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Recission: Non-Wilful Misrepresentation; Unilateral and Mutual Mistake; Mistake of Law and Fact

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A further question may be asked as to the effect of the California Constitution's prohibition of lotteries[53] upon the court's ability to give relief which amounts to an enforcement of the prohibited arrangement. Again lacking precedent and authority, analogy and extension can only carry us so far and this question would appear to be outside the area of reasonable association.

It would appear that in the final analysis, the answer to the question of whether a contract arising from one of the questionable schemes enumerated will be enforced or not lies in the abyss of public policy. A relaxation of the rules or a tightening thereof will reflect a judicial attempt to accomplish public desires and necessities. At one extreme is the absolute denial of efficacy to such a contract on the basis that it is illegal and at the other the free enforcement on public policy grounds, or rather that such an enforcement will not be violative of any public policy, which is in effect the same thing.

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[53] "The legislature shall have no power to authorize lotteries or gift enterprises for any purpose and shall pass laws to prohibit the sale in this State of lottery or gift enterprise tickets or tickets in any scheme in the nature of a lottery. . . ." CAL. CONST. art. IV, § 26.

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RESCISSION: Non-Wilful Misrepresentation; Unilateral and Mutual Mistake; Mistake of Law and Fact

Rescission, as a contract remedy, is ". . . the annulling or abrogation or unmaking of a contract and the placing of the parties to it in statu quo."[1] Professor Corbin states that true rescission is a mutual agreement of the parties to discharge and terminate duties under a presently existing contract; however, he recognizes the widespread usage of the term when an unilateral dissolution is meant, and defines this unilateral rescission as a ". . . declaration of freedom by an injured party for a breach by the other party."[2] It is this unilateral rescission with which this article is concerned; that is, rescission as a legal right to relief based on consent improperly derived.

The affirmative defense or remedy of unilateral rescission is based on theories of equity and justice, and is therefore somewhat subject to the vagaries of language of different courts guided by different legislation on the subject. But the same thesis is apparent in most cases, *i.e.*, that one should not be bound by a contract which is in some way imperfect when such imperfection is not attributable to him. This is the right of ". . . voiding the voidable contract" of which Bishop speaks.[3]

Procedural Requirements

When a party to a contract desires to rescind, he must act promptly upon discovery of the facts which entitle him to rescission.[4] This require-

[1] Sessions v. Meadows, 13 Cal. App. 2d 748, 751, 57 P.2d 548, 549 (1936).

[2] 5 CORBIN, CONTRACTS § 1167, at 727 (1951).

[3] BISHOP, CONTRACTS § 679, at 265 (1887).

[4] Schneider v. Henley, 61 Cal. App. 758, 215 Pac. 1036 (1923); CAL. CIV. CODE § 1691.

ment of prompt action has not, however, been inflexibly applied, and where delay has not resulted in prejudice to the other party, rescission has been granted.[5]

Before a party is entitled to unilaterally rescind a contract, he must also restore, or tender restoration, to the other party all that he received under the contract.[6] Of course, where the contract is wholly executory, there is nothing to restore and such offer is not required.[7]

In most states there is a difference in the procedural requirements of tender or restoration of the benefits received under a contract, depending upon whether rescission in equity or in law is sought.[8] In equity, the general rule is that an offer or tender of restoration is not a condition precedent to suit.[9] However, in California the rule seems to be that an offer of restoration is necessary before action either in law or equity.[10] However, certain wide exceptions have developed to the rule where what would be a proceeding in equity is involved; so in fact, the practice tends, even in California, toward the majority view, requiring restoration as a condition precedent to rescission at law, but not in equity.[11]

The principles upon which the right to rescission rests are primarily equitable; therefore the right rests only with the party who is himself without fault.[12]

The basic authority for rescission is found in California Civil Code section 1689, which provides that a party to a contract may rescind if consent to the contract was given by mistake or obtained through duress, menace, fraud or undue influence.[13]

The primary concern of this note is with those cases where rescission is sought under this section of the Civil Code. The concentration will be only upon cases where the consent was derived without any intended mis-

[5] Lombardi v. Sinanides, 71 Cal. App. 272, 235 Pac. 455 (1925); Stone v. McCarty, 64 Cal. App. 158, 220 Pac. 690 (1923).

