BUSINESS AGENTS ACT

Rights of Purchaser under S. 39.

S. 39 of the *Business Agents Act* 1938 is a statutory provision peculiar to South Australia. It reads:

(1) Any contract for the sale of any business shall be voidable at the option of the purchaser at any time within six months from the making thereof, unless—

(a) the contract is in writing; and

(b) the contract contains the following particulars namely

(i) the name, address and description of the vendor; and

(ii) the name, address and description of some person to whom all moneys falling due under the contract may be paid; and

(c) the contract if the consideration mentioned is £200 or more, or if it is one of a number of contracts forming substantially one transaction in which the total consideration is £200 or more is executed by the purchaser in the presence of two witnesses neither of whom shall be the vendor, the vendor's agent, or any person employed by the vendor's agent.

(2) A purchaser shall not be deemed to have elected to affirm a contract which is voidable under this section by reason of any payments of money made by the purchaser pursuant to the contract within the period of six months aforesaid.

The question of the extent of the right given to the purchaser was raised in *Drozd* v. *Vaskas*(1). The plaintiffs purchased from the defendants a cafe business, including its equipment, goodwill and stock. The plaintiffs drew up a contract which was not in the form, nor was it executed in the way required by s. 39. Within six months of the date on which this document was signed the plaintiffs notified the defendant by letter from his solicitors that he was treating the agreement as rescinded on three grounds: (1) that the defendant had induced him to enter the contract by representing that the weekly profit of the business was greater than it was; (2) that the defendant had failed to execute a transfer of the lease; and (3) that he had a right to do so under s. 39 of the *Business Agents Act*.

Reed J. found the misrepresentation proved and that the plaintiffs had not affirmed the contract at any time before their solicitors wrote to the defendants; an express affirmation was necessary: *Abram Steamship Co.* v. *Westville Shipping Co.*(2). But the misrepresentation could not give rise to rescission of the contract in this case because the plaintiffs had ceased to carry on the business which it was therefore impossible to restore; there cannot be rescission when there cannot be a total *restitutio in integrum*: *Hunt* v. *Silk*(3); *Clough* v. *London and North Western Railway Co.*(4). Reed J. points out that in determining whether to grant rescission "the Court must fix its eyes on the goal of doing what is practically just"(5).

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(1) [1959] S.A.S.R.
(2) [1923] A.C. 773 at 779; and see 23 Halsbury 2nd Ed. 110 Note (g).
(3) (1804) 5 East 449.
(4) (1871) L.R. 7 Ex 26 at 35.
(5) *Spence* v. *Crawford* [1939] 3 All E.R. 822 at 829.

But he concludes: "rescission involving compensation could not do justice to the defendants in this case."

With respect to the failure to transfer the lease. His Honour found that execution of the transfer was a fundamental condition of the contract, but that the plaintiffs in electing to treat the breach as terminating the contract gained no right to rescission but only to damages: *McDonald* v. *Dennys Lascelles Ltd.*(6).

This left the question whether s. 39 of the *Business Agents Act* gave the plaintiffs a right to rescind the contract. Reed J. considered that as the section did not specify the consequences of the exercise of the purchaser's right. The intention of the legislature must be ascertained from the language of the section. Subsection (2) recognises that the purchaser may elect to affirm the contract and so lose the benefit of the section. What amounts to an affirmance is to be determined by the general law in the absence of statutory expression to the contrary. In this case there was such an affirmance by the plaintiffs in allowing a situation to arise under which *restitutio in integrum* became impossible, i.e., if there cannot be rescission there is affirmance.

