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Equity: Right of Vendee to Retain Possession Pending a Decree for Rescission

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not, the customary solicitude of the Supreme Court of Florida for the interests of minor children¹⁶ and the numerical weight of authority, as well as the reluctance of the Michigan court in paying its tribute to stare decisis in the principal case, should influence the Florida Court to align itself with the majority.¹⁷

ROBERT FORNEY

**EQUITY: RIGHT OF VENDEE TO RETAIN POSSESSION
PENDING A DECREE FOR RESCISSION**

Hilerio v. Barton, 42 So.2d 275 (Fla. 1949)

The complainants, who brought suit for rescission of a contract for the purchase of real property, alleged fraudulent representations by the vendors. They also requested that a lien be declared on the realty for that part of the purchase price paid. The vendee-complainants entered possession upon making a down payment on the purchase price. The complainants further alleged that they stood ready to vacate the premises when reimbursed by the vendor respondents or as ordered by the court. The circuit court entered an order requiring them to vacate. On certiorari, HELD, a vendee in equity seeking rescission of a contract because of fraud may retain possession of the property pending suit if he offers to return it in compliance with the decree he seeks. Order of the circuit court quashed.

The courts have given increased attention to the law of rescission in recent years as a result of increasing transactions in both land and personalty. Out of the older cases arose the general proposition that ordinarily a complainant must abandon possession before he

¹⁶This attitude is well illustrated in Note, 1 U. OF FLA. L. REV. 360 (1948).

¹⁷The factual situation here discussed has provoked considerable comment: see Notes, 2 A.L.R.2d 880 (1948), 145 A.L.R. 821 (1943), 132 A.L.R. 773 (1941), L.R.A. 1918A 818 (1918); 14 AUST. L.J. 76 (1940); 26 MINN. L. REV. 114 (1941); 16 NOTRE DAME LAW. 240 (1941); 18 WASH. L. REV. 215 (1943). For an analysis of the adoption question in relation to homestead law in Florida, see Crosby and Miller, *Our Legal Chameleon, The Florida Homestead Exemption: I-III*, 2 U. OF FLA. L. REV. 12, 60 (1949).

can obtain rescission of an executory contract.¹ Most of the cases invoking this doctrine, however, recognize that the vendee may retain possession in order to indemnify himself against loss when a vendor is insolvent² or has left the state³ or is a non-resident⁴ or refuses an offer of restoration,⁵ even if the offer is conditional on repayment of the purchase price.⁶ Decisions of Alabama stand alone in distinguishing between suits for rescission based on fraud and those based on lack of title, deficiency in title, or mistake; the vendee may remain in possession with little question in case of fraud but must show exceptional circumstances otherwise.⁷ The reason advanced by the Alabama Court for the distinction is that fraud taints and vitiates the entire contract. The Florida cases involving rescission do not indicate whether Florida would make such a distinction.⁸ It is doubtful, however, that Florida will follow Alabama, since there is no logical basis for the distinction.

These exceptions and modifications have led to the rule of this case, adhered to in most jurisdictions today, that a vendee seeking rescission based on fraud need not restore or offer to restore possession so long as he offers to do so in his pleadings in accordance

¹*Parks v. Brooks*, 16 Ala. 529 (1849); *Greenlee v. Gaines*, 13 Ala. 198, 48 Am. Dec. 49 (1848); *Duncan v. Jeter*, 5 Ala. 604, 39 Am. Dec. 342 (1843); *Whitlock v. Denlinger*, 59 Ill. 96 (1871); *Williams v. Hefner*, 89 Mont. 361, 297 Pac. 492 (1931).

²*Burkett v. Munford*, 70 Ala. 423 (1881); *Read v. Walker*, 18 Ala. 323 (1850); *Greenlee v. Gaines*, 13 Ala. 198, 48 Am. Dec. 49 (1848); *Duncan v. Jeter*, 5 Ala. 604, 39 Am. Dec. 342 (1843); *McIndoe v. Morman*, 26 Wis. 588, 7 Am. Rep. 96 (1870).

³*Foster v. Gressett's Heirs*, 29 Ala. 393 (1856).

⁴*Sorensen v. Larue*, 43 Idaho 292, 252 Pac. 494 (1926).

⁵*Everett v. Pickens*, 203 Ala. 322, 83 So. 33 (1919); *Castiglia v. Lucas*, 132 Misc. 480, 230 N.Y. Supp. 116 (Sup. Ct. 1928); *Keefus v. Weilmunster*, 89 App. Div. 306, 85 N.Y. Supp. 913 (2d Dept. 1903).

⁶*Oregon Mtg. Co. v. Renner*, 96 F.2d 429 (9th Cir. 1938); *Younge v. Harris*, 2 Ala. 108 (1841); *Florence Oil & Ref. Co. v. McCandless*, 26 Colo. 534, 58 Pac. 1084 (1899); *Castiglia v. Lucas*, 132 Misc. 480, 230 N.Y. Supp. 116 (Sup. Ct. 1928).

⁷*Bailey v. Jordan*, 32 Ala. 50 (1858); *Garner, Neville & Co. v. Leverett*, 32 Ala. 410 (1858); *Read v. Walker*, 18 Ala. 323 (1850); *Parks v. Brooks*, 16 Ala. 529 (1849).

