THE LAW OF CONTRACT IN CANADA

by

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(iii) Repentance
(iv) Parties not equally in fault

1. Invalidity through illegality

To be acceptable, a contract must be capable of recognition by the law, not prohibited by the law. Stretching back to the eighteenth century, to look no further, are dicta which establish categorically that the courts will not recognize and effectuate an improper purpose.[1] What this means is that certain agreements, though otherwise and in all other respects acceptable, will not qualify as valid contracts, if they contravene the law.[2] In some circumstances, however, and for some limited purposes a contract which is invalid can still have legal consequences when in accordance with settled principles, its invalid parts can be severed from the rest, and what is valid can be recognized and given effect by the court. Such consequences, however, are exceptional. The basis for the doctrine is that illegal agreements are invalid. The "real nature doctrine of illegality is to preclude an action, not to provide the foundation for one."[3]

As already seen, a contract may be, or become, invalid for various reasons; uncertainty;[4] mistake;[5] incapacity;[6] fraud;[7] duress, undue influence or unconscionability.[8] A contract for an illegal purpose, *i.e.*, a purpose regarded by the law as improper, though it conforms to all other requirements of a valid transaction, will also be void. Invalidity through illegality refers to the infringement by a contract of some statute or doctrine of the common law relating to the purpose or object to be achieved by such contract. The term "illegality", in this sense, does not mean "criminal". An illegal contract, though invalid and therefore void, does not necessarily involve the contracting parties in liability for criminal conduct.[9] The courts have frequently used the expression "illegal" to mean not only a contract which is undoubtedly illegal under statute, or because it contravenes public policy[10] to be examined later, but also a contract which at common law is not completely and truly illegal. Some of these so-called "illegal" contracts were not, and are not now, illegal in the fullest sense. They are void to the extent of their illegality, but may be enforced as to the rest, if the illegal part can be severed from the legal. In the more sophisticated language and ideas of the twentieth century, contracts may be invalid, in whole or

1 *Collins v. Blantern* (1767), 2 Wils. 341; *Lowe v. Peers* (1768), 4 Burr. 2225; *Holman v. Johnson* (1775), 1 Cowp. 341. See *Still v. M.N.R.* (1997), 154 D.L.R. (4th) 229 at 237-238 (Fed. C.A.).
2 This and the previous two sentences were quoted by Stratton C.J. in *Tucker Estate v. Gillis* (1988), 53 D.L.R. (4th) 688 at 691 (N.B.C.A.).
3 *Brooks v. Canadian Pacific Railway* (2007), 298 Sask. R. 64 at 121 (Sask. Q.B.), *per* Dawson J.: below, pp. 406-410. Note, however, the exceptions: below, pp. 414-420.
4 Above, pp. 17-25.
5 Above, Chapter 7.
6 Above, pp. 151-153, 158-164.
7 Above, Chapter 8.
8 Above, Chapter 9.
9 The passage from "A contract for an illegal purpose" to here was quoted by Douglas J. in *Field v. McLaren* (2009), 239 Man. R. (2d) 156 at 175 (Man. Q.B.).
10 Below, pp. 361-363.

contrasted with legal terms, and may be applying outmoded (or in some instances *avant-garde*) notions of what is in the public interest. Judges are not legislators, even though, explicitly in some cases, impliedly in others, they may apply notions of policy in the making of their decisions.[165]

