party has not bestowed any benefits on the other party (or desires a declaratory judgment as protection against a later suit for breach of contract even if the other party has returned the benefits received under the contract). Section 1691 as proposed by Mr. Levit would suggest that the single "legal" action is what he has in mind. On the other hand, Section 1692, speaking in terms

of seeking to have the rescission of a contract "adjudged" raises considerable doubt on the matter. I have concluded that what Mr. Levit has in mind is that the law of California should continue to provide for both out-of-court rescission enforced when necessary by a "legal" action and rescission effected by court decree but that the existing differences between the two actions with respect to such matters as right to jury trial, attachment, etc. should be eliminated. If this is Mr. Levit's suggestion and his suggestion is accepted by the Commission I believe that it would be desirable to revise the statutes which he proposes to make it somewhat clearer that this is the objective the Legislature has in mind. In Item D attached I have suggested for the consideration of the Commission a number of changes in the statutes proposed by Mr. Levit which I believe would contribute to such clarification.

I believe that the ideas and objectives which I have in mind in suggesting these modifications of Mr. Levit's proposals will be apparent upon reading them. I will not, therefore, comment on them prior to the meeting except to say (1) the statutes proposed in Item D could be modified to provide for a single "legal" action relating to rescission by eliminating proposed Civil Code Section 1692 and making related changes in the other sections proposed and (2) the statutes proposed in Item D could be modified to provide for a single "equitable" action relating to rescission by eliminating proposed Civil Code Section 1693 and making related changes in the other sections proposed.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

2/12/58

IV. Suggested Legislation

In order to accomplish the objective indicated in part III of this study, the following legislative changes are suggested:

1. Sections 3406 through 3408 of the Civil Code should be repealed.

Comment: Inasmuch as a unitary rescission procedure is recommended, it is necessary to repeal in toto either the existing provisions respecting out-of-court rescission (which may provide a basis for an action to enforce a rescission) or the existing provision respecting actions to obtain rescission. The present provisions respecting out-of-court rescission are more comprehensive than those respecting actions to obtain a rescission. Therefore, it would seem expedient to repeal the latter and amend the former so as to accomplish the desired changes.

2. Section 1688 of the Civil Code should be amended to read as follows:

"A contract is extinguished by its rescission. A rescission is accomplished only when all of the parties have agreed to rescind and such agreement has been executed or when rescission has been adjudged pursuant to the provisions of sections 1689 through 1692 of this Code."

Comment: This change is intended to show that a rescission can be accomplished only by an executed agreement to rescind or by a court decree and that the concept of a unilateral out-of-court rescission which may be enforced by a court action not involving an adjudication of rescission is abandoned.

3. Section 1689 of the Civil Code should be amended to read as follows:

"The rescission of a contract may be adjudged, on application of a party aggrieved, a-party-to-a-contract-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;

7. Where the contract is unlawful for causes which do not appear in its terms and conditions, and the parties were not equally at fault; or

8. When the public interest will be prejudiced by permitting it to stand."

Comment: The change in the introductory phrase is necessary in light of the abandonment of the concept of out-of-court rescission which might be made the basis for an action to enforce a rescission and to make it clear that if one of the parties refuses to execute a rescission, rescission can only be accomplished by a decree of a court. The introductory phrase proposed to be substituted for the present one

is taken from Section 3406 of the Civil Code which, pursuant to proposal "1" above, would be repealed.

The subparagraphs proposed to be added to Section 1689 incorporate the grounds for rescission which presently appear in Section 3406 but not in Section 1689. The proposed language is taken directly from Section 3406.

4. Section 1690 of the Civil Code should be amended to read as follows:

"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~~ 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."

Comment: The purpose of this change is to substitute a reference to adjudication of rescission for the present reference to out-of-court rescission.

5. Section 1691 should be repealed and a new Section 1691 enacted, reading as follows:

"1. A party who in a complaint, answer or cross-complaint, or by way of reply, as provided in subparagraph of this section, asserts a claim to have the rescission of a contract adjudged, shall not be denied relief, whether such relief would have formerly been denominated legal or equitable, because of a failure before judgment to restore or to offer to restore the benefits received under such contract, or to give notice of rescission to the other party.

