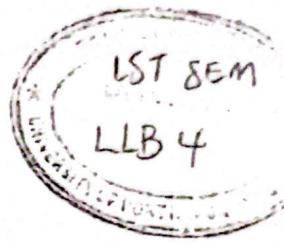


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FIRST SEMESTER



- OTHER EQUITABLE REMEDIES
- CHAPTER 20 OF PROF FABUNMI

• RESCISSION

- Where a contract is voidable, but not void, such a contract is valid until rescinded
- The right to rescind, which may arise in certain circumstances, is exercised where a party to a contract expresses by word or act in an unequivocal manner, that he is no longer willing or that he refuses to be bound by the contract.
- That course of conduct or action, if justified by the circumstances or by the facts of the case, puts an end to the contract and restores the parties as between them, to the position in which they were before the contract was entered into.
- RESCISSION
- The full effect of rescission, therefore, is to treat the contract as though it had never been entered into.

NATURE OF THE REMEDY

- It enables a party to set aside a transaction. In such a case, the other party must be informed unless he has made communication impossible. See *Car & Universal Finance Co Ltd v Caldwell* (1964) 1 All ER 290
- Furthermore, rescission is not a judicial remedy, but the act of the party entitled to rescind, and the order of the court granting rescission may be regarded as no more than a mere judicial recognition of this fact. See *Abraham Steamship Ltd v Westvice Shipping Co* (1923) AC 773
- RESCISSION
- The jurisdiction of the court is always invoked rather than settlement out of court because of fear that the other party may subsequently bring an action on the agreement, and also because *restitution in integrum* which is essential to this remedy can only be properly carried out by the court.
- Indeed, it is a settled law that a contract cannot be rescinded by one party for the default of the other unless both can be put in *status quo as before the contract*. See *Hunt v. Silk; Blackburn v. Smith*
- RESCISSION

Ground for Rescission

i. Fraudulent Misrepresentation

- There is fraudulent misrepresentation when it is shown that a false representation has been made knowingly and intentionally, or without belief in its truth or recklessly without caring whether it is true or false, and with the intention that the other party should act on it and has been so acted upon by the claimant
- This renders the contract **voidable both at law and in equity**, the contract being valid until the injured party elects to rescind it. See *Derry v. Peek; Peek v. Gurney*
- RESCISSION
- However, there must be actual fraud, and so long as the plaintiff is induced to act by the defendant's statement, the misrepresentation is operative. See *Sule v Aromire* (1951) 20 NLR 34
- Note that it is not a defence that the plaintiff might have found out the truth if he had made enquiry

- However, rescission will not be granted on a mere allegation of a defect in title, even for example, where there is a misrepresentation by the head of the family that the land belonged to the family. See *William v Aromire* (1938) 14 NLR 34
- RESCISSION

(i) Innocent Misrepresentation

- A misrepresentation is 'innocent' if the defendant honestly believes in the truth of his assertion even if he has no reasonable ground for his belief. See *Derry v Peek*
- However, mere non-disclosure of material facts does not amount to misrepresentation unless it is so active a misstatement of facts or such a partial or fragmentary statement of facts as would be rendered absolutely false by that which is not disclosed. See *UNN v Turner & Ors* (1968) 1 ALR Comm 90; *Salisu Bangbala v Deputy Sheriff, Lagos CFAO* (1966) All NLR 390
- RESCISSION
- At Common Law, innocent misrepresentation was not recognised as a ground for relief unless incorporated into the contract. If the representation is a condition of the contract, the injured party may either rescind the contract or sue for damages. If the representation is a mere warranty, the remedy will be damages only
- Equity has extended this jurisdiction by affording relief to the injured party even when the misrepresentations were not expressly incorporated into the contract. See *Redgrave v Hurd* (1881) 20 Ch.D 1
- RESCISSION
- However, a contract for the sale of goods cannot be rescinded on the grounds of innocent misrepresentation once the goods have been or are deemed to be accepted. See *Long v Lloyd* (1958) 1 WLR 753; *Ajayi v Eberu* (1964) 1 ALR Comm 155
- Note that this equitable jurisdiction is limited to the rescission of the agreement or the right to resist specific performance, and damages are generally not awarded. Although the injured party may be entitled to an indemnity in respect of the expenses incurred in pursuance of the contract. See *Newbigging v Adam*.
- RESCISSION