The desirability of limiting the scope of the doctrine of public policy, at least in relation to contracts, was stated in *Fender v. St. John-Mildmay*.[166] Even clear and accepted instances of the doctrine should not be applied unnecessarily, but only if there is evidence of the dangerous or injurious consequences of permitting the validity and enforceability of a contract that would come within the doctrine. The need to approach such matters with caution, and not to expand the doctrine beyond what has been accepted in the past or what is absolutely essential for the future, was stressed by the majority of the Supreme Court of Canada in *Re Millar*.[167] This case concerned a disposition in a will. The applicable principles of law were the same. Duff C.J., and Davis, Kerwin and Hudson JJ. stated that public policy was limited to decided cases and instances, and there was no power in the courts to create new kinds of situations which contravened public policy. Moreover, even within the specified instances when the doctrine applied, if application of the doctrine was sought for the purpose of invalidating a transaction, it had to be shown that: (1) the prohibition was imposed in the interests of the safety of the state, or the economic and social well-being of the state and its people as a whole; and (2) it was imposed only in clear cases, in which harm to the public was substantially incontestable and did not depend upon what were termed the idiosyncratic inferences of a few judicial minds. The Supreme Court, therefore, as the House of Lords before it, was cognizant of the dangers inherent in riding the "unruly horse" of public policy, which, once mounted, could lead to unforeseen destinations and terminations. There is grave risk in permitting the judges to strike down contracts at will, whenever in their opinion some jealously guarded tenet which they favour and approve is under attack, whether or not the public generally would agree with their assessment of the potential consequences. Nor do the judges want a very wide power in this respect. Even where no statute governs, the precedents of the past may have presented the judges with enough power and flexibility, in undisputed instances, to enable them to regulate and control attempts to undermine society by acting illegally.[168]

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165 *Miliangos v. George Frank (Textiles) Ltd.*, [1975] 3 All E.R. 801 at 821-825 (H.L.) *per* Lord Simon of Glaisdale.

166 [1938] A.C. 1 (H.L.): *Janson v. Driefontein Consol. Mines Ltd.*, [1902] A.C. 484 (H.L.); *Egerton v. Brownlow*, above, note 157; *Rodriguez v. Speyer Bros.*, [1919] A.C. 59 (H.L.); *Geismar v. Sun Alliance & London Ins.*, [1977] 3 All E.R. 570 at 575 *per* Talbot J.

167 [1938] S.C.R. 1.

168 For an interesting example, from Quebec, of a plea of illegality on the grounds of public policy being raised unsuccessfully, see *Angers v. Gauthier*, [1924] S.C.R. 479; leave to appeal to Privy Council refused (1924), 26 Que. P.R. 106 (P.C.), where the licensed pilots of Montreal agreed to combine their earnings and divide the net product equally among themselves. When the association sued a pilot for failure to fulfil the agreement, his plea of illegality failed. See also a curious case in which it was alleged that a clause preventing fraternization between employees in the North and local Indians and Eskimos was not valid under the Canadian Bill of Rights; the claim was not upheld: *Whitfield v. Can. Marconi Co.* (1967), 68 D.L.R. (2d) 251 (Que. Q.B.); affirmed (1968), 68 D.L.R. (2d) 766n (S.C.C.); application for rehearing dismissed, [1968] S.C.R. 960. But see the *Ont. Human Rights Comm.* case, above, note 161, on the use of an anti-discrimination statute. Note

with the existing trade of the purchaser of the invention or of the inventor's services, then, such an agreement may be within the doctrine.[411]

4. The consequences of illegality

(a) Voidness of transaction

A contract which is illegal either at common law or under statute is void and unenforceable by either party.[412] For example, a court will not assist a party to enforce an agreement that is in unreasonable restraint of trade.[413] While the burden may be upon the defendant to establish that the plaintiff is relying upon an illegal contract to prove his case,[414] it would seem that the court is entitled to take note of an illegality that is obvious on the face of the contract.[415] The House of Lords in

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411 This and the preceding two sentences were cited with approval by Kelly J. in *Acadia Forest Products Ltd. v. Neal Forest Products Ltd.* (1983), 48 N.B.R. (2d) 429 at 436 (N.B.Q.B.).