[6] Kent v. Clark, 20 Cal. 2d 779, 128 P.2d 868 (1942); Morrison v. Lods, 39 Cal. 381 (1870); Weger v. Rocha, 138 Cal. App. 109, 32 P.2d 417 (1934); CAL. CIV. CODE § 1691; *But see* Carruth v. Fritch, 36 Cal. 2d 426, 224 P.2d 702, 24 A.L.R.2d 1403 (1951).

[7] Esau v. Briggs, 89 Cal. App. 2d 427, 201 P.2d 25 (1949).

[8] At law, see *e.g.*, cases collected Annot., 105 A.L.R. 1003 (1936); 12 AM. JUR. *Contracts* § 451 (1938).

[9] Nelson v. Carlson, 54 Minn. 90, 55 N.W. 821 (1893); Custer v. Shackelford, 225 S.W. 450 (Mo. 1920); BLACK, RESCISSION AND CANCELLATION 1514, n. 146 (2d ed. 1929).

[10] See McCall v. Superior Court, 1 Cal. 2d 527, 36 P.2d 642, 95 A.L.R. 1019 (1934); Kelley v. Owens, 120 Cal. 502, 47 Pac. 369 (1897).

[11] See McNeese v. McNeese, 190 Cal. 402, 213 Pac. 36 (1923); Auclair v. Auclair, 72 Cal. App. 2d 791, 165 P.2d 527 (1946); RESTATEMENT, RESTITUTION CAL. ANNOT. § 65, comment *d* (1937).

[12] Nelson v. Spence, 182 Cal. App. 2d —, 6 Cal. Rptr. 312 (1960); Joshua Tree Townsite Co. v. Joshua Tree Land Co., 100 Cal. App. 2d 590, 224 P.2d 85 (1950). For further discussion of the procedural aspects of rescission, see Comments, 36 CALIF. L. REV. 606 (1948); 21 CALIF. L. REV. 130 (1933); 19 CALIF. L. REV. 424 (1931).

[13] Besides allowing rescission by consent of all the parties as provided in CAL. CIV. CODE §§ 1697 and 1699, and for the reasons listed in CAL. CIV. CODE § 1689, including failure of consideration, the Civil Code also provides for rescission when the contract is unlawful or against public policy. CAL. CIV. CODE § 3406.

statement by the other party, *i.e.*, where there was no guilty knowledge. Thus are eliminated from consideration the grounds of duress, menace, and the cases involving wilful misrepresentation or fraud.

Non-Wilful Representation

With the exclusion of all the cases involving "wilfulness," it might seem that the only remaining grounds for rescission under Civil Code section 1689 would be mistake. But the California courts, even though this element of guilty knowledge is removed, have rescinded many contracts on the theory of a consent grounded even on a non-wilful misrepresentation, or a type of fraud.[14]

Actual and Constructive Fraud

California Civil Code section 1572 provides that any positive assertion in a manner not warranted by the information of the person making it, which is in fact not true even though the speaker believed it to be true, is *actual* fraud. Thus it appears that when a representation is recklessly made, or made without reasonable grounds for believing its truth, the person making such representation is guilty of actual fraud. Where such a representation is made, the only intent needed is an intent to induce a party to enter into a contract, and rescission is not restricted to those cases where there is an actual intent to deceive.[15]

If the statements made were warranted, then the relationship between the parties is important. Civil Code section 1573 provides that ". . . any breach of duty without an actually fraudulent intent, which gains an advantage to the person in fault . . . by misleading another to his prejudice, is constructive fraud." Therefore, it is possible for a party to make a statement which, in view of all the facts known to the speaker, is warranted, but which, because of the relationship existing between the parties, may amount to *constructive* fraud, when the statement is not in fact true.

