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9

The Proprietary Consequences of Fraud

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1. Introduction

Suppose A is fraudulently induced to transfer rights to B.¹ B, for example, knocks on A's door falsely representing that they are collecting for charity; in truth, they believe that charity begins at home. If A hands over a £50 note, they will obviously have claims for compensatory damages against B in the tort of deceit and, alternatively, to be paid the value of their performance in unjust enrichment.² Both are necessarily personal claims. But what are the 'proprietary' consequences of the handing over of the note?³ Does A's right pass to B? If so, does B immediately hold that right on trust for A? Alternatively, can A revest the right in themselves by unilaterally rescinding the transfer or obtaining an order of the court to that effect? Similar questions arise in reverse, where A is fraudulently induced to take a transfer of rights from B. B, for example, may have sold a title to a fake Picasso painting to A, and A is now seeking to recover the purchase price.

The position is confused but seems to be this. The right will pass despite the fraud, though there is supposedly authority to the effect that this is not always the case. If the right does pass, then it is said that A can, in the limited circumstance that the right was transferred pursuant to a contract of sale of goods, unilaterally rescind the contract, thereby revesting the right in themselves. Otherwise, some cases say that B is an immediate trustee for A, though others say there is no immediate trust, but that A has a 'right' or 'power' to rescind, the exercise of which will turn B into a trustee for A. There is doubt whether this can be done unilaterally or requires an order of the court. Once done, however, the trust backdates to the point of transfer, though stripped of most of its content.

¹ At common law, fraud means a misrepresentation which the representor knows to be false, or one made recklessly as to whether it is true or false: *Derry v Peek* (1889) 14 App Cas 337.

² Where A's performance is made pursuant to a contract, A will in the same proceedings have to obtain an order rescinding the contract: *Clarke v Dickson* (1858) El Bl & El 148.

³ The word 'proprietary' is used loosely to include the raising by operation of law of a trust, orders for reconveyance or nullity, and other specific relief.

The object of this chapter is to challenge almost all of this thinking. It will argue that fraud never prevents the right passing, either at law or in equity. It will also argue that there is no ability on the part of A unilaterally to revest the right, and that B is never a trustee for A, either at the point of receipt or on rescission, whether rescission is done unilaterally or pursuant to a court order. There is instead a power in the court of equity, analogous to its power to issue orders for specific performance of a contract and specific delivery up of converted chattels, to order specific reconveyance in the case of fraudulently induced transfers. This jurisdiction is not, however, confined to fraud. Transfers obtained by spontaneous mistake, innocent misrepresentation, duress, undue influence and breach of fiduciary duty can also be ordered to be reversed.

The chapter is divided into eight sections. After this introduction, Section 2 examines the effect of fraud on the transfer. It will be seen that this never prevents the right passing. Section 3 looks at the availability of specific restitution in equity through the so-called 'equity to rescind'. It will be shown to be generally available, though subject to certain conditions or 'bars'. Section 4 looks at arguments for an immediate trust and finds them wanting. Section 5 considers the possibility of the victim of fraud unilaterally rescinding the transfer and obtaining a retransfer of the right. In the limited circumstances where it is available, the reasoning is shown to be deficient. Section 6 asks whether A can turn B into a trustee of the right without the aid of the court, and concludes that they cannot, while Section 7 asks whether the making of a court order for reconveyance creates a backdated trust, also concluding that it does not. Section 8 concludes that the only 'proprietary' consequence of fraud is that A can seek an order for specific restitution from the court.

2. Was there the Transfer/Creation of a Right?

It is undoubtedly the case that rights pass or are created despite their transfer or creation being induced by fraud. In *Feret v Hill*,⁴ the defendant titleholder to land was fraudulently induced to grant a lease to the claimant, who had represented he would use the premises as a perfumery when all along he intended it as a common brothel. The defendant ejected the claimant, who sued for wrongful ejection. Fraud notwithstanding, the court allowed the claim, holding that there had been the grant of a valid lease. Jervis CJ said that the defendant intended and in fact did grant the claimant a lease and delivered possession of the premises to him. What was there to avoid that or divest the claimant of the lease? Though the defendant's motive for granting the lease was fraudulently induced, it did not affect the grant itself, the essential elements of which were present. The claimant's misrepresentation of the proposed use was 'as to something altogether collateral to the contract.'⁵

⁴ (1854) 15 CB 207.

⁵ *ibid* 223–24. Maule, Cresswell and Crowder JJ gave similar reasons for allowing the claim.

Thus, the question will be whether, despite the fraud, the conditions for the transfer or creation of the right were satisfied. These will, of course, differ according to the nature of the right in question, but provided they are met, the right will either pass or be created. Cases concerned with titles to goods further illustrate this proposition. In *R v Prince*,⁶ a wife forged and cashed in a bank a cheque for £900 on her husband's account, the clerk handing her nine £100 notes. Her lover, to whom she gave one note, was acquitted of handling stolen goods. Title to the notes had passed to the wife despite the clerk's fraudulently induced mistake. In *Clough v London and North Western Railway*,⁷ a contract for the sale of titles to pianos was induced by a down-payment of £68 and a fraudulent misrepresentation that the purchaser intended to pay the balance. Mellor J, giving the judgment of the Court of Exchequer Chamber,⁸ held that 'The fact that the contract was induced by fraud did not ... prevent the property from passing.'⁹

The reason why the right passes despite the fraud, as *Feret v Hill* makes clear, is that, provided all the elements of a valid conveyance are present, there is no super-added requirement that the transfer be not fraudulently induced. The same is true for transfers caused by other forms of mistake, and of duress, undue influence, and breach of fiduciary duty.

In the cases so far discussed, no difference was drawn between a transfer made pursuant to a contract of sale, as in *Clough v London and North Western Railway*, or one outside such contract, as in *R v Prince*. However, there is sometimes said to be an exception in cases of sales of titles to goods where the fraud is such as to invalidate the contract of sale.¹⁰ Here, title is said not to pass.¹¹ The reason seemingly is that the contract is the conveyance, so that, if void, there is no conveyance. This view is, however, mistaken.¹²

The proposition is supposedly demonstrated by the decision of the House of Lords in *Cundy v Lindsay*.¹³ A rogue called Blenkarn ordered handkerchiefs on credit from Lindsay. Blenkarn signed his name to make it look like 'Blenkiron & Co', 'a well-known and solvent house',¹⁴ taking premises at 37 Wood St, Cheapside, the same street from which Blenkiron & Co traded. Lindsay knew about the respectable firm, thought the order came from them, and was accordingly prepared to grant credit. The goods were despatched to 'Blenkiron & Co, 37 Wood

⁶ (1865–72) 1 CCR 150.

⁷ (1871) LR 7 Ex Ch 26.

⁸ Which also included Byles, Blackburn, and Lush JJ.

⁹ (1871) LR 7 Ex 26, 34.

¹⁰ This would be contrary to *Stocks v Wilson* [1913] 2 KB 235 where, despite the contract being invalidated by the Infants Relief Act 1874, title was held to pass.

¹¹ This was, for example, the view of Lords Nicholls and Millett in *Shogun Finance Ltd v Hudson* [2004] 1 AC 919.

¹² See the very helpful discussion in R H Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' in A S Burrows and E Peel (eds), *Contract Terms* (Oxford University Press, 2007), ch 6.

¹³ (1878) 3 App Cas 459.

¹⁴ *ibid* 465 (Lord Cairns LC).

St, Cheapside.' Blenkarn took possession of the goods but never paid for them, selling his title on to Cundy, who purchased in good faith. Cundy was sued by Lindsay in conversion. Liability turned on whether Lindsay's title had passed to Blenkarn and in turn to Cundy. The House of Lords held that it had not, so that Cundy was indeed liable.

Lord Cairns LC formulated the question thus: 'Was there any contract which, with regard to the goods in question in this case, had passed the property in the goods from the Messrs Lindsay to Alfred Blenkarn?' He said: 'If the property in the goods in question passed, it could only pass by way of contract; there is nothing else which could have passed the property.' There was, however, no contract. Cundy intended to deal with Blenkiron & Co, not Blenkarn. Since there was no contract, there could be no passing of title to the goods; it was, he said, 'Idle ... to speak of property passing'.¹⁵

The reasoning is difficult, for it is not clear that the contract is the conveyance in cases of sales of goods. The later Sale of Goods Act 1979, replacing the 1893 Act which codified the common law, speaks instead of the 'intent' of the parties to the contract as the conveyance, which intent is to be found, not only in the express terms of the contract, but in the 'conduct of the parties and the circumstances of the case'.¹⁶ The result in *Cundy* can be defended, however, for if the contract of sale was void, this would not then be an occasion on which the intent of the parties could pass title; we would be thrown back on the general rule that title only passes by deed or delivery,¹⁷ neither of which, as we will see, were present.