(ii) Constructive Fraud

- Constructive fraud consists of a variety of unconscientious conduct which, if made use of to induce a party to enter into a transaction, may constitute a ground for rescinding such transaction. Duress or undue influence are common examples. See *Taylor v Brew* (1942) 8 WACA 201, *Trenco Nig Ltd v A.R.P.E.I.C. Ltd* (1978) All NLR 124, *Johnson v Williams* (1935) 2 WACA 248, *Johnson v Maja* (1951) 2 WACA 290, *Willaims v Franklin* (1961) 1 All NLR 128
- In setting aside such transaction, the court will look into the circumstance before deciding whether or not, to set aside such transaction because it is important that sanctity of contracts be maintained. Hence, a party should not be released from his obligations under a contract which he enters freely on mere allegation of any of these vitiating factors
- RESCISSION

(iv) Contracts Uberrimae Fidei (utmost good faith)

- Contracts uberrimae fidei are by nature such that one party has the means of knowledge, and unless there is full disclosure of this knowledge, the other party may rescind the contract.

- Contracts in this group cover a wide range of relationship which include insurance contract, contracts of family settlements, and other fiduciary relationships. See *Century Insurance Co Ltd v Atumiya* (1966) 2 ALR Comm 314; *Enterprises (Elect) Ltd v British Commonwealth Insurance Co Ltd* (1965) NMLR 147
- RESCISSION

i) Misdescription

- A purchaser under a contract of sale may rescind on the ground of substantial misdescription which amounts to a material misrepresentation. See *Smith v Land & House Property Corp.*
- The right to rescind can be exercised not only where the misrepresentation is made by the vendor, but also where it is made by his authorised agent. See *Sodipo v Coker, Mullens v Miller* (1882) 22 Ch.D 194
- RESCISSION

vi) Mistake

- Mistakes operate both at law and in equity to render a contract void *ab initio* if it strikes at the root of the contract (*Cundy v Lindsay*), or render it more voidable if the mistake is not fundamental.
- Equity often relieves a party from the consequences of his own mistake so long as it can do so, without injustice to a third party
- Thus, a contract is liable to be set aside in equity if the parties are under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and the party seeking to set it aside was not at fault
- RESCISSION
- The mistake must relate to the subject matter of the contract and not merely to the quality of the service rendered under it. See *Bell v Lever brother Ltd* (1931) A.C. 161
- Note that there is an important distinction between a mistake of fact, and mistake of law, as money paid under the former is recoverable (*Willmott v Barter* (1879) 15 Ch.D. 96), while money paid under the latter is irrecoverable. See *Abraham v Tijani* (1944) 17 NLR 123; *Impey v InLR Comm* 273
- RESCISSION

LOSS OF RIGHT TO RESCIND

- The right to rescind a voidable contract must be exercised promptly because undue delay may give the impression that the injured party has acquiesced in the transaction. See *Akiti v Texaco (Africa) Ltd*
- The right may also be lost if *restitution in integrum* is impossible (*Bada v The Premier Thrifty Society* (1938) 4 NLR 20), or a 3rd party has acquired an interest in the property such that he will be prejudiced by rescission
- DELIVERY UP AND CANCELLATION OF DOCUMENTS
- Documents which are avoidable and which have been avoided may at the instance of the party to it, be required to be delivered up and cancelled.
- This arises from the fear that if such documents are allowed to remain in the possession of the parties, claim may be founded upon it or third party may be deceived by it.
- However, delivery up will not be ordered if the document is void at law, and the invalidity appears on its face so that there is no risk of a successful action being brought on it. See *Simpson v Lord Howden*

DELIVERY UP AND CANCELLATION OF DOCUMENTS

If the party asking for the relief proves fraud, actual or constructive, and it is inequitable that the transaction be allowed to stand, he is entitled to be relieved against it in equity, and such documents may be ordered to be delivered up for cancellation. See Erhumunse v Omeregbe (1961) WNL 301, Barclays Bank D.C.O v Olofintuyi & Ors (1961) WRNLR 252, Vaitonu v Odutayo (1950) 19 NLR 119