2. The court may refuse to adjudge a rescission of the contract if the claim for rescission is not asserted promptly after the discovery of the facts which entitle the party to have a rescission adjudged and if such lack of promptness has been prejudicial to the other party.

3. The court may make a tender by the rescinding party of restoration of the benefits received by him under a contract a condition of a judgment of rescission.

4. Where a release is pleaded in an answer to a claim asserted in a complaint or cross-complaint, or is introduced as a defense to a claim asserted in a counterclaim, the party asserting the claim may serve and file a reply stating a claim to have the rescission of the release adjudged. If such a reply be filed and served, the court shall determine separately, or shall require the jury to render separate verdicts upon, 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 not entitled to rescission of the release, the release shall be accorded such effect as it may be entitled to 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 whether or not the party asserting the claim recovers a judgment thereon, a separate judgment shall be entered 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.

Comment: Subparagraph "1" of this proposed section (based on Section 112-g of the N.Y. Civil Practice Act) is intended to do away with the requirement, now applicable in actions to enforce an out-of-court rescission, that the rescinding party give notice of rescission and make an offer to restore prior to commencement of the action.

Subparagraph "2" makes applicable in all rescission actions, whether formally denominated legal or equitable, the equitable standard of laches and the equitable technique of the conditional decree to assure that the status quo is re-established.

Subparagraph "3" authorizes conditional judgments where necessary to reinstate the status quo.

Subparagraph "4" authorizes a party asserting a claim to which a release has been pleaded to assert in the same action a claim for rescission of the release and provides that in such a case, should rescission of the release be granted, a judgment should be entered for the other party for the restoration of benefits paid for the release.

6. A new Section 1692 should be added to the Civil Code, reading as follows:

Where a party in an action or by way of defense, counterclaim or reply seeks to have the rescission of a contract adjudged, any party shall be entitled to a jury trial upon the issues so raised."

Comment: This proposed section is intended to assure to each party to an action where rescission is sought a right to a jury trial.

7. Section 338 of the Code of Civil Procedure should be amended to read as follows:

"Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture.
2. An action for trespass upon or injury to real property.
3. An action for taking, detaining, or injuring any goods, or chattels, including actions for the specific recovery of personal property.

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

5. An action upon a bond of a public official except any cause of action based on fraud or embezzlement is not to be deemed to have accrued until the discovery, by the aggrieved party or his agent, of the facts constituting said cause of action upon the bond.

6. An action against a notary public on his bond or in his official capacity except that any cause of action based on malfeasance or misfeasance is not deemed to have accrued until discovery, by the aggrieved party or his agent, of the facts constituting said cause of action; provided, that any action based on malfeasance or misfeasance shall be commenced within one year from discovery, by the aggrieved party or his agent, of the facts constituting said cause of action or within three years from the performance of the notarial act giving rise to said action, whichever is later; and provided further, that any action against a notary public on his bond or in his official capacity must be commenced within six years.

7. An action to have the rescission of a contract adjudged and to recover for benefits conferred pursuant to said contract, whether such relief would have formerly been denominated legal or equitable and whether the party seeking to have the rescission adjudged seeks specific restitution of benefits conferred or their value. 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.

Comment: This proposal is intended to establish a uniform statute of limitations in actions for rescission. The provision respecting the accrual of the cause of action for rescission for fraud or mistake is intended to conform this limitation period to that provided by Code of Civil Procedure § 338(4) for other actions for relief on the grounds of fraud or mistake. The time of accrual with respect to other grounds will be governed by the general rule elaborated by the courts that the cause of actions accrues as soon as an action might be brought. For example, a cause of action for rescission of a contract for breach would accrue, just as would an action for compensatory damages for breach, at the time of the breach.

8. Section 537(1) of the Code of Civil Procedure should be amended to read as follows:

"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; provided, that 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 and 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, whether such relief would formerly have been denominated legal or equitable, shall be deemed to be an action upon an implied contract within the term as used throughout all subdivisions of this section."

Comment: The purpose of this proposed change is to make it clear that a party seeking to rescind a contract and to recover a money judgment may have the provisional remedy of attachment in all circumstances where such remedy would be available to a party asserting a claim to enforce a contract.