The two other speeches in *Cundy v Lindsay* were more equivocal. Lord Hatherley said that no goods were delivered to anyone except for the purpose of transferring property to Blenkiron & Co. There was no sale, just an obtaining by false pretences, and therefore, no delivery of goods with intent to pass property to Blenkarn.¹⁸ Likewise, for Lord Penzance, there was no contract and delivery between the parties. All their letters, although received and answered by Blenkarn, were addressed to Blenkiron & Co, and intended for that firm only. The goods were not delivered to Blenkarn, only to Blenkiron & Co, though at the wrong address.¹⁹

Cundy v Lindsay is not, therefore, a case of a fraudulent misrepresentation preventing property passing; the reason the property did not pass was because the requirements of a valid delivery were not met. Thus, the presence of fraud does not per se invalidate a grant of rights; the question instead is whether the requirements for a valid grant are present.

¹⁵ (1878) 3 App Cas 459, 466.

¹⁶ Sale of Goods Act 1979, s 17(2).

¹⁷ *Cochrane v Moore* (1890) 24 QBD 57.

¹⁸ (1878) 3 App Cas 459, 468.

¹⁹ *ibid* 472.

3. The 'Equity to Rescind'

In *Feret v Hill*, Maule J said that the defendant landlord's 'proper remedy' was 'in a court of equity'.²⁰ What he meant by this was that the defendant should have petitioned the court of equity for an order that the tenant surrender the lease and in the meantime for an injunction restraining them suing at law for wrongful ejection or enforcing any legal judgment.²¹ Then, but only then, could the defendant lawfully eject the plaintiff. This 'proper remedy' is known as the 'Equity to Rescind'.

3.1. Content

The order granted by the court in such cases is a form of specific relief, similar to specific performance, though an order to unwind a transaction rather than to perform it. It was described extra-judicially by Sir Peter Millett as an order for 'specific unperformance'.²²

Examples of such specific relief, which are again not confined to cases of fraud, are legion. In *Clark v Malpas*,²³ a title to land had been conveyed pursuant to a contract of sale which was grossly unfair, the vendor being poor and illiterate. At first instance, the Master of the Rolls declared the conveyance void, directed it to be cancelled, but refused to direct a reconveyance on the ground that it was unnecessary. Selwyn²⁴ and Jessel²⁵ for the plaintiff argued on appeal that this course was 'against the previous understanding of the profession, and it is important that it should be determined what is the correct form'.²⁶ It was held that the proper form of decree was not to declare the deed void, but to direct it to be set aside and order a reconveyance. Knight-Bruce LJ said that 'in the declaration that the conveyance is void the word void is too strong an expression, for the deed is not legally but only equitably void'.²⁷ He therefore ordered the defendant to reconvey. Turner LJ held that the decree instead be framed as an 'order in the usual way that it be set aside and that the Defendant do reconvey the property'.²⁸

²⁰ (1854) 15 CB 207, 226.

²¹ See the form of relief in both *Williams v Bayley* (1866) LR 1 HL 200 and *Cooper v Phibbs* (1867) LR 2 HL 149 (below). Any injunction would also bind the defendant's trustee in bankruptcy, who simply steps into the defendant's shoes in this regard: *Re Eastgate* [1905] 1 KB 465.

²² Sir Peter Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 416.

²³ (1862) 4 De GF & J 401.

²⁴ Later a Lord Justice of Appeal in Chancery.

²⁵ Later a Master of the Rolls.

²⁶ (1862) 4 De GF & J 401, 403.

²⁷ *ibid* 405. We will see that the language of 'equitably void' is false (text to n 51).

²⁸ *ibid* D O'Sullivan, S Elliott & R Zakrzewski, *The Law of Rescission*, 3rd edn (Oxford University Press, 2023), [3.52], maintain that this represented a change in the law, but the arguments of counsel show this to be wrong.

In *Broun v Kennedy*, a title to land was conveyed as a gift to the plaintiff's legal adviser. The plaintiff later brought an action in equity praying 'that the indenture ... might be declared void, and might be delivered up and cancelled', for an injunction, and other relief. Romilly MR ordered that the deed be delivered up to be cancelled and that the defendant 'reconvey the reversion'.²⁹

We also see the grant of orders for 'specific unperformance' in two well-known decisions of the House of Lords. In *Williams v Bayley*,³⁰ a father agreed to pay his son's criminally incurred debts and granted security for such promise under threat of the son's prosecution. When the son absconded, the father successfully filed a bill for a declaration that the two agreements and the securities thereby created were obtained by the defendant by improper pressure, for delivery up of the securities, and for an injunction restraining the defendants from proceeding at law. In *Cooper v Phibbs*,³¹ a case of the spontaneously induced mistaken taking of a lease of a profit, a petition was successfully filed in the Court of Chancery in Ireland for an order 'that the agreement ... might be delivered up to be cancelled, and the Defendant ... perpetually restrained from suing upon the same'.³²

Three other well-known decisions are *Tate v Williamson*,³³ *Allcard v Skinner*,³⁴ and *Newbigging v Adam*.³⁵ In *Tate v Williamson*, an undue influence case involving a sale and purchase of a title to land, Page-Wood VC granted a declaration that the sale agreement be set aside, that the conveyance made in pursuance of that agreement stand only as security for the purchase moneys paid, and that, on their repayment, the defendant reconvey the title to the vendor.³⁶ In *Allcard v Skinner*, the relief sought was 'a declaration that the Plaintiff was induced to make over the property by the undue influence of the Defendant Skinner and repayment of the moneys and re-transfers of the railway stock'. Lindley LJ described the defendant's 'equitable title' as 'imperfect by reason of the influence',³⁷ and would have granted the order but for the claimant's subsequent laches and acquiescence. Cotton LJ, dissenting, held that she could recover 'on the ground that it was property the beneficial interest in which she had never effectually parted with'.³⁸ Because in his view this gave rise to an immediate trust, he disagreed that the claim was barred by laches.³⁹ However, consistently with what was said in *Clark v Malpas*, also an equity case, Lindley LJ said that the conveyance was voidable, not void.⁴⁰ In *Newbigging v Adam*, a contract to become a partner in a business was set aside

²⁹ (1863) 33 Beav 133, 154. His decision was affirmed by the Lords Justices: (1862) 4 De GJ & S 217.

³⁰ (1866) LR 1 HL 200.

³¹ (1867) LR 2 HL 149.

³² *ibid* 153–4.

³³ (1865–66) LR 1 Eq 528.

³⁴ (1887) 36 Ch D 145.

³⁵ (1886) 34 Ch D 582.

³⁶ His decree was upheld by Lord Chelmsford LC: (1866–67) LR 2 Ch App 55.

³⁷ (1887) 36 Ch D 145, 185.

³⁸ *ibid* 172.

³⁹ *ibid* 175.

⁴⁰ *ibid* 186. Bowen LJ also held that the claim was barred by laches and acquiescence.

on the ground of innocent misrepresentation. The decree was that the defendants were liable to repay the amount paid by the plaintiff with interest at four per cent per annum after deducting sums drawn out by the plaintiff with interest, and that the defendant should indemnify the plaintiff against all debts of the partnership to which he had become liable.⁴¹

Finally, an example from the twentieth century is *O'Sullivan v MAM*,⁴² where various contracts were entered into as a result of undue influence. The court ordered the agreements be set aside, an account of the profits be made by the defendants subject to an allowance for reasonable remuneration for their services, the reconveyance of copyrights, and the delivery up of certain master-tapes.

There are three important points to note about the orders just described. First, the remedy is clearly that of the court. Just as there is no ability in a claimant to order a contracting party to perform and invoke the contempt jurisdiction of equity if the order is disobeyed, so too is there no possibility of the 'equity to rescind' being exercisable by claimants alone. To attract the sanction of the court for non-performance, there must first be an order of the court. Second, as *Clark v Malpas* demonstrates, the order of the court is not self-executing. Just as an order that the defendant perform a contract does not *ipso facto* mean that the contract is performed, so too an order for 'specific unperformance' will not by itself revert the rights in the claimant: there needs to be a retransfer by the defendant.⁴³ That is so even if the claimant, as in *Broun v Kennedy*,⁴⁴ is granted a declaration of invalidity. Third, the orders made are often both complex and conditional, as witness those in *Cooper v Phibbs*, *Tate v Williamson* and *Newbigging v Adam*, with fine adjustments being made between the rights of the parties, backed by the coercive powers of the court.

3.2. Nomenclature

The 'equity to rescind', therefore, is nothing more than the issuance of a court order for specific restitution. In this sense, it is no different from a claimant seeking any other order from the court, for example, that the defendant pay the claimant damages for a breach of contract or the commission of a tort, to pay an amount of money representing the defendant's unjust enrichment, to perform a contract, or to deliver up land or converted goods.

The ability of the claimant to seek an order of 'specific unperformance' is, however, often described in terms of them exercising an 'election'⁴⁵ or

⁴¹ (1886) 34 Ch D 582, 585.

⁴² [1985] QB 428.