This theory has been successfully used in cases involving brokers, spouses, the physically weak or intoxicated, or in other cases when there has been some relationship of trust or confidence giving rise to some legal duty which was breached, resulting in damage to another, but which fell short of *actual* fraud.[16]

"Innocent" Misrepresentation

But if the representation was warranted and there is not the specified relationship between the parties, the statute goes no further. But at least a few California cases have allowed rescission, somewhat on the basis of what Restatement of Contracts section 476 terms an "innocent misrepre-

[14] Spreckles v. Gorrill, 152 Cal. 383, 92 Pac. 1011 (1907).

[15] J. C. Millett Co. v. Park & Tilford Distilleries Corp., 123 F. Supp. 484 (N.D. Calif. 1954); Pohl v. Mills, 218 Cal. 641, 24 P.2d 476 (1933); Spreckles v. Gorrill, 152 Cal. 383, 92 Pac. 1011 (1907); Howe v. Deck, 46 Cal. App. 2d 569, 116 P.2d 155 (1941).

[16] See Fowler v. Brown, 125 Cal. App. 2d 450, 270 P.2d 559 (1954); *In re* Arbuckle's Estate, 98 Cal. App. 2d 562, 220 P.2d 950, 23 A.L.R.2d 372 (1950). Applied to brokers: Darrow v. Robert A. Klein & Co., 111 Cal. App. 310, 295 Pac. 566 (1931); to spouses: Holmes v. Holmes, 98 Cal. App. 2d 536, 220 P.2d 603 (1950); to the physically weak: Carty v. Connolly, 91 Cal. 15, 27 Pac. 599 (1891); to the intoxicated: Deasy v. Taylor, 39 Cal. App. 235, 178 Pac. 538 (1919).

sentation." Usually in cases such as *Scott v. Delta Land & Water Co.*,[17] where there was an innocent misrepresentation of the productivity of the land sold, this has been done to prevent the necessity of categorizing the specific ground upon which rescission was granted.[18] In *Scott*, the court said, ". . . [I]n an action . . . [for rescission] the good faith of the party who procures the assent of another to the making of a contract by material misrepresentations is of no moment."[19]

The requirement that the party attempting to rescind must have actually relied upon the misrepresentation is common to all these cases where rescission was granted because of consent gained by a misrepresentation,[20] but the requirement is often blended into the element of materiality, which will be referred to later.

Misrepresentation of Law and Fact

In these classifications, there has been no emphasis on differences between misrepresentations of law and of fact. The rule has been in California, that a misrepresentation of law is not actionable unless there has been some relation of trust or confidence between the parties.[21] However, the definition of this relationship has been liberally construed to include relationships which were legal, social, moral, domestic or merely personal.[22] It is interesting to note that if this wide definition of a confidential relationship were extended in the application of the theory of constructive fraud, almost any case which today might be termed a purely innocent misrepresentation might then be rescinded as a contructive fraud.

Mistake

Mistake is the other broad basis of rescission when the matter of improperly derived consent is involved. California Civil Code section 1577 defines mistake of fact as one which involves no breach of duty and which consists of an unconscious ignorance or forgetfulness of a fact, material to the contract, or a belief in the present existence of a thing material to the contract which does not, or has not, existed.

Mutual Mistake of Fact

To serve as a theory upon which rescission will be granted, such a mistake must be mutual in the majority of American jurisdictions.[23] Even in California most of the cases of rescission on the grounds of mistake, are decided on the theory of mutual mistake.[24] These cases are mainly of two

[17] 57 Cal. App. 320, 207 Pac. 389 (1922).

[18] See Giovanni v. Bartmann, 59 Cal. App. 651, 211 Pac. 844 (1923) (dictum); Bradley v. Delta Land & Water Co., 57 Cal. App. 790, 207 Pac. 395 (1922); Scott v. Delta Land & Water Co., *supra* note 17.

[19] *Supra* note 17, at 328, 207 Pac. at 392, where facts excluded other theories.

[20] See CAL. CIV. CODE § 1568.

[21] Haviland v. Southern Calif. Edison Co., 172 Cal. 601, 158 Pac. 328 (1916); Champion v. Woods, 79 Cal. 17, 21 Pac. 534 (1889).

[22] See, *e.g.*, Bank of America v. Sanchez, 3 Cal. App. 2d 238, 38 P.2d 787 (1930).

