

## Delay as a Bar to Rescission

John M. Friedman

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

John M. Friedman, *Delay as a Bar to Rescission*, 26 Cornell L. Rev. 426 (1940)  
Available at: <http://scholarship.law.cornell.edu/clr/vol26/iss3/7>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## DELAY AS A BAR TO RESCISSION

JOHN M. FRIEDMAN

The remedy of rescission has enjoyed great popularity during the last few years. The frequency with which it has been invoked is probably traceable not only to the increase in number of business transactions, but also to the economic stress of the times. Contracts made in the flush days of the 1920's have turned out to be not as desirable as planned. Promisors are unable to perform and promisees seek the return of specific consideration given, instead of resorting to a suit for damages against a defendant of doubtful responsibility. Purchasers discover that sellers' statements which induced sales were vastly exaggerated and, with worthless purchases on their hands, seek the return of the considerations paid.

But just as the desirability of a rescission becomes manifest slowly to a would-be rescinder over a period of continued depression, so also the restoration by the defending party of the consideration given in the same measure becomes more difficult. As a consequence, where a rescission action is brought, the plaintiff's delay in seeking the rescission is frequently asserted as a bar to the action. Several problems arise in connection with this plea of delay, as yet not definitively answered by the courts.

The typical situation with which we are concerned is this: a contract between *X* and *Y* is voidable because of *Y*'s fraud or breach of contract; *X* discovers the fraud or breach of contract, but fails to seek a rescission until after the lapse of a period of time. What effect will such lapse of time have upon his power of rescission?

The answer can be stated simply in general terms. A party who has a power of rescission will lose such power if he delays in exercising it for an unreasonable time after acquiring knowledge or notice of the facts.<sup>1</sup> This

---

<sup>1</sup>The rule has no efficacy, however, where there is fraud in the factum, or making of the contract, which renders the contract void rather than voidable. *Telford v. Metropolitan Life Ins. Co.*, 223 App. Div. 175, 228 N. Y. Supp. 54 (3d Dep't 1928), *aff'd w.o. op.*, 250 N. Y. 528, 166 N. E. 311 (1928). So also where the contract is void as against public policy. *Woods v. Kern County Mut. Bldg. & Loan Ass'n*, 34 Cal. App. (2d) 468, 93 P. (2d) 837 (1939); *Geel v. Valiquett*, 292 Mich. 1, 289 N. W. 306 (1939).

It may be noted that a party who has lost his power to rescind because of his delay may still resort to an action for damages for fraud and deceit, or breach of contract, as the case may be. *Brite v. W. J. Horwey & Co.*, 81 F. (2d) 840 (C. C. A. 5th 1936); *Carter v. Finch*, 186 Ark. 954, 57 S. W. (2d) 408 (1933); *National Life Co. v. Wilkerson's Adm'r*, 254 Ky. 459, 71 S. W. (2d) 1034 (1934); *McNulty v. Whitney*, 273 Mass. 494, 174 N. E. 121 (1930); *Holcomb & Hoke Mfg. Co. v. Osterberg*, 181 Minn. 547, 233 N. W. 302 (1930); *Urdang v. Posner*, 220 App. Div. 609, 222 N. Y. Supp. 396 (1st Dep't 1927), *aff'd w.o. op.*, 247 N. Y. 565, 161 N. E. 184 (1928); *Castiglia v. Lucas*, 132 Misc. 480, 230 N. Y. Supp. 116 (Sup. Ct. 1928).

In addition to most of the cases cited, and to the textbook references discussed, hereinafter, see Notes (1936) 102 A. L. R. 852, 888-889, 912-913; (1931) 72 A. L. R. 726; (1927) 48 A. L. R. 917, 928.

rule has been enacted by statute in several jurisdictions.<sup>2</sup> The Uniform Sales Act applies the rule to sales voidable for breach of warranty.<sup>3</sup>

The rule requiring promptness, however, must be distinguished from the rule that intentional acts, performed in recognition of a contract as valid, result in a ratification of a previously voidable contract and bar rescission.<sup>4</sup> Many cases speak of the loss of the power of rescission because of the rescinding party's delay or failure to act promptly, where the party has actually performed acts in affirmance of the contract. We are not concerned with such cases of *actual* affirmance or ratification. Nor are we concerned with the exceptional case where a purchaser of property, who has received and retained the substantial benefit of the sale, is denied a rescission because of his "delay," even though during such delay he had no knowledge of the facts entitling him to rescind.<sup>5</sup>

### 1. *The theory of loss of the power of rescission by delay.*

There have been expressed several theories to explain the loss of the power of rescission because of the rescinding party's delay. Most commonly the failure to act promptly is labelled "laches."<sup>6</sup> An elementary maxim of equity is "Equity aids the diligent." It has been said that the requirement of promptness in rescinding is, for the "security of titles," based upon the equitable maxim "*Vigilantibus non dormientibus jura subservient*": those awake, not those asleep, the laws assist.<sup>7</sup> But while the operation of laches is closely similar to the operation of delay in barring a rescission, the rule involved is not the same.

The rescission of a contract may be accomplished either at law or in

<sup>2</sup>CAL. CIVIL CODE (Deering, 1937) § 1691; GA. CODE ANN. (Park, Skillman & Strozier, 1936) § 20-906; MONT. REV. CODE ANN. (Anderson & McFarland, 1935) § 7567; N. D. COMP. LAWS ANN. (1913) § 5936; OKL. STAT. ANN. (1937) tit. 15, § 235; S. D. CODE (1939) § 10.0804.

<sup>3</sup>UNIFORM SALES ACT §§ 49, 69 (3), discussed *infra* pp. 445-446.

<sup>4</sup>See 3 BLACK, RESCISSION AND CANCELLATION (2d ed. 1929) c. 37, esp. §§ 594 *et seq.*; RESTATEMENT, CONTRACTS (1932) § 484; 5 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1937) § 1527.

<sup>5</sup>*Donovan v. Aeolian Co.*, 270 N. Y. 267, 200 N. E. 815 (1936), discussed *infra* note.

<sup>6</sup>The entire discussion of the question contained in 2 BLACK, RESCISSION AND CANCELLATION (2d ed. 1929) c. 33, §§ 536-548 is interspersed with numerous characterizations of the bar of delay as laches. And see Note (1929) 8 TEX. L. REV. 160.

The defense is so characterized in California even though the requirement of promptness is imposed by statute (see note 2 *supra*). *McCray v. Title Ins. & Trust Co.*, 12 Cal. App. (2d) 537, 55 P. (2d) 1234 (1936); *Deasy v. Taylor*, 39 Cal. App. 235, 178 Pac. 538 (1918). So also in Georgia. *Equitable Bldg. & Loan Assn. v. Brady*, 171 Ga. 576, 156 S. E. 222 (1930). *But see* *Davis v. Rite-Lite Sales Co.*, 8 Cal. (2d) 675, 67 P. (2d) 1039 (1937) and *Stevens v. Bryson*, 135 Cal. App. 684, 27 P. (2d) 932 (1933), holding that prejudice resulting from the delay need not be proved. And see *Ross v. Real Estate Inv. Co.*, 135 Cal. App. 563, 28 P. (2d) 52 (1933), indicating that in an action at law based upon an executed rescission, delay is no defense.

<sup>7</sup>*Lutjen v. Lutjen*, 64 N. J. Eq. 773, 781, 53 Atl. 625, 628 (1902).

equity.<sup>8</sup> Where the rescinding party can obtain complete relief by declaring his rescission, tendering back to the defending party whatever the defending party gave under the contract, and suing at law upon such "executed" rescission to recover back what he has given, his remedy is so limited.<sup>9</sup> It is clear that where the rescinding party seeks the return of money<sup>10</sup> or personal property,<sup>11</sup> the legal remedy is adequate. But where the legal remedy is inadequate, and it is necessary to consummate the rescission by an equity decree, such as one directing the return of real estate, or the cancellation of a lien, a suit in equity is permitted.

Where rescission is sought by means of an action at law, it is obvious that laches is not a defense to the action. Laches is a purely equitable defense and will not be sustained in an action at law.<sup>12</sup> The loss of the power of rescission because of delay, in rescission actions at law, at any rate, cannot be said to have resulted from laches.

Moreover the elements of laches are not identical with the elements of the rule requiring prompt action in rescinding. "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another."<sup>13</sup> As will be seen shortly, prejudice is not a necessary element of the rule of promptness.

A further distinction, although not an especially significant one, between the defense of laches and the rule requiring promptness in rescinding is this: the burden is upon the defendant to prove laches unless laches clearly appears on the face of the complaint,<sup>14</sup> whereas in rescission actions, it is incumbent

<sup>8</sup>Gould v. Cayuga County National Bank, 86 N. Y. 75 (1881); McNaught v. Equitable Life Assurance Society, 136 App. Div. 774, 121 N. Y. Supp. 447 (2d Dep't 1910).

<sup>9</sup>Tyler v. Moses, 13 App. D. C. 428, 442-443 (1898); Voehl v. Title Guarantee and Trust Co., 155 Misc. 697, 278 N. Y. Supp. 984 (Sup. Ct. 1934), *aff'd w.o. op.*, 242 App. Div. 762, 275 N. Y. Supp. 215 (1st Dep't 1934), *aff'd mem.*, 266 N. Y. 662, 195 N. E. 371 (1935); Fetterman v. Title Guarantee and Trust Co., 254 App. Div. 704, 3 N. Y. S. (2d) 866 (2d Dep't 1938).

<sup>10</sup>The remedy is an action for money had and received. Steinert v. Title Guarantee and Trust Co., 258 App. Div. 927, 16 N. Y. S. (2d) 749 (2d Dep't 1939), *aff'd w.o. op.*, 283 N. Y. 636, 28 N. E. (2d) 36 (1940).

<sup>11</sup>The remedy is replevin. Williams v. Logue, 154 Miss. 74, 122 So. 490 (1929).

<sup>12</sup>Waits v. Moore, 89 Ark. 19, 115 S. W. 931 (1909); Williams v. Burnside, 207 Iowa 239, 222 N. W. 413 (1928); Cullen v. Johnson, 325 Mo. 253, 29 S. W. (2d) 39 (1930); RESTATEMENT, RESTITUTION (1937) § 148; 5 FIERO, PARTICULAR ACTIONS AND PROCEEDINGS (1929) 529. And see Ross v. Real Estate Inv. Co., 135 Cal. App. 563, 28 P. (2d) 52 (1933).

<sup>13</sup>4 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) § 1442, p. 3418, quoting from Chase v. Chase, 20 R. I. 202, 37 Atl. 804 (1897).

<sup>14</sup>Cooke v. Darnell, 100 Cal. App. 482, 280 Pac. 383 (1929); McGrath v. C. T. Sherer Co., 291 Mass. 35, 195 N. E. 913 (1935); Hifler v. Calmac Oil & Gas Corp., 10 N. Y. S. (2d) 531 (Sup. Ct. 1939), *aff'd on op. below*, 258 App. Div. 78, 16 N. Y. S. (2d) 104 (4th Dep't 1939); Wood v. Hill, 214 App. Div. 417, 212 N. Y. Supp. 550 (1st Dep't 1925).

upon the plaintiff to prove that he acted promptly in seeking his rescission.<sup>15</sup>

It is, of course, true that laches may be asserted as a defense to a suit in equity for a rescission. But regardless of any defense of laches, it would seem that promptness in rescinding is required in equity suits.<sup>16</sup> Thus in many equity suits for rescission, relief is denied because of the plaintiff's delay, where no prejudice resulting from the delay appears, and where the delay is not characterized as laches.<sup>17</sup>

But an entirely different basis for the requirement of prompt action in rescinding has been expressed. It has been said that the requirement "is based on the consideration of natural justice that while the defrauded party shall be protected against loss and restored to his *status quo*, the one who commits the wrong shall not be made the subject of a new and unwarranted speculation nor be punished beyond the necessity of making the one defrauded whole."<sup>18</sup> This reason for the requirement bears a close resemblance to the policy behind the doctrine of laches, namely the prevention of preju-

<sup>15</sup>See cases cited *infra* notes 117, 118.

<sup>16</sup>In *Stevens v. Bryson*, 135 Cal. App. 684, 27 P. (2d) 932 (1933), it was held that the defense of delay in an equity suit for rescission, while termed "laches," affects the *right*, and is to be distinguished from the ordinary defense of laches which affects only the remedy; so that in rescission suits, prompt action, regardless of prejudice to the defendant, is required.

In *Scott v. Empire Land Co.*, 5 F. (2d) 873, 875 (S. D. Fla. 1925), *aff'd*, 24 F. (2d) 417 (C. C. A. 5th 1928), the court, after stating that laches might bar an equity suit for rescission, states that: "Another well-established rule in this connection is to the effect that a party, desiring to rescind a contract on the ground of fraud, must at once, upon discovery of the fraud, announce his purpose to rescind. . . ."