⁴³ *O'Sullivan* (n 28), citing *Leech v Leech* (1674) 2 Ch Rep 100; *Lady Hudson's Case* (1704) 2 Eq Cas Abr 52; *Clavering v Clavering* (1704) Prec Chan 235; *Harrison v Owen* (1738) 1 Atk 520; *Re Way's Trust* (1864) 2 De G & J 365.

⁴⁴ (1863) 33 Beav 133.

⁴⁵ This is the language of Mellor J in *Clough v London and Northwestern Railway* (1871) LR 7 Ex Ch 26, 34 and Lord Hatherley LC in *Reese River Silver Mining Co Ltd v Smith* (1869–70) LR 4 HL 64, 74.

'choice'⁴⁶ to rescind the transfer. This is a misnomer. An election properly-so-called requires a claimant to choose *at trial* between inconsistent remedies, such as loss or gain for a wrong,⁴⁷ or between an order for compensatory damages for breach of contract or specific performance.⁴⁸ By contrast, in cases of fraudulently induced transfers, no such choice is being made. The victim of the fraud simply has the option of going to court and obtaining an order to rescind the transfer, ie, an order that the defendant reconvey, just as they have the option of suing for damages in the tort of deceit or for a money remedy in unjust enrichment. We would never describe these last as involving the exercise of an 'election', though the claimant always has the 'choice' not to sue at all. We should equally eschew this language where the 'equity to rescind' is concerned. As will be seen, it leads to confusion.

Equally inaccurate is the description of the ability to petition the court as a 'right to rescind'. We see this language in many cases, for example, in the speech of Lord Blackburn in *Erlanger v New Sombrero Phosphate Co.*⁴⁹ However, it is not a right, at least in the Hohfeldian sense of a claim-right,⁵⁰ because there is no correlative duty on anyone. Indeed, until a court order is made, it will be the claimant who is subject to duties, as witness the landlord's duty in *Feret v Hill* not to interfere with his tenant's right to exclusive possession of the premises. Only when the court orders a reconveyance can there said to be any duty on the defendant; even then, the duty is arguably owed to the court, not to the claimant.

Likewise, the 'equity to rescind' is not a 'power', though it was also described as such by Lord Blackburn in almost the same breath as when describing it as a right. It is not a power in any Hohfeldian-sense because it does not give the claimant the ability unilaterally to alter the legal position of another. Just as we would not describe a tort victim seeking an order from a court that the tortfeasor pay compensatory damages as exercising a 'power', nor should we see the exercise of the 'equity to rescind' as such. Once again, it is nothing more than an application to the court for specific as opposed to monetary relief.

Finally, the language of voidability is unhelpful,⁵¹ for it gives the impression that the order of the court itself avoids the transfer. However, we know this is untrue. As the cases demonstrate, though courts often grant declarations of invalidity, the order is not self-executing: it does not invalidate the transfer; some further act is necessary. Of course, any exercise by the defendant of rights in the meantime may be restrained by injunction, but that only proves the point. In this sense, therefore, 'voidable' can only mean valid but liable to be ordered to be reversed.

⁴⁶ '[T]he innocent party is given a choice as to whether to apply to set aside a voidable contract or to affirm it and to continue to be bound by it': *Flowers v Chief Land Registrar* [2018] UKUT 145 (TCC), [26] (Morgan J).

⁴⁷ As in *Neilson v Betts* (1871) LR 5 HL 1 (patent infringement); *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (conversion); *Island Records Ltd v Tring* [1995] 3 All ER 444 (breach of copyright); *Tang Man Sit v Capacious Investments Ltd* [1996] 1 AC 514 (breach of trust).

⁴⁸ *Johnson v Agnew* [1980] AC 367, 392 (Lord Wilberforce).

⁴⁹ (1878) 3 App Cas 1218, 1278.

⁵⁰ W N Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913–14) 23 *Yale LJ* 16, 30–32.

⁵¹ As, eg, in *Clark v Malpas* (1862) 4 De GF & J 401 and *Allcard v Skinner* (1887) 36 Ch D 145.

3.3. Conditionality of the ‘Equity to Rescind’

The making by the court of orders for ‘specific unperformance’ are conditional on the claimant giving back to the defendant any benefits received. *Clarke v Dickson*⁵² was a case involving the sale of shares induced by a fraudulent misrepresentation. The purchaser sought to set the contract aside and obtain an order for the repayment of the purchase price. It was held that the plaintiff’s only option was a claim for damages for deceit. The order was refused because the partnership in which the shares had originally been purchased had since been incorporated, making *restitutio in integrum* impossible. As Crompton J colourfully said, ‘If you are fraudulently induced to buy a cake you may return it and get back the price; but you cannot both eat your cake and return your cake.’⁵³

We see the conditionality of orders to rescind in *Maguire v Makaronis*,⁵⁴ where a solicitor procured a loan contract and grant of security through a breach of fiduciary duty. The borrowers defaulted on the loan but resisted a claim for possession by counterclaiming for the transaction to be set aside. Both the primary judge and a majority of the Victorian Court of Appeal granted the relief sought by the borrowers, though with no requirement that they repay the amounts outstanding on the loan. The High Court of Australia held that relief should have been conditioned on repayment of the loan, otherwise the borrowers would have been ‘left with the fruits of the transaction of which they complain, whereas their equity was to have the whole transaction rescinded and, so far as possible, the parties remitted to their original position.’⁵⁵ Other decisions illustrating this conditionality are the undue influence cases of *Stump v Gaby*⁵⁶ and *Gresley v Mousley*,⁵⁷ discussed below.

In this respect, the so-called ‘equity to rescind’ operates no differently to claims for specific performance of a contract or delivery up of converted goods. Just as not all contracts will be ordered to be specifically enforced and not all converted goods ordered to be delivered up, so too will not all tainted transfers of rights be ordered to be reversed.

3.4. Exigibility of the ‘Equity to Rescind’

The victim of fraud obviously cannot obtain an order for a retransfer of rights against the immediate transferee where the right in question has in the meantime passed to a third party. It is, however, possible to bring a claim for specific relief against such third party, provided they did not give value in exchange in good

⁵² (1858) El Bl & El 148.

⁵³ *ibid* p 152.

⁵⁴ (1997) 188 CLR 449.

⁵⁵ *ibid* 475 (Brennan CJ, Gaudron, McHugh and Gummow JJ). Kirby J gave a separate judgment but agreed with this part of the majority’s reasoning.

⁵⁶ (1852) 2 De G M & G 623.

⁵⁷ (1859) 4 De G & J 78.

faith and without notice of the reason for rescission. As Lord Westbury said in *Phillips v Phillips*:

[W]here there are circumstances that give rise to an equity as distinguished from an equitable estate – as for example, an equity to set aside a deed for fraud, or to correct it for mistake – and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere.⁵⁸

His lordship does not here distinguish between subsequent purchasers of legal and equitable rights.⁵⁹ In this sense, therefore, the ‘equity to rescind’ does not operate against third parties in the same way as do interests such as equities of redemption, restrictive covenants over land, and interests of beneficiaries of trusts, all of which bind purchasers for value without notice of equitable rights, being postponed only as against those taking *legal* rights.⁶⁰ It is for this reason that the ‘equity to rescind’ is, unhelpfully, described as a ‘mere equity’, as opposed to an ‘equitable interest’. That it behaves differently should not be at all surprising, for it is not a right or power at all, merely the ability to petition a court for specific relief; what is surprising is that it has any third-party effect at all.

3.5. Loss of the ‘Equity to Rescind’

Not every claim for an order for specific performance of a contract will succeed. The claim might fail for various reasons, including the fact that the contract is for personal services, that damages are an adequate remedy, it would require constant supervision by the court, laches and acquiescence, or that the order would cause undue hardship. We might call such factors ‘bars’ to specific performance. In the same way, though the elements of claim for an order of ‘specific unperformance’ may be made out, it might still fail for various reasons. These ‘bars to rescission’ are fourfold: affirmation; the intervention of third-party rights; laches; and (as already seen) the impossibility of counter-restitution.⁶¹

3.5.1. Affirmation

Affirmation of the transfer or contract pursuant to which the rights were granted entails the loss of the ‘equity to rescind’. While affirmation will be rare in cases

⁵⁸ *Phillips v Phillips* (1862) 4 De G F & J 208.

⁵⁹ A Reilly, ‘What were Lord Westbury’s Intentions in *Phillips v Phillips*? Bona Fide Purchase of an Equitable Interest’ [2021] CLJ 156.

⁶⁰ *Pilcher v Rawlins* (1872) LR 7 Ch App 259.

⁶¹ A fifth bar, that there could be no rescission in the case of an executed conveyance involving an innocent misrepresentation, laid down in *Seddon v North Eastern Salt Co* [1905] 1 Ch 326 and *Angel v Jay* [1911] 1 KB 666, was abrogated by s 1(b) of the Misrepresentation Act 1967, which provides that ‘a person may rescind a contract, notwithstanding that it has been performed, if he would otherwise have been entitled to rescind without alleging fraud.’

of fraud, there are examples. In *Re Hop and Malt Exchange and Warehouse Co*,⁶² the claimant was induced to take shares in a company on the faith of fraudulent misrepresentations contained in the prospectus. He subsequently instructed his broker to sell the shares. Lord Romilly MR held that he had thereby affirmed the contract and refused an application for an order that the company remove him from the share register.