412 *U.S. Fidelity & Guar. Co. v. Cruickshank*, [1919] 3 W.W.R. 821 (Sask.C.A.) (contract to stifle a prosecution, illegal at common law); *Ernest v. Christian*, [1929] 1 D.L.R. 207 (N.S.C.A.) (contract which violated a provincial temperance statute); *Menard v. Genereux* (1982), 138 D.L.R. (3d) 273 (Ont. H.C) (contract which involved fraud on a bank); *Berne Dev. Ltd. v. Haviland* (1983), 40 O.R. (2d) 238 (Ont. H.C.) (contract which involved deception of mortgagee); *Cerilli v. Klodt* (1984), 48 O.R. (2d) 260 (Ont. H.C.) (contract intended to defraud vendor's estranged wife); *Mazerolle v. Day & Ross Inc.* (1986), 70 N.B.R. (2d) 119 (N.B.Q.B.) (purchase of cigarettes through Indians to avoid payment of provincial taxes; no claim against insured when the cigarettes were stolen); *Tucker Estate v. Gillis* (1988), 53 D.L.R. (4th) 688 (N.B.C.A.) (chattel mortgage unenforceable since made in connection with, and in pursuance of, an illegal scheme to avoid payment of provincial sales tax); *Ace Asphalts & Maintenance (Products) Ltd. v. O'Neill* (1991), 114 N.B.R. (2d) 168 (Alta. Q.B.), plaintiff could not claim unpaid wages because he was accepting unemployment insurance (where the contract was valid but to have allowed an action would have infringed the *ex turpi causa* doctrine: below); *Maksymetz v. Kostyk* (1992), 79 Man. R. (2d) 115 (Man. Q.B.) (illegal partnership could not be enforced); *Wood v. Bonnell* (1992), 100 Nfld. & P.E.I.R. 79 (P.E.I.T.D.); affirmed (1993), 105 Nfld. & P.E.I.R. 243 (P.E.I.C.A.) (mortgage for an unlawful purpose void). This will be so even if the contract is made expressly subject to the proviso that it is to conform to a provincial statute's requirements: *Trusteel Corp. v. Queensway Const. Corp.*; *Re Trusteel Corp. and Truman* (1960), 22 D.L.R. (2d) 616 (Ont. C.A.); reversed [1961] S.C.R. 528; *Murray Elias Ltd. v. Walsam Invts. Ltd.*, [1964] 2 O.R. 381 (Ont. H.C.); affirmed [1965] 2 O.R. 672n (Ont. C.A.). But it must be shown to be illegal; hence the different decision at different levels in *Howard Sand & Gravel Co. v. Gen. Security Ins. Co.*, [1953] 3 D.L.R. 633 (Ont. H.C.); reversed [1954] 1 D.L.R. 99 (Ont. C.A.); which was affirmed [1954] 4 D.L.R. 682 (S.C.C.). Hence a contract that is valid within the jurisdiction will be enforceable even if it is invalid elsewhere; *Bigelow v. Craigellachie Glenlivet Distillery Co.* (1905), 37 S.C.R. 55; *Nat. Surety Co. v. Larsen*, [1929] 3 W.W.R. 299 (B.C.C.A.).

In *Kotello v. Dimerman* (2006), 271 D.L.R. (4th) 147 (Man. C.A.) the defendant could not be sued for breach of the covenant by which the plaintiff pledged his guitar to him, because the contract infringed the provisions about interest. However the plaintiff could sue the defendant for conversion, because the guitar had been sold to a third party!

413 *Boddington v. Lawton*, [1994] I.C.R. 478 at 491 (C.A.). But the contract exists and parties can perform it. For a contrary view see *O'Sullivan v. Management Agency &Music Ltd.*, [1985] 1 Q.B. 428 at 469 (C.A.) *per* Fox L.J.

414 *Wilkinson v. Harwood*, [1931] S.C.R. 141.

415 *Rodrigue v. Dostie*, [1927] S.C.R. 563; *Scott v. Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724 (C.A.). Absence of knowledge of the illegality will not affect the issue; the transaction will still be illegal: *Laliberté v. Blanchard* (1979), 28 N.B.R. (2d) 394 (N.B.Q.B.); affirmed (1980), 31 N.B.R. (2d) 275 (N.B.C.A.), quoting Lord Denning M.R. in *J.M. Allan (Merchandising) Ltd. v. Cloke*,

North Western Salt Co. v. Electrolytic Alkali Co.,[416] held that a defendant could not elicit the illegality of a contract in the course of cross-examination unless the illegality was clear on the face of the contract, or pleaded in defence, or appeared from the plaintiff's examination-in-chief. Thus, if illegality is not pleaded, and the plaintiff's case does not obviously appear to rest and be based upon an illegal transaction, the issue of illegality may never come before the court.[417] Everything may depend, therefore, upon whether or not the plaintiff has to rely upon the illegal transaction to establish his case.[418]