[23] *E.g.*, McMillon v. Flagstaff, 18 Ariz. 536, 164 Pac. 318 (1917); RESTATEMENT, CONTRACTS § 503 (1932); 12 AM. JUR. *Contracts* § 133 (1939); 19 AM. JUR. *Equity* § 57 (1939).

[24] *E.g.*, Van Meter v. Bent Constr. Co., 46 Cal. 2d 588, 297 P.2d 644 (1956); Goldner v. Jaffe, 171 Cal. App. 2d 751, 341 P.2d 354 (1959).

types: 1. where there has been a misrepresentation which induces the contract, or 2. where the mistake is related to the intrinsic nature of the bargain, but was not the result of a misrepresentation.

Where a Misrepresentation Induces Contract

In the first category, one of the leading cases is *Johnson v. Withers.*[25] In that case the seller's misrepresentation regarding the minerals to be found on the land was based on an expert's report, also mistaken. Rescission was allowed on the theory of mutual mistake even though the court said the misrepresentation was the chief inducement of the contract. In *Mosher v. Lack,*[26] an innocent misrepresentation as to the amount of acreage in a piece of land was made by the seller; rescission was again granted on the basis of mutual mistake. In *Lombardi v. Sinanides,*[27] where vendor of land innocently misrepresented the boundary, rescission was also granted for mutual mistake, although in this case the Civil Code section 1572 definition of actual fraud was also considered.

Where Mistake Related to Nature of Bargain

In the second category are found the more traditional cases of mutual mistake where the mistake is related to the intrinsic nature of the bargain. California follows the general rule in this category which is illustrated by such cases as *In re Barton's Estate,*[28] where an agreement for compensation was rescinded because of a mutual mistake of both trustees and beneficiary as to computation of the trustee's remuneration.

Unilateral Mistake of Fact

The majority of cases rescinded in California on the grounds of mistake are such cases of mutual mistake. But neither Civil Code section 1572 nor section 1689, the governing statutes, expressly require mutuality. Consequently, there are many cases in California which allow rescission for an unilateral mistake of fact,[29] contrary to the general rule which requires mutuality. The theory has been used most often in cases where to hold the parties to the contract would result in great hardship to the mistaken one, or where there is any element of unfairness, but the mistake was not mutual.

One famous California case which allowed rescission for unilateral mistake is *Forest Lawn Memorial Park Ass'n v. De Jarnett.*[30] The rules of the cemetery limited ownership of the plots to Caucasians. The contract which the defendant, a Negro, signed also contained the restrictive clause, but the court allowed rescission by the cemetery on the basis of an unilateral mistake of fact. In *Moore v. Copp,*[31] rescission was allowed of a contract of sale which the defendant set up to prevent the plaintiff from quieting her title. Here the age discrepancy and the hardship on the plaintiff had the contract been enforced, combined with her unilateral mistake as to

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[25] 9 Cal. App. 52, 98 Pac. 42 (1908).

[26] 40 Cal. App. 574, 181 Pac. 815 (1919).

[27] 71 Cal. App. 272, 235 Pac. 455 (1925).

[28] 96 Cal. App. 2d 234, 214 P.2d 857 (1950).

[29] *E.g.,* Brunzell Constr. Co. v. G. J. Weisbrod, Inc., 134 Cal. App. 2d 278, 285 P.2d 989 (1955).

[30] 79 Cal App. 601, 250 Pac. 581 (1926).

[31] 119 Cal. 429, 51 Pac. 630 (1897) (dictum).

some of the surrounding facts, allowed her to obtain rescission. In that case the Supreme Court stated, ". . . [I]t is not necessary that a mistake of fact be mutual."[32]

Kemper Constr. Co. v. City of Los Angeles[33] is another case where rescission was allowed for unilateral mistake. Kemper sued to cancel a bid it had submitted on a public construction project and to obtain a discharge of its bid bond. In submitting its bid, plaintiff mistakenly omitted an item amounting to $301,769, through a computational error. Plaintiff discovered its error within hours of the opening of the bids and asked rescission, but the defendant resolved to accept the bid. (An ordinance prevented the sealed bids being withdrawn and gave the city three months in which to accept).