To reach this conclusion the learned judge has to take a different view of the section from that expressed by Abbott J. in *Veitch* v. *Easson*(7). The actual decision in that case was that there had been an affirmance of the contract for the sale of a business constituted in the continuation of the business and in the signing of a lease by the plaintiff purchaser. But His Honour also considered that s. 39 would give the purchaser a right exercisable despite the fact that it was not possible to restore the parties to their former positions. He found that the right was analogous to that of an infant to avoid his contract or to that of a party to a contract unenforceable under the Statute of Frauds. He rejected the argument that the right was similar to that of a person induced to enter a contract by fraudulent misrepresentation, i.e., the equitable right of rescission (as long as restitution is possible, there is no affirmance and the rights of third parties are not altered); otherwise a right to damages by common law action for deceit. Thus in his view the section is not to be limited by any condition that the purchaser, when he exercises his option to avoid, shall be able to remit the vendor to his former position.

It is submitted that while this portion of Abbott J.'s judgment states with clarity the arguments for and against limiting the operation of the section, by the equitable rules relating to rescission his conclusion is open to question. The analogies which he draws to infants' contracts and contracts contrary to the Statute of Frauds are not accurate in one important respect: the right of an infant to avoid his contract in effect exists only in respect to that part of the contract which is executory on his side, hence, he can recover money paid by him only if there is a total failure of consideration on the other side: *Steinberg* v. *Scala (Leeds) Ltd.*(8). And similarly the *Statute of Frauds* renders a contract *unenforceable*(9), i.e., it gives a defence to an action to enforce performance. Both Abbott J. and Reed J.,

(6) (1938) 48 C.L.R. 457, per Dixon J. at 476-7.
(7) [1949] S.A.S.R. 9.
(8) [1923] 2 Ch. 452.
(9) *Maddison* v. *Alderson* (1883) 8 App. Case 467 at 488.

however, were concerned with the question whether the remedy of rescission existed: return of purchase money in exchange for return of business. If the section is to be construed in accordance with the analogies drawn by Abbott J. the plaintiff still should not have succeeded in recovering his money because the consideration had not failed. His only right would be to avoid performance of any outstanding contractual duty. It is respectfully submitted that the analogy to the rights of a contracting party to avoid a contract for misrepresentation, which Abbott J. rejected, gives a more complete answer to the problems which arise in considering the extent of the remedy generating from the word "avoid". The rules relating to infants' contracts have been evolved to protect the infant insofar as he has not carried out his contract, and as such they provide no analogy in the case where a party claims to be able to go back on what has already been done.

In *Drozd* v. *Vaskas* Reed J. did not approach the problem as a question of applying the equitable principle of rescission. He found that an election to affirm the contract would be constituted in some occurrence which rendered *restitutio in integrum* impossible. Thus in effect the equitable rule is put into effect. But is this approach always good? Inability to restore may result from causes which have nothing to do with the purchaser. Can this then be construed as an affirmance? It is submitted that construction of the word "avoid" in s. 39 can only be completely achieved by analogy from the general law. If the section arises again for consideration the question to be asked should be: does this section give remedies akin to those given at common law and in equity for contracts induced by misrepresentation or undue influence, or does it give some greater or lesser right? The existence of the question illustrates the lack of definition which in general exists with respect to the exact rights arising when a contract is labelled "voidable".

HEALTH ACT

Suffer to Inhabit or Occupy—Relation to Landlord and Tenant Act

The extent of operation and relation of the *Health Act* 1935-1955 and orders made under it to general enactments like the *Landlord and Tennant (Control of Rents) Act* 1942-1957 arose for consideration on appeal before the Supreme Court in the case of *Piro* v. *Boorman*.[1] Premises of the appellants let to a weekly tenant were declared unfit for habitation and an eviction order made under s. 116 of the *Health Act* 1935-1955. The appellants' son continued to call at the tenement to collect the weekly rent and no action was taken by the appellants to put out the tenants. They were convicted under s. 117 which states that "any person who, after the expiration of the specified time . . . suffers to be inhabited or occupied any such building" shall be guilty of an offence.

Counsel contended that there was a conflict between this order and s. 42 of the *Landlord and Tenant (Control of Rents) Act* which pre-

1. [1958] S.A.S.R. 226.