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We think the case was not one to be withdrawn from the jury, and therefore a new trial should be ordered.

Special leave to appeal granted. Appeal allowed. New trial ordered. Prisoner remanded in custody to await his trial subject to any bail which the Supreme Court may in its discretion think fit to allow.

Solicitors for the appellant, *Reid & Reid*, Newcastle, by *Lobban, Lobban & Harney.*

Solicitor for the respondent, *J. V. Tillett*, Crown Solicitor for New South Wales.

B. L.

[HIGH COURT OF AUSTRALIA.]

BROWN . . . . . APPELLANT;
DEFENDANT,

AND

SMITT . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE. *Feb.* 25, 26; *May* 14.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Vendor and Purchaser — Sale of land — Purchaser in possession — Fraudulent misrepresentation by vendor — Rescission of contract — Compensation — Improvements by purchaser — Repairs — Losses in business.

In an action by a purchaser against a vendor for rescission of a contract for the sale of land where the purchaser had entered into possession of the land,

Held, by *Knox* C.J., *Gavan Duffy* and *Starke* JJ. (*Isaacs* and *Rich* JJ. dissenting), that the case being one in which rescission should be ordered, the purchaser was entitled to recover as compensation the value added to the land

by reason of permanent improvements, which were not mere matters of taste or personal enjoyment, made by him before he knew of the matters which justified the rescission.

Held, also, by *Knox* C.J., *Isaacs*, *Gavan Duffy*, *Rich* and *Starke* JJ., that the purchaser was entitled to recover as compensation the cost of necessary repairs, but was not entitled to recover as compensation collateral losses which he had sustained by reason of the fact that he had entered into the contract, such as losses incurred in carrying on a business on the land.

Decision of the Supreme Court of Victoria (*Mann* J.) varied.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court on 28th May 1923 by Robert Gustav Smitt against William John Brown, in which the plaintiff alleged that by an agreement in writing dated 24th May 1922 he agreed to purchase and the defendant agreed to sell a certain farm and the buildings thereon for the price of £3,755 9s., and that in pursuance of the contract the plaintiff paid the sum of £755 9s. and went into possession of the farm in July 1922. The plaintiff further alleged that in order to induce the plaintiff to enter into the contract the defendant fraudulently made certain false representations to the plaintiff. The plaintiff claimed (a) rescission of the contract; (b) return of the sum of £755 9s., and (c) "damages £1,000 or in all £1,854." Particulars given in the statement of claim showed that the sum £854, part of the £1,854, was made up by deducting £130, being the income the plaintiff received from the farm while he was in possession, from £984, being the expenses incurred by the plaintiff in work and labour and materials for repairing, working and improving the farm, loss and depreciation of stock and expenses of moving to the farm and droving. Among his defences the defendant contended that the plaintiff was barred by acquiescence, laches and delay, and had affirmed the contract by asking for and receiving time for payment of interest under the contract.

The action was heard by *Mann* J., who made an order rescinding the contract, and ordering the defendant to repay to the plaintiff the £755 9s. paid under the contract and also to pay to the plaintiff £175 as and by way of compensation to the plaintiff.

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From that decision the defendant now appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Hayes K.C. (with him *Hennessy*), for the appellant. The respondent, having gone into possession and having remained in possession pursuant to the contract until the action was brought, is not in a position to restore the appellant to his original position. The case is not one for rescission, but the proper remedy is by an action for deceit (*Hunt* v. *Silk* (1); *Blackburn* v. *Smith* (2); *Rutherford* v. *Acton-Adams* (3)). The respondent is not entitled both to rescission and to damages for deceit (*Dominion Coal Co.* v. *Dominion Iron and Steel Co.* (4)). The respondent continued in possession after he had discovered the misrepresentations, and has, by continuing in possession, elected to affirm the contract (*Fullers' Theatres Ltd.* v. *Musgrove* (5)). His delay in taking proceedings amounts to laches, and is an answer to the claim for rescission. It was his duty to notify the appellant that he renounced the contract, and he did not do so. The remedy in an action for rescission is to put an end to the contract, and nothing more (see *King* v. *Poggioli* (6)). Nor is the respondent entitled to compensation for improvements or for losses in carrying on business (see *Adam* v. *Newbigging* (7)).

