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RESCISSION AS A SELF-HELP REMEDY: A CRITICAL ANALYSIS

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I. INTRODUCTION

THIS article concerns the nature of rescission. Rescission is a commonplace and familiar remedy, yet it has been described as "one of the most difficult to analyse".[1] In view of this cautionary comment, it is perhaps advisable to begin tentatively, with a definition of rescission for the purposes of this article. The word "rescission" derives from the Latin *rescissio, rescindere*, meaning to cut or tear open. In English law today, rescission is the process by which a subsisting contract (or other disposition of property) is avoided at the instigation of one of the parties, on account of some defect vitiating or otherwise tainting that party's entry into the contract, such as fraudulent or innocent misrepresentation, undue influence, duress or certain shared mistakes.[2] Rescission is said to avoid or nullify the contract "*ab initio*", which involves not just the cancellation of future executory obligations, but also the restoration of the parties to the positions they occupied before the contract. In the case of an executed or partly executed contract, then, rescission involves the restitution of benefits (*in specie*, where specific property is concerned) transferred pursuant to the contract.[3]

This meaning has not always prevailed in English law. Until relatively recently, the term rescission was used whenever a contract was brought to an end otherwise than by performance, such as, for example, termination of a contract by mutual agreement or by

* Selwyn College, Cambridge. I am grateful to Professor Gareth Jones for his comments on an earlier draft. All errors which remain are entirely my own.

[1] A. Burrows, *The Law of Restitution* (Butterworths, London, 1993) ("Burrows"), p 32.

[2] This article will not deal with those "fundamental" common mistakes often said to render a contract void at common law (see *Bell* v. *Lever Bros Ltd* [1932] AC 161), which it is suggested are better explained as instances of failure of an implied condition precedent (see *Solle* v. *Butcher* [1950] 1 K.B. 671 at 691 and J. C. Smith, "Contracts—Mistake, Frustration and Implied Terms" (1994) 110 L.Q.R. 400).

[3] P.B.H. Birks, *Introduction to the Law of Restitution* (Clarendon Press, Oxford, 1989) p. 163 argues that rescission of a purely executory contract is itself a restitutionary process, and this view is shared by N.Y. Nahan (née Chin), "Rescission: A Case for Rejecting the Classical Model?" (1997) 27 U.W.A.L.R. 66 at pp. 72–73. This writer prefers the view of Burrows (n. 1 above) that rescission of a purely executory contract involves no element of restitution. The argument that rescission involves restitution, namely the revesting of the benefit of contractual rights (albeit that those rights have instantaneously ceased to have any meaningful value or existence upon the moment of rescission), seems unnecessarily complex and unreal.

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failure of a condition precedent.[4] In particular, the term was used at common law in the nineteenth century to describe the termination of a contract by one party on acceptance of the other's repudiatory breach. Today, it is recognised that this process does not involve avoidance *ab initio*, but merely prospective termination of outstanding executory obligations[5] and that "rescission" is a misleading and inappropriate label for this significantly different concept.

Thus far, it would seem that rescission is simple enough to define. However, any investigation of rescission runs almost immediately into two features that cause problems throughout the English law of obligations and property. These are, first, the terminological and analytical confusion which can be traced to the jurisdictional divide between law and equity, and which was, if anything, crystallised rather than removed by the Judicature Acts. Secondly, the reliance on metaphor—it is difficult to describe precisely what is meant by rescission without recourse to language, more suited to haberdashery, of unravelling and cutting away, sometimes at the expense of precise analysis. These features lead, as Burrows points out, to analytical difficulties plaguing the concept of rescission, of which this article will consider just one.

Before embarking on this task, however, it is worth pausing to note that, despite these analytical difficulties, there has been considerable judicial and academic interest in rescission in recent years. Undoubtedly, the remedy is now much better understood and more flexible than it once was.

For example, it was traditionally said that rescission is not available ("barred") once it has become impossible to restore the parties to their pre-contract position (that *restitutio in integrum* is impossible), but two recent developments have reduced the scope of this bar to rescission. First, in *Mahoney* v. *Purnell*[6] the device of "equitable compensation" was used to award, in effect, the monetary equivalent of rescission, when precise restitution was not possible. Moreover, in *Smith New Court Securities Ltd.* v.

[4] See for example Chitty, *A Practical Treatise on the Law of Contracts not under Seal* (2nd ed, 1834) p. 573. More recently, Morison, *Rescission of Contracts: A Treatise on the Principles Governing the Rescission, Discharge, Avoidance and Dissolution of Contracts* (Steven & Haynes, London, 1916), regarded the term "rescission" as "peculiarly applicable to ... cases of determination by act (consent) of [both] parties" and preferred the term "avoidance" for the process known today as rescission.

[5] *Johnson* v. *Agnew* [1980] A.C. 367.

[6] [1996] 3 All E.R. 61. An elderly man sold his shares in the family hotel business to his son-in-law, who later sold the business at considerable profit. In subsequent proceedings, the son-in-law failed to rebut the presumption of undue influence, but it was impossible for the parties to be restored to their former positions (the hotel business had been sold and the company wound up). Rescission was therefore barred, but instead the court awarded the plaintiff "equitable compensation" assessed by reference to the gains made by the defendant on the transaction, putting the plaintiff into the monetary equivalent of the pre-contract position.

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Scrimgeour Vickers (Asset Management) Ltd.,[7] Lord Browne-Wilkinson expressed considerable doubt at the assumption made by the parties (and indeed the Court of Appeal) that rescission was not available since the quoted shares, the subject matter of the contract, had been sold by the plaintiff representee and could no longer be restored *in specie*. In an authoritative obiter passage, he expressed the view that the remedy of rescission was more flexible than this.[8]

A second recent development is the important debate that has taken place on the equitable proprietary consequences of rescission. This debate raised questions such as whether the transfer of property (pursuant to a contract or by other disposition), in circumstances of vitiated intent entitling the transferor to rescind the transfer, gives rise to a mere equity or a full resulting trust.[9] And, once the disputed equitable response occurs, what status and responsibilities does the defendant holding legal title to the property have?[10]

For the purpose of this article, the significance of these developments lies, not in their substance, but in their *terms of reference*. The authorities on *restitutio in integrum*, and the judicial and academic examination of the equitable proprietary consequences of rescission, are couched in terms which pre-suppose that it is a straightforward matter to determine when and how the rescission itself occurs. Yet this is far from straightforward.

The difficulty is this. Rescission is usually a judicial remedy, effected by judicial decree. On occasion, however, the law regards rescission as a "*self help remedy*". The self help analysis of

[7] [1997] A.C. 254.

[8] *Ibid.* at p. 262: "[T]he reasons why Smith abandoned their claim to rescind were not explored before your Lordships. I will therefore say nothing about the point save that if the current law in fact provides (as the Court of Appeal thought) that there is no right to rescind the contract for the sale of quoted shares once the specified shares purchased have been sold, the law will need to be closely looked at hereafter. Since in such a case other, identical shares can be purchased on the market, the defrauded purchaser can offer substantial *restitutio in integrum* which is normally sufficient."

[9] The latter thesis is propounded by Chambers, *Resulting Trusts* (Clarendon Press, Oxford, 1997), whilst the "mere equity" analysis is supported by Sir Peter Millett in Cornish, Nolan, O'Sulllivan & Virgo (eds.), *Restitution Past, Present and Future* (Hart Publishing, Oxford, 1997) p. 216 and by A. J Oakley *ibid.* pp. 229–230. See also *Twinsectra Ltd.* v. *Yardley* [1999] Lloyds L.R. 438, 461–462, in which Potter L.J. supports the "mere equity" analysis.

[10] An issue settled by Millett L.J. in *Bristol and West Building Society* v. *Mothew* [1998] Ch. 1, 22–23: "The right to rescind for misrepresentation is an equity. Until it is exercised the beneficial interest in any property transferred in reliance on the representation remains vested in the transferee. In *El Ajou* v. *Dollar Land Holdings Plc* [1993] 3 All E.R. 717, 734 I suggested that on rescission the equitable title might revest in the representee retrospectively at least to the extent necessary to support an equitable tracing claim. I was concerned to circumvent the supposed rule that there must be a fiduciary relationship or retained beneficial interest before resort may be had to the equitable tracing rules .... But all that is by the way. Whether or not there is a retrospective vesting for tracing purposes it is clear that on rescission the equitable title does not revest retrospectively *so as to cause an application of trust money which was properly authorised when made to be afterwards treated as a breach of trust*."

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rescission involves two related notions. First, that the innocent party[11] can rescind purely by his own act of election, by giving notice to the other party:[12] there is no formal legal requirement or need to obtain a court order, even though in practice this may be necessary. Secondly, that where judicial rescission *is* obtained, it is nonetheless still the plaintiff's election which is regarded as the operative rescinding event, so the judicial relief is "backdated" to the date of that election, in theory rendering vulnerable dealings with the subject matter of the transaction between election and court order.[13]

It is immediately apparent that this self help analysis goes beyond the uncontroversial notion that a contract induced by one of the relevant vitiating factors is voidable not void. It is trite law that the innocent party in such a case has a right of election either to affirm or avoid the contract, and that the contract is valid unless and until he elects to rescind.[14] The self help analysis is more problematic because it demands that it is the exercise of this right of election which actually *effects* the rescission. Considerable difficulty arises where the transaction is executed or partly executed, where rescission has restitutionary consequences. How does the self help analysis work in this context?

Unfortunately, any attempt to determine whether and in what circumstances the plaintiff's election is sufficient to rescind a transaction, or to establish how a backdated judicial order for rescission operates, where an executed contract or transfer of property is involved, runs almost immediately into contradictory authority and analytical difficulties of theoretical and practical significance.

