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accord with these principles. There may be, however, two additional reasons for the decision of the California court. One is that courts are, perhaps, more prone to deny permission to deviate in periods of inflation than in periods of depression. Secondly, the California courts have been, as a rule, rather strict with reference to permitting deviations from express terms of trust instruments.[23] In their efforts to achieve a more flexible rule some states have passed statutes which permit a deviation from the terms of the trust where such deviation is for the best interests of the beneficiaries.[24] The decision in the principal case raises a doubt as to whether the California courts will exercise their inherent jurisdiction to permit a deviation from the terms of the trust when a real emergency does arise.

MERRILL TRADER

RETURN OF BENEFITS AS PREREQUISITE TO CONTRACT RESCISSION

Rescission implies restoration of both parties to a former status.[1] The general rule is that a party who wishes to rescind a contract must place the defendant in the position he held before the transaction.[2] The theory of rescission at law is that an action will not lie until the other party has been restored to his former position. By returning, or offering to return, the benefits he has received, the plaintiff acquires the right to sue for the property he has transferred to the other party. A court of law in effect rescinds the contract by allowing an action for recovery of property, chattels or damages, without saying anything in its judgment concerning the contract. This is a different approach from that of equity, which avoids the contract and makes the necessary restoration of benefits by decree of the court.[3] Flexibility in fram-

[23]For illustrative cases see: In re Van Deusen's Estate, 30 Cal. 2d 285, 182 P.2d 565 (1947); Leonardini v. Wells Fargo Bank & Union Trust Co., 131 Cal. App. 2d 9, 280 P.2d 81 (1955); Security-First National Bank of Los Angeles v. Easter, 136 Cal. App. 691, 29 P.2d 422 (1934).

[24]3 Bogert, Trusts and Trustees § 561 at 495 (1946); 2 Scott, Trusts § 167 at 1177 (2d ed. 1956).

[1]12 Am. Jur., Contracts § 451 (1938).

[2]Ibid., citing an exhaustive list of cases.

[3]These two theories have been described in New York Life Ins. Co. v. Sisson, 19 F.2d 410, 411-12 (W.D. Pa. 1926): "In an action at law the status quo must be restored before an action will lie. There, in order that the plaintiff may have a legal remedy based upon rescission by the act of the party himself, he must restore

ing decrees enables equity courts to adjust their requirements for restoration to individual cases, and to give a more adequate remedy than can be afforded by the law courts.

Two reasons have been advanced for requiring a party rescinding a contract at law to restore to the other party everything of value that he has received under it:[4] (1) The defendant should not be put to another lawsuit to regain the benefits with which he has parted.[5] (2) A party cannot affirm in part and rescind in part, but must affirm or rescind *in toto*.[6] The basis for both reasons is the same: it is neither just nor right to relieve one party from his obligations and to excuse him from making the other party whole. Equity courts act in accord with both reasons, decreeing rescission only upon condition that the benefits received by the rescinding party will be restored.[7]

Even at law the general rule requiring restoration of benefits has exceptions.[8] The most important are listed in the *Restatement of Contracts*,[9] which states that restoration is not necessary: (1) When the thing received is worthless, as in the case of counterfeit money;[10] (2)

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or attempt to restore the consideration. The rescission reinvested him with the legal title to the thing for which he subsequently sues, and therefore must be conditioned upon a surrender of the thing received by him in pursuance of the transaction he thus avoids. This may be appropriately termed a legal rescission, and is the act of the party thereto.

"In equity, by reason of the change of situation, a different rule prevails. A bill in equity is an action brought to rescind, and is not based on any idea, or on any theory, that the contract has already been rescinded, as in an action at law. Here the plaintiff sues for rescission. The plaintiff simply seeks the aid of the court to set aside and rescind the contract, and it is in no sense essential that he should previously have attempted a rescission, or should have made a tender of the thing received, to the other party. In such an action the plaintiff simply expresses a willingness to perform such conditions as the court may regard necessary to impose as proper terms upon which relief shall be granted. In case of rescission, what the plaintiff should do to reinstate the other party in statu quo as a condition for rescission is for the court to determine, having fully heard the case. This has been termed an equitable rescission, and the distinction between it and a legal rescission is perfectly plain, and has been fully recognized by the authorities."