[RICH J. referred to *Hulton* v. *Hulton* (8).

[STARKE J. referred to *Whittington* v. *Seale-Hayne* (9); *Erlanger* v. *New Sombrero Phosphate Co.* (10); *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (11).]

Foster, for the respondent. There was nothing which indicated an intention of the respondent to affirm the contract after he had discovered the misrepresentations. Mere delay does not show an affirmance of the contract. The respondent, having proved a case for rescission, is entitled to compensation. The only cases where

(1) (1804) 5 East 449.
(2) (1848) 2 Ex. 783.
(3) (1915) A.C. 866.
(4) (1909) A.C. 293, at p. 311.
(5) (1923) 31 C.L.R. 524.
(6) (1922-23) 32 C.L.R. 222.
(7) (1888) 13 App. Cas. 308, at p. 317.
(8) (1917) 1 K.B. 813, at p. 821.
(9) (1900) 82 L.T. 49.
(10) (1878) 3 App. Cas. 1218.
(11) (1899) 2 Ch. 392.

compensation has been refused are cases of innocent misrepresentation. In a case of fraudulent misrepresentation compensation may always be given (*Baugh* v. *Price* (1); *Edwards* v. *M'Leay* (2); *Redgrave* v. *Hurd* (3); *Erlanger* v. *New Sombrero Phosphate Co.* (4)). The cost of improvements is included in compensation (see *Hart* v. *Swaine* (5)).

[STARKE J. referred to *Gibson* v. *D'Este* (6).]

Hayes K.C., in reply.

Cur. adv. vult.

May 14.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. The respondent—the plaintiff in the action—asked by his statement of claim : (1) rescission, on the ground of fraudulent representations, of a contract by which he agreed to purchase a farm from the appellant ; (2) return of £755 9s. paid under the said contract, and (3) " damages £1,000 or in all £1,854." The particulars given in the statement of claim showed that the sum of £854, part of the £1,854 claimed, was for the expense incurred by the respondent in repairing, working and improving the farm, loss and depreciation of live-stock, and cost of maintenance and other expenses incurred in connection with the live-stock.

The learned trial Judge (*Mann* J.) accepted the evidence of the respondent and his witnesses, and held that the contract was induced by three false and fraudulent representations on the part of the defendant (the vendor) or his agent, namely, (a) that the farm was a first class dairying property ; (b) that the soil was of good quality and was volcanic soil, and (c) that 120 acres of the land had been cleared. After rejecting certain defences based on allegations of acquiescence, laches on the part of the plaintiff, and an election to affirm the contract, the learned Judge decreed the rescission of the contract. So far, we think the Judge below was clearly right, substantially for the reasons assigned by him. But he also ordered

(1) (1752) 1 Wils. 320.
(2) (1818) 2 Swans. 287.
(3) (1881) 20 Ch. D. 1.
(4) (1878) 3 App. Cas., at p. 1277.
(5) (1877) 7 Ch. D. 42.
(6) (1843) 2 Y. & C. C. C. 542.

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the defendant to repay to the plaintiff £755 9s., the amount paid under the contract, and, in addition, the sum of £175 as and by way of compensation to the plaintiff. This latter sum appears to have been arrived at by crediting the respondent with £345 in respect of "compensation for expenditure occasioned by the contract" and debiting him with £130—the gross amount received by him from the business carried on on the farm during his occupation—and with £40 allowed to the appellant as compensation because he would receive back the property without a growing hay-crop upon it and too late to sow another crop for the current season.