This article will examine the notion of rescission as a self help remedy to determine, first, whether it applies generally or only to rescission for certain identifiable vitiating factors. This in turn requires an analysis of the dual historical provenance of rescission. The article will conclude that the current treatment of rescission is historically inaccurate and generally unsatisfactory, and that it should be rationalised to ensure both the consistent treatment of

[11] For simplicity, this article will use the term "plaintiff" throughout for the party rescinding or seeking rescission, though rescission is also commonly raised by way of a defence.

[12] Though in exceptional circumstances the plaintiff may be able to rescind without communicating notice thereof to the other party: *Car and Universal Finance Co Ltd* v. *Caldwell* [1965] 1 Q.B. 525 and see later.

[13] The authority usually cited for this proposition is *Reese River Silver Mining Co* v. *Smith* (1869) L.R. 4 H.L. 64 ("*Reese*").

[14] See for example Millett L.J. in *Bristol and West Building Society* v. *Mothew* [1998] Ch. 1, 22: "Misrepresentation makes a transaction voidable not void. It gives the representee the right to elect whether to rescind or affirm the transaction. The representor cannot anticipate his decision. Unless and until the representee elects to rescind the representor remains fully bound."

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like vitiating factors and the removal of legal concepts that are palpably fictitious and unhelpful.

II. Rescission as a Self Help Remedy: A Brief Sketch

There is very little consistency in modern legal texts and authorities dealing with rescission as a self help remedy.

A. Commentators

There is, first, no consensus amongst commentators on this question. For example, while Burrows treats rescission generally as a self help remedy, regardless of the vitiating factor,[15] Treitel confines his discussion of the self help analysis to rescission *for misrepresentation*.[16] The author of *Cheshire, Fifoot & Furmston's Law of Contract* also discusses rescission as a self help remedy in the book's section on misrepresentation,[17] spelling out the historical distinction between rescission at law and in equity, while later in the same chapter, the text moves on to deal with transactions set aside for duress and undue influence, using the term rescission occasionally in this context but without further discussion of the self help analysis. Likewise Beatson in *Anson's Law of Contract* discusses the self help analysis in the section on misrepresentation, with a footnote indicating that "similar principles" govern rescission for undue influence.[18]

Like Burrows, Smith describes the self help analysis as the general rule, regardless of the vitiating factor, but then observes that the discretionary relief on terms for common mistake in equity awarded in *Solle* v. *Butcher*[19] does not fit the analysis:

> The voidability recognised in *Solle* v. *Butcher* is quite different from that which is available to a party induced to enter into a contract by misrepresentation, undue influence, or other factors which are recognised as grounds for avoiding a contract. The representee, for example, can rescind the contract simply by giving notice to the representor. The contract is then rescinded ab initio. Rescission is a do-it-yourself remedy. The representee does not need the assistance of the court—though he may do so in order to get his property back or, in other words, to realise the object of the rescission. But the rescission in *Solle* v. *Butcher* was permitted by the court subject only to quite complicated conditions. It was clearly not open to the

[15] Note 1 above, p. 32.
[16] G.H. Treitel, *The Law of Contract* (Sweet & Maxwell, London, 10th ed., 1999), p. 344.
[17] M. Furmston, *Cheshire, Fifoot & Furmston's Law of Contract* (Butterworths, London, 13th ed., 1996), p. 292.
[18] Beatson, *Anson's Law of Contract* (Oxford University Press, Oxford, 27th ed., 1998) p. 248.
[19] [1950] 1 K.B. 671.

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> defendant simply to tell the plaintiff that the lease was rescinded and that he was going to evict him.[20]

Chambers makes no reference to the self help analysis at all, despite dealing with rescission for misrepresentation along with rescission for other vitiating factors.[21] In contrast, Birks regards the plaintiff's ability to rescind a voidable transaction by his own election as an important example of a power *in rem*, but goes on to muse that the "power" analysis: "... runs into trouble when, as always in equity, the right is dependent on the discretion of the court".[22]

On the related question of *backdated* judicial relief, most commentators simply refer to the decision in *Reese*, explaining without further comment that a judicial decree of rescission for misrepresentation is backdated to the party's own election to rescind.[23] Burrows, who states that judicial orders for rescission are always backdated, regardless of vitiating factor, goes further and makes reference to the conceptual difficulty that this entails for rescission of an executed transaction. He remarks, "The reason for this is unclear: does it follow that a defendant can not give a good title to a bona fide purchaser for value without notice in the period between commencement of the action and judgment?"[24]

Goode's analysis is different. He states that in the case of rescission by court order, "rescission does not take effect until the court has made its order", but goes on to say, "[t]he innocent party may ask for a declaration that his unilateral act of rescission (e.g. by notice) was valid and effective, and in such a case the order is declaratory only and the rescission takes effect at the time of the act of rescission."[25]

Finally, Spencer Bower & Turner[26] describe yet another form of backdating, as follows, "the declaration or order [of the court], when once made, relates back to the *date of the contract*, so as to nullify all mesne dispositions of property and acts consequential upon the contract which have taken place during the intervening

[20] Smith, "Contracts—Mistake, Frustration and Implied Terms" (1994) 110 L.Q.R. 400, 419.
[21] Chambers, *Resulting Trusts* n. 9 above, chapter 7.
[22] Birks, *Introduction to the Law of Restitution*, (Clarendon Press, Oxford, 1989) p. 66.
[23] Typical is the following passage from *Cheshire, Fifoot & Furmston's Law of Contract*, n. 17 above, p. 294: "Rescission, even though enforced by the court, is always the act of the defrauded party, in the sense that it is his election which effectively destroys the contractual nexus between him and the other party. It follows that rescission is effective from the date it is communicated to the representor and not from the date of any judgment in subsequent litigation."
[24] Burrows p. 32, footnote 2.
[25] Goode, *Commercial Law* (Penguin, London, 2nd ed., 1995) p. 113.
[26] Spencer Bower and Turner, *Actionable Misrepresentation* (Butterworths, London, 3rd ed., 1974).

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period."[27] This analysis (also citing *Reese* as authority) seems merely to be an expanded description of the *ab initio* effect of rescission. It can not bear the same meaning as Burrows' interpretation of relief backdated to the date of the plaintiff's election to rescind (with its attendant vulnerability of third party rights created between election and court order). Such an interpretation, involving vulnerability of all third party rights and dealings since the date of the contract, would be entirely inconsistent with the text's subsequent uncritical treatment of the bar to rescission once third party rights have intervened.

B. Case law

The reason for the conflicting views of commentators is easy to find. There is no consistency in the modern case law about when rescission operates as a self help remedy.

It is settled that the self help analysis can apply to fraudulent misrepresentations (although the point is not always taken or pleaded). In *Car & Universal Finance Co* v. *Caldwell*[28] the Court of Appeal was of the opinion that it is, generally, communication to the fraudster of the plaintiff's election which "repudiates" or rescinds a fraudulently induced contract (resuming possession of goods unequivocally demonstrates such an election and would also be effective). Of course, the Court went further and decided that, in exceptional circumstances, an uncommunicated election would amount to a sufficient avoidance of a contract of sale induced by fraud. But the self help analysis lay at the root of this exception.

However, the self help analysis is not, in modern case law, invariably confined to fraud. For example, the High Court of Australia in *Alati* v. *Kruger*[29] expressed the view that rescission for *all* forms of misrepresentation is "always the act of the party himself",[30] and expressly approved of the backdating analysis from *Reese*. Since *Alati* v. *Kruger*, some cases of innocent misrepresentation have been argued and decided on the basis of the self help analysis[31] whilst many others[32] make no reference to it at all.

It is rare to find reference to the self help analysis of rescission in connection with vitiating factors other than misrepresentation. However, the passage from *Alati* v. *Kruger* mentioned above was

[27] *Ibid.* p. 272.
[28] [1965] 1 Q.B. 525.
[29] (1955) 94 C.L.R. 216.
[30] *Ibid.* p. 224.
[31] For example, *Atlantic Lines & Navigation Co Inc* v. *Hallam Ltd. (The "Lucy")* [1983] 1 Lloyds L.R. 188.
[32] For example, *Leaf* v. *International Galleries* [1950] 1 All E.R. 693; *Witter (Thomas) Ltd* v. *TBP Industries Ltd* [1996] 2 All E.R. 573.

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expressly approved by the English Court of Appeal in the undue influence case of *O'Sullivan* v. *Management Agency & Music Ltd*[33] and the self help analysis makes an occasional appearance in other cases of undue influence. One example is the actual undue influence case of *Allied Irish Bank* v. *Byrne*,[34] in which Ferris J. said: "... having regard to the tenor of the defence and counter-claim, which denies any liability to the bank and resists enforcement of the mortgage, I consider that Mrs Byrne is to be taken to have exercised her power of avoidance when the defence and counter-claim were served."[35] This case illustrates a further difficulty, as Mrs Byrne pleaded more than one vitiating factor, namely misrepresentation and undue influence. This is not uncommon: misrepresentation is frequently pleaded in addition to mistake[36] or, in numerous cases under *Barclays Bank plc* v. *O'Brien*,[37] in addition to undue influence. In one such example, *TSB Bank plc* v. *Camfield*,[38] a wife's misrepresentation claim succeeded but her parallel undue influence plea was rejected; notably, Roch L.J. discussed the remedy of rescission in self help terms. His language was directed at rescission for innocent misrepresentation but, in context, his remarks were addressed to the *O'Brien* jurisdiction generally.

As is clear from even the briefest of sketches, the law is in a state of some uncertainty. It is important to explore in more detail the dual jurisdictional history of rescission, so as to resolve the current confusion.