Documents are sometimes sought to be cancelled because a member of the family has by it, purported to alienate the interest of the family in the property. See Adagun v Fagbola (1932) 11 NLR 110; Esau v Faro (1947) 12 WACA 135

RECTIFICATION

Nature of the remedy

Equity may exercise its remedial jurisdiction to correct errors in a written instrument so as to make it conform with the oral agreements of the parties

The parties must have agreed orally, the mistake only arising when the agreement is being committed into writing because the Court of Equity does not rectify contract. See Mackenzie v Coulson

RECTIFICATION

It is not necessary to find a concluded contract antecedent to the agreement before rectification can be ordered, provided that there was a common continuing intention which was not represented by the agreement. See Joscelyne v Nissen (1970) 2 QB 86

Rectification is exercised not only upon conclusive proof that the concluded instrument does not represent the common intention of the parties, but also that the proposed alteration do accord with their intentions at that time. See Olubowale v Manuki (1971) 11 ULR 145

RECTIFICATION

Conditions for the application of the remedy

A written instrument may be rectified if certain conditions are fulfilled.

(i) There must be a true agreement. See

(ii) A mistake must have been made while embodying the oral agreement into writing. Hence a fundamental mistake common to both parties will justify the rectifications of a written agreement. See Oyadiran v Baggett (1962) LLR 96

RECTIFICATION

But the court will not order rectification of an instrument if the mistake is unilateral, unless there is fraud. See Taylor v Brew.

Similarly, it will not be ordered where the person seeking the remedy is not a party to the contract which is sought to be rectified. See The Vessel "Leona II" & ors v Integrated Oil and Gas Ltd (2002) 12 SCN 303

But where the document is not a contractual document, the court may enquire whether the party seeking its rectification has sufficient interest to enable him invoke the jurisdiction of the court, as where the person seeking rectification of a trust is a beneficiary. See The Vessel "Leona II" & ors v Integrated Oil and Gas Ltd

The Effect of the Doctrine

- Promissory estoppel is **suspensory** only. Hence, once adequate notice of intention to resume legal right is given, the effect of the doctrine will be spent. *Tool Metal Manufacturing Co. Ltd v Tungsten Electric Co. Ltd.*
promissory estoppel contd

Application of the doctrine in Nigeria

- The doctrine has been accepted by Nigerian courts in litigation involving private persons. See *Ajayi v R.T. Briscoe (Nig) Ltd* (1964) 3 All ER 556; *Esin v Matzen and Tim (Nig) Ltd* (1966) 1 All NLR 233; *Thomas Alpin & Co. Ltd v African Development Corporation Ltd* (1964) 2 All NLR 75; and *Tika-Torre Press Ltd v Abina & ors* (1974) 4 ULR 145.

Promissory estoppel contd

- the doctrine as it operates in Nigeria as evidence from the cases is the decision of the PC in the *R.T.Briscoe case*, which is subject to the following qualifications: (a) that the other party has altered his position; (b) that the promisor can resile from his promise on giving reasonable notice which need not be formal notice, thereby giving the promisee a reasonable opportunity of resuming his position; (c) the promise only becomes final and irrevocable if the promisee cannot resume his position.

- The doctrine is also applicable to the State in appropriate circumstance. See *Robertson v Minister of Pensions* (1949) 1 KB 227; & *Mulji Jetho Ltd v Income Tax Commissioner* (1966) 2 A.L.R. Comm. - 1

PROPRIETARY ESTOPPEL

- Unlike promissory estoppel, the effect is permanent and capable of conferring a right of action as well as a substantive equitable right of property.

- Can be used as both a sword and shield.

Operation of the Doctrine

- operate where one person has expended money in *erecting or improving* the property on the land of another on the promise *either expressed or implied*, that he will be allowed a right in the said property. See *Inwards & ors v Baker* (1965) 2 Q.B 29.

Proprietary estoppel contd

- It may also arise in other circumstances where as a consequence of one's action actively or passively encouraged by the other, equity is raised in one's favour. See *Rochdale Canal Co v King* (No. 2)

- However, if there is no promise, express or implied, it is sufficient if a person acts in the mistaken belief actively or passively encouraged by the other either that he had sufficient interest to justify the expenditure or that he may obtain such interest in the future. See *Ramsden v Dyson*, *Inward v Baker*.