See *Maioaran v. Calabrese*, 100 N. J. Eq. 315, 135 Atl. 69 (1926); *Rector, Wardens, etc. v. Title Guarantee and Trust Co.*, 246 App. Div. 251, 285 N. Y. Supp. 297 (1st Dep't 1936), *aff'd w.o. op.*, 272 N. Y. 568, 4 N. E. (2d) 740 (1936). And see 5 FIERO, PARTICULAR ACTIONS AND PROCEEDINGS (1929) pp. 528-530, especially the following: "The laches of the plaintiff may bar equitable relief. The defense of laches is to be distinguished . . . from the question of waiver. A waiver of the right of rescission may arise from a delay in the assertion of the claim, from which delay an inference is drawn that the plaintiff has acquiesced in the fraud and elected to resort merely to damages for relief."

But see *Robert Hind, Ltd. v. Silva*, 75 F. (2d) 74, 78 (C. C. A. 9th 1935), indicating that delay will bar a suit in equity only if accompanied by prejudice.

<sup>17</sup>*Equitable Life Assur. Soc. of U. S. v. King*, 178 Ark. 293, 10 S. W. (2d) 891 (1928); *Hamlin v. Johns*, 166 Ga. 880, 144 S. E. 659 (1928); *Kanter v. Ksander*, 344 Ill. 408, 176 N. E. 289 (1931); *National Life Co. v. Wilkerson's Adm'r*, 254 Ky. 459, 71 S. W. (2d) 1034; *Yoffa v. National Shawmut Bank*, 288 Mass. 422, 193 N. E. 22 (1934); *Warren v. Hugo Scherer Estate, Inc.*, 272 Mich. 254, 261 N. W. 319 (1935); *Fowler v. Fowler*, 197 App. Div. 572, 188 N. Y. Supp. 529 (3d Dep't 1921); *Morgan v. Virginian Joint Stock Land Bank*, 41 Ohio App. 558, 180 N. E. 202 (1931); *Elliott v. Mork*, 144 Ore. 246, 24 P. (2d) 1036 (1933); *Williams v. Spinks*, 7 Tenn. App. 488 (1928); see *Cincinnati I. & W. R.R. v. Indianapolis Union Ry.*, 36 F. (2d) 323, 324 (C. C. A. 6th 1929), *cert. denied*, 281 U. S. 754, 50 Sup. Ct. 408 (1930); *Kimmell v. Twigg*, 88 W. Va. 531, 537, 107 S. E. 206, 208 (1921). And see *Hallahan v. Webber*, 7 App. Div. 122, 40 N. Y. Supp. 103 (1st Dep't 1896), discussed *infra* note 58.

<sup>18</sup>*Bank of U. S. v. National City Bank*, 123 Misc. 801, 803, 206 N. Y. Supp. 428, 431 (Sup. Ct. 1924), *aff'd w.o. op.*, 214 App. Div. 716, 209 N. Y. Supp. 793 (1st Dep't 1925).

dice to the defending party. But a "speculation" by a party to a contract, based on the existence of the contract, implies a deliberate, although tentative, recognition of the contract as valid. Carrying the thought further, it is said that the inaction of a would-be rescinder for a considerable period of time after acquiring knowledge of the facts results from his acquiescence in the existence of the contract; and that he will not be permitted to rescind a contract in which he has previously acquiesced.<sup>19</sup>

As a result of these latter reasons, the assertion of delay as a bar to rescission is frequently described as the assertion of a ratification or affirmation of the allegedly voidable contract.<sup>20</sup> Black, the leading text writer in the field of rescission, states that unreasonable delay "is a manifestation of his [the rescinding party's] election to affirm it [the contract] rather than to repudiate it."<sup>21</sup>

An act of ratification or affirmation, however, is usually conceived of as intentional.<sup>22</sup> That is, the ratifier or affirmer has done something which shows a willingness to abide by the contract. But it is obvious that in many cases where a party loses his power of rescission because of delay, no such intention is present. The party has simply sat back after knowledge of the facts, through indifference, negligence, or a speculative desire to see how things will turn out, and then, after what the court finds to be an unreasonable time, manifests his election to rescind.

Realizing this, the authorities sometime state that a would-be rescinder, who has delayed unreasonably, will be "deemed" or "presumed" to have ratified the contract.<sup>23</sup> The creation of such a legal fiction is entirely unnecessary.

Again, unreasonable delay has been said to constitute a waiver.<sup>24</sup> "Delay

<sup>19</sup>See for example *Faulkner v. Wassmer*, 77 N. J. Eq. 537, 77 Atl. 341 (1910).

<sup>20</sup>*Clough v. London & North Western Ry.*, L. R. 7 Ex. 26, 35 (1871). See (1927) 76 U. OF PA. L. REV. 211.

<sup>21</sup>2 BLACK, RESCISSION AND CANCELLATION (2d ed. 1929) § 536, p. 1316.

<sup>22</sup>*International Harvester Co. v. Edwards*, 76 Colo. 531, 233 Pac. 164 (1925); *Clark v. Kirby*, 243 N. Y. 295, 153 N. E. 79 (1926); *Pryor v. Foster*, 130 N. Y. 171, 29 N. E. 123 (1891).

<sup>23</sup>*Brennan & Cohen v. Nolan Laundry Co.*, 209 Iowa 922, 229 N. W. 321 (1930); *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799 (1886); *Fowler v. Fowler*, 197 App. Div. 572, 188 N. Y. Supp. 529 (3d Dep't 1921); *Martin-Barris Co. v. Jackson*, 24 App. Div. 354, 48 N. Y. Supp. 586 (4th Dep't 1897); *Hallahan v. Webber*, 7 App. Div. 122, 40 N. Y. Supp. 103 (1st Dep't 1896); *Union Savings & Loan Assn. v. Getty*, 135 Ore. 565, 296 Pac. 878 (1931); *Howard v. Turner*, 155 Pa. 349, 26 Atl. 753 (1893). See 5 FIERO, PARTICULAR ACTIONS AND PROCEEDINGS (1929) 528; Note (1927) 2 WASH. L. REV. 132.

<sup>24</sup>*Laminack v. Black*, 3 S. W. (2d) 824, 825 (Tex. Civ. App. 1928); see Notes (1936) 15 NEB. L. BULL. 198, 199; (1927) 2 WASH. L. REV. 132. It is stated in WOODWARD, THE LAW OF QUASI-CONTRACTS (1912) § 266, p. 428, that "inaction" or "the retention, for an unreasonable time, of money or property received under the contract, or the failure, in the case of a contract requiring more than one act by the other party, to

in making an election to rescind is a waiver of the misconduct of the other party, and may be deemed an election to treat the contract as valid and binding."<sup>25</sup> But a waiver, like a ratification or affirmance, is an intentional act,<sup>26</sup> and for the reasons stated above, unreasonable delay cannot be so characterized.

Failure to act promptly in rescinding has sometimes been said to result in an estoppel.<sup>27</sup> A defendant may set up an estoppel, however, only where he has done something in reliance upon the purposeful conduct of the plaintiff.<sup>28</sup> It is quite obvious that in the usual rescission case, there will be found neither action by the defendant in reliance upon the plaintiff's objective acceptance of a voidable contract, nor delay by the plaintiff calculated to induce any such action.

It is true that many of the elements of the above-mentioned defenses may be found where delay is set up as a bar to rescission. The plaintiff's delay may have resulted from his intention to ratify the contract or waive the fraud; his conduct may have induced reliance thereon and prejudice. But the rule requiring promptness in rescinding cannot properly be identified with any of those defenses; delay results, not in laches, or ratification, or waiver, or estoppel, but only in "the loss of the power of rescission."<sup>29</sup> Indeed, delay in rescinding does not give rise to an affirmative defense at all; rather, prompt action after knowledge or notice of the facts is a condition precedent to the granting of legal or equitable relief upon the theory of rescission; it is an element of the plaintiff's cause of action.<sup>30</sup> It is, therefore, erroneous to speak of the "defense" of delay, although the misnomer is frequently used.

---

give reasonable notice that further performance will not be accepted, may properly be regarded as evincing an election not to seek restitution."

<sup>25</sup>Kellner v. Rowe, 137 Wash. 418, 420, 242 Pac. 353 (1926).

<sup>26</sup>Oregon Mortgage Co. v. Renner, 96 F. (2d) 429 (C. C. A. 9th 1938); Commercial Savings Bank v. Kietges, 206 Iowa 90, 219 N. W. 44 (1928); Colby v. Plymouth Road Development Corp., 251 Mich. 663, 232 N. W. 237 (1930); Brennan v. National Equitable Investment Co., 247 N. Y. 486, 160 N. E. 924 (1928). In the case of Weinhagen v. Hayes, 174 Wis. 233, 249-250, 178 N. W. 780, 786-787 (1920), *aff'd on rehearing*, 174 Wis. 233, 183 N. W. 162 (1921), it is said: "A waiver may be shown by a course of conduct signifying a purpose not to stand on a right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon. . . . Mere delay did not amount to a waiver of their rights."

<sup>27</sup>See 2 WARVELLE, VENDORS (1st ed. 1890) 836, quoted in Thomas v. McCue, 19 Wash. 287, 293, 53 Pac. 161 (1898).

<sup>28</sup>See, for example, with reference to tort actions, 4 RESTATEMENT, TORTS (1939) § 894.

<sup>29</sup>The *Restatement of Restitution*, discussed *infra* pages 442-444, terms the rule "Delay in Avoidance of Transaction" and states (Section 64) that delay simply "terminates the power of rescission for fraud or mistake." The distinction is noted between this defense and the defenses of laches and affirmance. See comment *a* to Section 64. The *Restatement of Contracts*, discussed *infra* pages 444-445, terms the rule (Section 483) one of "Loss of Power of Avoidance."

<sup>30</sup>See discussion of burden of proof, *infra* pages 452-453.

Nevertheless, in reading the cases, it should be kept in mind that frequently the bar of delay is confused with the related defenses mentioned above, and that consequently the elements of those defenses have erroneously been considered. This confusion has somewhat accounted for the inconsistencies and uncertainties found in the cases.

It may be noted at this point, however, that despite the misnomers applied, the requirement of promptness in seeking rescission results from two motives: there is the desire that the defending party shall not be damaged by unnecessary delay on the part of the would-be rescinder in asserting his rescission; and there is an unwillingness to permit a rescission where the would-be rescinder by his conduct has indicated an intention to abide by the contract.

## 2. *When the period of delay commences.*

Before the unreasonableness of an alleged period of delay can be considered, it is necessary to select some time when the would-be rescinder can be said to have begun his delay. As stated above, such period commences when "knowledge or notice of the facts" is acquired.

Full and complete knowledge of an alleged fraud or breach of contract is not essential to impose upon a would-be rescinder the necessity of acting promptly and diligently if he wishes to assert a rescission. It is enough that he has such notice of the facts as would impel a reasonable man in his position to make inquiry.<sup>31</sup> Having such notice, he will be chargeable with knowledge of all the facts which inquiry would disclose.

The following rule is stated by Black:

"it is held that the purchaser of personal property is bound, within a reasonably short time after its delivery to him, to make a sufficient examination, inspection, or test of it to enable him to determine whether or not he has cause to complain of misrepresentations in regard to it,

<sup>31</sup>Scott v. Empire Land Co., 5 F. (2d) 873 (S. D. Fla. 1925), *aff'd*, 24 F. (2d) 417 (C. C. A. 5th 1928); Weber v. Wittmer Co., 26 F. Supp. 13 (W. D. N. Y. 1938); Bynum v. Southern Building & Loan Assn., 223 Ala. 392, 137 So. 21 (1931); Moore v. Giffen, 110 Cal. App. 659, 294 Pac. 730 (1930); Greene v. Locke-Padden Co., 36 Cal. App. 372, 172 Pac. 168 (1918); Lasby v. Burgess, 88 Mont. 49, 289 Pac. 1028 (1930); Davis v. Title Guarantee and Trust Co., 246 App. Div. 754, 283 N. Y. Supp. 934 (2d Dep't 1935), *aff'd w.o. op.*, 272 N. Y. 440, 3 N. E. (2d) 859 (1936); Ross v. Titterton, 6 Hun 280 (Sup. Ct. 1875); Wilson v. Empire Holding Corp., 145 Ore. 598, 28 P. (2d) 843 (1934); Whitney v. Bissell, 75 Ore. 28, 146 Pac. 141 (1915); Barr v. McCauley, 240 S. W. 961 (Tex. Civ. App. 1922); Burningham v. Burke, 67 Utah, 90, 245 Pac. 977 (1926). See Mortgage Bond Co. of N. Y. v. Carter, 230 Ala. 387, 388, 161 So. 448, 449 (1935); RESTATEMENT, RESTITUTION (1937) § 64, comment b. So in cases of breach of warranty under the UNIFORM SALES ACT § 49. *But see* Saunders v. Farmers and Merchants Nat. Bank, 61 S. D. 261, 265, 248 N. W. 250, 252 (1933), indicating that "unless a delay in discovering the fraud works a disadvantage to another, there is no estoppel on that account against the assertion of the right of rescission."

or of a deficiency in quantity or quality, or failure to correspond with samples or with a warranty.<sup>32</sup>

This is an erroneous statement of the law, imposing a far stricter duty upon a rescinding party than is imposed by the cases. The cases cited in support of the statement stand only for the well-settled propositions that: (1) the rescinding party may not shut his eyes to the obvious facts showing misrepresentation or breach of contract, but will be held to have acquired that knowledge which would have been acquired through ordinary and reasonable diligence;<sup>33</sup> and (what may amount only to an application of this rule) (2) where it is customary and usual to inspect or test goods sold, as in the case of commercial contracts for the sale of goods, the rescinding party is held to have acquired what knowledge of misrepresentation or breach of contract such an inspection or test would have disclosed.<sup>34</sup> This latter rule, with respect to breach of contract, has apparently been codified in the Uniform Sales Act.<sup>35</sup>

<sup>32</sup>BLACK, RESCISSION AND CANCELLATION (2d ed. 1929) § 540.