[4]Sisson v. Hill, 18 R.I. 212, 26 Atl. 196, 197 (1893).

[5]Ibid.; see Thayer v. Turner, 49 Mass. 550, 552 (1844); 12 Am. Jur., Contracts § 451 (1938).

[6]"It is a rule that a party cannot rescind a contract and at the same time retain the consideration, in whole or in part, which he has received under it." Jennings v. Gage, 13 Ill. 610, 612 (1852). Accord: Pullman Co. v. Krause, 145 Ala. 395, 40 So. 398, 400 (1906); Babcock v. Farwell, 245 Ill. 14, 91 N.E. 683, 692 (1910).

[7]Garner, Neville & Co. v. Leverett, 32 Ala. 410, 413-14 (1858); Sisson v. Hill, 18 R.I. 212, 26 Atl. 196, 197 (1893) (dictum).

[8]5 Williston, Contracts § 1530 (rev. ed. 1937).

[9]Restatement, Contracts § 349(2) (1932).

[10]Kent v. Bornstein, 94 Mass. (12 Allen) 342 (1866). Accord: Colil v. Massachusetts Security Corp., 247 Mass. 30, 141 N.E. 580 (1923); Restatement, Restitution § 65(c) (1936); 5 Williston, Contracts § 1530 (rev. ed. 1937).

When the thing received has been harmed by the defendant or has perished because of defects constituting the breach of defendant's contract, as a car stolen because the seller had not furnished a lock as agreed;[11] (3) When the plaintiff has received only money, which can be credited to him, as a partially-paid employee seeking the entire value of his services;[12] (4) When the benefit received by the plaintiff is one for which a price is capable of apportionment and the plaintiff does not demand return of the total price, as an action to recover a semester's tuition, less reasonable expenses, because the student was wrongfully expelled after the first few days of school;[13] (5) When the benefit, the value of which can be determined and credited to the defendant, constitutes a small part of the whole consideration and has been disposed of without reason to know of defendant's breach, as selling a small portion of the property purchased before discovery of the fraud that induced the purchase.[14]

Equity also will generally refuse rescission unless restoration can be accomplished in some manner.[15] *He who seeks equity must do equity.*[16] However, an offer to restore in the complaint is usually held a sufficient tender.[17] A statement in the complaint that the complainant is willing to perform whatever acts the court may decree as a necessary prerequisite to rescission has been held sufficient.[18] A failure to offer to restore has even been excused, because of the power of granting conditional decrees which can compel the rescinding party to restore the benefits.[19]

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[11]Smith v. Hellman Motor Corp., 122 Misc. 422, 204 N.Y. Supp. 229 (Munic. Ct. 1924).

[12]Posner v. Seder, 184 Mass. 331, 68 N.E. 335 (1903). Accord: Vavrica v. Mid-Continent Co., 143 Neb. 94, 8 N.W.2d 674 (1943), noted in 42 Mich. L. Rev. 189 (1943).

[13]Aynesworth v. Peacock Military College, 225 S.W. 866 (Tex. Civ. App. 1920).

[14]Putnam v. Bolster, 216 Mass. 367, 103 N.E. 942 (1914). The Restatement also lists another exception: when the return of the consideration is impossible from the time of its receipt; e.g., Ring v. Ring, 127 App. Div. 411, 111 N.Y. Supp. 713 (1908), aff'd 199 N.Y. 574, 93 N.E. 1130 (1910) (marriage was the consideration, which it was impossible to return).

[15]McClintock, Equity 231 (2d ed. 1948).

[16]2 Pomeroy, Equity Jurisprudence § 393(b) (5th ed. 1941).

[17]Fuller v. Chenault, 157 Ala. 46, 47 So. 197 (1908); Perry v. Boyd, 126 Ala. 162, 28 So. 711 (1900); cf. Robison v. Floesch Constr. Co., 291 Mo. 34, 236 S.W. 332, 20 A.L.R. 1239 (1921); 9 Am. Jur., Cancellation of Instruments § 43 (1937).

[18]New York Life Ins. Co. v. Sisson, 19 F.2d 410 (W.D. Pa. 1926). See also Twin Lakes Land & Water Co. v. Dohner, 242 Fed. 399, 402 (6th Cir. 1917); 5 Williston, Contracts § 1529 (rev. ed. 1937).