Rescission was allowed, but the court stressed the fact that though the mistake was unilateral, it would be unconscionable to allow the city to take advantage of the plaintiff's mistake and hold him to performance at this figure, especially since it had knowledge of his mistake when the bid was accepted.

Very often this element of hardship to the plaintiff is stressed when rescission is granted for an unilateral mistake of fact.

Mistake of Law

A mistake of law in California must be mutual to be the basis of rescission,[34] or it must be known to one party that the other is laboring under a mistake.[35] In the latter case, the contract is voidable by rescission at the instance of the mistaken party.[36]

There are at least two other exceptions to the general rule that a mistake of law must be mutual to entitle either mistaken party to rescission; one is by statute, the other by judicial decision.

The statutory exception, Civil Code section 1579, classifies a mistake of foreign law as a mistake of fact. The other exception as indicated by dicta in *Rued v. Cooper*, states that a mistake of a personal legal right is a mistake of fact.[37] It is not altogether clear what the courts mean by a mistake of a personal legal right. In *Rued*, it was a mistake as to plaintiff's right to recover money he had advanced in a stock transaction.

The definition is tenuous, but often it is used to allow the rescission of an inequitable contract which the plaintiff has entered into for the very purpose of in some way affecting his private legal rights, but which he misunderstands.

This exception to the general rule that a mistake of law must be mutual to be rescindable is not automatically applied, but is applied on a case to case basis when courts feel rescission is necessary, although the mistake of law is unilateral. Writers such as Williston have long advocated the lessening of emphasis on whether a mistake is of fact or law, and making the

[32] *Id.* at 436, 51 Pac. at 633.
[33] 37 Cal. 2d 696, 235 P.2d 7 (1951).
[34] *E.g.*, Benson v. Bunting, 127 Cal. 532, 59 Pac. 991 (1900).
[35] CAL. CIV. CODE § 1578.
[36] CAL. CIV. CODE § 3406.
[37] 119 Cal. 463 at 468, 51 Pac. 704 at 705 (1897) (dictum).

test for relief the equities of the individual case.[38] Nevertheless, the general rule remains in California, that to rescind for a mistake of law, it must be mutual.

Overlapping of Theories and Classifications

Occasionally, California courts have granted rescission on the theory of mutual mistake without determining its classification as one of law or of fact. In *Hannah v. Steinman,*[39] for example, a lease was procured for the purpose of building a wooden building. Unknown to either party, a newly enacted San Francisco building ordinance prohibited the erection of wooden buildings in the leased area. The court discussed mistake both of fact and law, but granted rescission without deciding the exact basis.

Moreover, there are overlapping tendencies not only within the classifications of relief, as shown in *Hannah v. Steinman,* but also between the *theories* of relief—non-wilful misrepresentation or mistake. For example, in *Brown v. Klein,*[40] rescission of a partnership agreement was sought because of a misrepresentation as to the amount of indebtedness of the defendant. Rescission was granted, but the court rested the decision on the theory of mistake.

Comparison of Theories

Such overlapping reflects the similarities of the two theories of rescission, but often leads to confusion. Therefore a comparison of the two is necessary.

As heretofore discussed, a non-wilful misrepresentation of fact as a ground for rescission can be of three kinds: actual fraud, where statements are unwarrantedly made; constructive fraud, where a legal relationship between the parties was breached; and purely innocent misrepresentation, where there was no legal relationship between the parties and the statements made were warranted though untrue.

For a misrepresentation of law to be grounds for rescission, there must have been some loosely-defined legal relationship between the parties, less strict than that required for constructive fraud.

Under the theory of mistake, a mistake of fact justifying rescission can be mutual, because the mistake is related to the extrinsic nature of the bargain or because of an innocent misrepresentation, or unilateral where the equitable considerations of hardship and unfairness become important.

Mistakes of law must be mutual to allow rescission with narrow exceptions: a mistake of a foreign law, mistake of one party known to be such by the other party, or a mistake of a personal legal right.

Rescission is allowed for mutual mistake without classifying it as either of law or fact, and the two basic theories are inextricably intertwined in cases which label a non-wilful misrepresentation a mistake.