<sup>33</sup>Berman v. Woods & Co., 38 Ark. 351 (1881); Phelps v. Grady, 168 Cal. 73, 141 Pac. 926 (1914); Carlsen v. Ziehme, 53 Fla. 235, 44 So. 181 (1907); Cohron v. Woodland Hills Co., 164 Ga. 581, 139 S. E. 56 (1927); Buford v. Brown, 45 Ky. 553 (1846); Clark v. Smith's Exec'rs, 10 Ky. L. R. 196 (1888); Dawson v. Flinton, 195 Mo. App. 75, 190 S. W. 972 (1916); Woods v. Thompson, 114 Mo. App. 38, 88 S. W. 1126 (1905); Reed v. Rogers, 19 N. M. 177, 141 Pac. 611 (1914); Leslie v. Evans, Van Epp & Co., 4 Ohio Dec. 307, 1 Cleve. L. R. 273 (1878); Boughton v. Standish, 48 Vt. 594 (1876); Kelsey v. J. W. Ringrose Net Co., 152 Wis. 499, 140 N. W. 66 (1913); Wilson v. Solberg, 145 Wis. 573, 130 N. W. 472 (1911).

<sup>34</sup>Roxford Knitting Co. v. Hamilton Mfg. Co., 205 Fed. 842 (C. C. A. 3d 1913); Doane v. Dunham, 79 Ill. 131 (1875); McMillan v. DeTamble, 93 Ill. App. 65 (1900); Stone v. Frohlich, 168 Mich. 128, 133 N. W. 951 (1911); Jones v. Bloomgarden, 143 Mich. 326, 106 N. W. 891 (1906); Farrington v. Smith, 77 Mich. 550, 43 N. W. 927 (1889); Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349 (1889); P. J. Sorg Co. v. Crouse, 88 Hun 246, 34 N. Y. Supp. 741 (Sup. Ct. 1895); Reichenenthal v. Glockner, 158 N. Y. Supp. 699 (App. Term 1916); Spiegelberg v. Karr, 24 Pa. Super. 339 (1904); Boothby v. Scales, 27 Wis. 626 (1871).

The following cases cited by Black involved only the question of whether or not the rescinding party had consumed an unreasonable time in testing the article sold: J. A. Fay & Egan Co. v. Independent Lumber Co., 178 Ala. 166, 59 So. 470 (1912); Economy Furnace Co. v. Blahley, 101 N. W. 1123 (Iowa 1905); Wilson v. Doolittle, 114 Kan. 582, 220 Pac. 508 (1923); Gridley v. Globe Tobacco Co., 71 Mich. 528, 39 N. W. 754 (1888); Tower v. Pauley, 51 Mo. App. 75 (1892). The question is really one of ratification or affirmation by exercise of dominion. See UNIFORM SALES ACT § 69 (3); 2 WILLISTON, SALES (2d ed. 1924) § 610.

In Roach v. Warren-Neely & Co., 151 Ala. 302, 44 So. 103 (1907), cited by Black, the contract provided that inspection should be made within a certain time.

See also: Ziegelmeier v. Allis-Chalmers Mfg. Co., 145 Kan. 652, 66 P. (2d) 387 (1937); A. C. Morris & Co., Inc. v. Heaton, 235 Ky. 66, 29 S. W. (2d) 617 (1930).

<sup>35</sup>§ 49. Acceptance does not bar action for damages.—In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such

But any suggestion that a defrauded party, or one whose promisor has committed a breach of contract, has a *duty* to ascertain the facts has been repudiated by the authorities.<sup>36</sup> It is only where notice of the facts has been brought to a would-be rescinder that he must act promptly in declaring his rescission.

### 3. *Is prejudice necessary?*

One of the problems which arise in considering the requirement of promptness is this: must prejudice be proved to have resulted from the rescinding party's delay before the power of rescission will be lost? Will the power be lost where it is apparent only that the rescinding party has delayed exercising the power for a long period of time?

The authorities are in some confusion on the point. A word of caution should first be said. Many of the cases which discuss the problem are in reality concerned with the defense of laches,<sup>37</sup> and consequently hold that prejudice must be proved. As has been seen, the rule of laches is not synonymous with the rule requiring promptness in rescinding,<sup>38</sup> so that such authorities are not in point.

In considering whether prejudice is necessary before a rescission will be barred for delay, the cases must be divided into those involving executed contracts and those involving executory contracts (or contracts where at least the defendant has not performed). A sufficient reason exists for this division, as will be seen.

Cases involving the rescission of executory contracts are relatively few. The rule of promptness, however, seems to have been relaxed greatly in these cases. Where no prejudice to the defending party or any third person appears as the result of delay, a defrauded party to an executory contract may rescind at any time before performance is tendered or claim is made.<sup>39</sup>

breach, the seller shall not be liable therefore."

Applying this section to the question of a duty to inspect, Judge Cardozo said in *Schnitzer v. Lang*, 239 N. Y. 1, 5, 145 N. E. 65, 66 (1924): "The plaintiff was under no duty to resort to extraordinary tests. His duty to inspect was confined to forms of inspection that were customary and reasonable." See also *Donovan v. Aeolian Co.*, 270 N. Y. 267, 272-273, 200 N. E. 815, 817 (1936); *Opler Bros., Inc. v. Ceylon Cocoa & Coffee Co.*, 175 N. Y. Supp. 829 (App. Term 1919); *Joannes Bros. Co. v. Czarnikow-Rionda Co.*, 121 Misc. 474, 201 N. Y. Supp. 409 (Sup. Ct. 1923), *aff'd w.o. op.*, 209 App. Div. 868, 205 N. Y. Supp. 930 (1st Dep't 1924).

<sup>36</sup>*McMahon v. Grimes*, 206 Cal. 526, 275 Pac. 440 (1929); *Hamaker v. Middaugh*, 134 Neb. 440, 278 N. W. 849 (1938); *Albert v. Title Guarantee and Trust Co.*, 277 N. Y. 421, 14 N. E. (2d) 625 (1938); *Baker v. Lever*, 67 N. Y. 304 (1876); *National Bank v. Taylor*, 5 S. D. 99, 58 N. W. 297 (1894); RESTATEMENT, RESTITUTION (1937) § 64, comment b.

<sup>37</sup>See, for example, cases cited *infra* notes 61 and 66.

<sup>38</sup>See *supra* pages 427-429.

<sup>39</sup>*Deasy v. Taylor*, 39 Cal. App. 235, 178 Pac. 538 (1918); *Ripley v. Hazelton*, 3

Similarly, where a party is deemed to have abandoned a contract, having made no performance whatsoever, the other party may rescind and recover his own performance at any time within the period of the Statute of Limitations,<sup>40</sup> or before some performance is attempted by the party deemed to have abandoned.<sup>41</sup> And where there is a prospective breach of contract, a declaration of rescission may be postponed until the breach.<sup>42</sup> The reason for the holdings in the latter two situations is sometimes expressed as a presumption that the rescinding party has extended indulgence to the defaulting party.

In all of these situations, however, the power of rescission will be lost

Daly 329 (N. Y. 1870). *Contra*: City of Del-Rio v. Ulen Contracting Corp., 94 F. (2d) 701 (C. C. A. 5th 1938); see also Dolle v. Melrose Properties, Inc., 252 Ky. 482, 490, 67 S. W. (2d) 706, 710 (1934).

In the case of *Roberts v. James*, 83 N. J. L. 492, 85 Atl. 244 (1912), the vendor sued to recover the purchase price, although no deed had yet been given. Upon a defense of fraud, the court said at pages 495-496:

"It is also settled that one who desires to rescind a contract must act within a reasonable time [citing cases]. What is a reasonable time necessarily depends on the circumstances of each particular case. It is settled in the English courts that unless the situation of the other party has changed to his detriment, the contract continues until the party defrauded elects to avoid it, and he may keep the question open as long as he does nothing to affirm the contract. *Clough v. London and North Western Railway* (1871), L. R. 7 Ex. 26; 41 L. J. Exch. 17. . . .

"In the case of an executory contract, a refusal to perform any obligation thereunder and the defense of an action brought thereon are all that the defrauded party can do by way of asserting his right to disaffirm the contract, and unless his silence or delay has operated to the prejudice of the other party, he may first assert his right when his adversary first asserts his claim by action."

That this rule applies only to executory contracts appears clearly in *Baron v. Buermann*, 103 N. J. Eq. 47, 142 Atl. 248 (1928); and *Navilio v. Sica*, 113 N. J. Eq. 340, 166 Atl. 719 (1933), *aff'd*, 115 N. J. Eq. 571, 171 Atl. 796 (1934).

The English cases cited in *Roberts v. James*, it should be noted, do not support the proposition announced. In the leading case of *Clough v. London and North Western Ry.*, L. R. 7 Ex. 26, 35 (1871), upon which the other English cases cited are based, it is said:

"We think that so long as he has made no election, he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind.

"And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined."

It is thus apparent that the English cases have stated the bar of delay in terms of affirmation, and that delay may bar a rescission regardless of prejudice.

<sup>40</sup>*Richter v. Union Land & Stock Co.*, 129 Cal. 367, 374, 62 Pac. 39, 41 (1900); *Richard v. Credit Suisse*, 242 N. Y. 346, 351, 352-353, 356-357, 152 N. E. 110-113 (1926); *Bank of U. S. v. National City Bank*, 123 Misc. 801, 206 N. Y. Supp. 428 (Sup. Ct. 1924), *aff'd w.o. op.*, 214 App. Div. 716, 209 N. Y. Supp. 793 (1st Dep't 1925).

<sup>41</sup>*Richard v. Credit Suisse*, 242 N. Y. 346, 152 N. E. 110 (1926).

<sup>42</sup>*Klinge v. Farris*, 128 Ore. 142, 268 Pac. 748 (1928), *aff'd on rehearing*, 128 Ore. 151, 273 Pac. 954 (1929).

where it appears that the party against whom the rescission is sought, or some third person, has relied upon the apparent acquiescence to his damage.

These principles have been applied to cases of executed contracts, where the rescinding party has received nothing of value from the defending party, or where there is nothing to tender back.<sup>43</sup>

The vast majority of rescission cases, however, involve executed contracts. There will be found some cases of this type which refuse to bar the rescission unless prejudice has resulted from the rescinding party's delay.<sup>44</sup> In a recent case tried before the New York Supreme Court,<sup>45</sup> the rehabilitator of the *B* corporation sought the rescission of certain sales of mortgage interests made by the defendant to the *B* corporation. It was claimed that the sales were voidable because the defendant and the *B* corporation had certain common officers and directors, and because the sales were unfair and illegal, all of which facts the court found to be true. The sales had been made in 1932 and early 1933, and rescission was sought in 1936. The date of discovery of the facts by the plaintiff was doubtful, but on the question of delay, the court said by way of dictum:

"I am of opinion that the prevailing rule in New York with respect to delay in rescission is stated in *Richard v. Credit Suisse* (242 N. Y., 346, 351), wherein it holds by quotation from *Barnette v. Wells Fargo Nat. Bank* (270 U. S. 438) that 'What promptness of action a court

<sup>43</sup>*Brown v. Young*, 62 Ind. App. 364, 110 N. E. 562 (1915); *Commercial Savings Bank v. Kietges*, 206 Iowa 90, 219 N. W. 44 (1928); *Williamson v. N. J. Southern R.R.*, 28 N. J. Eq. 277 (1877), *mod.* 29 N. J. Eq. 311 (1878). See also *Richards v. Farmers' and Merchants' Bank*, 7 Cal. App. 387, 94 Pac. 393 (1908); *Oliver v. O'Kelley*, 48 Ga. App. 762, 173 S. E. 232 (1933). Cf. *Ford v. Ott*, 186 Iowa 820, 829, 173 N. W. 121, 124 (1919), where in a case involving the defense of fraud asserted to a suit upon notes, no consideration having been received, the court said: "That the notes were procured by fraud rendered them voidable, not void; and, of course, it was optional with the maker whether or not he would challenge their legality. This, he was not bound to do until the holders sought to enforce the collection, and then might interpose the defense that the notes were obtained by fraud, and were, in part, without consideration. Were the suit to rescind and cause the notes and mortgage to be canceled, a different rule would obtain, and he must have acted promptly."