9. Section 427(1) of the Code of Civil Procedure should be amended as follows:

"1. Contracts, express or implied; provided, that an action to have the rescission of a contract adjudged, whether such relief would have formerly/been denominated legal or equitable, shall be deemed to be an action upon an implied contract within that term as used in this subdivision of this section."

Comment: The purpose of this proposed change is to make it clear that unrelated contract and quasi-contract claims may be joined with claims for rescission whether the claim for rescission would formerly have been denominated legal or equitable.

10. Section 112(a) of the Code of Civil Procedure should be amended as follows:

"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;"

Comment: Under the provisions of Code of Civil Procedure § 89(c) the municipal courts have jurisdiction of actions to cancel or rescind a contract when such relief is sought in connection with an action to recover money not exceeding \$3,000 or property not exceeding a value

of \$3,000. Under the provisions of Code of Civil Procedure § 112(a) the justice courts have concurrent jurisdiction over actions to enforce a rescission (i.e., an action formally denominated legal) when such action is brought to recover money not exceeding \$500 or property, other than real estate of a value not exceeding \$500. The proposed change would divest the justice courts of this concurrent jurisdiction which depends upon whether the action be denominated legal or equitable.

March 5, 1958

Possible Changes in Statutes

Proposed by Professor Sullivan

Professor Sullivan sets forth at Pages ³¹~~25~~ through ³⁹~~33~~ of his study suggested legislation together with comments thereon. His first proposal is to repeal Sections 3406 through 3408 of the Civil Code. However, Section 3407 may embody a substantive rule of law which should be retained in the new statute. It provides:

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.

I suggest the following changes in Section 1689 of the Civil Code as proposed by Professor Sullivan to be revised (changes from Professor Sullivan's proposed draft in strike-out and underline):

1689. The rescission of a contract may be adjudged, on application of a party aggrieved, in the following cases only:

1. If the consent of the party ~~rescinding~~ 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 ~~rescinds~~ seeks rescission, 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~~ seeks rescission, the cause for his obligation fails, in whole or in part;

5. ~~By-consent-of-all-the-other-parties.~~ If all of the parties to the contract have agreed to rescind it but a party has failed to execute the agreement;

I suggest the following changes in Section 1691 as drafted:

1. A party who ~~in-a-complaint,-answer-or-cross-complaint,-or~~

~~by-way-of-reply, as provided in subparagraph figure 4 of this section~~ asserts a claim to have the rescission of a contract adjudged, shall not be denied relief, whether such relief would have formerly been denominated legal or equitable, because of a failure before judgment to restore or to offer to restore the benefits received under such contract, or to give notice of rescission to the other party.

2. ~~The court may refuse to adjudge a rescission of the contract.~~ Rescission of a contract shall be denied if the claim for rescission is not asserted promptly after the discovery of the facts which entitle the party to have a seek rescission adjudged and if such lack of promptness has been prejudicial to the other party.
3. The court may ~~make a tender by the rescinding party of restoration of~~ require a party in whose favor a rescission is adjudged to restore the benefits received by him under a the contract rescinded as a condition of a judgment of rescission.
4. Where a release is pleaded in an answer to a claim asserted in a ~~complaint or cross-complaint, or is introduced as a defense to a claim asserted in a counterclaim~~ pleading, the party asserting the claim may serve and file a reply pleading stating a claim to have the rescission of the release adjudged. If such a reply pleading be served and filed and served, the court shall determine separately, or shall require the jury to render separate verdicts upon the questions whether the rescission of the release should be adjudged and whether the party asserting the claim for which the release is 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 to as a defense to the claim. If the party asserting the claim is entitled to rescission of the release, such rescission of the release shall be adjudged, and the release shall be accorded no effect as a defense to the claim.~~ Where the party asserting the claim recovers a judgment thereon, a separate judgment shall be entered 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.

I suggest the following changes in Section 1692 as drafted:

1692. Where a party in to an action ~~or by-way-of-defense, counterclaim or reply~~ seeks to have the rescission of a contract adjudged, any party shall be entitled to a jury trial upon the issues so raised.