[19]Carlton v. Hulett, 49 Minn. 308, 51 N.W. 1053 (1892); Allerton v. Allerton, 50 N.Y. 670 (1872); Restatement, Contracts § 481 (1932).

In *Block v. Block*,[20] the Supreme Court of Ohio expressed its viewpoint on the necessity for a restoration of benefits as a prerequisite to bringing an action of rescission. A husband had set up an irrevocable trust, which consisted of assets worth nearly a million dollars, substantially all of his property. The income was payable to the husband for life with the remainder over to a charitable foundation. Several months later the wife filed suit for divorce in an Illinois court. During negotiations for a property settlement a full disclosure of the husband's assets, including the existence of this trust, was made to the wife. The property settlement reached, which called for a lump sum payment of $110,000 to the wife, was incorporated into the divorce decree. Four years after the divorce the husband successfully petitioned the Common Pleas Court of Ohio to declare the trust void on the ground that his father had exercised undue influence in securing its establishment. The court ordered the trustee to reconvey the trust fund to the husband. Thereupon, the wife filed a bill in equity to have the property settlement provision of the Illinois divorce decree set aside for fraud. This was refused. As one of the grounds for this holding the court quoted a paragraph from the Northeastern Reporter headnote of an Illinois case:[21]

> " 'The inability of the party to restore the consideration for a contract which he seeks to rescind will not relieve him from the necessity of doing so, and it is not sufficient to offer to set off the amount against what is claimed from the other party.' "[22]

Immediately following this quotation the Ohio court said:

> "We are of the opinion that the plaintiff, not having tendered back the consideration which she received as a result of the contract and the Illinois decree, cannot maintain this action to set aside the decree."[23]

In so reasoning the Ohio court seemingly followed the general rule laid down in the law courts,[24] although it was sitting as an equity court. The court also cited a case involving a cause of action for damages due to personal injuries,[25] in which relief against a fraudulently obtained release was refused because the consideration received was not

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[20]165 Ohio St. 365, 135 N.E.2d 857 (1956).

[21]Babcock v. Farwell, 245 Ill. 14, 91 N.E. 683, 684 (1910) (headnote no. 4).

[22]165 Ohio St. 365, 135 N.E.2d 857, 864 (1956).

[23]Ibid.

[24]McClintock, Equity 231 (2d ed. 1948); 5 Williston, Contracts § 1529 (rev. ed. 1937). The consideration must be returned or tendered before the action at law can be begun.

[25]Picklesmier v. Baltimore & O. R.R., 151 Ohio St. 1, 85 N.E.2d 214 (1949).

tendered back before suing. This case clearly involved rescission of a contract at law.

The primary reason for refusing the wife relief seemed to be the wife's failure to prove the essential elements of fraud.[26] However, the court used ambiguous language in dismissing the action. It also is uncertain whether the court was refusing to vacate the Illinois judgment or refusing to rescind the property settlement contract. It is assumed that the court refused to modify the court decree because the contract could not be rescinded.[27] The contract could not be rescinded because there was no offer to restore the consideration before the action was brought.[28] This is where the Ohio court, sitting as an equity court, deviated from the usual equity doctrine.[29]

As stated in the *Restatement of Contracts*,[30] there is an exception to the general rule when the plaintiff receives only money, which may be credited to him. This exception is recognized by many law courts. It would certainly seem that an equity court should not require a stricter rule of restoration than is required at law. The restoration could have been provided for by a conditional decree, if the rescission was warranted. The denial of relief, because there was no tender of the benefit received, seems at best a makeweight argument and not in consonance with the better reasoned equitable doctrines. The rule of restoration by one seeking to rescind a contract should be reasonably interpreted, especially in equity, where flexible decrees may be used to protect both parties. It is submitted that the court in the principal case has confused the requirements of restoration as they exist at law and in equity. The end result of the court's reasoning is that an equity court has overlooked the advantages inherent in its own existence.

CHARLES C. RODRIGUEZ

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[26]165 Ohio St. 365, 135 N.E.2d at 865.

[27]165 Ohio St. 365, 135 N.E.2d at 863, where the court says: "It is clear from the record in the instant case that the divorce decree may not be modified or set aside and the award increased without a rescission of the contract of settlement."

[28]See note 23 supra.

[29]See note 3 supra.

[30]See § 349(2)(c) (1932).