<sup>44</sup>*Basye v. Paola Refining Co.*, 79 Kan. 755, 101 Pac. 658 (1909). See *Clovis Fruit Co. v. California Wine Assn.*, 40 Cal. App. 623, 626, 181 Pac. 229, 231 (1919); *Hogan v. Tucker*, 116 Ky. 918, 925, 77 S. W. 197, 199 (1903); *Jasper v. Price*, 261 Mass. 103, 108, 158 N. E. 504, 506 (1927); *Gyles v. Stadel*, 252 Mich. 349, 352, 233 N. W. 339, 340 (1930); *Dvinnell v. Boehmer*, 60 N. D. 302, 309, 234 N. W. 655, 658 (1931); *Dobie v. Sears, Roebuck and Co.*, 164 Va. 464, 470, 180 S. E. 289, 291 (1935); *Hudson v. Waugh*, 93 Va. 518, 524, 25 S. E. 530, 532 (1896); *Verlinden, Weickhardt, Dornoff Organ Co. v. McDonald*, 217 Wis. 35, 40, 258 N. W. 359, 361 (1935). Cf. the following cases: *Weinhagen v. Hayes*, 174 Wis. 233, 178 N. W. 780 (1921), *aff'd on rehearing*, 174 Wis. 252, 183 N. W. 162 (1921) (where the question is confused by terming the bar of delay one of waiver, the court saying: "Mere delay did not amount to a waiver of their rights"); *Wicks v. Smith*, 21 Kan. 412, 30 Am. Rep. 433 (1879) (bar confused with "affirmance"); *Webb v. Tri-State Fair & Racing Assn.*, 238 Ky. 87, 36 S. W. (2d) 839 (1931) (bar confused with "ratification").

<sup>45</sup>*Pink v. Title Guarantee and Trust Co.*, 164 Misc. 128, 298 N. Y. Supp. 544 (Sup. Ct. 1937).

may reasonably exact . . . must depend in large measure upon the effect of lapse of time without such disaffirmance, upon those whose rights are sought to be divested.'

"In the case at bar there is a complete absence of proof that whatever delay occurred did in any way prejudice the defendant or cause it damage. Under these circumstances, therefore, the plaintiff had the full time permitted by the Statute of Limitations in which to bring suit."<sup>46</sup>

The two cases cited in the opinion, however, do not support the rule announced. The case of *Richard et al. v. Credit Suisse*<sup>47</sup> involved the rescission of a contract for the purchase of foreign money. The rescission was sought by the purchasers when the seller tendered performance at an unreasonably late date. What was said with respect to promptness in rescinding constituted dictum, since it was found that the plaintiffs had acted promptly.<sup>48</sup> Judge Cardozo stated:

"There is a distinction between rescission for fraud, which goes upon the theory that a contract is to be treated as non-existent for lack of true assent, and rescission for abandonment, which goes upon the theory that a contract is avoided for non-performance though valid in its origin. In the one situation, notice of rescission must follow promptly upon discovery of the fraud. . . . 'What promptness of action a court may reasonably exact . . . must depend in large measure upon the effect of lapse of time without disaffirmance upon those whose rights are sought to be divested'. . . . In the other situation, . . . notice may be given at any time within the period of the Statute of Limitations unless delay would be inequitable. . . . Such inequity will result, for instance, if there is property to be returned, or if reliance upon apparent acquiescence will result in hardship or oppression."<sup>49</sup>

Thus there is a clear recognition that where the contract is at least partly executed, *i.e.*, where there is "property to be returned," delay automatically becomes inequitable. Certainly this latter statement applies to cases of rescission for fraud as well as to cases of rescission for non-performance. The

---

<sup>46</sup>*Id.* at 143, 298 N. Y. Supp. at 562. The court found that the plaintiff had here acted promptly. See dictum in accord in *Hiffer v. Calmac Oil & Gas Corp.*, 10 N. Y. S. (2d) 531, 543 (Sup. Ct. 1939), *aff'd on op. below*, 258 App. Div. 78, 16 N. Y. S. (2d) 104 (4th Dep't 1939).

<sup>47</sup>242 N. Y. 346, 152 N. E. 110 (1926).

<sup>48</sup>The case involved a contract made by cable by plaintiffs in New York with defendant in Switzerland for the purchase of Polish marks to be paid in Poland. Performance was attempted by the defendant at an unreasonably late date, but was rejected by plaintiffs, who sought rescission. It was conceded that plaintiffs had acted promptly after obtaining actual knowledge of the facts, and the court found that if the plaintiffs failed to inquire diligently as to whether performance had been made, the defendant also failed to notify the plaintiffs of its non-performance, and so could not take advantage of the plaintiffs' delay. The question of the unreasonableness of the plaintiffs' delay after they should have had knowledge of the facts was not considered.

<sup>49</sup>242 N. Y. 346, 351, 152 N. E. 110, 111 (1926).

point with regard to executed contracts is likewise recognized in the *Barnette v. Wells-Fargo National Bank* case.<sup>50</sup>

It is not to be denied that, where prejudice to the defending party or a third person resulting from the rescinding party's delay is proved, the power of rescission will be lost. Accordingly, such prejudice, or the possibility thereof, must play a part in determining the speed with which a rescission must be declared. But the power of rescinding an executed contract can be lost by sufficient delay even though the party against whom the rescission is sought is able to prove no prejudice resulting therefrom.

Certainly New York has never made such a requirement, apart from the decision referred to. The Court of Appeals has said in leading cases on the subject that rescission of a contract must be sought "promptly upon the discovery of the fraud,"<sup>51</sup> or "at the earliest practicable moment after discovery of the cheat";<sup>52</sup> "that the right to rescind a contract for fraud must be exercised immediately upon its discovery,"<sup>53</sup> and may be lost "by silence and inaction with knowledge of one's rights."<sup>54</sup> Numerous other decisions in New York have stated the rule similarly without any requirement of prejudice.<sup>55</sup> The decisions from other jurisdictions are overwhelmingly in

<sup>50</sup>270 U. S. 438, 446, 46 Sup. Ct. 326 (1925): "Here the very existence of the appellant's right depends upon the timely exercise of her election to disaffirm the deed. Delay in its exercise was necessarily prejudicial to her grantees; for they were entitled to and did rely and act upon the authority of her deed, and their defense under the circumstances was necessarily impeded and embarrassed by the lapse of time during the period in which they were left in ignorance of appellant's claim."

<sup>51</sup>*Gould v. Cayuga County National Bank*, 86 N. Y. 75, 82 (1881).

<sup>52</sup>*Cobb v. Hatfield*, 46 N. Y. 533, 537 (1871).

<sup>53</sup>*Strong v. Strong*, 102 N. Y. 69, 73, 5 N. E. 799, 800 (1886).

<sup>54</sup>*Schenck v. State Line Telephone Co.*, 238 N. Y. 308, 313, 144 N. E. 592, 593 (1924).

<sup>55</sup>*Tanenbaum v. Federal Match Co.*, 189 N. Y. 75, 81 N. E. 565 (1907); *Bruce v. Davenport*, 3 *Keyes* 472, 5 *Abb. Prac.* (n.s.) 185 (N. Y. 1867); *Fowler v. Fowler*, 197 *App. Div.* 572, 188 N. Y. *Supp.* 529 (3d Dep't 1921); *Silberstein v. Blum*, 167 *App. Div.* 660, 153 N. Y. *Supp.* 34 (1st Dep't 1915); *Trott v. Schmitt*, 119 *App. Div.* 474, 104 N. Y. *Supp.* 98 (2d Dep't 1907); *Martin-Barris Co. v. Jackson*, 24 *App. Div.* 354, 48 N. Y. *Supp.* 586 (4th Dep't 1897); *Hallahan v. Webber*, 7 *App. Div.* 122, 40 N. Y. *Supp.* 103 (1st Dep't 1896); *Sarantides v. Williams, Belmont and Co., Inc.*, 180 N. Y. *Supp.* 741 (App. Term 1920); *Little and Ives Co. v. Lamb Publishing Co.*, 108 *Misc.* 14, 177 N. Y. *Supp.* 265 (App. Term 1919); *Hoch v. Goodhart*, 31 *Misc.* 789, 65 N. Y. *Supp.* 223 (App. Term 1900); *Dennin v. Powers*, 96 *Misc.* 252, 160 N. Y. *Supp.* 636 (Sup. Ct. 1916), *aff'd w.o. op.*, 176 *App. Div.* 946, 162 N. Y. *Supp.* 1116 (4th Dep't 1917), *aff'd mem.*, 227 N. Y. 606, 125 N. E. 916 (1919).

*See* *Stauss v. Title Guarantee and Trust Co.*, 284 N. Y. 41, 45, 29 N. E. (2d) 462, 464 (1940); *Seneca Wire and Mfg. Co. v. A. B. Leach & Co.*, 247 N. Y. 1, 8, 159 N. E. 700, 702 (1928); *Pryor v. Foster*, 130 N. Y. 171, 175, 29 N. E. 123 (1891); *Baird v. Mayor, etc.*, 96 N. Y. 567, 598 (1884); *Masson v. Bovet*, 1 *Denio* 69, 74 (N. Y. 1845); *Ketletas v. Fleet*, 7 *Johns.* 324, 331 (N. Y. 1811); *Telford v. Met. Life Ins. Co.*, 223 *App. Div.* 175, 177, 228 N. Y. *Supp.* 54, 56 (3d Dep't 1928), *aff'd w.o. op.*, 250 N. Y. 528, 166 N. E. 311 (1928); *Friedman v. Richman*, 213 *App. Div.* 467, 469, 210 N. Y. *Supp.* 648, 650 (3d Dep't 1925), *aff'd w.o. op.*, 241 N. Y. 576, 150 N. E. 561 (1925); *Trowbridge v. Oehmsen*, 207 *App. Div.* 740, 749, 202 N. Y. *Supp.* 833, 839 (2d Dep't 1924), *aff'd w.o. op.*, 241 N. Y. 564, 150 N. E. 556 (1925); *Zimmele v.*

accord with these last cited New York cases.<sup>56</sup>

In fact there are many cases which have denied a rescission to the plaintiff because of his delay, although there was absolutely no proof of prejudice resulting to the defendant or a third person.<sup>57</sup> Some cases have expressly stated that prejudice is not a prerequisite.<sup>58</sup>

American Plaster Board Co., 1 App. Div. 327, 330, 37 N. Y. Supp. 183, 184 (1st Dep't 1896); Castiglia v. Lucas, 132 Misc. 480, 483, 230 N. Y. Supp. 116, 120 (Sup. Ct. 1928); Hill v. International Products Co., 129 Misc. 25, 71, 220 N. Y. Supp. 711, 756 (Sup. Ct. 1925), *aff'd*, 226 App. Div. 730, 233 N. Y. Supp. 784 (1st Dep't 1929); Bettinger v. Montgomery, 124 Misc. 906, 916, 210 N. Y. Supp. 320, 330 (Sup. Ct. 1925); Bank of U. S. v. National City Bank, 123 Misc. 801, 803, 206 N. Y. Supp. 428, 430 (Sup. Ct. 1924), *aff'd w.o. op.*, 214 App. Div. 716, 209 N. Y. Supp. 793 (1st Dep't 1925); Rose v. Merchants Trust Co., 96 N. Y. Supp. 946, 954 (Sup. Ct. 1905).

<sup>56</sup>In addition to cases cited in notes 57 and 58 *infra*, see McLean v. Clapp, 141 U. S. 429, 12 Sup. Ct. 29 (1891); Newsum Auto Tire Vulcanizing Co. v. Shoemaker, 173 Ark. 872, 294 S. W. 11 (1927); Jones v. Roper, 39 Ga. App. 309, 147 S. E. 156 (1929); Turner v. Jarboe, 151 Kan. 587, 100 P. (2d) 675 (1940); Aeolian Co. of Missouri v. Boyd, 65 S. W. (2d) 111, 113-114 (Mo. App. 1933).

<sup>57</sup>In addition to cases cited *supra* note 17, see the following: City of Del Rio v. Ulen Contracting Corp., 94 F. (2d) 701 (C. C. A. 5th 1938); Berman Bros. Iron and Metal Co. v. State Sav. and Loan Co., 222 Ala. 9, 130 So. 554 (1930); Toomey v. Toomey, 13 Cal. (2d) 317, 89 P. (2d) 634 (1939); Davis v. Rite-Lite Sales Co., 8 Cal. (2d) 675, 67 P. (2d) 1039 (1937); Stowe v. Kaetzel, 38 Cal. App. (2d) 356, 101 P. (2d) 719 (1940); Campbell v. Title Guarantee and Trust Co., 121 Cal. App. 374, 9 P. (2d) 264 (1932); Charles Brown and Sons v. White Lunch Co., 92 Cal. App. 457, 268 Pac. 490 (1928); Olson v. Platt, 82 Colo. 10, 256 Pac. 635 (1927); Leech v. Husbands, 34 Del. 362, 152 Atl. 729 (1930); Robertson v. Northern Motor Securities Co., 105 Fla. 644, 142 So. 226 (1932); Newell v. Rosenberg, 275 Mass. 455, 176 N. E. 616 (1931); Hart v. Copper Dist. Power Co., 289 Mich. 150, 286 N. W. 191 (1939); Heibel v. U. S. Air Conditioning Corp., 206 Minn. 288, 288 N. W. 393 (1939); Edward Thompson Co. v. Peterson, 190 Minn. 566, 252 N. W. 438 (1934); Stewart v. B. R. Menzel and Co., 181 Minn. 347, 232 N. W. 522 (1930); Tropical Paint and Oil Co. v. Mangum and Hatcher, 155 Miss. 876, 125 So. 248 (1929); Sedlacek v. Welpton Lumber Co., 111 Neb. 677, 197 N. W. 618 (1924); Maioran v. Calabrese, 100 N. J. Eq. 315, 135 Atl. 69 (1926); Tanenbaum v. Federal Match Co., 189 N. Y. 75, 81 N. E. 565 (1907); Fowler v. Fowler, 197 App. Div. 572, 188 N. Y. Supp. 529 (3d Dep't 1921); Silberstein v. Blum, 167 App. Div. 660, 153 N. Y. Supp. 34 (1st Dep't 1915); Trott v. Schmitt, 119 App. Div. 474, 104 N. Y. Supp. 98 (2d Dep't 1907); Martin-Barris Co. v. Jackson, 24 App. Div. 354, 48 N. Y. Supp. 586 (4th Dep't 1897); Wasko v. Title Guarantee and Trust Co., N. Y. L. J., Dec. 28, 1935 (App. Term 1935); Sarantides v. Williams, Belmont and Co., Inc., 180 N. Y. Supp. 741 (App. Term 1920); Stern Bros. v. Norwood, 169 N. Y. Supp. 545 (App. Term 1918); Hoch v. Goodhart, 31 Misc. 789, 65 N. Y. Supp. 223 (App. Term 1900); Dennin v. Powers, 96 Misc. 252, 160 N. Y. Supp. 636 (Sup. Ct. 1916), *aff'd w.o. op.*, 176 App. Div. 946, 162 N. Y. Supp. 1116 (4th Dep't 1917), *aff'd mem.*, 227 N. Y. 606, 125 N. E. 916 (1919); Morgan v. Virginian Joint Stock Land Bank, 41 Ohio App. 558, 180 N. E. 202 (1931); Tinius Olsen Testing Mach. Co. v. Wolf Co., 297 Pa. 153, 146 Atl. 541 (1929); Laminack v. Black, 3 S. W. (2d) 824 (Tex. Civ. App. 1928).