This major consequence of such a contract is often expressed in one of two ways. The first is, *ex turpi causa non oritur actio*.[419] This means that a claim cannot be founded upon a base cause, namely, the breach of a statute or a contract that is against public policy.[420] The second is, *in pari delicto potior est conditio defendentis*. This means that where the parties are equally at fault in their participation in illegality, the position of the defendant is the superior. It may be seen that these are two ways of saying the same thing, that rights or claims may not be founded upon illegality. Hence, in *Jackson v. Jackson*,[421] the defendant was unable to plead by way of defence to an action for the recovery of a loan that the transaction was in reality a gift in a form and manner designed to protect the father, who gave the money, from liability for gift taxes, that is, an illegal transaction. He could not rely upon the illegality to *prevent* his liability any more than in *North-Western Construction Co. v. Young*,[422] the plaintiff, an extra-provincial company which was unregistered under the British

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[1963] 2 All E.R. 258 at 261 (C.A.); *Central Trust Co. v. Rafuse* (1983), 147 D.L.R. (3d) 260 at 270-271 (N.S.C.A.) *per* Jones J.A. But such lack of knowledge may permit the ignorant party to pursue a remedy despite the illegality: *First Nat. Bank of Oregon v. Watson Ranching Ltd.* (1984), 34 Alta. L.R. (2d) 110 (Alta. Q.B.); *Accursi v. Hongkong Bank of Canada* (1997), 49 C.B.R. (3d) 226 (Ont. Gen. Div.); additional reasons at (1998), 4 C.B.R. (4th) 4 (Ont. Gen. Div.), no illegality unless bank knew of violation of the Securities Act.

416 [1914] A.C. 461 (H.L.); applied in *Uruski v. Hnatiw* (1956), 6 D.L.R. (2d) 441 (Sask. C.A.). See also *Zimmerman v. Letkeman*, [1978] 1 S.C.R. 1097, unlawful purpose of the parties disclosed by the evidence; therefore, contract of sale of land not specifically enforceable.

417 If the illegality is obvious, the party affected by such illegality does not have to be a party to the action; the court can give effect to the illegality and avoid the contract: *Cerilli v. Klodt* (1984), 48 O.R. (2d) 260 (Ont. H.C.) (contract to defraud estranged wife avoided, even though wife not a party to the purchaser's action for specific performance).

418 *Clark v. Hagar* (1894), 22 S.C.R. 510 at 523 *per* Gwynne J. See *Major v. Canadian Pacific Railway*, [1922] 3 W.W.R. 512 (S.C.C.); *Elford v. Elford*, [1922] 3 W.W.R. 339 (S.C.C.). Hence, in *Mack v. Edenwold Fertilizer Services Ltd.*, [1987] 5 W.W.R. 469 (Sask. C.A.); reversing [1986] 3 W.W.R. 741 (Sask. Q.B.), the Saskatchewan Court of Appeal held that an agreement to pay interest on money received by the seller, under a contract of sale that was illegal because it was framed so as to avoid paying income tax, was also illegal and unenforceable. The two contracts were not independent.

419 Which expresses a policy rather than a principle: *Gray v. Thames Trains Ltd.*, [2009] 4 All E.R. 81 (H.L.)

420 This means (i) courts will not enforce a contract expressly or impliedly forbidden by statue or entered into with the intention of committing an illegal act: (ii) courts will not assist a party to recover a benefit from his own wrongdoing: *Stone & Rolls Ltd. (in liquidation) v. Moore Stephens*, [2009] 4 All E.R. 431 (H.L.). On the effect of this doctrine as regards a corporation, see *Safeway Stores Ltd v Twigger*, [2010] 3 All E.R. 577 (Q.B.D.)

421 (1960), 34 W.W.R. 431 (B.C.S.C.).

422 (1908), 13 B.C.R. 297 (B.C.C.A.).