No one disputed that the plaintiff is entitled to repayment of the sum of £755 9s. if the contract is rescinded, but we have to consider what further relief ought to be granted to him. The parties being relieved of the contractual obligations, each must give back all that he obtained under the contract. Where the property the subject matter of a contract remains unchanged, no difficulty arises. Where it has been wholly or substantially destroyed by the default of the party seeking rescission, there can be no rescission because there can be no restitution. But where the property has been improved or deteriorated by the act of the purchaser, and yet remains in substance what it was before the contract, equity adjusts the rights of the parties by awarding money compensation to one or the other, and so substantially putting each party in the position which he occupied before the contract was made. Lord *Blackburn* in *Erlanger's Case* (1) said: "It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration. . . . And . . . 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." Again, *Rigby* L.J., in his dissenting opinion in the *Lagunas Case* (2),

(1) (1878) 3 App. Cas., at pp. 1278-1279.
(2) (1899) 2 Ch., at pp. 456-457.

repeats the words of the noble and learned Lord, and adds: "This important passage is, in my judgment, fully supported by the allowance for deterioration and permanent improvements made by Lord *Eldon* and other great equity Judges in similar cases. . . . The obligation of the vendors to take back the property in a deteriorated condition is not imposed by way of punishment for wrongdoing, whether fraudulent or not, but because on equitable principles it is thought more fair that they should be compelled to accept compensation than that they should go off with the full profit of their wrongdoing. Properly speaking, it is not now in the discretion of the Court to say whether compensation ought to be taken or not. If substantially compensation can be made, rescission with compensation is *ex debito justitiæ*." It would be no less unjust, however, that a person whose fraud or misrepresentation has induced the contract should be allowed to take back his property, with permanent and lasting improvements upon it made by the other party, without making any allowance for those improvements, which increased the sale value of the estate in his hands. The decision of Lord *Eldon* in *Edwards* v. *M'Leay* (1) is a distinct authority for the proposition that necessary repairs may be allowed in such cases; and the text-books unanimously, we think, support the view we have taken (see *Sugden's Vendors and Purchasers*, 14th ed., p. 254; *Dart's Vendors and Purchasers*, 7th ed., p. 811, and *Williams' Vendor and Purchaser*, 3rd ed., p. 815, note (*u*), pp. 816-817). This doctrine however, would not justify improving the vendor out of his estate, as is the phrase in the books, or rendering it impossible for him to recover his estate. Rescission in such a case would be impossible, and restitution out of the question. Again, allowances for improvements which were matters of taste or personal enjoyment could not be justified (see *Mill* v. *Hill* (2); *Stepney* v. *Biddulph* (3); *Kerr on Fraud and Mistake*, 4th ed., p. 372). Nor will allowances be given for improvements made after the party making them knows, or has reasonable notice, of the defect in title. He must then take the risk. And putting the parties in the position they were in before the contract, replacing them *in statu quo*, does not involve replacing

(1) (1818) 2 Swans. 287.
(2) (1852) 3 H.L.C. 828.
(3) (1865) 13 W.R. 576.

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them in the same position in all respects, but only in respect of the rights and obligations created by the contract which is rescinded. A party, in case of rescission, cannot ask the Court to award him compensation for all collateral losses which he may have sustained by reason of the fact that he entered into the contract, such as losses incurred in carrying on a business (*Newbigging* v. *Adam* (1); *Whittington* v. *Seale-Hayne* (2)), but only such compensation as will restore the *status quo ante* in relation to the subject matter of the contract. Such losses could, in this case, only be recovered in an action of deceit. That cause of action, if included in the statement of claim, was not relied on below, and in any event it seems to us that it was the contract, and not, in a legal sense, the establishment of the business, which the fraudulent representations induced.

Now, it is clear, from the evidence and from the judgment of *Mann* J., that he made allowances for some improvements on the property sold, not permanent in their nature, and also for some collateral losses incurred in connection with a business which the plaintiff carried on upon the property. It is manifest, therefore, that the sum of £175 allowed by the learned Judge as compensation is erroneous, and cannot be sustained. We are quite unable, on the evidence, to assess the proper amount, and in any case an account on familiar lines is much more desirable than the method adopted in the Court below.