<sup>58</sup>Stevens v. Bryson, 135 Cal. App. 684, 27 P. (2d) 932 (1933) (statute stating common law rule); Stotts v. Fairfield, 163 Iowa 726, 145 N. W. 61 (1914) (stating that the question of prejudice is merely to be considered in determining reasonableness, but is not controlling); Gridley v. Globe Co., 71 Mich. 528, 39 N. W. 754 (1888); Bauer v. National Union Fire Ins. Co., 51 N. D. 1, 198 N. W. 546 (1924) (statute stating common law rule). See *Cincinnati, I. & W. R.R. v. Indianapolis Union Ry.*, 36 F. (2d) 323, 324 (C. C. A. 6th 1929), *cert. denied*, 281 U. S. 754, 50 Sup. Ct. 408 (1930); Grosgebauer v. Schneider, 177 Wash. 43, 51, 31 P. (2d) 90, 93 (1934).

In *Hallahan v. Webber*, 15 Misc. 327, 329, 37 N. Y. Supp. 613, 614 (Sup. Ct. 1895),

Curiously enough, this great weight of authority has not been clearly recognized by the text writers. Black states:

the court adopted the erroneous view that the leading English case of *Clough v. London and North Western Ry.*, discussed *supra* note 39, stood for the following proposition:

"The reason for such a rule [requiring promptness in rescinding] is that others shall not be prejudiced or misled by the appearance of ownership with which the vendor has invested the other party, when a prompt disaffirmance of the sale upon discovery of the fraud affecting it would have prevented any such inquiry. Whether or not a rescission for fraud has been prompt and timely must, therefore, be determined in the light of the reason which gives life to the rule, and in each case will depend upon the peculiar facts and circumstances of such case; and where it is apparent that the delay has not been unreasonable, and that the rights of others have not been affected or jeopardized by it, it cannot be said that the right to rescind is gone because the person having it did not exercise it immediately upon his discovery of the facts upon which the right rested."

This alleged holding of the English court was repudiated by the Appellate Division, First Department, in reversing, 7 App. Div. 122, 123, 40 N. Y. Supp. 103, 104 (1896), the court saying:

"Whatever may be the true interpretation of the rule in England as laid down in the case of *Clough v. L. & N. W. R. Co.* (L. R. [7 Exch.] 26), upon which the learned judge below relied in coming to the conclusion which he did in deciding this action, in this State reasonable promptness of action in disaffirmance of a contract is required upon the part of the party seeking to rescind."

In *Annis v. Burnham*, 15 N. D. 577, 583, 108 N. W. 549, 551 (1906), actual waiver was found, but with respect to the statute requiring that rescission must be sought "promptly upon discovering the facts," the court said:

"Plaintiff contends that delays in effecting a rescission will not defeat that right unless the party rescinding is estopped from so doing by having caused the other party to become damaged or prejudiced in some way. The statute cannot be so construed. Promptness is made an imperative condition without regarding the consequences upon the other party."

*Accord*, *Saunders v. Farmers & Merchants Nat. Bank*, 61 S. D. 261, 248 N. W. 250 (1933).

In *Kimmell v. Twigg*, 88 W. Va. 531, 537, 107 S. E. 206, 208 (1921), it is said: "Delay which will defeat recovery is such as has worked disadvantageously to the other party, or such as will raise the presumption that plaintiff has waived his rights." *Accord*, *Martin v. Ash*, 20 Mich. 166 (1870).

And *cf.* *Lutjen v. Lutjen*, 64 N. J. Eq. 773, 781, 53 Atl. 625, 628 (1902), which was a suit to set aside a release for fraud, commenced almost ten years after the release was given. The court held the suit barred by lapse of time, although it did not appear when the alleged fraud was discovered, saying:

"Lapse of time alone is deemed by the authorities to be a sufficient ground of estoppel in cases like the present, when the court cannot feel confident of its ability to ascertain the truth now as well as it could when the subject for investigation was recent and before the memories of those who had knowledge of the material facts have become faded and weakened by time. To constitute estoppel of this description it is not essential that any actual loss of testimony, through death or otherwise, or means of proof, or changed relations, to the prejudice of the other party should have occurred. But the estoppel arises because the court cannot, after so great a lapse of time, rely upon the memory of witnesses to reproduce the details that entered into the final execution of the instrument of settlement."

A curious distinction is stated in *Samuel v. King*, 158 Tenn. 546, 549, 14 S. W. (2d) 963, 964 (1929):

"There would seem to be a reason sound in principle for giving to mere delay a material significance in cases of fraud, not generally applicable. Fraud vitiates

"The defense of laches, interposed to defeat the right to rescind a contract for fraud or other sufficient cause, should not be entertained unless it is made to appear that it would be inequitable to deny it. . . . Hence the cases generally agree that delay in taking steps to rescind a contract—even though so long-continued that otherwise it would amount to laches—will not prevent the granting of relief to the rescinding party where it is still possible to restore the other party to his former status, or where that status has not been changed, and where he has not been misled to his prejudice and will not be in any way injured by the rescission, and where no equities have intervened."<sup>59</sup>

Although the conditions imposed in the last sentence almost render ineffectual the rule stated, it should be noted that the statement is made with reference to the defense of laches. The pertinent cases cited, with the exception of one,<sup>60</sup> all involve the defense of laches,<sup>61</sup> or situations where the rescinding party was under no duty to return anything, as where the contract was executory on the part of the defendant.<sup>62</sup> The difficulty with the entire discussion of Black is that the rule requiring promptness in rescinding has continually been confused with the equitable doctrine of laches.<sup>63</sup>

Williston, in his treatise on *Contracts*, tends to fall into the same error

---

every contract *ab initio*. He who discovers fraud perpetrated against him must act promptly, or a suspicion of connivance will attach to him as a party willing to take benefits, if time yields them, and disposed to repudiate the transaction only after experimentation. Meanwhile, his own hands have become soiled. Also, inherent difficulties, arising out of mere delay, are peculiarly incident to litigation involving fraud."

But with respect to rescission for failure of consideration, the court held that the remedy was barred by laches only if the delay was prejudicial. *Cf.* *Pearsons v. Washington College*, 130 Tenn. 601, 172 S. W. 314 (1914).

<sup>59</sup>2 BLACK, RESCISSION AND CANCELLATION (2d ed. 1929) § 546, p. 1348.

<sup>60</sup>*Wicks v. Smith*, 21 Kan. 412, 30 Am. Rep. 433 (1879), where, however, the question was confused by terming the bar of delay an "affirmance."

<sup>61</sup>*Union Cemetery Co. v. Jackson*, 188 Ala. 599, 65 So. 986 (1914); *Harker v. Scudder*, 15 Colo. App. 69, 61 Pac. 197 (1900); *Ackman v. Potter*, 239 Ill. 578, 88 N. E. 231 (1909); *City of Chicago v. Cameron*, 120 Ill. 447, 11 N. E. 899 (1887); *Curtis v. Armagast*, 158 Iowa 507, 138 N. W. 873 (1912); *Parks v. Brooks*, 188 Mich. 645, 155 N. W. 450 (1915); *Gordon v. Schellhorn*, 95 N. J. Eq. 563, 123 Atl. 549 (1924); *State v. Warner Valley Stock Co.*, 56 Ore. 283, 106 Pac. 780 (1910), *rehearing denied*, 56 Ore. 308, 108 Pac. 861 (1910); *Grosh v. Ivanhoe Land and Improvement Co.*, 95 Va. 161, 27 S. E. 841 (1897).

<sup>62</sup>*Richards v. Farmers' and Merchants' Bank*, 7 Cal. App. 387, 94 Pac. 393 (1908); *Brown v. Young*, 62 Ind. App. 364, 110 N. E. 562 (1915); *Commercial Savings Bank v. Kietges*, 206 Iowa 90, 219 N. W. 44 (1928); *Baron v. Buermann*, 103 N. J. Eq. 47, 142 Atl. 248 (1928); *Roberts v. James*, 83 N. J. L. 492, 85 Atl. 244 (1912); *Williamson v. N. J. Southern R.R.*, 28 N. J. Eq. 277 (1877); *Clough v. London and North Western Ry.*, L. R. 7 Ex. 26 (1871).

<sup>63</sup>Despite his characterization of the bar of delay as resulting from laches, Black also states that a period of delay which is sufficient to bar a rescission is "tantamount to a waiver of his [the rescinding party's] objections to the contract, or is a manifestation of his election to affirm it rather than to repudiate it." 2 BLACK, RESCISSION AND CANCELLATION (2d ed. 1929) § 536, p. 1316. But it is obviously possible to have a waiver or affirmation, even though fictional, without resulting prejudice to the other party.

as Black. With respect to the time for the rescission of a contract for fraud, he says:

"Setting a fraudulent bargain aside, however, is an alternative right given on equitable principles to the injured party, and, therefore, if this remedy is desired, it must be sought with reasonable promptness after the fraud has been discovered. But 'The question of how much time a party to a contract has permitted to elapse is not necessarily determinative of the right to rescind; the immediate consideration being whether the period has been long enough to result in prejudice to the other party.'"<sup>64</sup>

Apart from the case quoted from,<sup>65</sup> the pertinent cases cited by Williston involve the defense of laches.<sup>66</sup> A similar statement is made with respect to the time for the rescission of a contract for mistake.<sup>67</sup> But with respect to the time for the rescission of a contract for a breach thereof, Williston draws a distinction between executed and executory contracts, saying:

"It is also said that one who wishes to rescind must manifest his election to do so without undue delay, or the right will be lost. It seems probable, however, that this is true only where the party seeking rescission has received money or property which he must restore as a condition of relief, or where there is further performance due under the contract from the other party which in the absence of notice he might suppose would be accepted in spite of his prior breach. The cases, though containing broader statements, generally fall in these classes."<sup>68</sup>

No sufficient reason for distinguishing between fraud or mistake cases and breach of contract cases, on the basis of the execution of the contracts involved, appears to the writer.

Williston, in his work on *Sales*, uses practically the identical language of his work on *Contracts*, with respect both to fraud cases<sup>69</sup> and breach of contract cases.<sup>70</sup>

The position taken by the American Law Institute in the *Restatement of Restitution* is somewhat obscure. The principal section of the *Restatement of*

<sup>64</sup>5 WILLISTON, *CONTRACTS* (Rev. ed. Williston and Thompson 1937) § 1526, pp. 4274-4275.

<sup>65</sup>*Brown v. Young*, 62 Ind. App. 364, 110 N. E. 562 (1915).

<sup>66</sup>*Hugill v. Keene*, 204 Cal. 381, 268 Pac. 624 (1928); *McCray v. Title Ins. and Trust Co.*, 12 Cal. App. (2d) 537, 55 P. (2d) 1234 (1936); *Hogan v. Ross*, 200 Iowa 519, 205 N. W. 208 (1925); *McGrath v. C. T. Sherer Co.*, 291 Mass. 35, 195 N. E. 913 (1935); *Heth v. Oxendale*, 238 Mich. 236, 213 N. W. 133 (1927); *Jones v. McGonigle*, 327 Mo. 457, 37 S. W. (2d) 892 (1931); *Yedlin v. Rubin*, 219 App. Div. 694, 220 N. Y. Supp. 545 (2d Dep't 1927), *aff'd w.o. op.*, 247 N. Y. 529, 161 N. E. 170 (1928); *Spangler v. Johnson*, 98 W. Va. 584, 127 S. E. 398 (1925).

<sup>67</sup>5 WILLISTON, *CONTRACTS* (Rev. ed. Williston and Thompson 1937) § 1594, pp. 4441-4443.