(b) Equitable rescission

(i) *In general*

In contrast with the common-law idea of rescission, it is sometimes possible for a party to seek the equitable remedy of rescission, by applying to a court for relief from a transaction in respect of which it would be inequitable to hold the applicant bound.[169] Rescission is a remedy, not a cause of action. Moreover it is an all or nothing remedy.[170]

The jurisdiction of the courts to grant rescission of a contract on equitable grounds, which involves a restoration of the parties to their original rights and property,[171] extends beyond the situations and circumstances in which, at common law, a party, acting unilaterally, can treat the contract as a legal nullity, and then pursue such common-law remedies as may be available. Although there is a degree of overlap between the common-law right to rescind for fraud, and the equitable jurisdiction of the court to grant rescission of a contract which has been entered into as a consequence of a false representation or some other fraud,[172] the equitable power to order rescission is wider in scope. Indeed, the limits of this jurisdiction have not been fixed. Wherever a court considers, on general equitable grounds, that a contract should not be allowed to stand, and that the request by one party that it be annulled and avoided should be granted, the court has the power to do so.[173] A court of equity can do what is "practically just".[174] For example, although it has been noted that damages are not recoverable for failure to sell land when the failure is due to the vendor's lack of title, unless the vendor was guilty of fraud,[175] the court can grant rescission of the contract at the suit of the purchaser, and the recovery of any purchase money which may have been paid over to the vendor.[176] Even if there has been no warranty given by the vendor and no innocent misrepresentation has occurred, the court is not powerless to relieve the purchaser from a contract which might be to his disadvantage, albeit that he might be bound at common law. In *Morang & Co. v. LeSueur*,[177] the court could rescind a contract under which a publishing company was to publish a particular work, when the company refused to publish the completed

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169 See, *e.g.*, *Lamers v. Lamers* (1978), 6 R.F.L. (2d) 283 (Ont. H.C.); *Iwaskow v. Kondruk* (1982), 36 A.R. 168 (Alta. Q.B.); *E. & R. Distributors v. Atlas Drywall* (1980), 118 D.L.R. (3d) 339 (B.C.C.A.).

170 *Alberta Treasury Branches v. Ghermezian* (1999), 249 A.R. 240 at 247 (Alta. Q.B.) *per* Moore C.J.Q.B.; reversed in part (2000), 266 A.R. 170 (Alta. C.A.); additional reasons at 2000 CarswellAlta 1106 (Alta. C.A.). A party who seeks rescission of a contract terminates it: *475878 Alberta Ltd. v. Help-U-Sell Inc.* (2002), 322 A.R. 250 (Alta. Q.B.); additional reasons at (2003), 322 A.R. 191 (Alta. Q.B.); affirmed (2004), 348 A.R. 182 (Alta. C.A.).

171 *Fleming v. Mair* (1921), 58 D.L.R. 318 at 321 (Sask. C.A.) *per* Lamont J.A.

172 Compare *Albert v. Legere* (1978), 88 D.L.R. (3d) 62 at 67 (N.B.C.A.) *per* Hughes C.J., referring to rescission for fraud, mutual mistake of a fundamental nature, or unilateral mistake induced by fraud.

173 This sentence was quoted by Creaghan J. in *Poirier v. Goguen* (1989), 99 N.B.R. (2d) 91 at 105 (N.B.Q.B.).

174 *O'Sullivan v. Management Agency & Music Ltd.*, [1985] 1 Q.B. 428 at 458 (C.A.) *per* Dunn L.J., 466 *per* Fox L.J., 471 *per* Waller L.J.; *Vadasz v. Pioneer Concrete (SA) Pty Ltd.* (1995), 130 A.L.R. 570 at 577 (Aust. H.C.).

175 *Bain v. Fothergill* (1874), L.R. 7 H.L. 158 (H.L.); see above, pp. 695-697.

176 *Reeve v. Mullen* (1913), 5 W.W.R. 128 (Alta. C.A.).

177 (1911), 45 S.C.R. 95.

manuscript, and could then order the return of the manuscript to the author, despite the passage of title from one party to the other. The conduct of the company being inequitable, the court could provide the author with a suitable remedy.