ISAACS AND RICH JJ. By agreement in writing dated 24th May 1922, Robert Gustav Smitt (the respondent) purchased from William John Brown a farm for the price of £3,755 9s. In pursuance of the contract the respondent, on 23rd June 1922, paid to the appellant £755 9s., part of the price, and in July went into possession. There has been no conveyance or transfer of the land. The respondent, on 28th May 1923, commenced an action in the Supreme Court in which his primary claim was for rescission of the contract with consequential relief, his alternative claim being for damages. The action was based on misrepresentation, alleged in the alternative to have been fraudulent. *Mann* J. ordered rescission, repayment

(1) (1886) 34 Ch. D. 582; (1888) 13 App. Cas. 308.
(2) (1900) 82 L.T. 49.

by the appellant of the £755 9s., and also payment by him of £175 as compensation. On the appeal, there were only two points of substance, namely, (1) whether on the facts rescission was properly directed or whether the respondent's only remedy was damages for deceit, and (2) whether compensation was properly allowed for permanent improvements, namely, clearing the land and provision for a permanent supply of water. The learned primary Judge confined his attention to three out of the many misrepresentations alleged. Those three are the most important, namely, (a) that the farm was a first class dairying property, (b) that the soil was good and volcanic and (c) that 120 acres had been cleared. There can be no doubt that those representations were made, were false, were fraudulent, and induced the respondent to purchase.

The first point of substance raised by the appellant as above stated was based on the contention that on the admitted facts the respondent, assuming an original right of rescission, had disentitled himself to that remedy either by delay or election. With respect to delay, there having been no alteration of the appellant's position caused by the delay and no intervening circumstances affecting third persons such as would make rescission unconscientious on the respondent's part, this objection cannot hold. As to election, much reliance was placed on the admission that by December 1922 the respondent had discovered the falsity of the first and second of the misrepresentations referred to. The third was not discovered until "about February 1923." But even after this discovery no immediate action was taken. The respondent continued in occupation, and wrote in February or March a letter to the appellant in which he said: "I intend to sell the place, it has turned out a very different property to the one I bought, in fact it is not in the same street." The contention is that these circumstances establish an irrevocable election to affirm the contract, and consequently a relinquishment of any right to avoid it. The law as to election in such a case is perfectly clear. For its essentials it is unnecessary to refer to prior authorities since the case of *Abram Steamship Co.* v. *Westville Shipping Co.* (1). The test, as there put, is stated in the judgment of Lord *Dunedin* (2) (which was assented to by the Earl of *Birkenhead*

(1) (1923) A.C. 773.

(2) (1923) A.C., at p. 779.

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and Viscount *Finlay*)—whether what the respondent has said and done should be "taken as a considered affirmation of the contract." The same view is expressed by Lord *Atkinson*, whose judgment was also adopted by the Earl of *Birkenhead*. At pp. 786-789 various authorities are reviewed. The decisive principle is contained in a passage cited by the learned Lord from *Clough* v. *London and North-Western Railway Co.* (1), namely, Did the party defrauded at any time after knowledge of the fraud either by express words or by unequivocal acts affirm the contract? An example of an unequivocal act is found in a passage in the judgment of Lord *Parker* (then *Parker* J.) in *Matthews* v. *Smallwood* (2). But, referring to that passage, if the landlord merely stated his intention to distrain or receive the rent, and yet did not distrain, and refused to receive the rent, could that be treated as in law a waiver? It is apprehended not. Neither in the circumstances can the acts and letter of the respondent be so regarded. When the whole of the circumstances are considered, such as the absence of any express confirmation, the rest of the letter referred to, the subsequent communications between the parties and the probabilities of the case, the proper conclusion is that the respondent did not either expressly or by an unequivocal act affirm the contract. Rescission was neither lost by delay nor surrendered by confirmation. That remedy was therefore appropriate, provided proper conditions are complied with. One condition is always inseparable from rescission—restitution by the plaintiff to the defendant of the property transferred. Authorities are collected and applied so far as there necessary in *Fuller's Theatres Ltd.* v. *Musgrove* (3). To those authorities may now be added *Abram Steamship Co.* v. *Westville Shipping Co.* (4). In addition to the general principle involved, there are certain dates in that case that are important. The action there was commenced on 5th November 1920, the sub-contract relied on as a bar to rescission was not dealt with by judgment for rescission on the ground of innocent misrepresentation until 11th December. The House of Lords held that as the sub-contract was put out of the way—though not till 11th December—the action for rescission of the primary

(1) (1871) L.R. 7 Ex. 26, at p. 34.
(2) (1910) 1 Ch. 777, at pp. 786 *et seqq.*
(3) (1923) 31 C.L.R., at pp. 541-543.
(4) (1923) A.C. 773.