3.5.2. *Third-party Rights have Intervened*

The intervention of third-party rights will also mean the court refusing to order relief. In *Oakes v Turquand*,⁶³ the House of Lords held that a shareholder could no longer rescind a contract to take shares on the ground of fraudulent misrepresentation once the company had gone into insolvency since that would prejudice the rights of the company's creditors. Similarly, in *Society of Lloyd's v Leighs*,⁶⁴ the Court of Appeal held that a contract between a Lloyd's Name and certain Lloyd's companies authorising the companies to make settlements on behalf of the Name could not be rescinded for fraudulent misrepresentation because rescission would affect third parties with whom settlements had been made.

3.5.3. *Laches*

There is a general defence in equity of laches, whereby undue delay prejudicial to the defendant bars any claim. As seen, the claim by the nun in *Allcard v Skinner* for an order to rescind a transfer of shares to the Lady Superior on the ground of undue influence was barred because she brought it more than five years after leaving the sisterhood. Unlike statutory periods of limitation, there is no fixed point at which laches takes effect but necessitates an exercise of judgment by the court.

3.5.4. *Impossibility of Counter-Restitution*

We saw that an order for 'specific unperformance' was conditional on the claimant making counter-restitution to the defendant. It follows that where counter-restitution is impossible, no order will issue. Thus, in *Boyd & Forrest v Glasgow & South Western Ry Co*,⁶⁵ a contract for the construction of a railway was completely performed before an action was brought to rescind it on the ground of innocent misrepresentation as to the nature of the strata in which the work was to be done, which allegedly made the work performed totally different from that contracted for, and for which the contractor then claimed to be paid on the basis of a *quantum*

⁶² (1866) LR 1 Eq 483.

⁶³ (1867) LR 2 HL 325.

⁶⁴ [1997] CLC 1398.

⁶⁵ 1915 SC (HL) 20.

meruit. One ground on which the claim failed was the impossibility of *restitutio in integrum*: the land could not be restored to its condition prior to the construction of the railway.

Two points, however, should be noted. First, there need not always be counter-restitution *in specie*: the court can where appropriate order money payments *in lieu*.⁶⁶ Second, courts are reluctant to find impossibility of counter-restitution in cases of fraudulent misrepresentation. According to Lord Wright in *Spence v Crawford*, 'the court will be more drastic in exercising its discretionary powers in a case of fraud than in a case of innocent misrepresentation'.⁶⁷

4. Is the Transferred Right Held on an Immediate Trust?

Having seen that the right will pass despite the presence of fraud so long only as the elements required for the transfer are present, but that courts of equity are sometimes willing, via the 'equity to rescind', to make orders for 'specific unperformance', the question arises whether a trust of the right arises immediately on receipt. There are some cases which say, or supposedly say, that it does.⁶⁸ There seem to be four arguments for an immediate trust: that A has 'an equitable estate' following the transfer; that fraud causes A's equitable title/beneficial interest not to pass to B; that B's conscience is affected; and, finally, that a trust arises simply because of the fraud. None, however, are convincing.

4.1. A has 'An Equitable Estate'

Following the transfer of the right to B, A is sometimes said to obtain 'an equitable estate', the presence of which means that B holds the right on trust for A.⁶⁹ However, this 'equitable estate' turns out to be nothing more than the 'equity to rescind', not an interest under a trust.

In *Stump v Gaby*,⁷⁰ a case of undue influence, Ayliffe White was, during his life, in very embarrassed circumstances, and in prison or under arrest for debt. His solicitor, Gaby, took advantage of the situation and obtained from White a

⁶⁶ *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218.

⁶⁷ *Spence v Crawford* [1939] 3 All ER 271, 288.

⁶⁸ According to R Chambers, *Resulting Trusts*, (Oxford, Clarendon Press, 1987) 86, 'whenever a provider of property to another is entitled to rescind a transaction ... and thereby recover any portion of that property, the recipient holds the recoverable property on a resulting trust for the provider from the moment the right of rescission ... first arises'.

⁶⁹ See, eg, Taylor J in *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265, 284, discussed below, text to nn 81–83.

⁷⁰ (1852) 2 De G M & G 623.

deed of assignment of his interest in land for a wholly inadequate consideration. White died soon after and his heir at law sought a declaration that the conveyance was null and void and that possession of the premises be given up to the plaintiff, together with all deeds and muniments of title relating thereto. One question was whether White's ability to petition the court came to an end on his death. Lord St Leonards LC held that it did not, that White remained an owner, subject to repayment of the money to the purchaser. He therefore had a devisable 'equitable estate'.⁷¹ However, what the court did not say was that White was the beneficiary of a trust. Notwithstanding the language of his remaining 'the owner' and having 'an equitable estate', the only issue was whether the 'equity to rescind' came to an end on his death.

Also said to be in favour of an immediate trust is *Gresley v Mousley*,⁷² another case of a purchase by solicitor from his client at an under-value. The client brought a bill in equity to set aside the sale, praying that the conveyance be declared fraudulent and allowed to stand only as a security for what, if anything, was due from him and for consequential relief. One issue was whether a successor in title of the now deceased client could maintain the suit. It was held that he could. Knight-Bruce LJ simply said the court was bound by *Stump v Gaby*, which in any case was rightly decided.⁷³ Turner LJ also relied on *Stump v Gaby*, saying that the decree of the court did not 'create a wholly new right' but 'proceeds upon a pre-existing right. The mere circumstance of an estate not being recoverable otherwise than by action or suit clearly does not prevent it from being devisable'.⁷⁴ Unfortunately, there is no discussion of the nature of this 'pre-existing right', which once again can only be the 'equity to rescind'.

A third decision, *Melbourne Banking Corp'n v Brougham (No 2)*,⁷⁵ involved the release of an equity of redemption to a mortgagee because of an allegedly fraudulent misrepresentation. There was found to be no misrepresentation. A subsidiary question was whether, if the release was voidable, an 'equity to set it aside' passed to the respondent under a general conveyance from the mortgagor's successor or whether it had to be specifically assigned. Lord Selbourne LC held that a general conveyance was enough. Once again, however, the court did not say there was a trust.

More difficult is *Re Garnett*,⁷⁶ involving a release by residuary legatees of their rights under their uncle's will. In earlier proceedings, the release was ordered to be set aside because made without independent advice and in ignorance of the value of the rights. The question now was whether those rights were caught by a covenant to settle future property. As a matter of construction of the covenant, the Court of Appeal held they were not. As Lopes LJ explained: "'future" can only mean

⁷¹ *ibid* 630.

⁷² (1859) 4 De G & J 78.

⁷³ *ibid* p 89.

⁷⁴ (1859) 4 De G & J 78, 92–3.

⁷⁵ (1882) 7 App Cas 307.

⁷⁶ (1886) 33 Ch D 300.

one thing – the exclusion of property which was originally the wife's at the time of the settlement.⁷⁷ However, there are statements to the effect that, even if this were not so, the rights would not be caught. Cotton LJ said: 'The setting aside of the release did not give them any new right, but merely had the effect of removing that which, if it had stood, would have been a bar and have prevented their previously existing right'⁷⁸ Lindley LJ said that 'setting aside a release confers no new title', it instead removed 'an impediment to the enjoyment of a pre-existing title. The lady did not acquire a title when the release was set aside. She always was entitled notwithstanding the release.'⁷⁹ No authority, however, was cited, and the point is *obiter*. Moreover, it is inconsistent with Lindley LJ's own later statement in *Allcard v Skinner*, discussed above, that 'Gifts liable to be set aside by the Court on the ground of undue influence have always been treated as voidable and not void.'⁸⁰

The point was directly addressed by the High Court of Australia in *Latec Investments Ltd v Hotel Terrigal Pty Ltd*,⁸¹ where a sale of a title to land was made by a mortgagee to its wholly owned subsidiary. The mortgagor sought and was granted an order setting the sale aside on the ground of equitable fraud. However, in the meantime, the subsidiary had granted an equitable charge over the title to an innocent third party. Was the third party chargee bound? It argued that the mortgagor only had an 'equity' to have the sale set aside, not an equitable interest, and that this 'equity' was not binding on a good faith purchaser for value, not only of a legal interest, but, as here, of an equitable one. The court agreed. Kitto J said that the mortgagor had only 'an equity', not an equitable interest,⁸² while Menzies J said that *Stump v Gaby* only described the result of a successful suit for rescission, not an immediate trust.⁸³

An immediate trust was also rejected by Brennan J in *Daly v Sydney Stock Exchange Ltd*,⁸⁴ involving the non-disclosure by a firm of stockbrokers to its client that it was in a parlous financial state. An employee of the firm had advised the client to lend it money, which money was lost on the firm's insolvency. There being a fiduciary relationship between the stockbrokers and their client, the latter had 'an equity to rescind', meaning he could petition the court for an order setting aside the contract of loan. Rescission, however, had never been sought. For the purposes of a statutory compensation scheme, it had to be decided whether the loan monies were paid to the stockbrokers 'as trustees'. The High Court held that the scheme only applied to express rather than constructive trusts. Brennan J went on to say there could not even be a constructive trust as the contract of loan had not been

⁷⁷ *ibid* 307; see also 304 (Cotton LJ); 306 (Lindley LJ).