<sup>68</sup>*Id.*, § 1469, pp. 4110-4111.

<sup>69</sup>2 WILLISTON, *SALES* (2d ed. 1924) § 648, pp. 1623-1624.

<sup>70</sup>*Id.*, § 611, p. 1531.

*Restitution*, dealing with the question, is section 64, which states that the power of rescission for fraud or mistake will be lost by an unreasonable delay "if the interests of the transferee or of a third person are harmed or were likely to be harmed by such delay." So stated, prejudice, or the likelihood thereof, is necessary, and makes the rule requiring promptness almost identical with the doctrine of laches stated elsewhere in the *Restatement of Restitution*.<sup>71</sup> But actual prejudice is not essential; the likelihood of prejudice is sufficient.<sup>72</sup>

Section 68 of the *Restatement of Restitution* states the effect of affirmance and disaffirmance of a contract, concluding generally that an election to do one terminates the right to do the other. Comment *b* of that section states that an affirmance may be effected "by failure to disaffirm, under such circumstances that dissent would normally be expressed if there were dissent (see Illustration 2)." This language seems to the writer to state the rule of Section 64 without the requirement of harm. Illustration 2, referred to, states just such a case, as follows:

"2. Same facts as in Illustration 1 [A is defrauded by B into paying money to B upon an alleged claim], except that upon discovery of B's fraud, A does nothing for three years when he brings suit against B for recovery of the money. It may be inferred that A had affirmed the transaction."

The result is stated in terms of "affirmance" rather than in terms of "terminating the power of rescission" which are used in Section 64. Any such

<sup>71</sup>Section 148, subdivision 1, reading as follows:

"In proceedings in equity, a person otherwise entitled to restitution is barred from recovery if he has failed to bring or, having brought has failed to prosecute, a suit for so long a time and under such circumstances that it would be inequitable to permit him now to prosecute the suit."

The comment upon this subdivision reads in part as follows:

"a. *The two elements.* A suit for restitution by proceedings in equity is barred by lapse of time only if it would be unjust to allow the complainant to maintain it. The existence of such injustice depends on an affirmative answer to two questions: Has the party seeking restitution been unreasonable in his delay after learning the facts; has the delay made it unfair to permit the suit either because a hardship would result to the respondent or to third persons because of a change of circumstances or because there would be a substantial chance of reaching an erroneous decision as to the facts?"

Thus the *Restatement's* rule of loss of the power of rescission through delay and its rule of laches differ only in the following unsubstantial ways: (1) the power of rescission may be lost through delay if there is damage or the *likelihood* thereof, whereas laches will bar a suit only if there *is* damage; (2) laches will bar a suit where the lapse of time makes the proof uncertain, whereas such element does not expressly enter into the bar of delay.

<sup>72</sup>And see comment *c* to Section 64, which states in part: "The power to avoid a transaction voidable for fraud or mistake and the right to restitution dependent thereon are qualified by equitable considerations and must be exercised with due regard for the interests of the transferee and of third persons. Hence if such interests are likely to be adversely affected by a delay in avoidance, the right to restitution is dependent upon a manifestation of an intent to avoid by the transferor made with reasonable promptness."

"affirmance," however, is purely fictional,<sup>73</sup> and is analogous to the "presumed intention to ratify" frequently used to justify the bar of delay, as noted above.<sup>74</sup>

If it can be said that the *Restatement of Restitution* makes prejudice an element of the rule requiring promptness in rescinding (which the writer doubts), the same cannot be said of the *Restatement of Contracts*. In discussing the requirement of tender, the *Restatement of Contracts* says that the offer by the would-be rescinder to return the consideration received must be made "promptly" after knowledge of the facts.<sup>75</sup> The element of prejudice to the defendant or a third person is not mentioned. With respect specifically to rescission actions based upon fraud, misrepresentation, or mistake,<sup>76</sup> the *Restatement of Contracts* states:

"§ 483. LOSS OF POWER OF AVOIDANCE BY FAILURE TO NOTIFY THE OTHER PARTY.

"(1) The power of avoidance for fraud or misrepresentation is lost if after acquiring knowledge thereof the injured party unreasonably delays manifesting to the other party his intention to avoid the transaction.

"(2) In determining the unreasonableness of delay the following circumstances are influential:

- "(a) the speculative character of the contract whereby prolongation of the power to affirm or to avoid would give an advantage to the injured party or increase the loss of the other party;
- "(b) the likelihood that the party guilty of the fraud or misrepresentation will materially change his position, or the welfare of a third person be unjustly prejudiced by delay;
- "(c) the fact that change of position by the party guilty of the fraud or misrepresentation, or prejudice to a third person, has in fact occurred during a period of delay in manifestation of intention."

Thus while damage, or the likelihood thereof, may show the unreasonableness of a period of delay, it is not essential to the loss of the power of rescission.<sup>77</sup> The comment to Section 483 further limits the application of

<sup>73</sup>Thus see the description of comment *b* to Section 68, contained in comment *a* to Section 64, as follows: "As stated in Comment *b* on § 68, a failure to manifest an avoidance under such conditions that a person desiring to avoid would ordinarily so manifest is sufficient evidence of affirmance, and in the absence of other evidence, such failure will prevent a subsequent avoidance."

<sup>74</sup>See *supra* page 430.

<sup>75</sup>Section 349, with reference to rescission for breach of contract; Sections 480, 510, with reference to rescission for fraud, misrepresentation, and mistake; and see comment *c* to Section 349, and comment *a* to Section 480. The primary consideration of the *Restatement* at these points, however, is the requirement of tender.

<sup>76</sup>See Section 510 with reference to actions based on mistake.

<sup>77</sup>See illustration 1 to Section 483, as follows: "A fraudulently induces B to enter into a contract in January by which A agrees to sell and B to buy one hundred shares of the C corporation on May 1st. B soon discovers the fraud but concludes to wait and see whether the market price of the shares rises or falls. In April he manifests

the section chiefly to executory contracts.<sup>78</sup>

The Uniform Sales Act states that an action by a buyer to rescind for breach of warranty<sup>79</sup> will not be permitted "if he fails to notify the seller within a reasonable time of the election to rescind."<sup>80</sup> It is also provided that "if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."<sup>81</sup> No definition of reasonableness is given. A recent case has held that the buyer's time to rescind may run from the date of sale rather than from the date when knowledge or notice of the facts is acquired, where the buyer is meanwhile receiving the substantial benefit of the contract.<sup>82</sup> A seller is expressly given the power of rescission for non-payment of the purchase price, if he serves notice, or performs an overt act showing intention to rescind,<sup>83</sup> or for repudiation or a material breach or anticipatory breach of contract by the buyer before delivery, by serving notice.<sup>84</sup> No

---

an intention to avoid the transaction. The manifestation is inoperative, although A has not changed his position and the welfare of third persons has not been prejudiced."

<sup>78</sup>Comment b, reading: "Ordinarily where an injured party has received part performance, he must return it promptly. If he cannot do so he cannot avoid the transaction (see § 480). The importance of the present Section is, therefore, chiefly confined to cases where no part performance has been received by the injured party."

<sup>79</sup>At common law, the authorities were divided upon the question of allowing rescission of a contract for a breach of warranty. Under the Uniform Sales Act, rescission may be had for any breach of warranty. See 2 WILLISTON, SALES (2d ed. 1924) §§ 608 *et seq.*

<sup>80</sup>UNIFORM SALES ACT § 69, subdivision 3.

<sup>81</sup>*Id.*, § 49. While the heading of this section reads "Acceptance does not bar action for damages," the body of the section states that it refers to "liability in damages or other legal remedy for breach of any promise or warranty," and so would include rescission actions. *Stewart v. B. R. Menzel & Co.*, 181 Minn. 347, 232 N. W. 522 (1930); *Stone v. Beim*, 176 N. Y. Supp. 25 (App. Term 1919). Where the acceptance of the goods is made with knowledge of the breach of promise or warranty, however, a ratification of the sale results, and no rescission is permitted. *Josten Mfg. Co. v. Medical Arts Bldg. Co.*, 73 F. (2d) 259 (C. C. A. 8th 1934); *May Oil Burner Corp. v. Munger*, 159 Md. 605, 152 Atl. 352 (1930); and see UNIFORM SALES ACT § 69, subdivision 3.

<sup>82</sup>*Donovan v. Aeolian Co.*, 270 N. Y. 267, 200 N. E. 815 (1936). The case involved the sale of a piano warranted to be new, although it had actually been used and rebuilt. The purchaser sought to rescind promptly upon discovering the facts, although she had used the piano for two years and had "obtained substantially the benefit which" she had expected to derive from the contract. Citing Section 69 of the Uniform Sales Act (N. Y. PERS. PROP. LAW § 150, subdivision 3), the court held: "It cannot be said that a notice of election to rescind is given within a reasonable time when it is postponed for almost two years and during that time the buyer has obtained substantially the benefit which he expected to derive from his contract. The buyer may not profit at the expense of the seller from such a long delay in the discovery of the breach of contract. A buyer who has received and retained substantial benefit from the contract may then recover compensation only for that which he has failed to receive." 270 N. Y. 267, 275, 200 N. E. 815, 818 (1936).

<sup>83</sup>UNIFORM SALES ACT § 61, subdivision 1.

<sup>84</sup>*Id.*, § 65.

requirement of promptness is made. The Act provides that with respect to contracts induced by fraud, misrepresentation, or mistake, "the rules of law and equity . . . shall continue to apply."<sup>85</sup> It would seem that the common law rules requiring promptness in rescinding would govern cases of rescission under the Uniform Sales Act.<sup>86</sup>

Is it desirable to require proof of prejudice before delay will be erected as a bar to rescission? In the writer's opinion, the better view is unquestionably the orthodox one; the power of rescission should be lost regardless of proved prejudice to the defending party or a third person.

The drastic nature of a rescission is obvious.<sup>87</sup> In the usual case, that of an executed contract, the parties have exchanged considerations and each has enjoyed for a time the benefits of the bargain. Months or years later, when rescission is sought, an attempt must be made to restore the parties to their position before the contract was made. The contract must be annulled, the considerations returned. From the very nature of the situation, it is impossible to place the parties in their original positions; "the parties cannot be placed *in statu quo* as to time."<sup>88</sup> Every day the contract is permitted to remain in force the greater becomes the security and dependence upon it of the defending party, and the more is increased the shock to his rights which must result from a rescission. In a sense, then, although the defending party may not be able to prove it, the prejudice to him must increase the longer the would-be rescinder delays. It is true also that

<sup>85</sup>*Id.*, § 73.

<sup>86</sup>*Holcomb & Hoke Mfg. Co. v. Osterberg*, 181 Minn. 547, 233 N. W. 302 (1930); *Silberstein v. Blum*, 167 App. Div. 660, 153 N. Y. Supp. 34 (1st Dep't 1915); *Land Finance Corp. v. Sherwin Electric Co.*, 102 Vt. 73, 146 Atl. 72 (1929); Note (1931) 72 A. L. R. 726, 736; see 2 WILLISTON, SALES (2d ed. 1924) § 611.

So indicated with respect to Section 69, by stating the common law rule of promptness, or by citing cases decided before the enactment of the section: *Moore v. Foss & Co.*, 18 F. (2d) 635 (D. Mass. 1927); *Chariton Plumbing & Heating Co. v. Lester*, 202 Iowa 475, 210 N. W. 584 (1926); *M. F. Marx Mfg. Co. v. Beha Laundry Co.*, 224 Ky. 263, 6 S. W. (2d) 245 (1928); *Kawecki v. Stuber-Stone Co.*, 218 Mich. 25, 187 N. W. 272 (1922); *Miller v. Zander*, 85 Misc. 499, 147 N. Y. Supp. 479 (Sup. Ct. 1914), *aff'd w.o. op.*, 166 App. Div. 969, 151 N. Y. Supp. 1130 (4th Dep't 1915); *Klein v. Ninetieth St., etc., Garage*, 182 N. Y. Supp. 256 (App. Term 1920); *Tinius Olsen Testing Mach. Co. v. Wolf Co.*, 297 Pa. 153, 146 Atl. 541 (1929).

So indicated with respect to rescission actions under Section 49: *Laundry Service Co. v. Fidelity Laundry Mach. & Eng. Co.*, 187 Minn. 180, 245 N. W. 36 (1932).

In a situation arising under Section 61, it might well be difficult to impose a requirement of promptness upon an unpaid seller, since the seller may impliedly be extending credit to the defaulting buyer.

In a situation governed by Section 65, the case of *Partola Mfg. Co. v. General Chemical Co.*, 234 N. Y. 320, 328, 137 N. E. 603, 606 (1922) states that it does not decide "whether or not defendant was bound to give notice of its election to terminate the contract within a reasonable time after the plaintiff had been chargeable with unreasonable delay."

<sup>87</sup>See *Donovan v. Aeolian Co.*, 270 N. Y. 267, 200 N. E. 815 (1936); *Warren v. Hugo Scherer Estate*, 272 Mich. 254, 256, 261 N. W. 319, 320 (1935).

<sup>88</sup>*Neblett v. Macfarland*, 92 U. S. 101, 105, 23 L. ed. 471 (1875).

problems of proof, such as the production of witnesses and papers, and the probing of memories, mount daily at the expense of a defending party who is not aware that the other party contemplates a rescission action.