contract was sustainable. On whatever grounds that is reached, it means that the effect of rescission goes back behind the date of the judgment for rescission and relates to the time of the making of the contract which is rescinded. Rescission, therefore, means restoration of the parties to the situation they respectively occupied immediately before the contract was made. Whatever that may involve where rescission takes place by the mere voluntary act of one of the parties acting upon the absolute rights which he possesses independently of any equitable interposition of the Courts, the law where that interposition is sought seems fairly clear. Lord *Blackburn's* judgment in *Erlanger's Case* (1) contains practically all the law material to the statement of the principles affecting this branch of the case. He says :—" As a condition to a rescission there must be a *restitutio in integrum*. The parties must be put in *statu quo*." The plaintiff, if purchaser, must restore the property purchased *in integrum*. But equity does not require it to be restored in *precisely* the state it was in before the contract. If substantially in that state, if no change has occurred which alters its character, and any deterioration can be compensated for in money, that is sufficient, so far as the plaintiff is concerned. In that case the vendor defendant receives back to all practical intents and purposes the property as he gave it, blemished, it may be, but not so affected as to change its character, and for the blemish he receives the equivalent in cash. But how is the plaintiff to be restored to his former status and as if there had never been any such transaction ? (See *Bellamy* v. *Sabine* (2).) He is entitled to the return of any purchase-money he has paid, to cancellation of any obligation he has by the contract incurred to the vendor and to indemnity against any obligation he has incurred or discharged to any other person pursuant to the contract (see *Newbigging* v. *Adam* (3)). In short, there must be a clear undoing of all that was done directly or indirectly by force of the contract. This statement is necessary in order to lead up to the question whether a plaintiff purchaser is entitled to be recouped the value of permanent improvements as part of the process of rescission. On

(1) (1878) 3 App. Cas., at pp. 1278, 1279.
(2) (1847) 2 Ph. 425, at p. 442.
(3) (1886) 34 Ch. D. 582, particularly at p. 595 ; (1888) 13 App. Cas., at pp. 310, 324.

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principle he is not so entitled. True, the vendor gets those improvements without paying for them. But he is not asking for them, and he is not bound to purchase them. Annulling one contract does not justify creating another; and, without another contract, what justification exists for compelling the vendor defendant to pay the value of the improvements? They are not the direct outcome of the contract, nor do they come into existence by force of the contract. The contract as to them does nothing more than qualify the purchaser to exercise his own volition as to how he shall deal with the property. He may improve it or he may injure it—at his will. But, if he so injures it as to alter its character, he must keep it. If he improves it, he may choose between alternative remedies, if he has them. He cannot, however, in the absence of special circumstances force, under the name of rescission, the obligation on the vendor of purchasing the additions. A vendor plaintiff, however, is in a different position. If he is permitted to rescind, the Court will impose on him as a condition of getting back his property the just obligation of paying for permanent improvements effected by the purchaser. As was said by Lord *Manners* L.C. in *Shine* v. *Gough* (1), "the other party" is reimbursed for permanent improvements. There are recorded instances of this being decreed in a vendor's action (*York Buildings Co.* v. *Mackenzie* (2); *Ex parte Hughes* (3); *Ex parte Bennett* (4); *Ex parte Hewit* (5); *Trevelyan* v. *White* (6); *Haygarth* v. *Wearing* (7)). On the other hand, in purchasers' actions no case permitting such allowance has been found. In *Berry* v. *Armistead* (8) no such direction appears, though the decree was based on "fraudulent misrepresentations." *Edwards* v. *M'Leay* (9), decided by Sir William *Grant* M.R. in 1815, and by Lord *Eldon* L.C. in 1818, was referred to as affording some warrant for allowing permanent improvements in this case. The formal decree there directed an account (*inter alia*) of moneys expended "in repairs or improvements." Lord *Eldon* struck out the word "improvements." The Lord Chancellor said of the decree (10):—"Its

(1) (1811) 1 Ball & B. 436, at p. 444.
(2) (1795) 8 Bro. Parl. Cas. 42.
(3) (1802) 6 Ves. 616.
(4) (1805) 10 Ves. 380.
(5) (1835) 2 Mont. & Ay. 477.
(6) (1839) 1 Beav. 588.
(7) (1871) 12 Eq. 320, at p. 330.
(8) (1836) 2 Keen 221.
(9) (1815) G. Coop. 308; (1818) 2 Swans. 287.
(10) (1818) 2 Swans., at p. 289.