Proprietary estoppel contd

- But such a mistaken belief must be genuine otherwise equity will afford no protection. See *Ramsden v Dyson*

Application in Nigeria

- The doctrine is hardly invoked, though there are many decided cases on acquiescence in which estoppel is an integral part. But in the following cases, the court resorted to the doctrine. See *A-G v John Holt & ors* (1910) 2 NLR 1; *Okechukwu v Onuorah* (2000) 12 SCNJ 146

LACHES AND ACQUIESCENCE

- It is essential for a legal system to have a time limit within which redress can be sought in a court of law
- If this is not so, justice could not truly be done because it is difficult, perhaps impossible, after a long delay to establish the facts which would enable the court to reach a just decision
- Hence, the limitation of time within which to bring actions as provided under the Limitation Act and laws of various states in Nigeria. Some of these Laws are expressly made applicable to equitable claims,

LACHES AND ACQUIESCENCE

- Note there are provisions too, which actually refer to certain equitable claims, in which the statute may be applied by analogy
- In instances where an equitable claim is not covered by the statutes either expressly or by analogy, such claim would be covered by the rules of laches and acquiescence.

• This would include claims under customary law which usually have no limitation period. See A-G v John Holt & Ors, Sunmonu v Disu Raqphael (1927) A.C. 881.

LACHES AND ACQUIESCENCE

NATURE OF LACHES AND ACQUIESCENCE

- Laches consists of lapse of time coupled with the existence of circumstances which made it inequitable to enforce the claims
- Equity does not fix a specific time but considers the circumstances of each case. See Smith v Clay
- The basis of this equitable jurisdiction is that it would be unjust to allow a plaintiff who has unduly slept on his right to insist on his strict legal rights after placing the other party in a position in which it would not be reasonable to place him, if the remedy were afterwards to be asserted.

LACHES AND ACQUIESCENCE

- The exercise of this jurisdiction is not arbitrary and the court is usually guided by the principles laid down in Lindsay Petroleum Co. Ltd v Hurd to wit:

• "...the validity of that defence must be tried upon the principles substantially equitable, two circumstances always important in such cases are the length of delay, and the nature of acts done during the interval which might affect either party, and cause a balance of justice in taking the one cause or the other, so far as relates to the remedy." see also Akpan Awo v Cookey Gam; Oyekunle v Alari (1961) WRHLR 281; Ogundimu v Adeusun (1964) LLR. 233

LACHES AND ACQUIESCENCE

- The term 'acquiescence' can be used in two sense vis-a-vis it may mean that a person abstains from interfering while a violation of his legal rights is in progress (Duke of Leeds v Earl of Amhest); or it may mean that a person refrains from seeking redress when a violation of his rights, of which he did not know at the time, is subsequently brought to his notice.

• It is in the former sense that acquiescence is used in this discussion, while acquiescence in the latter sense, is an element in laches.

LACHES AND ACQUIESCENCE

- A comprehensive definition of the term is contained in Caincross v Lorimer (1860) 3 L.R. 139.

- In essence, if A allows B to act in a certain way so that it can be reasonably inferred from A's conduct that he has consented to B's action, A will be deemed to have acquiesced, and will therefore be barred from resorting to his strict legal rights.

APPLICATION OF LACHES AND ACQUIESCENCE

- The equitable doctrines of laches and acquiescence, as applied in Nigerian courts, is the same as England
- LACHES AND ACQUIESCENCE
- It should be noted that although the judges have not laid down any clear principles, which are to govern their application, a few principles have emerged from decided cases.