These are exceptional, and unusual cases. More frequently the jurisdiction of the court to rescind a contract on equitable grounds is invoked in three main instances. The first is where the contract resulted from some fraud, which induced a mistake on the part of the defrauded party.[178] The second is where the mistake in question was the result of an innocent, non-fraudulent misrepresentation.[179] The third, which comprehends a somewhat mixed variety of instances, though sharing a general underlying character, is where the contract was procured, without fraud in the common-law sense, but as a consequence of what in equity is regarded as fraud, that is, by the use of undue influence, or some unconscionable conduct which renders the bargain questionable on equitable grounds, even though it may be perfectly valid at common law.[180]

Rescission may be granted even where the contract is not susceptible of attack at common law.[181] When it is, the purpose of the court is to produce *restitutio in integrum.*[182] This has two major consequences. In the first place, there cannot be rescission of part of a contract: all of it must be rescinded, or else none.[183] Second, there may have to be, and the court has the power to order, adjustments, perhaps involving monetary payments by way of compensation for use of property, or reimbursement of expenses, so as to ensure that, so far as is within the capability of the court, the parties are restored to their original situations, before the contract was ever concluded between them.[184]

Rescission is only possible where to grant such remedy would not operate to the prejudice of a third and innocent party, who was not implicated in the original contract and so ought not to be affected adversely by the subsequent, later avoidance

178 Above, pp. 285-293.

179 But perhaps only if there has been a total failure of consideration: see *Komarniski v. Marien*, [1979] 4 W.W.R. 267 (Sask. Q.B.). The passage from "More frequently" to here was quoted by Menzies J. in *Trippel v. Parker* (2002), 164 Man. R. (2d) 104 at 112 (Man. Q.B.); additional reasons at (2003), 175 Man. R. (2d) 4 (Man. Q.B.); affirmed (2004), 318 Man. R. (2d) 231 (Man. C.A.).

180 Above, pp. 312-330. This and the previous paragraph were quoted by Joyal J. *TDL Group Ltd. v. Zabco Holdings Inc.* (2008), 232 Man. R. (2d) 225 at 229 (Man. Q.B.). This paragraph, from "More frequently" to the end, was quoted by Bayda J.A. in *Carlson v. Big Bud Tractors of Can. Ltd.* (1981), 7 Sask. R. 337 at 356 (Sask. C.A.).

181 *Ivanochko v. Sych* (1967), 58 W.W.R. 633 (Sask. C.A.).

182 *Stephenson v. Bromley*, [1928] 4 D.L.R. 737 at 742 (Man. C.A.) *per* Fullarton J.A.

183 *Fleming v. Mair*, [1921] 2 W.W.R. 421 (Sask. C.A.); *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 (B.C.C.A.).

184 See *e.g.*, *Stephenson v. Bromley*, above; *Lambert v. Slack*, [1926] 2 D.L.R. 166 at 172 (Sask. C.A.) *per* Lamont J.A.; *Int. Casualty Co. v. Thomson* (1913), 48 S.C.R. 167; *Stearns v. Neys*, [1929] 3 W.W.R. 177 (Alta. S.C.); *Fleischhaker v. Fort Garry Agencies Ltd.* (1957), 11 D.L.R. (2d) 599 (Man. C.A.); *Bell v. Robutka* (1966), 55 D.L.R. (2d) 436 (Alta. C.A.); *Jarvis v. Maguire* (1961), 35 W.W.R. 289 (B.C.C.A.); *Walters v. Capron* (1964), 50 W.W.R. 444 (B.C.S.C.); *Kupchak v. Dayson Holding Ltd.*; *Dayson Holding Ltd. v. Palms Motel Ltd.* (1965), 53 D.L.R. (2d) 482 at 487-488 (B.C.C.A.) *per* Davey J.A.

of that transaction.[185] If granting rescission would have such an effect, a court of equity will refuse that remedy, leaving the plaintiff to his common-law remedy, that is, damages, if it is available in the circumstances.[186] Nor will rescission be granted if the plaintiff's contract is inequitable or he has been guilty of delay, or *laches*.[187]