III. History

The source of the confusion is historical, since the courts of common law and equity came to view rescission in distinctly different ways.[39] Although the origin of the term "rescission" is unclear (probably referring originally to the physical destruction of a document pursuant to an order of a court of Equity), by the early nineteenth century it was used in a number of different senses. So, for example, the earliest substantial edition of Chitty (published in 1834) uses the phrase to describe the process of avoiding a contract by mutual agreement or unilaterally for non-performance by the other party of a condition precedent, referring instead to

[33] [1985] 1 Q.B. 428, 457 *per* Dunn L.J.
[34] [1995] 1 F.C.R. 430.
[35] *Ibid.* p. 461.
[36] See for example *William Sindall plc* v. *Cambridgeshire County Council* [1994] 1 W.L.R. 1016.
[37] [1994] A.C. 180.
[38] [1995] 1 W.L.R. 430.
[39] See chapter 24 of Meagher, Gummow & Lehane, *Equity: Doctrines & Remedies* (Butterworths, Sydney, 3rd ed., 1992).

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"avoidance" of a contract, both at law and in equity, in cases of fraud.[40] By the publication of the first edition of Anson[41] in 1879, discharge of a contract by mutual agreement was still described as rescission, but the phrase was also used in the modern sense to describe the process of avoiding of a contract for fraud, undue influence and duress (with a section, familiar to modern eyes, dealing with the bars to rescission).

Focussing on the latter, modern, meaning of the phrase, it is clear that the common law had no *action* for rescission: instead, rescission at common law was effected by the unequivocal election of the innocent party. This was therefore the procedure for avoiding a contract for *fraud* and for other vitiating factors recognised at common law.[42] Although the common law courts had no jurisdiction to order the setting aside of contracts or dispositions at the plea of the innocent party, they offered instead the usual common law actions to assist the innocent party, following his own act of rescission, such as actions for money had and received. Likewise, a party who had avoided a contract for fraud could resist an action for damages brought on the contract at common law by the other party.

Equity's approach to rescission was quite different. Before the Judicature Acts, issues of rescission (in the modern sense of the term) arose in the Chancery courts in two distinct ways. First, in many cases where the common law recognised the innocent party's right to rescind, its strict requirement of absolute *restitutio in integrum* before the return of money or property to the innocent party would be ordered rendered that party's right to rescind by his own election nugatory in practice.[43] The courts of equity, operating in their concurrent jurisdiction, had more flexible tools at their disposal, capable of making subtle adjustments to the parties' rights, principally by ordering that accounts be taken. By doing what was "practically just" between the parties, the courts of equity were able to give relief in many cases that would have failed at

[40] Chitty *A Practical Treatise on the Law of Contracts not under Seal* (2nd ed, 1834) p. 527, 573 etc.

[41] Anson *Principles of the English Law of Contract* (1st ed. 1879).

[42] Contracts could also be avoided at common law for duress (*Whelpdale's case* (1605) 5 Co. Rep. 119a), certain instances of non-disclosure (see for example *Ionides* v. *Pender* (1874) L.R. 9 Q.B. 531) and for fundamental mistake of fact leading to a total failure of consideration (*Gompertz* v. *Bartlett* (1853) 2 El. & Bl. 849).

[43] See for example *Clarke* v. *Dickson* (1858) El. Bl. & El. 148, an action for money had and received for the price of certain shares following a purported rescission of the sale contract for fraud. The action failed because the purchaser was unable to return the shares in the same form as before the contract (the company having been converted to limited liability in the meantime).

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common law.[44] In such cases, equity followed the law and recognised that the act of rescission was the plaintiff's, but rendered the right to rescind meaningful by allowing its restitutionary consequences to be worked out.[45]

Secondly, and more significantly for the purpose of this article, rescission also arose in the context of equity's exclusive jurisdiction. This was used in cases for which the common law gave no relief, such as the avoidance of transactions induced by non-fraudulent misrepresentation, undue influence or certain non-fundamental mistakes, those made in breach of fiduciary duty, and also where the relevant disposition was merely of an equitable interest or right.

In its exclusive jurisdiction, it is evident that equity could not adopt the common law's view of rescission as effected by the election of the innocent party, since a transaction which was unimpeachable at law could not be nullified other than by judicial order.[46] Accordingly, the courts of equity developed their own form of relief, effective to "set aside" transactions valid at law, which could be utilised by an action for rescission *per se* or raised the plea by way of a defence.

So, for example, in *Erlanger* v. *New Sombrero Phosphate Company*[47] (decided as if the Judicature Acts had not been passed, since the suit was commenced before their enactment), a company sought to rescind the purchase of an island on the grounds that the promoters, although not guilty of fraud, had acted in breach of the fiduciary duty they owed the company. Lord Blackburn, in a well known passage, contrasted the approach of law and equity on the question of *restitutio in integrum* and, in the process, described the operation of rescission at common law and in equity in contrasting language. When speaking of common law rescission, Lord Blackburn approved the following passage from *Clough* v. *London and North Western Railway Co*: "In such cases (i.e. of fraud) the question is, Has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? Or, has he elected to avoid it? Or, has he made no election?"[48] However, he went on to describe the equitable process of the same

[44] *Erlanger* v. *New Sombrero Phosphate Co* (1878) 3 App. Cas. 1218, 1278–9 per Lord Blackburn.

[45] So in *Edwards* v *M'Leay* (1818) 2 Swan. 287, Eldon L.C. ordered that a conveyance of land "be set aside" on the basis of the vendor's fraud, with consequential orders for the cancellation of the conveyance and the taking of accounts.

[46] See Meagher, Gummow & Lehane, n. 39 above, para. 2414: "the position is quite different [*i.e.* from the situation under equity's concurrent jurisdiction] when equity deals with a contract or disposition which is not voidable at law... Then clearly the decision of the court of equity cannot be expressed as merely confirming a rescission already made at law by election of the party concerned no longer to be bound."

[47] (1878) 3 App. Cas. 1218.

[48] (1871) LR 7 Ex. 26, 35.

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name in quite different terms: "But a Court of Equity could not give damages, and, unless *it can rescind the contract*, can give no relief ... And a Court of Equity requires that those who come to it to ask *its active interposition to give them relief*, should use due diligence, after there has been such notice or knowledge as to make it inequitable to lie by."[49] As the plaintiff company failed to establish fraud, but succeeded in its equitable claim for breach of fiduciary duty, it is not surprising that Lord Blackburn used the "remedial" language of equity throughout his speech, as in his discussion of whether the bars of laches and acquiesence are "made out to such an extent as to deprive the company of the remedy by rescission which they had [*sic*] if they had come promptly."[50]

The same approach is seen in the well known decision of *Cooper* v. *Phibbs*,[51] an Irish Chancery appeal to the House of Lords, in which the female respondents had entered into an agreement with the appellant (their cousin) to lease a fishery to him. Neither party realised that the fishery already belonged in equity to the appellant (by virtue of a settlement which all parties had overlooked and which ensured that title to the fishery would only pass through the male line). The appellant brought proceedings asking for the agreement to be set aside and for such other relief "as the nature of the case would admit of". The House of Lords allowed the appeal, deciding that the agreement should be set aside for mutual mistake. The precise order was that the matter should be remitted to the Court of Chancery to determine the appropriate terms for a trustee's lien to be awarded to the apparent owners to cover expenditure incurred by them,[52] but their Lordships' view of the nature of the ultimate relief was quite clear. The order declared: "... that the said agreement is not in equity binding upon the Appellants and Respondents, but ought to be set aside ...".[53]

Similar illustrations are seen in cases on undue influence, where no trace of the self help analysis is found. So in *Williams* v. *Bayley*,[54] Lord Chelmsford used the following language: "It appears to me therefore that the case comes within the principles on which a court of equity proceeds in setting aside an agreement because there is inequality between the parties and one of them takes unfair advantage of the situation of the other and uses undue influence to

[49] (1878) 3 App. Cas. 1218, 1278 (emphasis added).
[50] *Ibid.* p. 1277.
[51] (1867) L.R. 2 H.L. 149. For a detailed examination of what the case did, and did not, decide, see P. Matthews (1989) 105 L.Q.R. 599.
[52] See Matthews n. 51 above, p. 605.
[53] *Ibid.* p. 167.
[54] (1866) L.R. 1 H.L. 200.

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force an agreement from him".[55] Likewise in *Sercombe* v. *Sanders*,[56] the plaintiff instituted proceedings requesting that certain mortgages be set aside on the grounds of the defendants' pressure and undue influence. The claim succeeded, with the Master of the Rolls concluding simply, "I must set aside these deeds".

Finally, and most significantly for this purpose, *innocent misrepresentation* (where the misrepresentation had not been incorporated as a term of the contract) was treated in precisely the same way. Before the Judicature Acts, it was actionable only in equity, as Jessel M.R. explained in *Redgrave* v. *Hurd*:[57]

> "As regards the rescission of a contract, there was no doubt a difference between the rules of Courts of Equity and the rules of Courts of Law—a difference which of course has now disappeared by the operation of the Judicature Act, which makes the rules of equity prevail. According to the decisions of Courts of Equity, it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false."[58]

Not surprisingly, then, the equitable rules of rescission as effected by court order were applied to such cases both before and after the Judicature Acts, as illustrated by the order in *Redgrave* v. *Hurd* itself. There, the victim of an innocent misrepresentation claimed rescission in his defence and counterclaim to an action for specific performance of the contract for the sale of the plaintiff's house and succeeded, obtaining an order "rescinding the contract and ordering the deposit to be returned".

It is notable that nowhere in these equitable authorities is there any reference to rescission being effected by the election of the innocent party or of the court's order being backdated to any earlier, operative date. Thus it is clear that, at the time of the Judicature Acts, there was no particular confusion about the operation of rescission, and that the process was treated as effected by the plaintiff's own election only in cases of fraud and other vitiating factors recognised at common law.

However, the historical distinction does not prevail today and, instead, the law lacks clarity and consensus. Two lines of misinterpretation can be detected in the case law, which together may explain the current position.

[55] *Ibid.* p. 216.
[56] (1865) 34 Beav. 382.
[57] (1881) 20 Ch. D. 1.
[58] *Ibid.* p. 12.