To facilitate the comparison, it is necessary to find a common term to symbolize all three kinds of misrepresentation; *i.e.,* 1. where misstatements were innocently made but unwarrantedly and with an intent to induce a

[38] 5 WILLISTON, CONTRACTS § 1589, n.8, at 4435 (rev. ed. 1937). See Cincinnati, Indianapolis & W. Ry. v. Indianapolis Union Ry., 36 F.2d 323 (6th Cir. 1929), *cert denied,* 281 U.S. 754 (1930); Peter v. Peter, 343 Ill. 493, 175 N.E. 846, 75 A.L.R. 890 (1931).

[39] 159 Cal. 142, 112 Pac. 1094 (1911).

[40] 89 Cal. App. 153, 264 Pac. 496 (1928).

contract; 2. where there may be no other element of responsibility than the relationship between parties; and, 3. where a false statement was made and relied on but where there was no special relationship between the parties and the representation was warranted. The term honest misrepresentation has been used to encompass all three, and because of the similarity of result to cases of the traditional type, the term fraud has been suggested.[41] This latter classification is useful and will be used here, although it has certain disadvantages because of the differences of degree within the definition itself.

The remedy of rescission whether based on the theory of mistake or on this theory of "fraud" is basically equitable in nature. Important to both theories is the policy that an innocent contractor should not be bound to a contract which is under the circumstances unjust, merely to preserve a profit to the other party. Equally important, though, is the idea that because neither party has wilfully created the inequity, neither should have to suffer. Consequently, an important element of each theory is the necessity for restoration of the adverse party to the statu quo. Whether the tender of restoration must be made before the action for rescission, or restitution be made as part of the relief gained, as by a conditional decree, restoration of the statu quo ante is an essential requirement. Also, the effect of rescission under either theory is the same—extinguishment of the contract.[42]

But compatible and similar as these two basic theories of rescission are, there are some differences. The most basic difference and yet the most difficult to specifically substantiate is the policy of the courts that whenever there is a representation made which is in fact false, even though the statement was made in the utmost good faith, there is a difference in the equities of the parties. As the court said in *Canadian Agency, Ltd. v. Assets Realization Co.*,[43] where rescission was sought because of an innocent misrepresentation as to earnings of stock sold, ". . . [W]hile the court at Special Term deemed this a case of mutual mistake (and it is such from one point of view, since both parties were mistaken as to material facts affecting the property sold) still it is something more than that."[44]

Requirement of Materiality

This degree of difference between the theory of mistake and "fraud" is reflected in many cases, sometimes almost imperceptibly. There is a greater requirement of materiality when rescission is asked on the grounds of mistake than when the theory is "fraud." It is said that ". . . mistake, either of law or fact, as grounds for rescission of a contract, must affect the execution and material elements of the contract and not merely some collateral matter."[45]

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[41] 5 WILLISTON, CONTRACTS § 1540, at 4329 (rev. ed. 1937): "Fraud works legal consequences because it induces mistake on the part of the person defrauded; and honest misrepresentation when it produces legal consequences, does so for the same reason."

[42] CAL. CIV. CODE § 1688.

[43] 165 App. Div. 96, 150 N.Y. Supp. 758 (1914).

[44] *Id.* at 102, 150 N.Y. Supp. at 762.

[45] Bellwood Discount Corp. v. Empire Steel Bldg. Co., 175 Cal. App. 2d 432, 435, 346 P.2d 467, 470 (1959).

This tendency toward strictness in mistake cases remains, even though it is modified somewhat from the days of the landmark Michigan "cow case," *Sherwood v. Walker.*[46] In that case it was held that the mistake must go to the whole substance of the agreement, so that the item must be substantially different from the one intended. More recently it was said, ". . . [T]he difference between the real and supposed quality must be so great, so extreme, as to make it virtually a different thing."[47]