(ii) *Fraud*

Wherever a party can successfully allege that he was induced to enter into a contract by reason of the fraudulent conduct of the other party (or the other party's agent),[188] the contract in question may be rescinded by the court,[189] even if the contract is executed,[190] and even if the contract is one transferring an interest in land.[191]

The plaintiff must establish the fraud,[192] and its effect.[193] Since an allegation of fraud is serious it must be proved by strong and clear evidence.[194] This does not mean that the plaintiff must discharge the criminal law burden of proof beyond a reasonable doubt. It means that before a court will conclude that the defendant is guilty of fraud there must be satisfactory proof of the validity of the allegation.[195] The fraud in question must relate to matters of fact. A fraudulent misrepresentation is one that misstates some existing or past fact, on which the plaintiff relies to

185 *Consol. Invs. Ltd. v. Acres*, [1917] 1 W.W.R. 1426 (Alta. C.A.); *Barry v. Stoney Point Canning Co.* (1917), 55 S.C.R. 51 at 66 *per* Idington J. See, however, *Stewart v. Complex 329 Ltd.* (1990), 109 N.B.R. (2d) 115 (N.B.Q.B.), where the fact that a third party had acquired an interest in the business that was the subject-matter of the contract to be rescinded did not prevent rescission.

186 Compare the language of Lamont J.A. in *Fleming v. Mair*, [1921] 2 W.W.R. 421 (Sask. C.A.) and that of MacFarlane J. in *Guest v. Beecroft* (1957), 22 W.W.R. 481 at 486 (B.C.S.C.).

187 Compare above, p. 748, below, p. 769.

188 *Hitchcock v. Sykes* (1914), 49 S.C.R. 403. Lack of diligence on the part of the plaintiff will not be a defence: *Stewart v. Complex 329 Ltd.*, above.

189 *Kupchak v. Dayson Holding Ltd.*; *Dayson Holding Ltd. v. Palms Motel Ltd.*, above; *Krahnbiel v. Dondaneau* (1955), 17 W.W.R. 436 (B.C.S.C.); *Nesbitt, Thomson & Co. v. Pigott*, [1941] S.C.R. 520; *Keatley v. Churchman* (1921), 62 D.L.R. 139 (Alta. S.C.); affirmed [1922] 2 W.W.R. 993 (Alta. C.A.); *Muise v. Whalen* (1990), 96 N.S.R. (2d) 298 (N.S.T.D.); *Stewart v. Complex 329 Ltd.*, above; *TWT Enterprises Ltd. v. Westgreen Devs. (North) Ltd.*, [1991] 3 W.W.R. 80 (Alta. Q.B.); affirmed [1992] 5 W.W.R. 341 (Alta. C.A.). Or the defrauded party can plead *non est factum*: *Brown v. Prairie Leaseholds Ltd.* (1953), 9 W.W.R. (N.S.) 577 (Man. Q.B.); affirmed (1954), 12 W.W.R. 464 (Man. C.A.).

The plaintiff will also be able to recover common-law damages for deceit: *Bank of Montreal v. Weisdepp* (1917), 34 D.L.R. 26 at 31 (B.C.C.A.) *per* McPhillips J.A.; *Goulet v. Clarkson*, [1949] 1 D.L.R. 847 (B.C.S.C.) (where the remedy of rescission was barred by the plaintiff's own conduct after discovery of the fraud); *Barron v. Kelly* (1918), 56 S.C.R. 455.

190 *Burns v. Ambler* (1963), 42 W.W.R. 254 (B.C.S.C.).

191 *Redican v. Nesbitt*, [1924] S.C.R. 135 at 146-147 *per* Duff J.; *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 at 21 (B.C.C.A.) *per* McLachlin J.A.

192 *Popowich v. Dromarsky*, [1946] 1 W.W.R. 570 (Alta. C.A.).