⁸*E.g.*, *Lang v. Horne*, 156 Fla. 605, 23 So.2d 848 (1945); *Hilliard v. Futch*, 99 Fla. 654, 127 So. 341 (1930); *Reese v. Levin*, 124 Fla. 96, 168 So. 851 (1936); *Cox v. Grose*, 97 Fla. 848, 122 So. 513 (1929).

with the prospective decree.⁹ There is no reason why a vendee should not be granted rescission without such an express representation on his part, since the decree of the court is binding on the vendee irrespective of the offer. One case involving realty,¹⁰ and several involving personalty,¹¹ have held such offer in the bill unnecessary. Incidentally, the cases bearing on the subject indicate that, although the vendee generally must pay or account for a reasonable use and enjoyment of the premises,¹² he is ordinarily entitled to interest on purchase money paid.¹³

There is a clear distinction between a suit in equity to obtain rescission and an action at law based on rescission. The latter generally is not maintainable until the vendee has abandoned possession¹⁴ or at least until he offers to restore what he has received under the contract.¹⁵ The suit in equity looks to the decree for rescission, while the suit at law is based on a prior act of rescission. The reason offered for the rule in the cases at law is that the contract is not totally rescinded until there has been an abandonment of possession. The fallacy in this reasoning is the failure to note the fact that to constitute rescission both parties must be placed in the status quo, and until the vendee receives the purchase money the contract is not totally rescinded.

The instant decision, permitting the vendee to remain in possession, is the first direct holding in Florida concerning the right of the vendee to retain possession while suing in equity to obtain rescission. The Florida Court in a relatively early case¹⁶ refused rescission when the vendee did not rely on the false representations made by the vendor. The Court in the statement of facts mentioned

⁹*Masters v. Van Wart*, 125 Me. 402, 134 Atl. 539 (1926); *Hopper v. Williams*, 27 Wash.2d 579, 179 P.2d 283 (1947); *Empey v. Northwestern & Pac. Hypotheek Band*, 129 Wash. 392, 225 Pac. 226 (1924).

¹⁰*Coffee v. Newsom*, 2 Ga. 442 (1847).

¹¹*Knappen v. Freeman*, 47 Minn. 491, 50 N.W. 533 (1891); *Thorpe v. Packard*, 73 N.H. 235, 60 Atl. 432 (1905); *Cain v. Norman*, 140 Wash. 31, 249 Pac. 71 (1926); 11 MINN. L. REV. 277 (1927).

¹²*Bailey v. Jordan*, 32 Ala. 50 (1858); *Florence Oil & Ref. Co. v. McCandless*, 26 Colo. 534, 58 Pac. 1084 (1899).

¹³*McIndoe v. Morman*, 26 Wis. 588, 7 Am. Rep. 96 (1870).

¹⁴*Mellenthin v. Donovan*, 168 Minn. 216, 209 N.W. 623 (1926); *Pollard v. Larson*, 115 Neb. 136, 211 N.W. 998 (1927); *Goelth v. White*, 35 Barb. 76 (N.Y. 1861); *Sievers v. Brown*, 36 Ore. 218, 56 Pac. 170 (1899).

¹⁵*See Vail v. Reynolds*, 118 N.Y. 297, 302, 23 N.E. 301, 303 (1890).

¹⁶*Hirschman v. Hodges, O'Hara & Russell Co.*, 59 Fla. 517, 51 So. 550 (1910).

that ". . . the bill then offers to deliver possession of said turpentine location to defendant company at any time that may be designated by the court . . .,"¹⁷ implying that such an offer might be necessary to sustain a bill for rescission when the vendee had possession. The question of right to possession during the suit was not, however, before the Court.

The Florida Supreme Court in *Dekle v. Noone*¹⁸ and *Willis v. Fowler*¹⁹ expressly recognized the necessity that the vendee offer in the pleading to restore possession to the vendor. In the former case the vendor's demurrer was sustained on several grounds, including the failure of the vendee to allege that he ever offered to restore possession prior to the suit or in the bill itself. In the latter, the Court gave as one reason for remanding that the complainant vendee should amend his bill to allege that he received the property and offered to restore it.

The Florida Supreme Court has not decided the right of the vendee to retain possession pending his suit at law, based on rescission, for return of the purchase money. In one case, however,²⁰ the Court implied that an offer to restore possession or the consideration would be sufficient.

This case clarifies the law of Florida in that a vendee now suing in equity for rescission of a contract of realty on grounds of fraud may retain possession of the property *pendente lite*. He must, however, offer to return it in conformity with the terms of the decree he seeks.

GEORGE W. WRIGHT, JR.

FLORIDA HOMESTEAD: AVAILABILITY OF EXEMPTION AFTER DIVORCE

Anderson v. Anderson, 44 So.2d 652 (Fla. 1950)

Plaintiff was awarded a divorce from defendant husband and given complete custody of their two minor children. The chancellor ordered that defendant pay ten dollars per week for support of the

¹⁷*Id.* at 521, 51 So. at 552.

¹⁸94 Fla. 1211, 115 So. 514 (1928).

¹⁹102 Fla. 35, 136 So. 358 (1931).

²⁰*See Cox v. Grose*, 97 Fla. 848, 853, 122 So. 513, 515 (1929).