Consequently, it is possible that a fact important enough to have actually induced the contract, may be deemed a collateral issue and rescission be denied if the theory advanced is mistake. Such was the case in *Vickerson v. Frey,*[48] where a building ordinance forbade utilization of all the apartment house space as had been anticipated. If any representations had been shown, as were allegedly made but not proved, it might have been possible to obtain rescission under a theory of "fraud." The test of materiality for "fraud" (misrepresentation) is less stringent; it is sufficient if it formed even part of the inducement, but the representation must be relied upon.[49]

Requirement of Injury

There is some difference in the requirement of injury in the two theories, too. Previously, under either theory, the mistake or "fraud" must have caused definite harm before an avoidance would lie. The Restatement of Contracts states that without this harm a party can not avoid a contract on the basis of mistake.[50] And in the California case of *Spreckles v. Gorrill,* the court stated that ". . . fraud which has and will produce no injury will not justify an action . . . for rescission."[51] However, the court defined the requisite injury as one which need not be measured in money, but which was sufficient if it was pecuniary in nature.[52] If the measure of injury adopted in *Earl v. Saks & Co.*[53] was followed, the differences between the theories would be even greater. In that case the California Supreme Court held that ". . . anyone fraudulently induced to enter a contract is injured. His interest in making a free choice and exercising his own best judgment . . . has been interfered with."[54] But this was a case of wilful misrepresentation, and the definition of the injury necessary to obtain rescission because of the non-wilful "fraud" in question here is limited to that of a tangible or pecuniary nature.[55]

These differences between the two theories stem from the implicit policy determination that there is some degree of difference in the equities of the parties under a theory of innocent "fraud" or misrepresentation in contrast to the situation of parties seeking rescission because of a mistake.

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[46] 66 Mich. 568, 33 N.W. 919 (1887).

[47] Vickerson v. Frey, 100 Cal. App. 2d 621, 628, 224 P.2d 126, 130 (1950).

[48] *Id.*

[49] Colton v. Stanford, 82 Cal. 351, 23 Pac. 16 (1890); Rouse v. Morgan, 108 Cal. App. 315, 291 Pac. 441 (1930).

[50] RESTATEMENT, CONTRACTS § 502, comment *b* (1932).

[51] 152 Cal. 383, 388, 92 Pac. 1011, 1014 (1907).

[52] *Id.*

[53] 36 Cal. 2d 602, 226 P.2d 340 (1951). See Comment, 39 CALIF. L. REV. 309 (1951).

[54] *Supra* note 53, at 611, 226 P.2d at 346.

[55] Wainscott v. Occidental Bldg. & Loan Ass'n, 98 Cal. 253, 33 Pac. 88 (1893).

Differences Within "Fraud" Theory

It is important to note that there also are degrees of difference *within* the theory of "fraud" itself. Rescission is more easily obtained with less showing of injury when the ground complained of is *actual* fraud based on statements unwarrantedly, though honestly, made to induce a contract as in the *Spreckles* case, than it is in a case such as *Rouse v. Morgan*,[56] where the misrepresentations were held to be warranted, and there was no proof that they were made to induce the contract. In the *Rouse* case rescission was denied, although land had been sold by an absentee landowner apparently in the belief (engendered by vendee) that his son had removed certain buildings from the land. Relief might have been granted had the details of the theory upon which rescission was sought been more clearly set out. But as decided, the case demonstrates the demand for a greater showing of injury and materiality when the ground complained of is this lesser degree of "fraud," namely an innocent misrepresentation. In fact, in this last degree of "fraud" the injury and materiality requirements are so similar to that required for the theory of mistake, that Witkin equates the two and states that California will grant rescission on the theory of mutual mistake even in innocent misrepresentation situations.[57]

Conclusion

Such overlapping is possible in many fact situations, but a summary statement that the theories are interchangeable, would be incorrect. The distinctions and differentiations between the degrees of the theory of "fraud," and the differences between that doctrine and the theory of rescission for mistake, do exist, although they are often not obvious and frequently are a matter of degree. In any case where rescission is desired and one or both of these theories are pleaded, knowledge of the similarities and the differences will help avoid confusion and should expedite the attainment of relief.

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[56] 108 Cal. App. 315, 291 Pac. 441 (1930).

[57] 1 WITKIN, SUMMARY OF CALIFORNIA LAW *Contracts* § 298 (7th ed. 1960).

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