terms must be made conformable to the prayer of the bill; striking out the word 'improvements,' and leaving the word 'repairs,' I give the plaintiff all that he has asked by his bill, and I cannot give him less." This has been thought to be, in effect, an intimation of opinion by that most distinguished Chancellor that, if the bill had asked for "improvements," the prayer would have been granted. But at least it is not a decision to that effect, and the implication is, at best, a surmise. It will be observed in the report in *Cooper* that no reference is made in the narration of the facts to "improvements," though "repairs" are expressly mentioned. The prayer in the bill (1) is stated to be "that the contract might be declared void, and that the defendants might be compelled to repay to the plaintiff his purchase-money and what he had laid out on the premises with interest." This may or may not have been the effect of the prayer, but at least it does not appear that the prayer was expressed to be confined to repairs. In his written judgment the Master of the Rolls concludes by saying (2): "He" (the plaintiff) "must have an allowance for any money he laid out in repairs during the time he was in possession." So far, therefore, as the report in *Cooper* is concerned, there is no trace of any reference or need for reference to "improvements" and, as the judgment was written, that omission was deliberate on the part of the Master of the Rolls. In *Swanston* it appears that the decree as actually drawn up included "repairs or improvements." As Sir *Edward Sugden* says in his *Law of Property as administered by the House of Lords* (1849), at p. 649, the "case of *Edwards* v. *M'Leay* is imperfectly reported in *Cooper*, and upon the appeal the facts and arguments are not stated." Lord *Eldon* L.C., however, begins his judgment by saying (3), "Having read the pleadings, I am entirely of opinion, that, though it may be necessary to state *with more precision* the subject of inquiry relative to repairs and improvements, the decree is substantially right." Then he says (4): "Nothing was done by the plaintiff after he knew the defect of the title; he certainly could have claimed no allowance *even* for subsequent repairs." The matter is left too doubtful to make the case—important as it is in other respects (see *Wilde* v.

(1) (1815) G. Coop. 308.
(2) (1815) G. Coop., at p. 318.
(3) (1818) 2 Swans., at p. 288.
(4) (1818) 2 Swans., at pp. 288-289.

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Gibson (1))—an authority which controls the question of allowing the permanent improvements in this case. See the judgment of *Fry* J. in *Hart* v. *Swaine* (2), which was treated as a case of fraud, and *Mathias* v. *Yetts* (3).

Apart from fraud it would hardly be contended that the improvements should be allowed for. The allowance of permanent improvements to a plaintiff who throws back to the vendor the property the latter transferred to him is *ex facie* not restitution unless it is the result of some obligation created by the contract. Is this enforced value to be the value to the vendor for his own purposes or the value to the hypothetical purchaser for some other purpose or the actual cost to the plaintiff? The only other possible ground of allowance, besides obligation created by the contract, must be fraud. But that would be in the nature of damages for deceit, and that is not the function of equity (*Arkwright* v. *Newbold* (4); *Derry* v. *Peek* (5); *Hulton* v. *Hulton* (6)). The allowance of permanent improvements to a defendant rests on a totally different footing. There the governing principle is that "he who seeks equity must do equity," the meaning and limitations of which are found in the judgment of Lord *Chelmsford* L.C. in *United States of America* v. *McRae* (7). In such a case it is a condition of obtaining rescission and of thereby being restored to the *status quo ante*. It does not determine what should be the adjustment of the restitution proper. That is to be ascertained according to settled principles applied to the circumstances of the particular case. In *Cooper* v. *Phibbs* (8) Lord *Westbury*, after observing that in consequence of the mistake the agreement could not stand, said: "But then, when the appellant comes here to set aside the agreement, an obligation lies upon him so to constitute his suit as to enable a Court of equity to deal with the whole of the subject matter, and once for all to dispose of the rights and interests of the parties in the settlement." Later, the learned Lord proceeds to ask (9): "What, then, are the rights and interests of the parties