Actively Giving up Right

- A person may be deemed to have given up his interest in a property if he refrains from asserting his right when it is being violated. See Aganran v Olushi (1907) 1 NLR 266, Johnson v Onisiwo (1943) 9 WACA 189; Segilola v Iyanda
- LACHES AND ACQUIESCENCE
- Note that lapse of time which amounts to laches varies.
- Generally, the court will refrain from enforcing rules of customary law if invoked to support a claim to title as against possession which has been acquiesced for a long period (Akpan Awo v Cookey Gam), and where there has been undue delay for 57 years, the court will regard it as sufficient acquiescence to bar a claim to possession under Glover Settlement Act. See Ogundimu v Adeosun (1964) LLR 233.
- LACHES AND ACQUIESCENCE
- It seems settled that a period of 21 years is regarded as sufficient, though a shorter period may confer right of possession in proper cases. See Ephraim v Asuquo (1923) 4 NLR 98, Okoh v Olotu (1953) 2 NLR 123

i. Passive Acquiescence

- It often happens that a person through neglect, loses a right which he could have enforced had he taken prompt action because equity will only aid the vigilant. See Ramsden v Dyson
- LACHES AND ACQUIESCENCE
- Note that if a person builds on the land of another knowing him to be the owner thereof, there is no principle of equity which prevents the owner from claiming the land with the benefit of all expenditure. See Ramsden v Dyson
- Here, it is essential that the person building the house knows that the land is not his own and continues to build in spite of resistance from the legal owner. Then, he can hardly be said to have acted in good faith to justify equitable intervention
- LACHES AND ACQUIESCENCE
- However, a different consideration applies where a person expends money to improve the land belonging to another with the full knowledge of the other. The court will look into all the circumstances of the case before deciding whether the owner of the developed property is deemed to have acquiesced in the development by his inaction.
- As a general rule, equity will not allow a person to benefit from his fraud. See Rafat v Ellis (1954) 14 WACA 420; Odutola v Akande; Abbey v Olienu (1954) 14 WACA 567

LACHES AND ACQUIESCENCE

- Usually, erecting buildings of a permanent nature (Minacho v Attah), or incurring expenditure of some other nature on the land and other acts of long use are the usual evidence of positive waiver of right supporting a plea of acquiescence. See Taiwo v Taiwo (1958) 3 FSC 82

- It is also not enough to prove long possession as the time when possession commenced, must be strictly proved. See Banjoko v Ololade

- The onus of proof in a plea of laches and acquiescence is on the defendant. See Alade v Aborishade (1960) 5 FSC 167; Finn v Ayeni (1964) NLR 130

LACHES AND ACQUIESCENCE

- The defence of laches can be pleaded against the state. See Nwakoby & Ors v Nzekwu (1961) All NLR 445

LIMITS OF THE DOCTRINE

- The doctrines are equitable principles evolved purposely to give defence where the law offers no assistance.
- Hence, if their duty is to be properly fulfilled, there must be a limit to the application of the doctrine for any indiscriminate use of it, will render the doctrine valueless. See Epelle v Ojo (1926) 7 NLR 96; Akpan Awo v Cookey Gam; Haladu Dadi v Idi Garba (1995) SCNJ 232

LACHES AND ACQUIESCENCE

- Acquiescence must be true acquiescence before it can be successfully pleaded as a defence. See Morayo v Okiade (1942) 8 WACA 46

- Also laches and acquiescence based on long use and possession must be open and adverse.

- The court is very slow to infer laches and acquiescence in respect of land over which occupational rights have been originally granted to strangers. Hence, it will not apply to customary tenancies and pledges. See Oshodi v Oloje, Suleman v Johnson (1951) 13 WACA 213; Amankwa v Abe (1967) 1 ALR Comm 114

LACHES AND ACQUIESCENCE

CONSEQUENCES OF ACQUIESCENCE

- JUDICIAL opinion is that long and undisturbed possession should be protected on the ground that certain rights have been acquired which it would be inequitable to disturb.

- Note that a person who has successfully invoked the plea of laches and acquiescence cannot be ejected by the true owner. He remains in possession for as long as he wishes.

- The legal owner has only the reversionary interest which may never become vested as the occupier can pass his interest to his descendants (See Odutola v Akande; Nwakobi v Nzekwu), but he cannot alienate the property to a 3rd party. See Diana v Soyenu (1937) 13 NLR 143

LACHES AND ACQUIESCENCE

- Laches and acquiescence may pass the original rights of the overlord to the occupier in proper cases, though a higher degree of acquiescence is required.

- This is due to the fact that the doctrines were not evolved to defeat the title of owner but rather to protect the possession of the occupier. See Diana v Soyenu