The Commission may wish to substitute for the revision of Section 338 of the Code of Civil Procedure by Professor Sullivan (p. 30) the following:

1. Add the following subparagraph 3 to C.C.P. Section 337:

3. An action to have the rescission of a written contract adjudged and to recover for benefits conferred pursuant to said contract, whether such relief would formerly have been denominated legal or equitable and whether the party seeking to have the rescission adjudged seeks specific restitution of the benefits conferred or their value. 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 aggrieved party discovered or should have discovered the facts constituting the fraud or mistake.

2. Add a similar subparagraph to C.C.P. Section 339, beginning as follows:

3. An action to have the rescission of a contract in writing adjudged and to recover, etc.

The Commission may wish to consider whether to add to the proposed statute a provision along the following lines:

The changes made by this bill shall not be applicable to or in any wise prejudice or affect any action pending on the effective date hereof in any of the courts of this State.

June 3, 1958

C - LEVIT PROPOSALS
WITH COMMENTS

The following would be the provisions of the Civil Code and the Code of Civil Procedure relative to rescission of contracts if Mr. Levit's recommendations were adopted: (changes from present law shown in strike-out and underline)

MR. LEVIT'S PROPOSALS

A. Civil Code:

§ 1688. RESCISSION EXTINGUISHES CONTRACT.

[No Change]

A contract is extinguished by its rescission.

§ 1689. ~~A-party-to-a-contract-may-rescind-the-same~~

A contract may be rescinded 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: provided that rescission cannot be had for mere mistake, unless the party against whom he rescinds can be restored to substantially the same position as if the contract had not been made;

[Incorporates
substance of
repealed C.C.
§ 3407]

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;

[7 and 8
taken from
repealed
C.C. § 3406]

7. Where the contract is unlawful for causes which do not appear in its terms and conditions, and the parties were not equally at fault; or

8. When the public interest will be prejudiced by permitting it to stand.

§ 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.

§ 1691. RESCISSION, HOW EFFECTED. Subject to the provisions of Section 1692, rescission, when not effected

by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,

2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so.

[New]

§ 1692. Where a party to an action, by complaint, cross-complaint, answer, counterclaim, or other appropriate pleading, seeks to have the rescission of a contract adjudged therein, whether such relief would formerly have been denominated legal or equitable:

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

[Last clause
taken from
repealed
C.C. § 3408]

2. The rescission shall not be denied because of a failure to restore or to offer to restore the

benefits received under such contract, but the court may require the party to whom rescission is granted to make any compensation to the other which justice may require.

3. Any party to such an action shall be entitled to a jury trial upon the issue of rescission; but trial by jury shall not preclude the court from requiring compensation as a condition of the judgment of rescission.

[New]

§ 1693. Where a release is pleaded in an answer to a claim asserted in a complaint or cross-complaint, or is introduced as a defense to a claim asserted in a counter-claim, the party asserting the claim may serve and file a reply stating a claim to have the rescission of the release adjudged. If such a reply be filed and served, the court shall determine separately, or shall require the jury to render separate verdicts upon, 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 not entitled to rescission of the release, the release shall be accorded such effect as it may be entitled to 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 whether or not the party asserting the claim recovers a judgment thereon, a separate judgment shall be entered 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.

[Note: The following sections of the Civil Code would be repealed:

§ 3406. The rescission of a contract may be adjudged, on the application of a party aggrieved:

1. In any of the cases mentioned in Section 1689; or,

2. Where the contract is unlawful, for causes which do not appear in its terms or conditions, and the parties were not equally in fault; or,

3. When the public interest will be prejudiced by permitting it to stand.

§ 3407. RESCISSION FOR MISTAKE. 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.

§ 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.]

B. Code of Civil Procedure:

§ 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....

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

1. Contracts, express or implied; provided, that an action to have the rescission of a contract adjudged, whether such relief would formerly have been denominated legal or equitable, shall be deemed to be an action upon an implied contract within that term as used in this subdivision of this section....

§ 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; provided, that 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 and 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, whether such relief would formerly have been denominated legal or equitable, shall be deemed to be an action upon an implied contract within the term as used throughout all subdivisions of this section....

