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FACULTY OF JURIDICAL SCIENCES

E- CONTENT

COURSE: BALLB-Vth Sem

SUBJECT: EQUITY AND TRUST

SUBJECT CODE: BAL 506

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Lecture-30





LECTURE-30

RESCISSION:

Now, we will look at the rescission of contract. Where a contract is voidable, but not void, such a contract is valid until rescinded. The right to rescind, which may arise in certain circumstances, is exercised where a party to a contract expresses by word or act in an unequivocal manner, that he is no longer willing or that he refuses to be bound by the contract. That course of conduct or action, if justified by the circumstances or by the facts of the case, puts an end to the contract and restores the parties as between them, to the

position in which they were before the contract was entered into. The full effect of rescission, therefore, is to treat the contract as though it had never been entered into.

Act of a party or a judicial remedy:

Resitutio in integrum is a fundamental feature of the remedy of rescission; where this is not possible, the right cannot be validly exercised. Therefore, where the circumstances of the case impose upon a party desiring to rescind the duty of making *resitutio in integrum*, until he discharges that duty rescission cannot be accomplished. See the following cases:

1. Clough v. London and North Western Rly. Co. (1871) L.R. 7. Exch. 26.
2. Abram Steamship Co. v. Westville Shipping Co. (1923) A.C. 773.
3. Erlanger v. New Sombrero Phosphate Co. (1878) 3

App. Cas. 1218,1278.

4. Newbigging v. Adams (1886) 34 Ch.D. 582 at 592.

It is a settled law that a contract cannot be rescinded by one party for the default of the other unless both can be put in status quo as before the contract. See **Hunt v. Silk** (1804) 5 East, 449. In **Blackburn v. Smith** (1848) 2 Ex. 783, 792, there was a contract for the sale of a piece of land between the plaintiff and the defendant. The plaintiff, having paid a deposit, went into possession.

He later gave notice to rescind the contract on the ground of certain events which had occurred and brought an action to recover his deposit. Parke, B. delivering the judgment of the Court said that inasmuch as the plaintiff had or retained the possession of the property the parties could not be

placed in status quo and, therefore, the action for the recovery of the deposit could not be maintained. Thus the fact of possession of the land by the plaintiff, made impossible for the act of rescission to have its natural effect.

If rescission can be accomplished by the act of a party, the question as to whether the right to rescind is in fact a judicial remedy becomes relevant. Surely the assistance of a court of equity is dispensed with where the act of rescission is not challenged by the other party to the contract. But a different situation may arise where for example there remain some question to be settled as between the parties such as taking account of property which might have passed between them with a view to restoring the parties to status quo as before the contract, or where the other party to the contract challenges the right of the first to rescind. See

Erlanger v. New Sombrero Phosphate Co. (supra) at 1278.

In such cases, the assistance of a court of equity becomes indispensable; it would have to decide whether the act of rescission relied upon was in itself effect. Nevertheless, 'it is an entire mistake to suppose that it is this verdict which by itself terminates the contract and restores the antecedent status. The verdict is merely the judicial determination of the fact that the expression by the plaintiff of his election to rescind was justified, was effective; and put an end to the contract.' See **Abram Steamship Co. v. Westville Shipping Co.** (supra) at 781. See further, **Reese River Silver Mining Co. v. Smith** (1869) L.R. 4 H.L. 64. 73; **Oakes v. Turquand** (1867) L.R. 2 H.L. 325.

Grounds for Rescission:

(i) **Mistake:** Where the two parties laboured under a common or mutual mistake, rescission may be granted. Lindley, L.J. said: in *Huddersfield Banking Co. v. Henry Lister & Son* (1895) 2 Ch. 273 at 281, 'An agreement founded upon a common mistake, which mistake is impliedly treated as a consideration which must exist in order to bring the agreement into operation, can be set aside, formally if necessary, or treated as set aside and as invalid without any process or proceedings to do so.'

The principle is that equity would relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. This is, however, on the supposition that the mistake renders the contract void ab initio and a

mistake which renders a contract not void, but voidable. The position seems to be that contracts will be void for mistake if the mistake is such as to prevent the formation of any contract at all.

(ii) Misrepresentation: A contract that is induced by a material misrepresentation made either fraudulently or innocently cannot stand; such misrepresentation is a ground for rescission.

(a) Fraudulent Misrepresentation: There is fraudulent misrepresentation when it is shown that a false representation has been made knowingly and intentionally or without belief in its truth or recklessly without caring whether it is true or false and with the intention that the other party should act on it and has been so acted upon by the other party. At law and in equity such misrepresentation renders the contract induced by it voidable. See the following cases: *Derry v. Peek*

(1889) 14 App. Cas. 337. Peek v. Gurney (1873) L.R. 6 H.L. 377. Horsfall v. Thomas (1862) 1 H. & C. 90; Smith v. Chadwick (1884) 9 App. Cas. 187 at 196.

(b) Innocent Misrepresentation: Though innocent misrepresentation cannot support an action at law for damages²⁶ it is, in equity, a ground for rescission. See Derry v. Peek (supra); Newbigging v. Adam (1886) 34 Ch.D. 582; Heilbit Symons & Co. v. Buckleton (1913) AC. 30 at 49. Where rescission of a contract is claimed on the ground of innocent misrepresentation it is sufficient if the plaintiff can prove that there was misrepresentation which induced him to enter into the contract. However, honestly, such misrepresentation might have been made and however free from blame the person who made it, the contract having been obtained by misrepresentation cannot stand. See Redgrave v. Hurd (1881) 20 Ch.D. 1 at 12; Derry v. Peek (supra);

Low v. Bouverie (1891) 3 Ch.D.82 at 100. The Court of Equity has power to set aside contracts whenever the court is of the opinion that it would be un-conscientious for a party to avail himself of a legal advantage which he had obtained. See Torrance v. Bolton (1872) L.R. 8 Ch. 118, 124; see generally, the recent changes made in the law of England by the Misrepresentation Act, 1967.