⁷⁸ *ibid* 303.

⁷⁹ *ibid* 300, 306.

⁸⁰ (1887) 36 Ch D 145, 186.

⁸¹ (1965) 113 CLR 265.

⁸² *ibid* 278. As we will see (text to nn 139–148), the orthodoxy is that a trust arises on rescission, backdated to the date of transfer.

⁸³ (1965) 113 CLR 265, 291. Taylor J held that there was a fully-fledged equitable interest before rescission but that, for different reasons, it did not bind the equitable chargee.

⁸⁴ (1985–86) 160 CLR 371.

rescinded.⁸⁵ There was no immediate trust, only the possibility of one coming into existence on rescission.⁸⁶

The approach of Brennan J has been followed in England and Wales. In *Lonrho plc v Al-Fayed (No 2)*,⁸⁷ the claimant alleged that it was fraudulently induced to sell a parcel of shares to the defendant. This meant, it argued, that it was entitled to rescind the sale and that the defendant, from the start, held the shares for it on trust, with the result that they were subject to various fiduciary obligations and, on the facts alleged, acted in breach of such obligations. The claim was dismissed by Millett J, holding the argument to be ‘misconceived’. Though it might be the case that on election to set aside the transfer ‘the beneficial interest in the property will be treated as having remained vested in [the plaintiff] throughout, at least to the extent necessary to support any tracing claim’, the notion of an immediate trust was inconsistent with the contract and conveyance being valid until set aside.⁸⁸

In *Bristol and West Building Society v Mothew*,⁸⁹ a solicitor negligently misrepresented to a mortgagee that his mortgagor client would have no other loans secured on the title. In fact, to the knowledge of the solicitor, the mortgagor intended to grant a second charge to another lender to secure a small indebtedness. The loan monies were paid to the solicitor, who handed them to the mortgagor. Chadwick J held that the loan monies were held on an immediate constructive trust because of the solicitor’s misrepresentation, with the consequence that the solicitor committed a breach of trust in paying them over to the mortgagor. The Court of Appeal disagreed. Millett LJ (as he now was) held that though the misrepresentation meant that the transaction could be avoided in equity, it was not void.⁹⁰

Thus, the notion of an immediate trust is inconsistent with the rule that the transfer of rights is valid, even though the court of equity might later order it to be reversed. Such a conclusion is also consistent with the rule encountered above that the ‘equity to rescind’ does not behave with respect to third parties in the same way as the interest of a beneficiary of a trust, that it is defeasible, not only by equity’s darling, but also by a purchaser for value without notice of an equitable interest.⁹¹

4.2. Equitable or Beneficial Interest does Not Pass

As seen, the right in question will be transferred despite its being induced by a fraudulent misrepresentation so long only as the requirements for a transfer are met. Some cases say, however, that A retains an ‘equitable’ or ‘beneficial’ interest in the ‘property’, which retention causes B to hold the right on immediate trust for A.

⁸⁵ *ibid* 389–90.

⁸⁶ Whether this should in fact be so is discussed below, text to nn 139–148.

⁸⁷ [1992] 1 WLR 1.

⁸⁸ *ibid* 12.

⁸⁹ [1998] Ch 1.

⁹⁰ *ibid* 22.

⁹¹ Above, text to nn 58–60.

We saw this thinking in Cotton LJ's dissent in *Allcard v Skinner*,⁹² though it was rejected by the majority. The same thinking, however, appears in the spontaneous mistake case of *Chase Manhattan v Israel-British Bank*, where Gouling J held that 'a person who pays money to another under a factual mistake retains an equitable property in it.'⁹³ The notion that the transferor retains an 'equitable' or 'beneficial' interest is, however, flawed.

First, and most obviously, A has no 'equitable' or 'beneficial' interest to retain. It was for this reason that *Chase Manhattan* was rightly disapproved by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC*, with Gouling J's reasoning described as 'fallacious.'⁹⁴ Lord Browne-Wilkinson said that 'a person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights.'⁹⁵ That must be right. Although A may hold the right 'beneficially' before the transfer, he does not hold with respect to it a separate 'beneficial interest'. 'Beneficial', in other words, is an adverb, not an adjective, describing a way in which rights are held, not a type of right. Moreover, if it really were the case that a right-holder had to have 'the beneficial interest' to retain, a trustee who was the victim of fraud, who could not be said to have 'the beneficial interest', would be unable to sue.

Second, even if there were such a right, we still need an explanation why it does not pass. If the fraud is 'altogether collateral' to the passing of the underlying right, why is it not equally collateral to the transfer of the equitable/beneficial interest? Unfortunately, no case attempts to explain its retention. Indeed, they do not even explain what is necessary for it to pass in the first place, perhaps because there can be no such requirement.

4.3. Transferee's Conscience is Affected

A third argument for a trust is that because equity is a 'court of conscience', trusts arise whenever a right-holder's 'conscience', whatever that might mean, is affected, and that a person who fraudulently induces a transfer to himself of a right is such a person because of his knowledge of the transferor's mistake. We see this thinking in Lord Browne-Wilkinson's speech in *Westdeutsche*, where he said that the result in *Chase Manhattan* could be justified on the basis that the bank retained the money after learning of the payor's mistake.⁹⁶

This reasoning does not work. First, the notion that 'equity is a court of conscience' expresses nothing more than the relationship between law and equity,

⁹² (1887) 36 Ch D 145.

⁹³ [1981] Ch 105, 119.

⁹⁴ [1996] AC 669, 706.

⁹⁵ *ibid.*

⁹⁶ [1996] AC 669, 715.

between competing legal systems. It describes the fact that courts of equity do not sit on appeal from common law courts, do not overturn common law judgments, but instead direct defendants not to enforce their common law rights. As Lord Hardwicke explained almost three centuries ago:

Though this court cannot set aside a judgment of a common law court obtained against conscience, yet will it decree the party to acknowledge satisfaction on that judgment, though he has received nothing; because obtained where nothing was due. So it cannot set aside a fine for being obtained by fraud and imposition ... yet, on a conveyance so obtained, this court never sent the plaintiff to the Common Bench to set it aside, but considers the person obtaining the estate, even by fine, as a trustee, and decrees him to reconvey on the general ground of laying hold of the ill-conscience of the party, to make him do what is necessary to restore matters as before.⁹⁷

Thus, the phrase ‘equity is a court of conscience’ describes not a liability rule but an aspect of equitable legal method.

Second, it is not clear how the fact that the recipient’s knowledge of the mistake is relevant. Knowledge will certainly not convey to the defendant the fact that they now have the duties of a trustee, which is what Lord Browne-Wilkinson was concerned about when rejecting the notion that there could be a trust absent knowledge.⁹⁸ The best it can show, assuming the transferee was not an avid reader of the law reports, was that they now knew they were liable to be ordered to repay/retransfer. Not surprisingly, Lord Browne-Wilkinson’s proposition was doubted extra-judicially by Sir Peter Millett: ‘By itself notice of the existence of a ground of restitution is obviously insufficient to found a proprietary remedy; it is merely notice of a personal right to an account and payment.’⁹⁹

4.4. Immediate Trust Simply because it is Fraud

The final ‘argument’ for an immediate trust is simply that they arise in cases of fraudulently induced transfers. This notion again comes from *Westdeutsche Landesbank Girozentrale v Islington LBC*, where Lord Browne-Wilkinson said that coins which were stolen were traceable in equity because held by the thief on trust, and though it was:

... difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity. Thus, an infant who has obtained property by fraud is bound in equity to restore it: *Stocks v Wilson* [1913] 2 KB 235, 244; *R Leslie Ltd v Sheill* [1914] 3 KB 607. Moneys stolen from a bank account can be traced in equity: *Bankers*

⁹⁷ *Barnesley v Powell* (1749) 1 Ves Snr 284, 289. See also F W Maitland, *Equity* (Cambridge University Press, 1909), 9.

⁹⁸ [1996] AC 669, 709.

⁹⁹ See n 22, 413.

Trust Co v Shapiral [1980] 1 WLR 1274, 1282C-E: see also *McCormick v. Grogan* (1869) LR 4 HL 82, 97.¹⁰⁰

There are a number of problems with this statement.