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A. The gradual blurring of the distinction between fraudulent and non-fraudulent misrepresentation

Following the Judicature Acts, one might have expected that the equitable rules would prevail, consigning the self help analysis for fraud to the history books, but this did not happen. Instead, with the passage of time, the distinction between rescission in law and equity began to blur, with the effect that the self help analysis began to feature in authorities concerned with non-fraudulent misrepresentation.[59]

This is well illustrated by the Scots case of *Abram Steamship Co Ltd* v. *Westville Shipping Co Ltd*,[60] a decision of the House of Lords which, it is suggested, exemplified the confusion present after the Judicature Acts. The case is significant because, unusually, the self help analysis of rescission formed its *ratio decidendi*.

The appellants had assigned to the respondents the benefit of a shipbuilding contract and had, *without fraud*, made misrepresentations to the respondents concerning the stage of construction of the ship. The respondents subsequently assigned the shipbuilding contract on to B (a company) and innocently passed on the same misrepresentations. The true position then came to light and B wrote to the respondents purporting to rescind ("repudiate") the contract. The respondents in turn wrote to the appellants in similar vein. The following month, B commenced proceedings in England for rescission against the respondents, "to set aside the contract and recover the money paid under it", and the respondents in turn commenced equivalent proceedings (in Scotland) against the appellants. B later obtained a consent judgment against the respondents, who had entered no defence to the English proceedings.

The appellants sought to argue, in the Scottish action brought against them, that the respondents did not have title to sue at the date the action was commenced, because the relevant contractual rights were at that time still vested in B. This argument turned on whether B's election to "throw up" the contract itself effected rescission and revested the relevant rights in the respondents, or whether (as orthodox equitable reasoning would suggest) that did not happen until judgment was entered for B setting aside the contract, *after* the date when the respondents commenced their action.

[59] Meagher Gummow & Lehane (n. 39 above) describe this blurring process in para. 2414, as follows:"Many of the cases which purport to lay down the principles here involved fraudulent misrepresentations … Others involved innocent misrepresentations and thus the auxiliary jurisdiction, but the distinction was not noted and authorities were cited from the concurrent jurisdiction".

[60] [1923] A.C. 773 ("*Abram*").

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The House of Lords was evidently anxious to assist the respondents and therefore, despite the fact that the misrepresentations were not fraudulent, applied the common law reasoning that B's election was itself effective to rescind the contract. Lord Atkinson stated the law as follows:

> Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract[61] he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in *status quo ante* and restores things, as between them, to the position in which they stood before the contract was entered into. It may be that the facts impose upon the party desiring to rescind the duty of making *restitutio in integrum*. If so, he must discharge that duty before the rescission is, in effect, accomplished; but if the other party to the contract questions the right of the first to rescind, thus obliging the latter to bring an action at law to enforce the rights he has secured for himself by his election, and the latter gets a verdict, 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.[62]

This is, of course, an exemplary statement of the common law approach. But how were their Lordships able to apply this approach to a case of non-fraudulent misrepresentation? One possibility is found in the speech of Lord Atkinson, who described the facts as if they rendered the contract voidable at common law. He referred to "deception"[63] having been practised upon the respondents, even though the respondents' allegation of fraud was dropped at an earlier stage in the proceedings, and, as explained above, did not explain that the lower court's finding of "essential error" meant no more than that the innocent misrepresentation was a material one. However, this alone can hardly explain the application of the common law rules of rescission.

More significantly, even without manipulating the facts their Lordships were able to find and rely on dicta from earlier

[61] This conceals a significant issue. It is clear from previous judgments in the case (interlocutors of the Lord Ordinary and the First Division of the Court of Session in Scotland, reported at 1922 S.C. 571) that "essential error" was being used as the "materiality" test for non fraudulent misrepresentations. So Lord President Clyde said, "the quality of essential error (for the purposes of a plea of essential error induced by innocent misrepresentation) covers any error material to entering into the contract, and the consequent acceptance of its rights and obligations."

[62] *Ibid.* p. 781.

[63] *Ibid.* p. 785.

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authorities which speak of "rescission" for "misrepresentation" as a self help remedy, without making clear that it is confined to *fraudulent* misrepresentation. For example, Lord Atkinson relied on statements from *Reese* (itself a case of fraud) in which Lord Hatherley L.C. talked loosely of rescission without confining his comments to rescission at common law:

> the agreement subsists until rescinded; that is to say, in this sense—until rescinded by the declaration of him whom you have sought to bind by it, that he no longer accepts the agreement but entirely rejects and repudiates it. It is not meant, I apprehend, by that expression "until rescinded", used by any of your Lordships at the time when that case[64] was argued before the House, to say that rescission must be an act of some court of competent authority, and that, until the rescission by that court of competent authority takes place, the agreement continues in its full vigour.[65]

Likewise Lord Dunedin relied on an obiter remark of Lord Herschell in *Edinburgh United Breweries* v. *Molleson*.[66] The remark was made in a passage dealing with whether an express contractual right to terminate an agreement for sale of a brewery, because its profits were less than had been warranted, could be exercised *after* the conveyance of the brewery. Deciding that it could not, Lord Herschell observed in passing: "No doubt, if there had been fraud, if there had been misrepresentation, it would have been open to Dunn, notwithstanding the execution of the conveyance, to set aside the conveyance and put an end to the transaction altogether."[67]

Admittedly, it is unclear whether Lord Herschell (speaking two decades after the Judicature Acts) was using "misrepresentation" as a synonym for "fraud" (as an earlier common law judge might have done and as his syntax suggested) or as signifying the separate vitiating factor of non-fraudulent misrepresentation. Thus it is not difficult see how Lord Dunedin could find enough ambiguity in the remark to permit the latter interpretation. However, this brief obiter comment was certainly not directed at the question of rescission as a self help versus a judicial remedy and the phrase "set aside" seems to have been used generally, without distinguishing between the two. With respect, it appears to have been taken somewhat out of context by Lord Dunedin and accorded too much weight as authority for the self help analysis for non-fraudulent misrepresentation.

[64] *Oakes* v. *Turquand* (1867) L.R. 2 H.L. 325, itself a fraud case.
[65] (1869) L.R. 4 H.L. 64, 73 (and see p. 534 below at n. 99).
[66] [1894] A.C. 96 (another Scottish appeal to the House of Lords).
[67] *Ibid.* p. 108.

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So, by this process of interpretation and citation, the House of Lords in *Abram* was able to adopt the common law treatment of rescission for non-fraudulent misrepresentation. Although the case concerned Scots law, their Lordships did not confine their observations to the Scots equivalent of rescission and the case introduced a certain amount of confusion into English law thereafter. Since *Abram*, some cases[68] have taken the same line and treat the self help analysis as applying to all instances of rescission, while others have applied the equitable analysis, even in cases of fraud. The latter approach was taken by the House of Lords, some sixteen years after *Abram*, in *Spence* v. *Crawford*,[69] a fraud case in which the self-help analysis was not mentioned, *Abram* was not cited and, in which Lord Wright stated:

> On the basis that the fraud is established, I think that this is a case where the remedy of rescission, accompanied by *restitutio in integrum*, is proper to be given ... The remedy is equitable. Its application is discretionary, and, where the remedy is applied, it must be moulded in accordance with the exigencies of the particular case.[70]

In contrast, the former approach is evident in an influential dictum of the High Court of Australia from *Alati* v. *Kruger*,[71] a case in which a purchaser was induced to purchase a fruit and vegetable business by the fraudulent misrepresentations of the vendor. The court, citing *Reese* and *Abram*, states:

> If the case had been decided according to the principles of the common law, it might have been argued that at the date when the respondent issued his writ he was not entitled to rescind the purchase, because he was not then in a position to return to the appellant *in specie* that which he had received under the contract, in the same plight as that in which he had received it ... But it is necessary to apply here the doctrines of equity, and equity has always regarded as valid the disaffirmance of a contract induced by fraud even though precise restitutio in integrum is not possible ... It is not that equity asserts a power by its decree to avoid a contract which the defrauded party himself has no right to disaffirm, and to revest property the title to which the party cannot affect. *Rescission for misrepresentation is always the act of the party himself* (*Reese* cited as a footnote). The function of the court in which proceedings for rescission are taken is to adjudicate upon the validity of the purported disaffirmance as an act avoiding the

[68] See for a recent example *Re Brown and Root McDermott's Fabricators Ltd's and another's application* [1996] S.T.C. 483, 493, citing *Abram* with approval.
[69] [1939] 3 Ch. D. 271.
[70] *Ibid.* p. 288.
[71] (1955) 94 C.L.R. 216.

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> transaction ab initio and, if it is valid, to give effect to it and make appropriate consequential orders.[72]

This is a strange observation, arguably sharing the terminological ambiguity seen in *Abram*. The first half of the quotation is expressly confined to fraud, as would be expected in a case concerning a fraudulent misrepresentation, and it is only the final section that refers, controversially, to misrepresentation generally. Moreover, the controversial statement seems unnecessary, being made in the context of an utterly orthodox explanation of equity's auxiliary jurisdiction to exercise its powers and achieve substantial *restitutio in integrum*. (This explanation was offered so as to counteract the suggestion that the respondent was not entitled to rescind because he could not restore the precise status quo ante, having carried on the business before the trial and ultimately closing it down between the date of the trial and of judgment.) Despite this, the full passsage from *Alati* v. *Kruger* was cited and approved by the English Court of Appeal in *O'Sullivan* v. *Management Agency and Music Ltd*,[73] a successful action for rescission for undue influence, once again in the context of an orthodox discussion of equity's greater flexibility when ordering *restitutio in integrum*.

Thus the fusion of law and equity,[74] rather than rationalising the treatment of rescission, has undoubtedly rendered it less clear. The second line of confusion derives from the common heritage of rescission and another distinct concept, namely termination for repudiatory breach of contract, where the plaintiff's election is also regarded as operative to terminate the contract.