MR. LEVIT'S COMMENTS ON HIS PROPOSALS

1. C.C. 1688. Leave as is. I do not agree that the right of rescission should be repealed and only the remedy of court adjudication left.

2. C.C. 1689. Re proposed new language: This language would apply indifferently to rescission by a party, by consent, or by court decree.

3. C.C. 1692 [New]. Comments are as follows:

Re paragraph numbered 1 :

I prefer to leave the burden of prompt notice on the rescinding party, as it is now under § 1691. He fails to give notice promptly (or to ask the court for rescission promptly) at his peril. BUT, if he can convince the court (or jury) that no substantial prejudice has resulted from his failure rescission may still result--indeed, must result. Prof. Sullivan seems to contemplate the same general idea in PP 1 and 2 of his § 1691. But he completely eliminates any requirement for giving notice of intent to rescind other than the filing of the action for rescission itself. I think this is rough on the rescindee; and this kind of emphasis on the prompt filing of the action may be rough on the rescinder--at least rougher than

my proposal. In any event, Prof. Sullivan's P 1 on this point seems somewhat in conflict with P 2, unless one assumes that P 1 refers only to an extra-judicial notice and P 2 only to the filing of a pleading.

Re paragraph numbered 2 :

I prefer to leave the burden of restoration or tender on the rescinding party, for the reasons noted above, and also because to do so will be likely to further the likelihood of an out-of-court rescission becoming one by consent. In substance I believe I have followed the intent of Prof. Sullivan's PP 1 and 3; although I have changed the approach of his P 13 to conform to the language found in § 3408, which I prefer.

Re paragraph numbered 3 :

This derives from Prof. Sullivan's § 1692. It seems to me to belong more properly in the place I have put it for what I feel is the sense of clarity. Without the last phrase I have added, I am not sure just what would happen to Prof. Sullivan's P 13 of § 1691 where a jury trial is had.

4. Concerning decision not to adopt Professor

Sullivan's proposed amendment of Section 338 of the Code of Civil Procedure: Query #1: Does the opening phrase clearly cover an action for rescission alone where no recovery of benefits is sought?

Query #2: The statute of limitations on a written contract is 4 years. Is it not inconsistent and dangerous to have a shorter statute on the right to assert rescission, especially if the only right to rescission is by court decree? And vice versa, perhaps, if an oral contract is involved? In short, should not the statute for rescission be the same as that upon the contract involved?

5. Re Civil Code § 3407: This section is repealed as such but since I believe that it is substantive I have incorporated the provisions in subdivision 1 of C.C. § 1691.

6/5/58

D - MC DONOUGH SUGGESTIONS FOR REVISION
OF LEVIT PROPOSALS

The following would be the provisions of the Civil Code relating to rescission of contracts if Mr. Levit's proposals were adopted with my suggested modifications (changes made in Mr. Levit's proposals shown in strike-out and underline).

A. Civil Code:

1688. ~~RESCISSIION-EXTINGUISHE -CONTRACT.~~ A contract is extinguished by its rescission. A contract is rescinded in whole or in part when:

1. Some or all of the parties have agreed to rescind the contract as to themselves and the agreement has been executed.
2. One of the parties to the contract has rescinded it as to himself in accordance with the provisions of Section 1691.
3. A court has entered a judgment rescinding the contract as to some or all of the parties thereto pursuant to Section 1692.

1689. A contract ~~may-be-rescinded~~ is subject to rescission by a party thereto under Section 1691 or by a court at the suit of such party under Section 1692 in the following cases only:

1. If the consent of the party ~~reseinding,~~ 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 seeks rescission by judgment, or of any other party to the contract jointly interested with such party; provided that

rescission cannot be had for mere mistake, unless the party against whom he rescinds or seeks rescission by judgment can be restored to substantially the same position as if the contract had not been made;

2. If, through the fault of the party as to whom he rescinds, or seeks rescission by judgment, 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-~~If another party to the contract has agreed to rescind the contract but has repudiated the agreement.