First, the authorities cited, as Rimer J noted in *Shalson v Russo*,¹⁰¹ do not support the proposition. The most obvious is *McCormick v Grogan*, a case concerning secret trusts, where the alleged ‘fraud’ was not any deceit but simply the reliance in litigation on statutory rules barring the admission of certain types of evidence of alleged declarations of trust.¹⁰² Second, Lord Browne-Wilkinson illegitimately jumps from theft of a physical thing (coins) to the fraudulently induced transfer of a right. Although both constitute crimes,¹⁰³ they are, from a civil law perspective, radically different: title passes in the case of the latter, though not the former.¹⁰⁴ Indeed, even in the case of the former, a trust seems impossible to envisage in terms of subject-matter. Thus, the fact that a transfer was fraudulently induced cannot, ipso facto, turn the transferee into a trustee.

5. Can the Transferor Unilaterally Revest the Right?

We have seen that A has an ‘equity to rescind’, ie, the ability to petition the court of equity for an order of ‘specific unperformance’. The question then is whether A can additionally effect a retransfer of the right themselves, without the aid of either the court or the defendant. According to *Feret v Hill*,¹⁰⁵ the clear answer is that they cannot: only the court of equity has the power to make an order that the lease be surrendered and injunct the lessee from suing at law; only the court of equity can impose sanctions for non-compliance. As we saw, the right in question was created, the elements of a valid grant being present.

However, it is sometimes thought that an exception exists where titles to goods are transferred pursuant to fraudulently induced contracts of sale. Thus, in *Car and Universal Finance Ltd v Caldwell*,¹⁰⁶ a fraudulently induced vendor of a title to a car was able unilaterally to revest the title in himself, so causing a successor in title to the fraudster to commit the tort of conversion.

How does this work? Although the ‘equity to rescind’, as its name implies, is only available from a court of equity, and, like orders for specific performance and delivery up, dependent on an order of that court, the common law in the mid-nineteenth century did two radical things. First, it allowed rescission of a contract of sale in cases of deceit (and possibly duress). Second, it held that this could be effected by the defrauded party unilaterally. That no court order was

¹⁰⁰ [1996] AC 669, 715–16.

¹⁰¹ [2005] Ch 281, [106]–[127].

¹⁰² *Blackwell v Blackwell* [1929] AC 318.

¹⁰³ Theft Act 1968, s 1; Fraud Act 2006, ss 14 & 15.

¹⁰⁴ A difference noted by the Court of Appeal in *Twinsectra Ltd v Yardley* [1999] Lloyd’s Rep Bank 438.

¹⁰⁵ (1854) 15 CB 207 (above, text to nn 4–5).

¹⁰⁶ [1965] 1 QB 525.

necessary is, however, immediately difficult. How are we to know whether there has been any affirmation, whether third party rights have intervened, or whether orders for counter-restitution need be made? Moreover, if they do need to be made, who is to make them? Indeed, who is to judge whether counter-restitution is even possible?

Not surprisingly, authority for the notion that title can be revested at law and without a court order is weak. The point has previously been addressed at length,¹⁰⁷ but, essentially, it was invented by Parke B in the mid-nineteenth century in *Load v Green*.¹⁰⁸ In that it was based on previous authority which does not support it and is inconsistent with principle, it should no longer be followed.¹⁰⁹

However, even assuming that rescission at law can be effected unilaterally, it is not clear how this causes the right to revest, with the point being merely assumed in the case-law.¹¹⁰ As seen, it does not happen with the making of an order pursuant to the 'equity to rescind', which is simply an 'order' that it be done, not the reversal of the transfer itself, even where there is granted a declaration of invalidity. Moreover, the doctrine is odd in that it is confined to the passing of titles of goods pursuant to contracts of sale; it does not apply to transfers of any other rights. Though several explanations have been proffered, none work.

5.1. Titles to Goods can Revest without Formality

John Cartwright explains the revesting of the right on the ground that titles to goods can revest 'without further formality', whereas rights such as shares or titles to land need a formal act of reconveyance.¹¹¹ This, however, assumes the point which needs to be proved.

5.2. Goods can be 'Recaptured'

Janet O'Sullivan suggests that the reason titles to goods operate differently to other rights is that goods can be 'recaptured'.¹¹² However, land can be 'recaptured', yet there is no automatic revesting, as *Feret v Hill* illustrates. Moreover, there is no 'recapture' of goods in many of the leading cases, including *Car & Universal Finance* itself. Further, such 'recapture' will only be lawful where an injunction has

¹⁰⁷ W Swadling, 'Property, Rescission, and the Common Law' (2005) 121 LQR 123, 142–52.

¹⁰⁸ (1846) 15 M & W 216.

¹⁰⁹ An argument accepted extra-judicially by Lord Millett in 'Proprietary Restitution', in S Degeling and J Edelman, *Equity in Commercial Law* (2005), 309, 320, fn 31.

¹¹⁰ See, eg, *Load v Green* (1846) M & W 216, 221 (Parke B); *Car & Universal Finance Ltd v Caldwell* [1965] 1 QB 525; *Newtons of Wembley Ltd v Williams* [1965] 1 QB 560, 571 (Sellers LJ).

¹¹¹ J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (6th edn, 2022) [4.11]. It might be asked why 'delivery' or 'contract' are not rules of formality. Delivery is certainly described as a 'formal act' by McCardie J in *Armstrong v Jackson* [1917] 2 KB 822, 825.

¹¹² J O'Sullivan, 'Rescission as a Self-Help Remedy: A Critical Analysis' (2000) 59 CLJ 509, 529.

been granted against the right-holder. Otherwise, as *Feret v Hill* demonstrates, any 'recapture' will be tortious. The argument again assumes what it sets out to prove.

5.3. Contract is the Conveyance

A third explanation for rescission of the contract effecting a reversion of title is that the contract is the conveyance and that that contract, because of the rescission, has now gone. However, it is once again unclear that the contract really is the conveyance. As seen, the Sale of Goods Act 1979 provides that the passage of title is determined by the intent of the parties to the contract of sale, and that such intent is to be found not only in the express terms of the contract but also from 'the conduct of the parties and the circumstances of the case'.¹¹³ Moreover, even if the contract did express the parties' intent as to the passing of title, so that no outside factors were involved, the avoidance of the contract cannot negate the fact that the relevant intent was present and effected the transfer. As seen, even an order made by a court of equity for specific unperformance is not self-executing: the defendant still needs to execute a retransfer or deliver up the relevant documents. How, then, is it that a victim of fraud can go further and effect a retransfer of the rights themselves?

5.4. Transferor can Withdraw Consent

It has been said that because transfers of rights are conditional upon the transferor's consent, the law gives the transferor a power in cases of fraudulently induced transfers to revoke their consent, and it is this revocation of consent, which happens on the exercise of the power, which effects the reversion of the right.¹¹⁴ Thus, Elise Bant writes:

Transfers of property, just like contracts, are conditional on the transferor's intention – in the case of transfers, the transferor must intend to pass title. Where the transferor's intention to transfer was impaired (by any legal or equitable vitiating factor), the transfer is effective to give the defendant the full legal beneficial title to the asset. But the transfer is voidable at the instance of the transferor. A claimant to such a vitiated transfer is entitled to revoke her consent to the transfer of title and obtain a proprietary interest in the asset. This analysis both explains and justifies the availability of proprietary restitution in cases of vitiated consent transfers.¹¹⁵

The same view had earlier been expressed by Birke Häcker who, on the assumption that some transfers of title were void, said:

[W]here title does pass, it need not do so unimpeachably. Less fundamental defects of consent may allow the transferor to avoid the conveyance and thereby to 'pull back' his

¹¹³ Above, text to n 16.

¹¹⁴ Though we will deal with this for the moment at common law, advocates of this approach claim that it explains both common law and equitable rescission.

¹¹⁵ Elise Bant, 'Reconsidering the Role of Election in Rescission' (2012) OJLS 467, 480.

former title. Yet not all impairments of consent warrant this response. Historically, the common law has limited its intervention to cases in which consent was procured by fraud or duress, leaving equity to deal with other instances where a defect of consent was regarded as relevant.¹¹⁶

There are several problems with this thinking.

First, it is circular to say, as does Häcker, that the right need not pass ‘unimpeachably’. That is certainly true if there is a power to re-vest the right, but it is hardly an explanation why such power exists in the first place.

Second, no explanation is proffered as to why the transferor is given the power to revoke their consent. Other litigants must put their complaints before a court. Why are these people being singled out for special treatment? Why should they not have to litigate like everyone else?

Third, no explanation is given why this power to withdraw consent is limited at common law to cases of fraud and (possibly) duress. Why are cases of innocent misrepresentation or even spontaneous mistake not ones where the transferor’s consent to the transfer can be withdrawn? Both also involve defects of consent recognised at common law such that they generate personal claims in unjust enrichment. Indeed, why does the ‘power’ to withdraw consent not avail a transferor in all cases of unjust enrichment recognised by the common law, including failure of basis and under the so-called *Woolwich*¹¹⁷ principle? It might be objected that such cases do not involve defective consents, but why should that matter? All transfers require consent, and although there will have been a defect in consent in both the fraud and duress cases, it will not have been such as to prevent the right passing and so is irrelevant. If the arguments of Bant and Häcker are correct, there is no reason why the transferor should not withdraw their consent in every unjust enrichment case. Yet we know this is not true. The argument, therefore, proves too much.