(iii) **Mere silence and Non-Disclosure:** A party to a contract is generally not under a duty to make any disclosure regarding the transaction unless where non-disclosure may amount to misrepresentation of material facts capable of inducing the other party to enter into the contract or where the circumstances of the particular transaction impose a duty to make disclosure. In **Oakes v. Turquand** (1867) L.R. 2 H.L. 325 at 342, the court held that

where a person has been, by the fraudulent misrepresentations of directors of a company or by their fraudulent concealment of facts, drawn into a contract to purchase shares in the company the directors cannot enforce the contract against him but he may rescind it. In that case Lord Chelmsford said: 'it is said that everything which is stated in the prospectus is literally true and so it is, but the objection to it is not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told, the character of falsehood.

Secondly, non-disclosure in contracts *uberrimae fidei* is a ground for rescission of such contracts. This class of contracts includes contracts of insurance of all kinds, family settlements or

arrangements. A party to a contract of this class is under a duty to make full disclosure of all facts within his knowledge; there must not only be good faith and honest intention, but also full disclosure; and without full disclosure, honest intention is not sufficient. See **Harvey v. Cooke** (1827) 4 Russ. 34 at 53; 38 E.R. 717, 725. Thus, a transaction purported to be family arrangement was set aside on the ground that the doubts existing as to the rights alleged to be compromised by the transaction were not presented to the party interested.

(iv) Constructive Fraud: Constructive fraud consists of a variety of un-conscientious conduct which, if made use of to induce a party to enter into a transaction, may constitute a ground for rescinding such transaction. Undue influence is a common example of constructive fraud. There is undue influence when the will of a party coerced

into a transaction which he does not desire to enter into. See *Wingrove v. Wingrove* (1885) 11 P.O. 81;

(v) **Mis-description:** The right to rescind is an appropriate remedy where one of the parties to the contract has mis-described property, the subject matter of the contract. However, misdescription that would sustain an action for rescission must be substantial. see *Smith v. Land and House Property Corporation* (1884) 28, Ch.D. 7 at 13.

(vi) **Conditional Terms in Contract:** It is not unusual for parties to a contract to include in the terms of the contract a provision empowering either of the parties to rescind the contract on the occurrence of certain events. Prima facie, the right to rescind becomes exercisable on the occurrence of the stipulated events; but the courts have

placed some limitation on the exercise of this right purposely to prevent fraudulent and arbitrary exercise of the right. Thus a condition giving a vendor the right to rescind in the event of his willingness to comply with an objection to the title is not to be considered as giving the vendor an arbitrary power to rescind the contract. See *In re Jackson and Haden's Contract* (1906) 1 Ch.D. 412, 420.

Before he can lawfully exercise that power, he must establish to the satisfaction of the court, some reasonable grounds for his unwillingness to meet the purchaser's objection; for instance, that compliance with the objection would involve him in litigation and expenses far beyond what he ever contemplated, (see *Duddell v. Simpson* (1866) L.R. 2 Ch. 102.) or that at the time the contract of sale was entered into, the vendor reasonably and

honestly, though erroneously, believed that he was or that he should be in a position to make a complete title to the property he purported to sell. In addition, the conduct of the vendor in the transaction must not have fallen below that of a prudent man of business, having regard to his contractual relations with other persons. See **Re Jackson and Haden**.

Loss of the Right to rescind the right to rescind is not indefeasible, and therefore, it may be lost in certain circumstances:

- Affirmation of the Contract and Acquiescence;
- Impossibility of *Restitutio in Integrum*;
- Completion of Contract;
- Acquisition of Rights by Third Parties;

Consequence of Rescission:

The condition for granting the relief is that the parties, as between them, be restored to their precontract position. Therefore, where the relief is granted, the contract is no longer in existence, thus the question of claiming damages for its breach does not arise since the full effect of rescission is to treat the contract as if it had never been entered into.

As was stated by Romer, J. in **Barber v. Wolfe** (1945) Ch. 187 at 189-190, where a party entitled to rescind elects that course of action, he cannot at the same time obtain damages for a breach of the contract which he is asking the court to rescind. See further **Henry v. Schroder** (1879) 12 Ch. 666, 667; **Hall v. Burnell** (1911) 2 Ch. 551.

MCQs

1. ***Resitutio in integrum* is a fundamental feature of**

the remedy of rescission.

- i.** True
- ii.** False
- iii.** Cannot say
- iv.** None of these

2. Where a contract is voidable, but not void, such a contract is valid until rescinded.

- i.** True
- ii.** False
- iii.** Cannot say
- iv.** None of these

3. Where a party entitled to rescind elects that course of action, he cannot at the same time obtain damages for a breach of the contract which he is asking the court to rescind.

- i.** True
- ii.** False
- iii.** Cannot say

iv. None of these

4. The right to rescind is an appropriate remedy where one of the parties to the contract has misdescribed property, the subject matter of the contract.

i. True

ii. False

iii. Cannot say

iv. None of these

5. A contract that is induced by a material misrepresentation made either fraudulently or innocently cannot stand; such misrepresentation is a ground for rescission.

i. True

ii. False

iii. Cannot say

iv. None of these