193 *Alexander v. Enderton* (1914), 15 D.L.R. 588 at 591 (Man. K.B.); affirmed (1914), 25 Man. R. 82 (Man. C.A.) *per* Martin C.J.; *Pioneer Tractor Co. v. Peebles* (1913), 15 D.L.R. 275 (Sask. S.C.); affirmed (1914), 18 D.L.R. 477 (Sask. C.A.); affirmed (1915), 8 W.W.R. 632 (S.C.C).

194 *Lasby v. Johnson*, [1928] 3 W.W.R. 447 (Sask. C.A.).

195 *Scott v. Cresswell*, [1975] 3 W.W.R. 193 (Alta. C.A.); *Nor. & Central Gas Corp. v. Hillcrest Collieries Ltd.*; *Byron Creek Collieries Ltd. v. Coleman Collieries Ltd.*, [1976] 1 W.W.R. 481 at 528-529 (Alta. T.D.).

the prejudicing of some innocent third party. The court will not upset a contract when to do so would have unfortunate consequences for strangers to the contract who have subsequently transacted with one of the original parties on the faith of the validity of the original contract.[250] In this respect, also, delay by the plaintiff may be material.[251]

(d) The importance of *restitutio*

There is another relevant matter which must be taken into account by the court when deciding whether or not to exercise its discretion and grant the equitable remedy of rescission. This is the possibility of being able to effect a true *restitutio in integrum* between the parties. Since the purpose or aim of the equitable remedy of rescission is to return the plaintiff to the position in which he was before the contract was made, and since one of the essential features of an equitable remedy is *mutuality*, that is, the potential availability of the remedy to both parties equally, it follows that unless *both* parties can be restored to their respective original situations, it should not be open to a court to rescind the contract.[252] However, the issue has often arisen whether complete restitution in every respect is necessary, and what in effect amounts to restitution.

It has been held that there is no need for a complete *restitutio* where the rescission is brought about by mutual agreement between the parties.[253] It has also been said, despite other judicial statements to the contrary,[254] that restitution is not always a condition precedent to rescission, though it will be so in most instances. The court will do what is just.[255] In this respect rescission was not granted where the plaintiff had received the full benefit of the defendant's work performed under the contract sought to be rescinded, and the plaintiff was neither able nor willing to make restitution to the defendant.[256] But there will be no need for restitution where the subject-matter of the contract has been destroyed, and therefore cannot be restored to the defendant, and that destruction has been the fault of the defendant. Such was the result when the defendant sold goods which were the subject-matter of the original contract of which rescission was being sought.[257]

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250 *Domenco v. Domenco* (1963), 44 W.W.R. 549 (Man. Q.B.). Contrast *Stewart v. Complex 329 Ltd.*, above, where the fact that third parties had acquired interests did not prelude rescission.

251 *Consol. Invts. Ltd. v. Acres*, above.

252 *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 at 21 (B.C.C.A.) *per* McLachlin J.A. This sentence was quoted by Laing J. in *Garrett Estate v. Cameco Corp.* (2001), 214 Sask. R. 161 at 180 (Sask. Q.B.).

253 *Pyramid Const. (Calgary) Ltd. v. Feil* (1957), 22 W.W.R. 497 (Alta. S.C.).

254 *Guest v. Beecroft*, above.

255 *Hudson Bay Invt. Co. v. Thompson*, [1924] 1 W.W.R. 933 at 938 (Man. K.B.) *per* Macdonald J.

256 *Ruiter Engineering & Const. Ltd. v. 430216 Ont. Ltd.* (1989), 32 C.L.R. 23 (Ont. C.A.); varying (1986), 23 C.L.R. 287 (Ont. H.C.). Compare *Terri-Grant Enterprises Inc. v. 82506 Can. Ltd.* (1986), 47 Sask. R. 63 (Sask. Q.B.), where no restitution was possible of benefits received by the plaintiff as a result of his purchase of a franchise which he made as a result of innocent misrepresentations by the defendant (although damages were awarded for breach of collateral warranty and negligent misrepresentation).

257 *Sager v. Man. Windmill Co.* (1914), 6 W.W.R. 265 (Sask. C.A.); affirmed (1914), 7 W.W.R. 1213 (S.C.C.) a strong case, since it concerned *fraud* by the defendant.