Fourth, even in cases of fraud and duress, why is withdrawal of consent only available at law with respect to titles to goods conveyed pursuant to contracts of sale? Why not titles to goods conveyed pursuant to a gift? And titles to land? And shares? And intellectual property rights? The explanations of Bant and Häcker would seem to be nothing more than *ex post facto* rationalisations of the existing law. It does not, as Bant claims, both explain and justify the law.

Finally, we would not describe cases like *Kelly v Solari*,¹¹⁸ where a claim was made for repayment of a mistaken payment, as involving revocations of consent. They are instead claims for an order from the court that the defendant pay the claimant a sum of money. Had a claim been brought in equity in *Feret v Hill* for an order that the defendant surrender the lease, it would have been no different, save that the claim would be for specific rather than monetary relief. We should likewise eschew the language of ‘revocation of consent’ in such cases.

¹¹⁶ Birke Häcker, ‘Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model’ [2009] CLJ 324, 330; see also 344, 355, 357.

¹¹⁷ *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

¹¹⁸ (1841) 9 M & W 54.

6. Can A Turn B into a Trustee without the Aid of the Court?

It is undoubtedly the case that A can petition the court of equity for an order that the transferee re-transfer the right; this is the so-called 'equity to rescind'. As will be seen, once such order is made, B is said to be a trustee for A, such trust backdating to the point of transfer. However, a prior question is whether A can generate a trust for themselves without going to court. Can they unilaterally rescind the transfer 'in equity', thereby turning B into a trustee?

6.1. Why Rescission in Equity?

The orthodoxy, as seen, is that, though there is an Hohfeldian power at law to rescind a contract for the sale of goods for fraudulent misrepresentation and (possibly) duress, that is the limit of common law rescission. Events such as innocent misrepresentation, spontaneous mistake, undue influence, and breach of fiduciary duty do not give rise to this 'power' at law. Moreover, even a fraudulently induced conveyance of a title to land or one brought about by duress cannot be rescinded at law. In all these cases, transferors must resort to Equity.

6.2. Unilateral Rescission in Equity?

The question, then, is how the transferor effects rescission in Equity. The position seen so far is that though the transferor has an 'equity to rescind', this is not an Hohfeldian power, merely the ability to petition the court for an order of 'specific unperformance' and consequential relief. On that basis, there can be no such thing as unilateral rescission in equity, just as there is no such thing as unilateral orders for specific performance of a contract or for delivery up of converted goods. However, it is sometimes said that rescission in equity (not just at law) is the act of the party themselves. If so, then something fundamental has happened to the 'equity to rescind'. It no longer comprises the ability to seek a remedy from a court but a true Hohfeldian power, and we have moved from the realm of procedure to that of substance.

However, it is difficult once again to see how it can be a power properly-so-called.¹¹⁹ The same issues as were discussed in relation to common law rescission apply here, namely, how the 'bars' to rescission can apply without an adjudication and orders made by a court. For instance, the 'equity to rescind' is conditional upon the claimant making counter-restitution. Absent a court order, how is it possible to

¹¹⁹ See generally, J O'Sullivan (n 112).

know whether counter-restitution is needed and the form it should take? Likewise, how are issues such as the laches and acquiescence to be adjudged? Do we leave it to the claimant to make such decisions?

Not surprisingly, there is no shortage of dicta to the effect that it is the court which does the rescinding, not the transferor. Thus, Lord Blackburn in *Erlanger v New Sombrero Phosphate Co*, after referring to the common law remedy of damages, said:

But a court of equity could not give damages, and, unless it can rescind the contract, can give no relief. And on the other hand, it can take accounts of profits, and make allowance for deterioration. And I think the practice has always been for a court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract.¹²⁰

These words make no sense when we see the transferor as themselves effecting rescission; talk throughout of ‘the court’ shows that this is a remedy of the court.

In the same vein, we saw Lord Wright’s description of the remedy in *Spence v Crawford*¹²¹ as being within the discretion of the court. Talking of Lord Blackburn’s *dictum* cited immediately above, he said:

... Lord Blackburn is careful not to seek to tie the hands of the court by attempting to form any rigid rules. The court must fix its eyes on the goal of doing ‘what is practically just’. How that goal may be reached must depend on the circumstances of the case, but the court will be more drastic in exercising its discretionary powers in a case of fraud than in a case of innocent misrepresentation.¹²²

Lord Wright also spoke of courts going ‘a long way in ordering restitution if the substantial identity of the subject-matter of the contract remains,’ ordering ‘rescission and mutual restitution in certain cases,’ and doing their best to ‘unravel the complexities of any particular case, which may in some cases involve adjustments on both sides.’¹²³ Again, none of this is consistent with the notion that it is the claimant rather than the court which effects rescission.

The decision of the High Court of Australia in *Alati v Kruger*,¹²⁴ which is often cited as authority for the view that rescission in equity is the act of the transferor, is in fact a good illustration of the opposite proposition. Although the majority cite the decision of the House of Lords in *Reese River Silver Mining Co v Smith*¹²⁵ to say it is the ‘act of the party’, that case turned on a peculiarity of the statutory scheme in question. Moreover, the point was not in issue in *Alati*. Furthermore, there were difficult questions concerning the plaintiff’s ability to make *restitutio in integrum*. It was held that though this might have barred any claim to rescind at law, it was:

¹²⁰ (1878) 3 App Cas 1218, 1278.

¹²¹ [1939] 3 All ER 271, 288; above, text to n 67.

¹²² *Ibid* 289.

¹²³ *Ibid*.

¹²⁴ (1955) 94 CLR 216.

¹²⁵ (1869–70) LR 4 HL 64, 73.

... necessary here to apply the doctrines of equity, and equity has always regarded as valid the disaffirmance of a contract induced by fraud where the situation is such that, by the exercise of its powers, as for example the power to take accounts of profits and to direct inquiries as to allowances proper to be made for deterioration, it can do what is practically just and thereby replace the parties substantially, even though not precisely, in statu quo.¹²⁶

Such a statement is once again inconsistent with rescission being the act of claimants themselves. Moreover, it is not enough, as the High Court asserts, to say that:

The function of a court in which proceedings are taken is to adjudicate upon the validity of the purported disaffirmance as an act avoiding the transaction ab initio, and, if it is valid, to give effect to it and make appropriate consequential orders.¹²⁷

Any process of adjudication and the making of consequential orders gives the lie to the notion of equitable rescission as the act of the party.

So far as English authority is concerned, it has been argued that the point is concluded in favour of rescission being an act of the party by the decision of House of Lords in *Abram Steamship Co Ltd v Westville Shipping Co Ltd*.¹²⁸ Whilst it is true that Lord Atkinson there said, in a minority speech, that rescission was the act of the party, the authorities on which he relied, *Hunt v Silk*¹²⁹ and *Blackburn v Smith*,¹³⁰ do not support that proposition, for both are simple breach of contract cases, not ones involving rescission. The confusion is probably explained by the fact that, at that time, ‘rescission’ was used to describe both termination for breach and rescission properly-co-called,¹³¹ and termination for breach can undoubtedly be brought about by the act of the party not in breach.¹³² Moreover, in the earlier decision of *Boyd & Forrest v The Glasgow & South Western Rlwy Co*, the same judge spoke unequivocally of the ‘Court of Equity’ setting aside contracts.¹³³

More recently, in a case where a settlement was sought to be set aside on the ground of unilateral mistake, *Pitt v Holt*,¹³⁴ a seven-member United Kingdom Supreme Court held that the ‘equitable jurisdiction to set aside a voluntary disposition on the ground of mistake was exercisable whenever there was a causative mistake which was so grave that it would be unconscionable to refuse relief’.¹³⁵ This once again makes clear that the ultimate decision lies with the court, that

¹²⁶ (1955) 94 CLR 216, 223.

¹²⁷ *ibid* 224.

¹²⁸ [1923] AC 773. The argument is that of S Elliott, ‘The Basic Structure of Rescission’ in B McFarlane and S Elliott, *Equity Today: 150 Years After the Judicature Reforms* (Hart Publishing, 2023), ch 9.

¹²⁹ (1804) 5 East 449.

¹³⁰ (1848) 2 Ex 783.

¹³¹ Clarity was only achieved in the late 1970s, with the decisions of the House of Lords in *Johnson v Agnew* [1980] AC 367 and in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.

¹³² The confusion is noted in *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 and the decision of the Privy Council in *Lodder v Slowey* [1904] AC 442 said to be wrongly made as a result.

¹³³ 1915 SC (HL) 20, 30. Above, text to n 65.

¹³⁴ [2013] UKSC 26.

¹³⁵ *ibid* [128].

it must be unconscionable for the court to refuse relief. Indeed, in relation to the related appeal in *Futter v Futter*, the Supreme Court indicated that relief on the ground of mistake, had it been claimed, would probably have been refused on the ground that it involved an artificial tax avoidance scheme,¹³⁶ a conclusion totally at odds with rescission being the act of the party.