B. The continued influence of the historical use of the concept "rescission" to mean termination for breach of contract

A further problem is the persistent use of the term "rescission" to mean both avoidance of a contract or other disposition for a vitiating factor *ab initio* and also termination of contract, prospectively only, for a repudiatory breach (either of condition or serious breach of an innominate term).[75]

As mentioned above, the common law courts did not traditionally distinguish between the two processes and used the term "rescission" for both. For example, in *Hunt* v. *Silk*,[76] a tenant

[72] *Ibid.* pp. 223–224 (emphasis added).
[73] [1985] Q.B. 428, 457 *per* Dunn L.J.
[74] See Lord Diplock in *United Scientific Holdings* v. *Burnley Borough Council* [1977] 2 W.L.R. 806, 811, though cf. P.V. Baker, "The Future of Equity" (1977) 93 LQR 529.
[75] For example, Treitel (n. 16 above) uses "rescission" for both processes, but defends this terminology on the basis that the alternative language is "clumsy" (pp. 702–704).
[76] (1804) 5 East 449.

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purported to "rescind" an agreement for lease, for breaches by the landlord of covenants to execute the lease and to repair the premises, and sought the return of his premium in an action for money had and received. This remedy was denied because the tenant could not effect full *restitutio in integrum*, having been in possession of the premises for ten days.[77] Today, there would be no such requirement: assuming that the breaches would justify termination of the agreement, the tenant would be entitled to terminate (prospectively only) and claim the equivalent of his premium in a damages action.[78] True rescission *ab initio* would not be the appropriate remedy.

For many years, the heresy continued that termination of a contract for repudiatory breach involves rescission and was not removed until the seminal House of Lords case of *Johnson* v. *Agnew*,[79] which explained the crucial distinction between rescission properly so called, operating *ab initio*, and termination for breach of contract. Lord Wilberforce described the latter process, whereby a contracting party (in this case, the vendor of land), faced with a repudiatory breach by the other party, has an option either to accept the repudiatory breach, terminate the contract and seek damages, or alternatively keep the contract alive and (in the case of contracts for the sale of land) seek specific performance, as follows:

> At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as "rescinding" the contract, this so-called "rescission" is quite different from rescission *ab initio*, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence ... In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about "rescission *ab initio*"...[80]

The removal of this confusion meant that the vendor, who had previously obtained an order for specific performance which the

[77] This reason is given by all four judges and appears to form the ratio decidendi of the case. An alternative explanation, mentioned in the reasoning of three members of the court, is that, by continuing in occupation, the tenant elected to affirm the agreement: see Goff & Jones, *The Law of Restitution*, 5th ed., (Sweet & Maxwell, London, 1998) p. 527 ("Goff & Jones").

[78] Indeed, even at the time of *Hunt* v. *Silk*, an action on the contract for damages would have been open to the plaintiff. Hunt's action for money had and received was non-suited, which specifically left him entitled to bring an action for damages instead. I am grateful to Mr Michael Prichard for this point.

[79] [1980] A.C. 367.

[80] *Ibid.* pp. 392–393.

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purchaser had ignored, was subsequently able to bring the contract to an end *and* recover damages for breach. Cases which suggested that damages were irrecoverable because the contract was thereby rescinded *ab initio* were overruled,[81] thereby removing one of the significant errors which had arisen from the elision of the two concepts.[82]

Yet it is possible that the common law notion that rescission *stricto sensu* is effected by the innocent party's election is also a remnant of the traditional failure to separate out these two distinct uses of the same term. It is submitted that when *Johnson* v. *Agnew* drew attention to this confusion, a further consequence should have been to confirm that, of the two, only termination for breach can intelligibly be regarded as being fully effected by the plaintiff's election.

In such a case, the plaintiff's election operates only on future executory obligations and has, by definition, no effect on executed transfers of property. Indeed, in the context of termination for repudiatory breach, the only relevance of the notion of the innocent party's election is to clarify the fact that a repudiatory breach does not bring the contract to an end automatically (as for example in cases of frustration). There is no need for restitution[83] and thus there is no associated problem with counter-restitution or the need to impose other terms, nor any question of disrupting third party rights. Overall, regarding the operative act of termination as an election by the innocent party raises none of the "backdating" difficulties which arise in cases of rescission of executed transactions.

Overall, an assessment of the historical background makes it evident that confusion and misinterpretation have for too long prevented a rational approach to rescission. Of course, the law would be clarified to a limited extent if the plaintiff's election analysis was once again confined to vitiating factors of common law origin, in that it would possible to identify with more certainty than at present which vitiating factors attract the self help analysis, although the development of economic duress as a vitiating factor, after the Judicature Acts, would cause difficulty, as would the

[81] *Henty* v. *Schroder* (1879) 12 Ch. D. 666; *Barber* v. *Wolfe* [1945] Ch. 187; *Horsler* v *Zorro* [1975] Ch. 302; and *Capital and Suburban Properties Ltd* v. *Swycher* [1976] Ch. 319.

[82] See also *Photo Production Ltd* v. *Securicor Transport Ltd* [1980] A.C. 827, in particular Lord Wilberforce's criticism of the terminological confusion generated by the inappropriate use of the term "rescission".

[83] In the sense of restoration of benefits conferred under an executed contract, although is not clear whether this view would be shared by commentators who regard rescission of a purely executory contract as restitutionary (n. 3 above). This is not to deny the possibility that the innocent party may have a *quantum meruit* or *quantum valebat* claim for the reasonable value of services or goods provided under the contract where the contract price had not accrued by the date of discharge: see Goff & Jones pp. 531–534.

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appropriate treatment of non-fundamental mutual mistakes. However, in the absence of convincing arguments of principle, there can be no justification for retaining historical categories for the sake only of history: no rational legal system should treat closely related vitiating factors differently merely because of the accident of their historical development.

On this basis, two principled options for reform suggest themselves. One limited option would be to confine the self help analysis of rescission to cases of fraud, if it can be established, by arguments of principle, that fraud merits a different remedial response from other, related vitiating factors. This limited option is canvassed below, as is the more radical option of selecting just one of the two distinct analyses of rescission and applying it to all vitiating factors. As will be seen, this writer favours the more radical option, despite the attractions of a separate remedial regime which accords favourable treatment to the victims of fraud. On balance, it is suggested that the equitable notion of rescission should now prevail entirely and that the notion that rescission is effected by the election of the innocent party should be excised from the law.

IV. Why the Self Help Analysis Should be Abolished—The Restitutionary Problem

It is worth reiterating at the outset that the difficulties inherent in the self help analysis of rescission stem from the *restitutionary* implications of rescinding an executed contract or other disposition. Rescission of a purely executory contract is a relatively simple process and it does not much matter whether the rescission is treated as being effected by the plaintiff's own election or by subsequent judicial order. Where the matter is not disputed by the other party, a court order will in practice be unnecessary, but this does not detract from the premise that rescission properly so called should be regarded as a judicial remedy only. Where one party intimates his intention to "rescind" a purely executory contract and the other party concurs, the resulting abandonment of the contract is not the result of rescission but of a contractual compromise. There is of course no need to insist on a decree of rescission in such a case, but equally no need to regard it as an example of rescission as a self help remedy. In much the same way, a "letter before action" demanding financial compensation following a breach of contract, which is not disputed but which is met in full by the party in breach, is not regarded as a self-help exercise of the remedy of damages.

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Turning then to executed transactions, it has already been seen that the self help analysis of rescission has two related aspects. The first is that the plaintiff can rescind by his own act of election, generally by giving notice to the other party.[84] In other words, there is no theoretical legal requirement to obtain a court order, even though in practice this will frequently be necessary (if for example the other party disputes the plaintiff's entitlement to rescind). The second is that, where judicial rescission is obtained, it is nonetheless still the plaintiff's election which is regarded as the operative rescinding event, so the judicial relief is in some way "backdated" to the date of the plaintiff's election. Both aspects, though particularly the latter, give rise to difficulties and will for convenience be analysed separately.

A. Disadvantages of the first aspect

There are two related problems with this aspect of self help rescission

The first involves the process known as "reception". The law regards it as a logical consequence of the self help analysis that the plaintiff can, in theory, revest in himself legal title to property which passed under the avoided contract, without recourse to judicial assistance. Such reception is, of course, only practicable where the property concerned comprises chattels which can be physically repossessed by the plaintiff (other forms of property, such as real property or choses in action, can not in practice be recaptured by the plaintiff's intervention alone). Similarly, reception of chattels is itself sometimes regarded as a mode of communicating the innocent party's election to rescind, on the basis that seizure of goods is an unequivocal act demonstrating that party's intention to renounce the contract, thus allowing him to recapture his goods without any prior notification to the other party. Both interpretations are considered in *Caldwell*.[85]

Whatever the correct analysis of reception, it is undoubtedly true that reception of chattels is a powerful weapon; much more so than the discretionary judicial version of rescission. A party who rescinds a voidable contract on a self help basis and recaptures chattels transferred pursuant to it avoids, in practice, the court's discretion to examine his conduct or to consider whether rescission

[84] *Cf. Car and Universal Finance Co Ltd.* v. *Caldwell* [1965] 1 Q.B. 525 ("*Caldwell*").

[85] Lord Upjohn did not express a conclusion on whether reception is an exception to the requirement of communication or itself a mode of communication, saying "Counsel for the plaintiff concedes that there is one [exception to the requirement of communication]: where the subject matter of the contract is a transfer of property, then the party entitled to do so may disaffirm the contract by retaking possession of the property; but counsel submits that this is really a method of communication, though for my part I do not see how this can be true of every case that could be suggested."

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should have been regarded as barred. This draconian self help procedure is perhaps justifiable as against a deliberate fraudster,[86] but seems entirely unacceptable for other vitiating factors, lending support to the limited reform option.