6. Under the circumstances provided for in sections 1785 and 1789 of this code;

7. Where the contract is unlawful for causes which do not appear in its terms and conditions, and the parties were not equally at fault; or

8. When the public interest will be prejudiced by permitting it to stand.

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 or to seek

rescission by judgment 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.

[new] 1691. When a contract is subject to rescission under Section 1689 a party aggrieved may rescind the contract as to himself by manifesting his intention to do so to the other parties to the contract. Subject to the provisions of Section 1694, he must

(1) Rescind promptly upon discovering the facts which entitle him to rescind if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and

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

[new] 1692. When a contract is subject to rescission under Section 1689 a party aggrieved may bring an action to have the contract rescinded as to himself by the judgment of the court. Subject to the provisions of Section 1694, he must

(1) Give the other parties to the contract notice of his intention to bring such an action promptly 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 from 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.

[new] 1693. When a contract has been rescinded in whole or in part by the executed agreement of some or all of the parties to the contract or by the action of a party pursuant to Section 1691, any party to the contract may bring an action for a declaratory judgment that such rescission has been effected and to recover any money or thing owing to him by any other party to the contract as a consequence of such rescission and for any other relief to which he may be entitled under the circumstances.

~~1692,--Where a party to an action, by complaint, cross-complaint, answer, counterclaim, or other appropriate pleading, seeks to have the rescission of a contract adjudged therein, whether such relief would formerly have been denominated legal or equitable:-~~

1694. When an action is brought pursuant to Section 1692 or Section 1693.

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

2. ~~The rescission~~ Relief shall not be denied because of a failure to restore or to offer to restore the benefits received

under such contract, ~~but-the~~ unless such failure has been substantially prejudicial to the other party.

3. The court may require the party to whom ~~reseission~~ relief is granted to make any compensation to the other which justice may require.

~~-3.~~ 4. Any party ~~to-such-an-action~~ shall be entitled to a jury trial ~~upon-the-issue-of-reseission;~~ but trial by jury shall not preclude the court from requiring compensation as a condition of the judgment ~~of-reseission.~~

[new] 1695. A person having a right of action under Section 1692 or Section 1693 may assert the same by way of defense, counter-claim or cross-complaint.

~~1693.~~ 1696. Where a release is pleaded in an answer to a claim asserted in a complaint or cross-complaint, or is introduced as a defense to a claim asserted in a counter-claim, the party asserting the claim may serve and file a reply stating a claim to have the rescission of the release adjudged. If such a reply be filed and served, the court shall determine separately, or shall require the jury to render separate verdicts ~~upon,~~ with respect to 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 not entitled to rescission of the release, the release shall be accorded such effect as it may be entitled to 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 whether or not the party asserting the claim recovers a judgment thereon, a separate judgment shall be entered 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.

B. Code of Civil Procedure:

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 brought pursuant to Section 1692 or Section 1693 of the Civil Code. ~~for-the-rescission-of-a-contract....~~

[new: 337. Within four years:....

Stat.
Lim.]

3. An action relating to a contract in writing brought pursuant to Section 1692 or Section 1693 of the Civil Code.

When the ground relied upon is fraud or mistake the cause of action shall not be deemed to have accrued until the aggrieved party discovered or should have discovered the facts constitu-

ting the fraud or mistake.

[new: 339. Within two years....

Stat.

Lim.]

3. An action relating to a contract not in writing brought pursuant to Section 1692 or Section 1693 of the Civil Code. When the ground relied upon is fraud or mistake the cause of action shall not be deemed to have accrued until the aggrieved party discovered or should have discovered the facts constituting the fraud or mistake.

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

1. Contracts, express or implied; provided, that an action brought pursuant to Section 1692 or Section 1693 of the Civil Code ~~to have the rescission of a contract adjudged, whether such relief would formerly have been denominated legal or equitable,~~ shall be deemed to be an action upon an implied contract within that term as used in this subdivision of this section....

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; provided, that 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 and an action brought pursuant to Section 1692 or Section 1693 of the Civil Code to have the rescission of a contract adjudged and to recover in which relief by way of a money judgment is prayed for the value of benefits conferred under such contract, whether such relief would formerly have been denominated legal or equitable, shall be deemed to be an action upon an implied contract within the term as used throughout all subdivisions of this section....