A possible explanation for the confusion is the compressed language often used in the case-law. When it is said that the claimant can rescind, this is an unfortunate contraction of the phrase ‘the claimant can petition the court for an order of rescission.’ The phenomenon is encountered elsewhere. One example concerns falsification and surcharge of accounts in equity. In *Libertarian Investments Ltd v Hall*, Lord Millett NPJ said that if an account disclosed an unauthorised investment, ‘the plaintiff may falsify it’, and that if the account is shown to be defective, ‘the plaintiff can surcharge’ it.¹³⁷ However, both statements were immediately followed by words indicating that this involved asking the court to do the things in question, which is precisely what should be the understanding here.

Finally, even those who argue that rescission in equity is the act of the party, generally admit that this is done by the issuance of court proceedings, which only makes the point.

7. Does the Making of a Court Order Create a Backdated Trust?

We now reach the final issue. Having seen that rescission in equity means nothing more than the court ordering the unwinding of the transaction on both sides and perhaps the granting of declarations of invalidity and injunctive relief preventing the transferee exercising the right or enforcing any judgment obtained consequent upon it, the orthodoxy is that, on the making of such orders, the transferee holds the rights in question on trust for the transferor, which trust backdates to the point of transfer. How then does this backdated trust arise?

Before answering this question, we should notice that it is not really a trust. In the already discussed case of *Bristol and West BS v Mothew*, Millett LJ refused to allow such backdating to generate claims for breach of trust, saying that in the earlier case of *El Ajou* he spoke in such terms only to avoid the long-criticised rule that a fiduciary relationship need be present for equitable tracing.¹³⁸

As to why this ‘trust’ arises, the typical reasoning is that the ‘equitable’ or ‘beneficial title’ terms which are used interchangeably, revests when the court order is made. Thus, in *Alati v Kruger* it was said that ‘a rescission which the common law

¹³⁶ *ibid* [135]. A recent example of relief being refused on these grounds is the decision of the Court of Appeal in *Bhaur v Equity First Trustees (Nevis) Ltd* [2023] EWCA Civ 534.

¹³⁷ *Libertarian Investments Ltd v Hall* [2014] 1 HKC 368, [168], [170].

¹³⁸ [1998] 1 Ch 1, 22. Above, text to n 89.

courts would not accept as valid cannot of its own force revest the legal title to property which had passed, but if a court of equity would treat it as effectual the equitable title to such property revests upon the rescission.¹³⁹ The same thinking can be found in English cases. Thus, in *El Ajou v Dollar Land Holdings plc (No 1)*, Millett J (as he then was) spoke of victims of fraud being ‘entitled to rescind the transaction and revest the equitable title to the purchase money in themselves ...’¹⁴⁰ In *Bristol and West Building Society v Mothew*, the now Millett LJ said: ‘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,’¹⁴¹ with the implication that on rescission this ‘beneficial interest’ revests, while in *Shalson v Rosso*, Rimer J said that on rescission ‘the beneficial title which passed to the representor ... revests in the representee.’¹⁴²

We encountered the same thinking when examining the question whether there could be a trust before rescission.¹⁴³ It was seen as flawed, for the simple reason that the transferor has no ‘beneficial’ or ‘equitable’ title before the transfer; such title could not therefore pass to the transferee. It is equally the case that it cannot re-pass. Moreover, even if it passed, we still lack an explanation why it revests in the transferor on the making of court orders for rescission.

One explanation might be that the effect of rescission in equity is to avoid the transaction so far as equity, though not the law, is concerned. As seen, judges are prone to describe the transfer as not altogether void but voidable, albeit in equity.¹⁴⁴ On this view, the court of equity on rescission treats the transfer as avoided, meaning it was never made, so that in the eyes of equity, the right never left the transferor. Of course, the reality is different: the right is in the transferee. To resolve this conflict as to the location of the right, the transferee will hold the right on trust for the transferor.

The problem is that this is not how trusts work. As Maitland noted over a century ago, trusts do not involve conflicts as to the location of rights.¹⁴⁵ Moreover, the transaction is not ‘voidable’ at all. What instead happens is that the court orders specific relief. The thinking seems to be that if the transfer is not void, but that specific relief is ordered, it must mean that the transfer has thereby been avoided. But this does not follow. Though often granted, there is no need for courts to make declarations of invalidity. Indeed, how can such declarations be made when all the elements necessary for the transfer were present? If there really were different requirements of validity in equity, the transfer would have been void in equity from the start. Yet we know that is not the case. The language of voidability seems only to express the idea that the transferee is liable to be ordered to reconvey.

¹³⁹ (1955) 94 CLR 216, 224.

¹⁴⁰ [1993] 3 All ER 717, 733. Of course, it is not the claimants themselves who rescind, but the court.

¹⁴¹ [1998] Ch 1, 22–23.

¹⁴² [2005] Ch 281, [122].

¹⁴³ Text to nn 92–95.

¹⁴⁴ Eg, Lindley LJ in *Allcard v Skinner* (1887) 36 Ch D 145, 186.

¹⁴⁵ Maitland (n 97) pp 17–18.

Another argument for a trust would be, by analogy with situations where orders for specific performance of a contract of sale can be granted, that equity looks upon as done that which ought to be done, and it is this which gives rise to the trust. It could be said that once the order to retransfer is made, equity fictitiously treats it as having been performed. However, the argument is already weak in the context of specific performance of contracts of sale;¹⁴⁶ it is equally weak here. Moreover, it cannot explain the backdating of the trust. Indeed, in the context of the so-called ‘trust’ generated by the availability of specific performance, many judges doubt whether it is a trust at all.¹⁴⁷ The same scepticism should apply here.

8. Conclusion

We saw that fraud does not prevent the transfer or grant of rights to the fraudster: the fact that the transaction was fraudulently induced is ‘altogether collateral.’ We also saw that it is a mistake to think that the House of Lords in *Cundy v Lindsay* held that there could be no transfer in the case of a contract of sale of goods void as being fraudulently induced. The reason why title did not there pass was because the essential elements of a valid conveyance by delivery were not present; fraud had nothing to do with it.

We also saw the impossibility of victims of fraud unilaterally rescinding grants of rights and thereby revesting rights, and that the exceptional case of a transfer of titles to goods made pursuant to fraudulently induced contracts could not be supported; cases such as *Car and Universal Finance Ltd v Caldwell* were demonstrated to be wrongly decided. Nor is it possible for the victim of fraud unilaterally to rescind in equity and thereby turn the fraudster into a trustee; arguments that self-help rescission in equity was possible were shown to be misconceived. Finally, arguments as to a backdated trust arising on court-ordered rescission were seen as unconvincing.

Victims of fraud have, and only have, an ‘equity to rescind’, the ability to bring a claim in equity to rescind the transaction, seeking orders from the court for reconveyance of the right and injuncting the fraudster from relying on the right in the meantime. The language of ‘election’, ‘power’, and ‘right’ are all misnomers and apt to mislead. There is only the possibility of the grant of court orders for specific relief, which operate in the same way as orders for specific performance of

¹⁴⁶ W Swadling, ‘The Vendor-Purchaser Constructive Trust’ in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co., 2005), ch 18; W Swadling, ‘The Mischief of Maxims’ in B McFarlane and S Elliott, *Equity Today: 150 Years after the Judicature Act Reforms* (Hart Publishing, 2023), ch 5, 94–99.

¹⁴⁷ *Knox v Gye* (1871–72) LR 5 HL 656, 675–6 (Lord Westbury); *Rayner v Preston* (1881) 18 Ch D 1, 6 (Cotton LJ), 11 (Brett LJ); *Berkley v Poulett* [1977] 1 EGLR 86, 93 (Stamp LJ); *Kern Corpn Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164, 192 (Deane J); *Southern Pacific Mortgages v Scott* [2015] AC 385, [63] (Lord Collins of Mapesbury).

contracts or delivery up of converted goods. That is, or at least should be, the sole extent of the 'proprietary' consequences of fraud.

One so-far neglected question is whether courts award this remedy too liberally. We saw Lord Millett describe it as a form of 'specific unperformance'. Drawing an analogy with specific performance of contracts, he questioned whether such orders should be confined to 'land or other property of special value to the transferor'.¹⁴⁸ He was right so to do. The issue is lost sight of when thinking in terms of trusts arising on rescission, leading to the thought that the claimant is then simply exercising their power under *Saunders v Vautier*¹⁴⁹ to collapse the 'trust'.¹⁵⁰ Of course, *Saunders v Vautier* applies to all trusts, regardless of subject-matter. But it is a false analogy. We do not make this mistake with specific performance and should not do so with specific 'unperformance'.

¹⁴⁸ See n 22, 416.

¹⁴⁹ (1841) 4 Beav 115.

¹⁵⁰ See, eg, Häcker (n 116) at 346.