Likewise it must be conceded that the limited case law on recaption is confined to cases of fraud,[87] with little evidence that the expansion of the self help analysis to other vitiating factors has generated any attempts to use recaption in such cases. However, even for fraud, recaption is open to criticism. First, whatever the practical advantages of recaption, its theoretical relationship with subsequent judicial involvement is not clear. There is authority that the rescinding party must offer counter-restitution to the other party, if that would have been ordered as a condition of judicial rescission.[88] But what of other matters usually considered in judicial proceedings? Presumably, by electing to rescind by recaption of chattels, the rescinding party runs the risk of a subsequent judicial determination that his recaption was unjustified or barred, for example by delay, but this matter is not at all clear from the case law. In cases of innocent misrepresentation, the judicial discretion to award damages in lieu of rescission under section 2(2) of the Misrepresentation Act survives a purported self help election to rescind by notice,[89] but the analogy is not strong since the court's jurisdiction here is an express statutory one.

Moreover, the trend in the present century has been to limit the range of self help remedies, in matters of both tort and contract, for fear of their potential for provoking discord, even at the expense of the victims of intentional wrongdoing. So, for example, the Court of Appeal in *Burton* v. *Winters*[90] set out considerable limitations on the right of the victim of nuisance or trespass by encroachment to resort to the self-help remedy of abatement, expressing disapproval of the conduct of the appellant in that case. Even the principal authority concerning recaption after rescission for fraud, *Re Eastgate ex parte Ward*,[91] is unenthusiastic about the process. There, a fraudster obtained goods on credit and then

[86] Although it may not be entirely consistent with the rule that it is only where the defendant's possession of goods was wrongful from its inception that those goods can be recaptured using force. For example, an owner must resort to law and cannot use force or trespass on land to retake goods after a bailment has come to an end: "I can not enter his house and take the goods for they did not come there by a wrong but by the act of us both." *Webb* v. *Bevan* (1844) 6 M & G 1055, approved in *Devoe* v. *Long* [1951] 1 D.L.R. 203.

[87] The cases generally cited are *Re Eastgate ex parte Ward* [1905] 1 K.B. 465 and *Tilley* v. *Bowman Ltd* [1910] 1 K.B. 745.

[88] See *Clough* v. *London and North Western Rail Co* (1871) L.R. 7 Exch. 26, "No man can at once treat the contract as avoided by him, so as to resume the property he parted with under it, and at the same time keep the money or other advantages that he obtained under it ..."

[89] *Atlantic Lines & Navigation Co Inc* v. *Hallam Ltd. (The "Lucy")* [1983] 1 Lloyds L.R. 188.

[90] [1993] 1 W.L.R. 1077.

[91] [1905] 1 K.B. 465.

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absconded without paying, fleeing his rented house and taking the key with him. His landlord assisted one of the fraudster's creditors (Mr Bowling) to break into the house and take back his goods. In a subsequent action by the fraudster's trustee in bankruptcy, the judge confirmed that the goods no longer formed part of the fraudster's estate; the creditor had rescinded the contract as soon as he discovered the fraud and was entitled to retake possession. However, the judge was clearly unhappy with the mode of recaption, saying "I cannot say that I approve of the way in which possession was retaken in this case. But in my opinion Mr Bowling was only taking, though taking it in a wrong way, that which was his own."[92]

Speculation on the facts of this case indicates some of the potential problems which self-help remedies create, echoing the judicial concerns expressed about them in other areas. Would it have been decided the same way if the landlord had not been involved in the break-in? How much force (if any) could have been used against the fraudster to wrestle the goods away from him? Such problems would be removed if a court order were required for the rescission of all executed contracts and dispositions, and the consequent revesting of property transferred pursuant to them. Of course, this involves subjecting the victim of fraud to the unpalatable possibility that he might see the disputed property in the possession of the fraudster, but be unable to seize it immediately, but in reality this is unlikely to be a significant problem. Fraudsters, anxious to avoid discovery, tend to dispose of goods and disappear.

So, leaving recaption to one side, a second related area to consider is the effect of the self help analysis on third parties, who have acquired an interest in property transferred pursuant to a voidable contract. In order to protect such third parties, rescission is barred as soon as third party rights have intervened and this is a matter which a court examining a plea for judicial rescission can determine. However, the protection is negated if rescission is regarded as having *already* occurred before the third party's right is created, in circumstances which the third party could not have known about. This problem can arise in theory whenever rescission is effected by notice communicated to the other party, without recourse to a judicial order, although in practice the receipt of such communication should usually prevent *honest* recipients from disposing of the disputed property to third parties.

However, there is a much greater danger of self help rescission

[92] *Ibid.* p. 467.

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prejudicing third parties in cases involving fraud, because of the decision in *Caldwell*. As is well known, this establishes an exception to the usual requirement of communication of an election to rescind, and allows a victim of fraud to effect self-help rescission without notice to the fraudster, who has inevitably absconded.

The effect of this exception is that the plaintiff can effect rescission immediately on discovering the fraud, without the need to trace the fraudster or the goods. If he can do so before disposal of the goods by the fraudster, then the third party recipient gets no title to the goods. The Court of Appeal in *Caldwell* evidently viewed this as an unavoidable consequence of the need to protect plaintiffs from the impossible task of communicating with a fraudster who has deliberately made himself scarce. As Sellers L.J. said, "The position has to be viewed, as I see it, between the two contracting parties involved in the particular contract in question. That another innocent party or parties may suffer does not in my view of the matter justify imposing on a defrauded seller an impossible task."[93]

Caldwell is a controversial decision, negating the protection supposedly offered by the bar to rescission once third party rights have intervened.[94] In its desire to protect a defrauded plaintiff, the court rendered third party purchasers extremely vulnerable. It is fictitious to treat the question as one between plaintiff and fraudster, when the real fight is between the two innocent parties, and the merits in the real contest will generally favour the third party over the plaintiff who dealt with and was duped by the fraudster.[95] Under *Caldwell*, contracts induced by fraud, although voidable in theory, behave as if they are void *ab initio* when the impetus elsewhere (as in the law of mistake) is to move away from treating contracts as void so as to protect third parties. The Law Reform Committee recommended the abolition of the exception in *Caldwell* in favour of the standard self help analysis with notice to the other party required to effect rescission.[96]

[93] [1965] 1 Q.B. 525, 528–529.

[94] Sometimes this result is avoided on the facts. In *Newtons of Wembley Ltd* v. *Williams* [1965] 1 Q.B. 560, the third party was protected, on the basis that the sale to him had the same effect as if the seller was a "mercantile agent" (pursuant to section 9 of the Factors Act 1889). Therefore, as the third party bought the car in a well-established street market, without notice of the plaintiff's purported rescission, he acquired good title.

[95] The real reason for the decision in *Caldwell* may well have been the fact that the court was less than impressed with the conduct of the third party: see Sellers L.J. *ibid.* p. 529: "I can see nothing unjust in the loss falling on the G & C Finance Corporation Ltd ... who made the minimum enquiries, who bought a car which apparently they never saw and hired it out to a man of whose existence and identity they did not know and who may well have been fictitious ..."

[96] Law Reform Committee's 12th Report, *Transfer of Title to Chattels*, para. 16 "We think that unless and until notice of the rescission of the contract is communicated to the other contracting party an innocent purchaser from the latter should be able to acquire good title."

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Of course, it might be argued that those who purchase goods in "unofficial" circumstances (car boots sales, second hand markets and through private sales) are less deserving of protection, if those goods turn out to have been obtained by fraud, than the typical third party purchaser. Perhaps the usual arguments urging protection of third parties are not as compelling in cases of fraud? However, the law already has mechanisms for tackling this issue: the requirement that, for rescission to be barred by intervening third party rights, such rights must have been acquired in good faith and without notice,[97] so that suspicious circumstances surrounding the purchase can prevent the purchaser acquiring good title. For this reason, the additional advantage given to the victims of fraud by *Caldwell* is unnecessary.

Further, it is submitted that, in view of its other disadvantages, the protection of third parties would be tightened yet further if the self help analysis were abandoned altogether in favour of a requirement of court intervention, so that even notice to the innocent party would not effect rescission. As has been said, in most cases not involving fraud, the recipient of a rescinding communication will not seek to dispose of property affected by the rescission, so that such a reform would rarely offer any additional protection to third parties in such cases, but it is possible to conceive of instances where a disposition might go ahead following notice of rescission. Any such loophole is better closed than open, particularly in the light of other disadvantages inherent in the self help analysis. Moreover, in fraud cases like *Caldwell*, plaintiffs would be no worse off having to seek judicial rescission than if they were required, as proposed by the Law Reform Committee, to give notice to the fraudster to effect self help rescission. The reality on both hypotheses is that a bona fide third party will have taken a good title, thereby barring rescission, before the plaintiff can do what is required of him.

B. Disadvantages of the second aspect

The second aspect of the self help analysis is that, where a judicial decree of rescission is obtained, it is deemed to take effect on the operative date of the plaintiff's election to rescind ("backdated"). This retrospective analysis is problematic for a number of reasons.

First, the House of Lords' authority invariably cited for the backdating of a judicial order for rescission, *The Directors of the Reese River Silver Mining Co Ltd* v. *Smith*,[98] is not on close reading

[97] Sale of Goods Act 1979, section 23. See *Whitehorn Bros* v. *Davison* [1911] 1 K.B. 463.
[98] (1869) L.R. 4 H.L. 64.

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a strong authority for the general proposition. Smith was induced to subscribe for shares in a mining company in reliance on statements in the prospectus issued by the directors that the company had purchased a valuable mine. On discovering that the statements were untrue, he filed a bill against the directors seeking to rescind his contract with the company on the ground of fraudulent misrepresentation, praying that his name be removed from the list of shareholders and claiming the return of his premium. He also obtained an injunction, restraining the directors from suing him for calls on the shares, but by the time the company was wound up, judgment had not been obtained on the rescission action and Smith's name was included on the list of contributories. He sought to have his name removed from the list of contributories and succeeded in the House of Lords, where it was decided that, in an appropriate case, the power given to the court by the Companies Act 1862 to rectify the register of shareholders could be exercised after as well as before a winding up order.