Consider a typical situation where the defrauded purchaser of property delays for a lengthy period in asserting a rescission. Who can say what efforts the seller might have made to resell the property during such period, and whether such efforts would or would not have been successful?<sup>89</sup> Where a defrauded seller delays, can it be said that the buyer, had the rescission been timely asserted, would not have made profitable use of the returned purchase price, or would not have made an advantageous purchase of other property?

It is this drastic nature of a rescission that calls for prompt action by one who would invoke the remedy. The conscience of a court of equity recognizes the need of promptness and imposes the requirement. The equitable considerations which govern the legal remedy<sup>90</sup> produce the same result.

It may be said that one guilty of fraud is entitled to no undue consideration from the court.<sup>91</sup> Yet the policy of the law on its civil side is not punishment. A fair attempt to compensate for wrongs is the aim. "The weight of authority does not stress the moral angle in granting rescission in equity at least."<sup>92</sup> Moreover, in how many cases can the court say that a defending party is clearly guilty of an actual fraud? A defending party will not usually admit an innocent misrepresentation, much less a fraudulent one. Yet rescission will be permitted for an innocent misrepresentation or a mutual mistake of fact. The penalizing inclination in a case where fraud is suspected, therefore, should have no influence in denying the bar of delay.<sup>93</sup> On the other hand, the requirement of promptness does not impose a penalty upon the would-be rescinder. He may have his rescission if he acts diligently.

Again, where rescission is sought for breach of contract, the breach frequently results from no moral turpitude of the defending party. There is no reason for punishing him, and every reason for requiring promptness of the would-be rescinder.

---

<sup>89</sup>See *Laminack v. Black*, 3 S. W. (2d) 824, 825 (Tex. Civ. App. 1928); *Stauss v. Title Guarantee and Trust Co.*, 284 N. Y. 41, 47, 29 N. E. (2d) 462, 465 (1940): "So long as plaintiff retained her certificates, the defendant—to the extent of plaintiff's holdings—was at a disadvantage by being prevented from taking such action as conditions warranted in relation to the property."

<sup>90</sup>*Steinert v. Title Guarantee and Trust Co.*, 258 App. Div. 927, 16 N. Y. S. (2d) 749 (2d Dep't 1939), *aff'd w.o. op.*, 283 N. Y. 636, 28 N. E. (2d) 36 (1940).

<sup>91</sup>See Note (1929) 8 TEX. L. REV. 160; RESTATEMENT, RESTITUTION (1937) § 64, comment c, p. 251.

<sup>92</sup>*Clark, Cir. J.*, in *Herman v. Mutual Life Ins. Co. of N. Y.*, 108 F. (2d) 678, 680 (C. C. A. 3d 1939).

<sup>93</sup>*Bank of U. S. v. National City Bank*, 123 Misc. 801, 803, 206 N. Y. Supp. 428, 431 (Sup. Ct. 1924), *aff'd w.o. op.*, 214 App. Div. 716, 209 N. Y. Supp. 793 (1st Dep't 1925).

A comparison might be drawn between the rule barring rescission for delay and the rule barring rescission because of an actual ratification of the contract by affirmative acts of dominion. Where a would-be rescinder has, after knowledge of the facts, performed acts of dominion, or acts which would be performed only as the result of an affirmance of the voidable contract, he is held to have ratified the contract and to have lost his power of rescission.<sup>94</sup> Prejudice, or the possibility thereof, to the defending party is clearly no element of such ratification. The power of rescission is lost as the result only of the would-be rescinder's conduct. But we have seen that the loss of the right to rescind because of delay has sometimes been said to result from "ratification" or "waiver." Just as prejudice is not an element of ratification, so also it should not be prerequisite to the loss of the power of rescission for delay.

The above arguments may not necessarily hold true where the contract sought to be rescinded is purely executory, or where there is no money or property to be returned. In this situation, there is involved no restoration of the *status quo ante* except for a declaration that certain contractual rights and duties are voided. In such a case, therefore, sufficient reason exists for relaxing the ordinary rule requiring prompt action.

#### 4. *What is unreasonable delay?*

If prejudice to the defending party or a third person is not the prime test of the unreasonableness of a rescinding party's delay, what test has been or can be formulated? The tests laid down by the authorities have been expressed in extremely general terms. It is said that a would-be rescinder must act "with due diligence," or "promptly," or "with reasonable promptness."<sup>95</sup> Some authorities have stated that the rescinding party must act "at once," or "immediately," or "at the earliest practicable moment" after discovery of the facts, although it has been said that such expressions of the rule are "too severe."<sup>96</sup> It has also been said that the reasonableness of the time within which rescission is sought depends upon "the facts and circumstances of each particular case."<sup>97</sup> While such expressions are certainly not erroneous, they offer probably as little assistance to the courts and litigants as the vague definition of negligence as the failure to use due care. It would seem that the courts have considered the requirement of promptness simply by peering into their own consciences and arriving at nebulous conclusions that this plaintiff has acted promptly, and that that

---

<sup>94</sup>See *supra* note 4.

<sup>95</sup>2 BLACK, RESCISSION AND CANCELLATION (2d ed. 1929) § 536, p. 1316.

<sup>96</sup>*Id.*, § 536, p. 1320; and see Note (1931) 72 A. L. R. 726, 737-739.

<sup>97</sup>Gridley v. Globe Tobacco Co., 71 Mich. 528, 39 N. W. 754 (1888); Note (1929) 8 TEX. L. REV. 160, 161; Note (1931) 72 A. L. R. 726, 749-753.

plaintiff has not. In some cases it has been held that a delay of only a few weeks or months is fatal to a rescission action; other cases have sustained a rescission where the plaintiff has delayed for years.<sup>98</sup> Black states that "thirty days is about the utmost length of time which the courts are disposed to allow to the purchaser"<sup>99</sup> or seller<sup>100</sup> of personal property within which to rescind; and that the tendency is to allow a longer time where there is a sale of real property.<sup>101</sup> It has been truly said that the "value of the decisions as precedents, especially as far as regards particular periods of time, lies largely in similarity of circumstances."<sup>102</sup>

The writer does not presume to advance a test which will greatly refine the tests now used. The very nature of the rule calls for latitude in its application. We recall that the requirement of promptness is based upon two motives: a desire, similar to that giving rise to the defense of laches, to avoid prejudice resulting from the delay; and an unwillingness, similar to that giving rise to the defense of ratification, to grant a rescission to one whose conduct has evidenced an affirmance.<sup>103</sup>

With respect to the first motive, it is to be remembered that by virtue of the drastic nature of a rescission, prejudice is bound to increase with the delay. To minimize such prejudice, the rescinding party should be given a reasonable time to consider whether or not to rescind, after which he must rescind *immediately*, if he wants that remedy. With respect to the second motive, this observation may be made: the normal reaction of a defrauded party, or one whose promisor has defaulted, is to desire the avoidance of the contract—or at least to give serious consideration to such avoidance. Is not failure to seek the avoidance immediately after a reasonable time for such consideration fairly conclusive evidence of an intention to abide by the contract? When we say that a rescinding party must seek rescission within a reasonable time, therefore, we mean that rescission must be sought *within a reasonable time for considering whether rescission is desired*.

A person who has the power of rescission should be given an opportunity after discovery of the facts to test an article sold and to decide if he will abide by, or repudiate, the contract.<sup>104</sup> The "duty to rescind does not arise

<sup>98</sup> BLACK, RESCISSION AND CANCELLATION (2d ed. 1929) §§ 541-543. For collection of cases with respect to purchasers of chattels, see Note (1931) 72 A. L. R. 726, 760 *et seq.*

<sup>99</sup> BLACK, RESCISSION AND CANCELLATION (2d ed. 1929) § 542, p. 1336.

<sup>100</sup>*Id.*, § 542, p. 1338.

<sup>101</sup>*Id.*, § 543, p. 1339.

<sup>102</sup>Note (1931) 72 A. L. R. 726, 727. See *Tyler v. Moses*, 13 App. D. C. 428, 444 (1898).

<sup>103</sup>See *supra* page 432.

<sup>104</sup>*Shaner v. West Coast Life Ins. Co.*, 72 F. (2d) 681 (C. C. A. 10th 1934); *Drumar*

until the ground for rescission has been established."<sup>105</sup>

It would seem that, in the case of most contracts, only a few weeks, possibly a few months, would suffice for a thorough consideration of the desirability of rescission. If the rescinding party delays beyond this period necessary for deliberation, he should be held to have lost his power of rescission.

It is suggested that where delay is asserted as a bar to rescission, the question be asked: How promptly would a reasonable man have acted if he were in the plaintiff's position? If I (the reasonable man, of course) had whatever special knowledge of business affairs the plaintiff has, and if I used my ordinary common sense, how soon after I knew or had notice of the facts would I have demanded that the bargain be rescinded?<sup>106</sup> If it is found that a reasonable man would have demanded a rescission before the would-be rescinder did, the power of rescission should be held to have been lost.

Where actual prejudice has resulted from the delay, the inquiry is at an end. The power of rescission is terminated.<sup>107</sup> Loss of evidence or greater difficulties of proof occurring during the delay may be sufficient prejudice

Mining Co. v. Morris Ravine Mining Co., 33 Cal. App. (2d) 492, 92 P. (2d) 424 (1939); Economy Furnace Co. v. Blackley, 101 N. W. 1123 (Iowa 1905); Wilson v. Doolittle, 114 Kan. 582, 220 Pac. 508 (1923); Gyles v. Stadel, 252 Mich. 349, 233 N. W. 339 (1930); Gridley v. Globe Tobacco Co., 71 Mich. 528, 39 N. W. 754 (1888); Tower v. Pauly, 51 Mo. App. 75 (1892); International Harvester Co. of America v. Olson, 62 N. D. 256, 243 N. W. 258 (1932); Hobart Mfg. Co. v. Rodziewicz, 125 Pa. Super. 240, 189 Atl. 580 (1937); Note (1931) 72 A. L. R. 726, 741-745.

<sup>105</sup>Passaic Valley Sewerage Com'rs v. Holbrook, Cabot & Rollins Corp., 6 F. (2d) 721, 725 (C. C. A. 3d 1925), cert. denied, 269 U. S. 582, 46 Sup. Ct. 107 (1925).

<sup>106</sup>See Whittington v. H. T. Cottam Co., 158 Miss. 847, 857, 130 So. 745, 748 (1930) (the rescinding party "must exercise that degree of diligence which may be fairly expected from a reasonable person," [citing cases]); Tinius Olsen Testing Mach. Co. v. Wolf Co., 297 Pa. 153, 157, 146 Atl. 541, 542 (1929) ("What is a reasonable time is what a reasonable, prudent man would do under given time and circumstances.") Cf. Note (1927) 2 WASH. L. REV. 132: "This promptness is that which a man of ordinary prudence would exercise under the same or similar circumstances."

<sup>107</sup>Tyler v. Moses, 13 App. D. C. 428 (1898); Matteson v. Wagoner, 147 Cal. 739, 82 Pac. 436 (1905); Stotts v. Fairfield, 163 Iowa 726, 145 N. W. 61 (1914); Mills v. City of Osawatomie, 59 Kan. 463, 53 Pac. 470 (1898); Cook v. Smith, 184 Mo. App. 561, 170 S. W. 672 (1914); Hodgson v. Barrett, 33 Ohio St. 63 (1877); Parmlee v. Adolph, 28 Ohio St. 10 (1875); Nerve Food Co. v. Robertson, 199 Pa. 486, 49 Atl. 234 (1901); DuPont v. DuBos, 52 S. C. 244, 29 S. E. 665 (1898); Shoemaker v. Cake, 83 Va. 1, 1 S. E. 387 (1887); see RESTATEMENT, CONTRACTS (1932) § 483, subdivision 2 (b) and (c). In *Stotts v. Fairfield*, the court said at page 738:

"A further fact to be considered in determining whether or not the tender was made within a reasonable time is the fact whether or not the rescission, at the time at which it was made, was less beneficial to the party entitled to the tender, than if it had been made earlier, or, in other words, whether the party to whom the tender was made was in any way prejudiced by the delay; whether he was put in any worse position than he would have been had the tender been made earlier. None of these are controlling facts in determining whether or not the tender was within a reasonable time, but they are facts that may be considered by the jury in determining this question."

to bar relief.<sup>108</sup> Similarly, where the delay clearly evidences an intention to waive the fraud or breach of contract, the power of rescission is lost. The loss here results in reality from a true ratification rather than from simple delay.