(1) (1848) 1 H.L.C. 605, at p. 635.
(2) (1877) 7 Ch. D., at p. 47.
(3) (1882) 46 L.T. 497, at p. 507.
(4) (1881) 17 Ch. D. 301, at p. 320.
(5) (1889) 14 App. Cas. 337, at p. 360.
(6) (1917) 1 K.B., at p. 820.
(7) (1867) L.R. 3 Ch. 79, at pp. 88-89.
(8) (1867) L.R. 2 H.L. 149, at p. 170.
(9) (1867) L.R. 2 H.L., at p. 171.

which ought to be ascertained ?" The decree declared (1) "that the same agreement is not in equity binding upon the appellant and respondents, but ought to be set aside, subject to the appellant paying to the respondents a proper occupation rent" for a certain cottage, &c., including *improvements* by the respondents' predecessor. A condition is not imposed on a defendant—except in special cases where, for instance, the plaintiff is really defending himself from the actual or possible assertion of legal rights otherwise unconscientious (see *Sugden's Vendors and Purchasers*, 14th ed., at p. 747; *Willmott* v. *Barber* (2); *Plimmer* v. *Wellington* (3)). We would add that the reference (without citations) of *Rigby* L.J., in the *Lagunas Case* (4), to decisions of Lord *Eldon* and other great equity Judges must be read by the light of the considerations we have stated.

For these reasons the improvements in this case which were additions to the property, not needed to keep it in its original condition, and not made by reason of any obligation of or under the contract, ought not to have been allowed.

So much of the order of Mann J. as ordered the defendant to repay to the plaintiff the sum of £755 9*s. and also the sum of* £175 *as and by way of compensation to the plaintiff set aside. The following accounts and inquiries to be taken and made before the proper officer of the Supreme Court of Victoria* : (1) *An account of the purchase and other moneys paid under the contract with interest thereon from the time when the same were actually paid at the rate of six per centum per annum* ; (2) *an account of the costs charges and expenses paid and incurred by the plaintiff in consequence of and incident to the purchase* ; (3) *an account of the sums laid out by the plaintiff prior to 25th February* 1923 *in necessary repairs and in improvements of a permanent lasting and substantial nature, and an inquiry whether and to what extent the value of premises in the statement of claim mentioned*

(1) (1867) L.R. 2 H.L., at p. 173.
(2) (1880) 15 Ch. D. 96.
(3) (1884) 9 App. Cas. 699.
(4) (1899) 2 Ch., at p. 456.

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has been increased in value by such improvements; (4) *the defendant abandoning an account of the rents and profits received by the plaintiff, an annual value by way of occupation rent to be set on the premises whereof the plaintiff has been in actual occupation. Case remitted to the Supreme Court to enter judgment upon the result of these accounts and inquiries according to law. Otherwise judgment affirmed. The appellant to pay to the respondent one half of the costs of this appeal.*

Solicitor for the appellant, *Joseph Barnett.*

Solicitors for the respondent, *Loughrey & Douglas.*

B. L.

Dist *Lands & Forests, Minister for* v *McPherson* (1991) 22 NSWLR 687

Appl *Vanmeld Pty Ltd* v *Cussen* (1994) 121 ALR 619

Cons *Fawthrop & Repatriation Commission, Re* (1994) 36 ALD 140

[HIGH COURT OF AUSTRALIA.]

DAVIES AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

LITTLEJOHN AND OTHERS . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1923.

SYDNEY, *Dec.* 5, 6, 20.

KNOX C.J., ISAACS AND HIGGINS JJ.

Will—Construction—Direction to pay "charges or encumbrances"—Conditionally purchased land in New South Wales—Unpaid instalments of purchase-money—Vendor's lien—Crown Lands Consolidation Act 1913 (*N.S.W.*) (*No.* 7 *of* 1913), *secs.* 6, 38, 40, 44, 45, 47, 48, 51, 53-56, 150, 154, 181, 206, 259-261, 270, 272.

Held, that in respect of land conditionally purchased pursuant to the *Crown Lands Consolidation Act* 1913 (N.S.W.) and the Acts thereby consolidated, the Crown has not a vendor's lien for the instalments of purchase-money not yet