The reason given in commentaries, and indeed in the headnote of the case, as to why it was an appropriate case for the rectification of the register after a winding up order, is that Mr Smith rescinded his agreement with the company by his own election when he commenced proceedings for rescission, so that a subsequent judicial order of rescission should be backdated to that operative date (which preceded the winding up order). This is supported by Lord Hatherley's dictum, quoted above,[99] together with the words which follow:

> the agreement subsists until rescinded; that is to say, in this sense—until rescinded by the declaration of him whom you have sought to bind by it, that he no longer accepts the agreement but entirely rejects and repudiates it. It is not meant, I apprehend, by that expression "until rescinded", used by any of your Lordships at the time when that case[100] was argued before the House, to say that rescission must be an act of some court of competent authority, and that, until the rescission by that court of competent authority takes place, the agreement continues in its full vigour. If it were necessary to use the word "rescinded" in any way in that sense, it appears to me that it would be more correct to say that the rescission by a Court of competent authority dates from the moment when proceedings were taken invoking the aid of that competent authority.[101]

[99] See p. 523 below at text to n. 65.
[100] *Oakes* v. *Turquand* (1867) L.R. 2 H.L. 325, itself a fraud case.
[101] *Reese* p. 73.

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This passage is commonly regarded as encapsulating the *ratio decidendi* of *Reese*. *Reese* in turn is cited as general authority for the retrospective effect of judicial decrees of rescission. However, on closer reading, the authority is not particularly compelling. In the first place, the case was one of fraud, so has little to say about rescission generally. Moreover, the precise decision concerned the exercise of a statutory discretion to rectify the shareholders register, which subsisted after winding up of the company, on the ground that the directors should have removed Mr Smith's name at an earlier stage.[102] This ground for the exercise of the statutory discretion does not necessarily correspond with the effect of rescission at common law. Only Lord Hatherley expressed anything resembling a general rule concerning the backdating of judicial orders of rescission, yet this has come to be accepted as the *ratio* of the case.

So, for example, Lord Cairns decided the case with no reference to the effect of a decree of rescission, but purely in terms of the statute. He examined the fact of the fraud and the steps taken by Mr Smith, and concluded that the directors should have removed his name from the register when he requested them to do so by filing his bill, on the basis that it is "a case clearly coming within the 35th section, where there has been a default in the executive of the company."[103]

Lord Wrestbury was also at pains to avoid approving any general statements about the effect of decrees of rescission, but to decide the case by reference to its precise facts, stressing that Mr Smith had already obtained an injunction before the winding up. He said, "I would press upon your Lordships that this case has a distinguishing feature, namely that a suit was instituted, and was in full progress, and had given birth to a judicial order, at the instance of the present Respondent, anterior to the making of the winding up order."[104]

On reflection, then, the decision in *Reese* was not based on general principles of rescission of contracts, but concerned a very specific point of company law. This was the articulation of an exception to the general rule[105] that the commencement of winding up is an absolute bar to any attempt by a shareholder to avoid his contract to take shares (or take similar action, such as to apply for rectification of the shareholders' register). The case decided that there is an exception to the general rule where the shareholder has

[102] Companies Act 1862 sections 35 and 98.
[103] *Reese* p. 81.
[104] *Ibid.* p. 76.
[105] Derived from *Oakes* v. *Turquand* (1867) L.R. 2 H.L. 325.

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commenced *judicial proceedings* for rescission before the date of the winding up order. A purported exercise of self help rescission by notice alone will not suffice.[106]

Leaving to one side the dubious provenance of the supposed backdating rule, its operation is far from straightforward. A number of complications will be mentioned.

The first practical problem is that it is necessary to determine precisely what the operative date for rescission is, since this is the date as at which the judicial order is deemed to take effect. Yet it is unclear which specific "self help" event effects rescission in such circumstances. For example, notification to the other party of the plaintiff's desire to avoid the transaction is sometimes treated as effecting rescission—this is, of course, the first aspect of the problem, discussed above. In such a case, where the other party disputes the rescission and so the plaintiff eventually resorts to litigation, does the initial notice count as the operative event or the subsequent commencement of proceedings? Does the answer differ depending on the *wording* of the initial communication? It would be strange if there was a substantive difference between "I hereby rescind" with no mention of litigation, and "I intend to rescind" contained in a letter before action. There is a dearth of authority on the question.

If, as Lord Hatherley's approach in *Reese* suggests, the commencement of proceedings is treated as the operative date, there is still room for ambiguity, since that could either mean the date of issue of the writ or of service on the defendant. Such English authority as there is suggests that the date of service. Lord Upjohn said in *Caldwell*: "In some cases the distinction between the two was, on the facts, immaterial and in those cases judges have, I think, sometimes reasonably used "issue" of the writ as being synonymous with "issue and service" of the writ. On principle, as at present advised, I prefer the view that the election to determine arises only on service of the writ; until then the defendant [*sic*] may change his mind and tear it up."[107] The date of service is consistent with the usual requirement of notice to the defendant when rescission is effected non-judicially and with analogous areas such as election to terminate a contract for repudiatory breach. However, the important decision of the High Court of Australia in *Alati* v. *Kruger* regarded the operative date as "the date when the respondent issued his writ."[108] There is evidently some doubt as to

[106] According to Fry L.J., the shareholder must have "done something more than" merely elect to rescind his contract to take shares: *Re Scottish Petroleum Co. (Wallace's case)* (1883) 23 Ch. D. 413, 439.
[107] [1965] 1 Q.B. 525, 532.
[108] (1955) 94 C.L.R. 216, 222–224.

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the precise operative date, and doubt of this kind about the date on which a retrospective order takes effect is undesirable.

A further implication of the "backdated relief" analysis may be termed the problem of partial rescission or rescission "on terms". This problem has arisen in cases decided in accordance with *Barclays Bank plc* v. *O'Brien*,[109] where one person (commonly a wife) is induced to stand surety for the indebtedness of the debtor (commonly her husband) because of undue influence (usually an unrebutted presumption of undue influence) or misrepresentation by the debtor, and where the creditor is fixed with constructive notice of the relevant vitiating factor. In such circumstances, *O'Brien* establishes that the surety is entitled to rescind the transaction as against the creditor, even though the creditor was not the source of the undue influence or misrepresentation.

In such a case, it is generally assumed that the surety would not have contracted at all, in the absence of misrepresentation or undue influence. However, it is occasionally possible to demonstrate that the surety would still have entered into *a* transaction, be it guarantee or charge, with the creditor if there had been no such vitiating factor, but on terms more favourable to the surety. In particular, where the debtor has misrepresented the terms of the guarantee or charge, for example by understating its duration or the amount guaranteed or secured, it may be possible to be certain that those misrepresented terms were terms to which the surety gave genuine consent. Accordingly, in such cases, creditor banks have argued for partial rescission only, in other words that rescission of the actual transaction should be made only on condition that the surety submit instead to a revised version of the transaction on the terms as misrepresented.

The English Court of Appeal refused, in *T.S.B. Bank plc* v. *Camfield*,[110] to countenance partial rescission of this kind. Mrs Camfield argued that she had been induced to join in a charge over the matrimonial home to the bank by her husband's misrepresentation that the security was limited to £15,000 when it was, in fact, unlimited. The bank was fixed with constructive notice of the husband's misrepresentation, but argued that the charge should be rescinded on terms that it be replaced by a charge securing £15,000. The Court of Appeal rejected the bank's argument, asserting that rescission is an "all or nothing" process, that Mrs Camfield's right to rescind against her husband was unlimited, and that the bank could be in no better position than Mr Camfield.

[109] [1994] 1 A.C. 180 ("*O'Brien*").
[110] [1995] 1 W.L.R. 430.

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In stark contrast is the decision of the Australian High Court in *Vadasz* v. *Pioneer Concrete (SA) Pty Ltd.*[111] Here, the appellant (a company director) entered into a personal all-monies guarantee of the company's debts with the respondents. On being sued on the guarantee, the appellant alleged by way of defence that officers of the respondent had fraudulently represented that the guarantee covered future indebtedness only. The appeal proceeded on the basis that fraud was assumed. Despite this, the High Court stressed that it had the jurisdiction to order relief conditional on the party seeking equity doing equity which, in this case, meant that the guarantee would be only partially rescinded in so far as it related to past indebtedness. "To enforce the guarantee to the extent of future indebtedness is to do no more than hold the appellant to what he was prepared to undertake independently of any misrepresentation."[112]

As these conflicting decisions suggest, the question of relief on terms is complex and the merits are by no means clear.[113] This writer has examined the substantive issue elsewhere.[114] However, one thing is clear. The Court of Appeal's reasoning in *Camfield* was muddied by the suggestion made by Roch L.J. that the court had no jurisdiction to award rescission on the terms proposed, because the rescission had already been effected by the wife's own election, by the time the case reached the court. He said:

> The right to set aside or rescind the transaction is that of the representee, not that of the court. The court's role in a disputed case will be to decide whether the representee has lawfully rescinded the transaction or is entitled to rescind it. Normally, if the representee is entitled to rescind the legal charge, that will have been effected by the representee's pleading that the transaction has been or should be set aside; that is to say, the transaction would have been set aside before the matter reaches the court. The court is not being asked to grant equitable relief; nor is it, in my view, granting equitable relief to which terms can be attached.