Of course the speculative desire of a reasonable man might cause him to delay his decision. But such desire does not enter into a consideration of the reasonableness of a delay. An attempt at speculation—that is, the retention of the fruits of the bargain, or the continued recognition of a contract as subsisting, done for a time with the purpose of seeing whether affirmance or disaffirmance would be more profitable—might properly be characterized as an actual ratification of the contract. The authorities uniformly condemn such speculation by a would-be rescinder.<sup>109</sup> The speculative nature of property conveyed or of a contract voidable for fraud or breach of its terms calls for special diligence on the part of a would-be rescinder.<sup>110</sup>

The situation sometimes arises where a contract is voidable for several different misrepresentations, and where the would-be rescinder has delayed unreasonably in rescinding after discovery of one of the misrepresentations. Such delay will not bar a rescission upon the ground of a different misrepresentation where the rescission is sought promptly after the discovery thereof.<sup>111</sup> And similarly, where the power of rescission is lost by delay after one breach of contract, it may be exercised for a subsequent breach, if an action is brought promptly.<sup>112</sup>

A rescinding party who is accused of delay may be able to offer a valid excuse for such delay. It often appears that the would-be rescinder is lulled into inaction or acquiescence by the conduct of the other party in promising to investigate or remedy the claimed defect. In this event, promptness is required only after it becomes apparent that the other party

---

<sup>108</sup>Ulrich v. Gordon, 100 N. J. Eq. 75, 134 Atl. 838 (1936), *aff'd on op. below*, 101 N. J. Eq. 309, 137 Atl. 919 (1927); Lutjen v. Lutjen, 64 N. J. Eq. 773, 53 Atl. 625 (1902); Bangert v. Provident Trust Co., 314 Pa. 442, 171 Atl. 564 (1934).

<sup>109</sup>Grymes v. Sanders, 93 U. S. 55, 23 L. ed. 798 (1876); Rugan v. Sabin, 53 Fed. 415 (C. C. A. 8th 1892); Hunt v. Jones, 203 Ala. 541, 84 So. 718 (1919); Moore v. Giffen, 110 Cal. App. 659, 294 Pac. 730 (1930); Simon v. Williams, 140 Miss. 854, 105 So. 487 (1925); Hallahan v. Webber, 7 App. Div. 122, 40 N. Y. Supp. 103 (1st Dep't 1896); Sarantides v. Williams, Belmont & Co., Inc., 180 N. Y. Supp. 741 (App. Term 1920); Little & Ives Co. v. Lamb Publishing Co., 108 Misc. 14, 177 N. Y. Supp. 265 (App. Term 1919); see RESTATEMENT, CONTRACTS (1932) § 483, subdivision (2) (a).

<sup>110</sup>Newsum Auto Tire Vulcanizing Co. v. Shoemaker, 173 Ark. 872, 294 S. W. 11 (1927); Bank of U. S. v. National City Bank, 123 Misc. 801, 803, 206 N. Y. Supp. 428, 431 (Sup. Ct. 1924), *aff'd w.o. op.*, 214 App. Div. 716, 209 N. Y. Supp. 793 (1st Dep't 1925); see RESTATEMENT, RESTITUTION (1937) § 64, comment c, p. 251.

<sup>111</sup>Pitcher v. Webber, 103 Me. 101, 68 Atl. 593 (1907). See RESTATEMENT, RESTITUTION (1937) § 64, comment b.

<sup>112</sup>*Ibid.*

will not offer satisfaction.<sup>113</sup> Where there are negotiations between the parties for settlement or compromise, rescission need not be sought until after such negotiations fail.<sup>114</sup> Where the would-be rescinder cannot practicably communicate his desire to rescind to the other party, he is excused from prompt action until such communication can be made.<sup>115</sup>

While a rescinding party is under a legal disability, such as infancy or insanity, prompt action in rescinding is not required, even though knowledge or notice of the facts is had; but prompt action in rescinding is required after the disability is removed.<sup>116</sup>

### 5. *Problems of pleading and proof.*

The rule would seem to be established that the burden is upon the rescinding party to show that he acted promptly in seeking rescission.<sup>117</sup> The requirement of prompt action is usually made an element of the cause of action.<sup>118</sup> As a practical matter, however, the burden of moving forward

<sup>113</sup>*Mortgage Bond Co. of N. Y. v. Carter*, 230 Ala. 387, 161 So. 448 (1935); *Long v. Los Altos Country Club, Inc.*, 122 Cal. App. 116, 9 P. (2d) 600 (1932); *Winsor School v. Eastman Heat Control Corp.*, 26 N. E. (2d) 332 (Mass. 1940); *Federal Motor Truck Sales Corp. v. Shanus*, 190 Minn. 5, 250 N. W. 713 (1933); *Advance-Rumely Thresher Co., Inc. v. Wenholtz*, 80 Mont. 82, 258 Pac. 1085 (1927); *Angerosa v. White Co.*, 248 App. Div. 425, 290 N. Y. Supp. 204 (4th Dep't 1936), *aff'd w.o. op.*, 275 N. Y. 524, 11 N. E. (2d) 325 (1937); *Kirk Johnson Co., Inc. v. Light*, 100 Pa. Super. 425 (1930); *Aeolian Co. of Missouri v. Boyd*, 65 S. W. (2d) 111 (Mo. 1933); *Kelsey v. J. W. Ringrose Net Co.*, 152 Wis. 499, 140 N. W. 66 (1913); Note (1931) 72 A. L. R. 726, 745-749. See 2 BLACK, RESCISSION AND CANCELLATION (2d ed. 1929) § 544; 5 WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1937) §1469, p. 4111.

<sup>114</sup>*Graham v. Los Angeles, etc., Bank*, 3 Cal. (2d) 37, 43 P. (2d) 543 (1935); *Wagaman v. Clifford F. Reid, Inc.*, 5 Cal. App. (2d) 168, 42 P. (2d) 678 (1935); *Taylor v. Fry*, 255 Mich. 333, 238, N. W. 274 (1931); *Kupfer & Co. v. Peilman*, 67 Misc. 149, 121 N. Y. Supp. 1081 (App. Term 1910).

In *Jackson v. Howard*, 174 Misc. 382, 22 N. Y. S. (2d) 442 (Sup. Ct. 1940), a sale of realty was made in April, 1938, misrepresentations were discovered in June, 1938, and an action to recover damages for fraud was instituted in August, 1938. This action was discontinued in October, 1939, and a rescission action was begun. It was held that under the circumstances plaintiffs could not be charged with "laches."

<sup>115</sup>2 BLACK, RESCISSION AND CANCELLATION (2d ed. 1929) § 544, p. 1344. See, however, cases cited in Note (1931) 72 A. L. R. 726, 751-753.

<sup>116</sup>2 BLACK, RESCISSION AND CANCELLATION (2d ed. 1929) § 537. Similarly, where the rescission is based upon duress, the rescinding party is not required to act promptly until after the duress is removed. *Id.*, § 538, p. 1326; *Spiva v. Boyd*, 206 Ala. 536, 90 So. 289 (1921); *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359 (1894).

<sup>117</sup>*Ruff v. Copeland*, 137 Ga. 56, 72 S. E. 506 (1911); *Van Dyck v. Abramssohn*, 214 Iowa 87, 241 N. W. 461 (1932); *Farmers Trust Co. v. Threlkeld's Adm'x*, 257 Ky. 211, 77 S. W. (2d) 616 (1934); *International Supply Co. v. Bryan & Emery*, 164 Okla. 142, 23 P. (2d) 205 (1933). *Contra*: *Bullard v. Citizens' Nat. Bank*, 173 Miss. 450, 160 So. 280 (1935), *aff'd on rehearing*, 173 Miss. 452, 162 So. 169 (1935).

<sup>118</sup>*Bynum v. Southern Building & Loan Ass'n*, 223 Ala. 392, 137 So. 21 (1931); *Stevens v. Bryson*, 135 Cal. App. 684, 27 P. (2d) 932 (1933); *Stauss v. Title Guarantee and Trust Co.*, 284 N. Y. 41, 29 N. E. (2d) 462 (1940); *Dennin v. Woodbury*, 96 Misc. 247, 160 N. Y. Supp. 647 (Sup. Ct. 1916), *aff'd sub nom.*, *Dennin v. Finucane*, 176 App. Div. 946, 162 N. Y. Supp. 1116 (4th Dep't 1917), *aff'd mem.*, 227 N. Y. 607, 125 N. E. 916 (1919); *Thomas v. McCue*, 19 Wash. 287, 53 Pac. 161 (1898);

with the evidence is usually shifted with great facility to the defending party. A rescinding party who will admit that he discovered a fraud more than a week or two before making a tender is rare. Such admission might, of course, mean an immediate dismissal of his cause of action. The rescinding party's allegations and proof will probably show due diligence. It is then incumbent upon the defendant to show knowledge or notice of the facts at a date earlier than that admitted, and to establish unreasonable delay therefrom.

Since the requirement of prompt action is an element of a cause of action in rescission, the complaint must show such diligence by the rescinding party.<sup>119</sup> A suggested form of allegation showing such diligence, to be used in an action at law, follows:

1. On the . . . . . day of . . . . ., plaintiff discovered (the facts upon which the action is based).
2. (Facts excusing failure to discover prior to such date, where the lapse of time between making the contract and discovery is considerable).
3. On the . . . . . day . . . . ., and promptly upon discovering the facts as alleged in paragraph 1, plaintiff notified defendant that plaintiff elected to rescind the contract (or sale), plaintiff tendered to defendant (the consideration received), and plaintiff demanded of defendant the return of (the consideration given).
4. (Facts excusing failure to rescind after discovery, where the lapse of time is considerable.)

In a suit in equity for a rescission, the third paragraph could be omitted.

While a denial of any allegations of diligence would seem to be sufficient to raise the issue, some authorities hold that loss of the power of rescission by delay must be pleaded as a defense.<sup>120</sup> In the interests of due caution, the writer recommends the express pleading of such "defense," and suggests the following form:

For a First Separate and Complete Defense to the Cause  
of Action, If Any, Alleged in the Complaint, Defendant  
Alleges on Information and Belief That:

---

*see* Canadian Agency, Ltd. v. Assets Realization Co., 165 App. Div. 96, 101-102, 150 N. Y. Supp. 758, 762 (1st Dep't 1914).

<sup>119</sup>Continental Jewelry Co. v. Pugh Bros., 168 Ala. 295, 53 So. 324 (1910) (mere allegation of reasonableness not enough, but there should be allegations showing dates of discovery of facts and disaffirmance, and facts showing reasonableness where there is a lapse of time between such dates); Phelps v. Grady, 168 Cal. 73, 141 Pac. 926 (1914); Leech v. Husbands, 34 Del. 362, 152 Atl. 729 (1930); Dennin v. Woodbury, 96 Misc. 247, 169 N. Y. Supp. 647 (Sup. Ct. 1916), *aff'd sub nom.*, Dennin v. Finucane, 176 App. Div. 946, 162 N. Y. Supp. 1116 (4th Dep't 1917), *aff'd mem.*, 227 N. Y. 607, 125 N. E. 916 (1919); Bartels v. Title Guarantee and Trust Co., N. Y. L. J., May 14, 1938, p. 2356 (City Ct. N. Y.); *see* Hardt v. Heidweyer, 152 U. S. 547, 558-560, 14 Sup. Ct. 671 (1894).

<sup>120</sup>Rector, Wardens, *etc.* v. Title Guarantee and Trust Co., 246 App. Div. 251, 285 N. Y. Supp. 297 (1st Dep't 1936), *aff'd w.o. op.*, 272 N. Y. 568, 4 N. E. (2d) 740 (1936).

1. For a long time prior to (the date of tender, or the date of the commencement of the action where there is no tender), plaintiff had full knowledge, or in the exercise of reasonable diligence should have had full knowledge, of all of the facts upon which said alleged cause of action is based.

2. No attempt was made to rescind the contract (or sale) prior to (the date mentioned in paragraph 1).

3. By reason of the said delay in attempting to rescind, plaintiff has lost whatever power of rescission which he may have had.<sup>121</sup>

Where the facts relating to the rescinding party's delay are undisputed, it is said that the question of the reasonableness of such delay is one for the court alone.<sup>122</sup> In a jury case, however, where such facts are disputed, or where different inferences may be drawn from undisputed facts, the question of reasonableness should be submitted to the jury.<sup>123</sup>

## 6. Conclusion.

It may seem that the writer has been unduly strict with a would-be rescinder, advocating the loss of the power of rescission if the rescinder fails to act immediately after a reasonable time for deliberation. Recent cases, however, have shown a tendency to limit the remedy of rescission, in view of its drastic nature.<sup>124</sup> The New York Court of Appeals has refused to apply to a rescission action the rule which tolls the Statute of Limitations in an "action to procure a judgment on the ground of fraud" until the discovery of the fraud.<sup>125</sup> The writer believes that the courts will show little tenderness with a rescinding party where a considerable time has elapsed between the making of the contract or sale and the attempt to rescind.

---

<sup>121</sup>Similar pleading upheld as sufficient in *E. T. C. Corp. v. Title Guarantee and Trust Co.*, 252 App. Div. 846, 300 N. Y. Supp. 994 (1st Dep't 1937).

<sup>122</sup>See cases cited in Note (1931) 72 A. L. R. 726, 755-758.

<sup>123</sup>*Id.*, at 753-754.

<sup>124</sup>See, for example, *Browne v. Briggs Commercial & Development Co.*, 271 Mich. 191, 259 N. W. 886 (1935); *Donovan v. Aeolian Co.*, 270 N. Y. 267, 200 N. E. 815 (1936).

<sup>125</sup>*Cohen v. City Company of N. Y.*, 283 N. Y. 112, 27 N. E. (2d) 803 (1940); *Steinert v. Title Guarantee and Trust Co.*, 258 App. Div. 927, 16 N. Y. S. (2d) 749 (2d Dep't 1939), *aff'd w.o. op.*, 283 N. Y. 636, 28 N. E. (2d) 36 (1940).