It is not clear whether Roch L.J.'s observations are directed at rescission generally, whatever the vitiating factor, or whether they are confined to rescission for misrepresentation. The language of the paragraph suggests the latter, but its context is part of a general discussion about the *O'Brien* jurisdiction, which is expressly

[111] (1995) 130 A.L.R. 570.
[112] *Ibid.* p. 579.
[113] The decision has been distinguished by the Court of Appeal in *Dunbar Bank plc* v. *Nadeem* [1998] 3 All E.R. 876, with Millett L.J.'s cautious words at p. 884, "Whether that case was rightly decided or not, it was a very different case."
[114] J. O'Sullivan, 'Undue Influence and Misrepresentation after O'Brien: Making Security Secure', ch. 3, in F. Rose (ed.) *Restitution and Banking Law* (Mansfield Press, Oxford, 1998).

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cover undue influence, misrepresentation and "other equitable wrongs". In any event, *Camfield* was a case of innocent misrepresentation and thus it is a further instance of the historical error, discussed above, which lead to the adoption of the self help analysis for vitiating factors of equitable origin.

Leaving the historical problem to one side, it is suggested that this reasoning is a further example of the inadequacy of the self help analysis. Whatever the "correct" answer to the thorny question of rescission on terms, the courts should be free to determine whether to impose such terms in accordance with the merits of the case.[115] It is unfortunate if the self help analysis operates to fetter this process at the outset. The approach of the High Court of Australia, which recognised the jurisdiction to impose terms so as to do equity between the parties and regarded rescission as a discretionary remedy, is preferable.[116]

Roch L.J.'s reasoning raises a further question. If the court's order was confirmatory only, backdated to Mrs Camfield's earlier, operative act of rescission, what was the status of the bank's charge during the period between commencement of proceedings and judicial determination?

This brings us to the most significant conceptual difficulty flowing from the retrospective analysis of judicial orders in the context of self help rescission, namely how it impacts on title to property transferred under the voidable contract or disposition. Principally, what is the position of third parties who acquire rights in such property during the "lacuna period", that is after the relevant "operative date" (assumed to be the date of service) but pending judicial resolution of the issue? This is the issue that catches the attention of Professor Burrows when he describes the retrospective nature of rescission orders, a characteristic which he ascribes to all instances of judicial rescission. As has been mentioned above, he raises the question: "does it follow that a defendant cannot give a good title to a bona fide purchaser for value without notice in the period between commencement of the action and judgment?"[117]

In a case decided *without* the backdating analysis, this difficulty does not arise. For example, it is clear from *Lagunas Nitrate Company* v. *Lagunas Syndicate*[118] that the court judges whether the

[115] With respect, it is also difficult to agree with Roch L.J.'s assumption that the jurisdiction to award damages in lieu of rescission under section 2 (2) of the Misrepresentation Act 1967 potentially extends to misrepresentations made by a stranger to the disputed contract.

[116] That is not to say that the conclusion reached in *Vadasz* was necessarily appropriate, given that fraud was assumed.

[117] Burrows, p. 32.

[118] [1899] 2 Ch. 392.

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parties can be restored to the pre-contract position or whether rescission is barred in "real time", when giving judgment. Here, a company brought an action against its promoters, seeking to rescind certain purchase contracts on the basis of non-fraudulent misrepresentations in the prospectus. The majority of the Court of Appeal refused the action, on the ground that the company had continued to work the property and had so altered it that the parties could not be restored to their original positions. Rigby L.J. dissented, forming the view that rescission was not barred because the acts of alteration were in reality those of the promoters (the vendor syndicate), not the company. But it is significant that all three judges examined the state of affairs and determined whether rescission was barred taking into account matters up to the date of judgment, expressly considering acts carried out after the commencement of the action.[119] In the same way, a court is able to consider intervening dealings with the subject matter of the voidable transaction occurring up until judgment.[120] Third parties are fully protected whenever their rights were created: there is no lacuna period and thus there is clarity in title.

In contrast, the backdating analysis tends towards uncertainty and vulnerability. For example, a purchaser may wish to avoid a complex transaction involving the sale of business for misrepresentation. Here, if the vendor disputes the purchaser's claim, the latter will be anxious to keep trading during the, often significant, period leading up to and during the trial of the matter. More troubling is the (more unusual) case of a claim for rescission by a vendor, resisted by the purchaser who must carry on the business pending trial. In both cases, the backdating analysis would suggest that sales or charges created over property forming part of the transaction during that period are vulnerable. If the claim for rescission eventually succeeds, are such dealings to be overridden because the putative creator is retrospectively stripped of capacity to deal with the property at the relevant time? What if the putative creator becomes insolvent between the date of "election" to rescind and ultimate court order?[121]

In fact, despite the citation of *Reese* as authority for the backdating analysis in virtually every text on rescission, it is impossible to find any authority in which this point has been

[119] For example Rigby L.J.'s dissent, *ibid.* pp 458–459, and Collins L.J., *ibid.* pp . 463–464.
[120] See for example *Witter (Thomas) Ltd* v. *TBP Industries Ltd* [1996] 2 All E.R. 573, 588.
[121] Generally, the transferor's equity to rescind a voidable transaction survives the transferee's insolvency. See *Load* v. *Green* (1846) 15 M. & W. 216.

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taken.[122] The nearest is *Alati* v. *Kruger*[123] in which the commencement of proceedings by the purchaser of a fruit and vegetable business was regarded as the operative act of rescission. Between commencement of proceedings and the date the reserved judgment was delivered, he had closed down the business and assigned the lease back to the landlord. The High Court of Australia held that this did not preclude relief, since the "validity of his rescission depended, therefore, only upon the question whether *restitutio in integrum* was possible in the circumstances as they existed at the commencement of the action."[124] However, because "the remedy is discretionary" the court was entitled to consider whether his conduct after commencing the action made it inequitable for relief to be granted, but held that it did not: "The respondent was under no duty to go on indefinitely, working for nothing and incurring losses, especially after the judge had announced findings of fact in his favour."[125]

So even here, the retrospective aspect of self help rescission was not taken to its logical conclusion, since the entitlement to relief was still regarded as discretionary. Moreover, no third party rights were created in the "lacuna period": no doubt this would have been a significant fact barring "relief" (even if not barring the earlier act of "rescission", since the court regarded the two as separate concepts).

In practice, it is simply inconceivable that the supposed *Reese* principle would ever operate inconsistently with the protection of bona fide third parties and wherever the courts are required to determine whether rescission is barred, they test that issue at the only meaningful time: the date of the court order. On reflection, then, it becomes clear that this aspect of self help rescission is something of a red herring. It adds nothing to the law, because wherever third party rights have intervened before the order is made, the courts ignore the self help analysis and pay only lip service to the theory that relief is backdated.

The point is confirmed when executed transactions involving real property are rescinded. No trace of the *Reese* principle appears in such cases. Historically, the common law courts did not have any

[122] In *Twinsectra Ltd.* v. *Yardley* [1999] Lloyds L.R. 438, 462, Potter L.J. refers loosely to the backdating analysis in passing, (though it makes no substantive difference to the result). He states: "where a transferor's legal and equitable title to his property has passed to the transferee according to basic principles of property law but in circumstances (*e.g.* involving fraud or misrepresentation) where the transferor has an equitable right (*i.e.* mere equity) to recover the property by having the transfer set aside, and the court declares that *from the outset* the transferee has held the property to transferor's order…" (emphasis added).

[123] (1955) 94 C.L.R. 216.

[124] *Ibid.* p. 223.

[125] *Ibid.* pp. 225–227.

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jurisdiction to order the reconveyance of land, even where the conveyance had been procurred by fraud, so such actions were entirely equitable,[126] and the equitable principles have not in this area been contaminated by the notion of back dated relied.

So, until a court order is made (for example an order to re-convey property in unregistered land or an order for rectification of the register in registered land), bona fide third parties who acquire an interest in the property are entitled to rely on the title as it appears to be (in the title deeds or on the register). In proprietary terms, they are not bound by the plaintiff's "equity to rescind".

This is well illustrated by two authorities involving registered land, both concerning rectification of the Proprietorship Register to reverse the effect of a fraudulently induced registered transfer, where the proprietor had created registered charges prior to the application for rectification. In both cases, *Re Leighton's Conveyance*[127] and *Norwich and Peterborough Building Society* v. *Steed*,[128] rectification was ordered as against the fraudulent registered proprietor, but not against the innocent registered chargees. Scott L.J. in *Steed* rejected the views of Slade L.J. *in Argylle Building Society* v. *Hammond*[129] that there is a statutory discretion to order rectification against bona fide third parties who had acquired rights in the property, such as the building society. The registered land provisions were construed so as to be consistent with the unregistered land position, that rescission will not be ordered against bona fide third parties who acquire an interest in the property for value without notice of the original owner's equity to rescind.

The "equity to rescind" analysis pre-supposes that the operative event of rescission is the court order, put into effect by a re-conveyance or by rectification of the register. On that basis, it is a smooth and transparent system. Third parties are protected and can rely on the apparent title of the party dealing with them, until that title is "removed" by court order. On the other hand, it simply does not mesh with the notion of back dated orders and, not surprisingly, no trace of that notion is found in the case law concerning rescinded real property transactions.

V. Conclusion

This article has attempted to argue that the notion of rescission as a self help remedy is a result of historical misinterpretation and has

[126] *Feret* v. *Hill* (1854) 15 C.B. 207.
[127] [1936] 1 All E.R. 667.
[128] [1993] Ch. 116.
[129] (1984) 49 P. & C.R. 148.

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little to commend it in today's law of obligations. Moreover, it is something of a fiction, as has been seen in the examination of the notion that judicial relief is backdated to the date of the plaintiff's election to rescind. Wherever adherence to the notion of rescission as effected by the plaintiff's election would lead to a substantively different result from that achieved by the operation of a purely judicial version of the remedy, the self help version tends to be ignored or side-stepped. It is surely time to remove this unnecessary confusion and to discard an irrelevant historical legacy, so as to create a more rational and intelligible modern remedy.

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