Doubtless in the declaration gazetted on 24th January 1947 the expression is to be read as descriptive and general, but a consideration of the constitution of the "War Veterans' Home" discloses no sufficient reason for regarding the institution as outside the description.

It follows from the foregoing reasons that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *P. T. Fowler & Sons.*

Solicitor for the respondents Roy Walter Strong Kelly and Theodore Le More Wells, Registrar-General of New South Wales, *F. P. McRae,* Crown Solicitor for the State of New South Wales.

Solicitors for the respondent War Veterans' Home, *Barker, Jones & Livingston.*

R. A. H.

[HIGH COURT OF AUSTRALIA.]

ALATI . . . . . APPELLANT;
DEFENDANT,

AND

KRUGER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1955.

BRISBANE, *Aug.* 4;

SYDNEY, *Nov.* 29.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Contract—Fraud—Rescission—Sale of business conducted on leased premises—Deterioration of business after sale—Eventual abandonment of premises by purchaser—Closure of business—Restitutio in integrum.

A court exercising equitable jurisdiction will hold valid the disaffirmance by the party aggrieved of a contract induced by fraud, even though precise *restitutio in integrum* is not possible, if the situation is such that, by the exercise of its powers, including the power to take accounts of profits and to direct inquiries as to allowances proper to be made for deterioration, the court can do what is practically just between the parties and thereby restore them substantially to the *status quo*.

The respondent bought a fruit business together with the good-will, stock-in-trade and specified assets from the appellant who made a fraudulent misrepresentation in the contract as to the average takings and whose agents made similar oral misrepresentations. The business was conducted on leased premises and the lease was assigned by the vendor to the purchaser with the landlords' consent. In the first two weeks the respondent found that the takings were substantially below the representations and immediately began an action in the Supreme Court of Queensland against the vendor and his agents, claiming rescission of the contract, return of the purchase money, and damages from the vendor and his agents. Before the trial the respondent obtained from the landlords for consideration a document under seal whereby they agreed to a re-assignment of the lease to the appellant if the respondent succeeded in his claim for rescission. At the end of the trial the judge announced his findings of fact, that the purchaser had been induced to enter into the contract by the vendor's fraudulent representations, but that he had not been influenced by the separate misrepresentations of the vendor's agents, and that the purchaser had carried on the business without being guilty of

any default. He then heard further argument on the question of *restitutio in integrum* and reserved judgment. The respondent continued to carry on the business which declined and even made a loss; but before the case was called for judgment he closed down the business and left the premises, and the landlords re-entered. The trial judge (*Townley* J.) held that the purchaser was entitled to rescind the contract and to obtain a decree, on proper terms, declaring and giving effect to the rescission as an avoidance of the transaction from the beginning, and that the purchaser had not lost his right to such a decree by his conduct before judgment was delivered.

The appellant appealed, and the respondent cross-appealed, or, alternatively applied for special leave to appeal, against the judgment entered in favour of the vendor's agents.

Held, by *Dixon* C.J., *Webb*, *Fullagar*, *Kitto* and *Taylor* JJ., that the decision of the Supreme Court of Queensland (*Townley* J.) be affirmed, but that the terms of the order be varied; that it was not open to the respondent to cross-appeal against the judgment in favour of the agents and that his application for special leave to appeal ought not to be granted.

APPEAL from the Supreme Court of Queensland.

Glen Kruger commenced proceedings against Nicola Alati and Joseph Yenco claiming rescission of a contract for the purchase of a certain fruit business formerly carried on by Alati at Toowong, Brisbane, Queensland, for the sum of seven hundred pounds (£700) upon the ground that he had been induced to enter into such contract by three fraudulent representations made respectively by Alati, Yenco as Alati's agent and B. F. Canniffe Pty. Ltd., which company acted in the matter as agent for both defendants. Kruger further alleged breach of warranty that the takings of the business were £100 per week.

The trial judge (*Townley* J.) found the three representations proved but was not satisfied that in entering into the contract Kruger had relied upon those made by Yenco and B. F. Canniffe Pty. Ltd. The action against Yenco accordingly failed, but succeeded as against Alati. His Honour accordingly declared that the contract was lawfully rescinded by Kruger and ordered that all executed copies thereof be delivered up to be cancelled. It was further ordered (1) that Kruger re-assign to Alati the lease of the business premises which had been assigned to Kruger pursuant to the contract and deliver to him all other property the subject of the contract; (2) that upon such re-assignment and delivery Alati repay the purchase money (£700) together with interest from the date of payment to the date of repayment; (3) that Alati pay to Kruger as damages the amount of the conveyancing costs and stamp duty incurred by the respondent in consequence of the

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contract; (4) that Kruger pay a reasonable rental for the period of his possession of the business; and (5) that Alati pay Kruger's costs of the action.

From this order Alati appealed to the High Court, and Kruger gave notice that he would seek by way of cross-appeal or by applying for special leave to appeal to obtain a reversal of the decision in Yenco's favour, and alternatively to have the order for costs in Yenco's favour deleted.

The relevant facts appear fully in the joint judgment hereunder.

N. J. Moynihan, for the appellant Alati. It was wrongly found that the statement as to the takings which was contained in the contract was a false representation. That statement refers to average takings over a period of fourteen weeks, the average takings do exceed £100, and "average" must be taken to refer to figures worked out over a certain period. On its correct interpretation the statement in the contract is not shown by the evidence to be false. Again, fraud must be strictly proved and the representation is shown readily to be consistent with an innocent interpretation and the rule *caveat emptor* will apply. In any case this was not an instance where *restitutio in integrum* should have been ordered. On the plaintiff's figures the extent of deterioration in the business would preclude rescission. There is sufficient evidence of deterioration being due to the plaintiff's inexperience in conducting such a business and the onus is on the plaintiff of showing that deterioration was not due to his fault and this onus has not been discharged.

P. Connolly, for the respondent. The construction adopted by the judge of the statement contained in the contract is the ordinary natural one. The implication is that the takings are sustained at that average level at the time the statement is made. Alternatively the finding that the plaintiff was not induced by the other false representations made during the negotiations was wrong. Thus the oral agreement was concluded before the final representation was inserted in the written contract. It is sufficient that a representation be an inducing factor and a purchaser does not analyze his mental processes so as to be able to appropriate among different inducements the various effects: *Arnison* v. *Smith* (1). The further representations made by Yenco as to the highest and lowest weekly takings can quite consistently be found to be inducements as well as the statement in the contract. Under O. 70, r. 13 (1) a cross-appeal would seem to lie and notice has been given. However there is the

(1) (1889) 41 Ch. D. 348, at p. 369.

obstacle provided by *In re Cavander's Trusts* (1). Alternatively, special leave should be granted since the circumstances are exceptional and the record is in any case before the court and related matters can easily be dealt with. Also the time expired on the day of appeal. It is wasteful to move *ex parte* and a more liberal attitude should be taken on a cross-appeal. Judgment is sought against Yenco also on the basis of possible failure to recover against the first defendant. There is a form of order in *Sibley* v. *Grosvenor* (2) in par. 7 of the proposal of the Chief Justice and such an order is sought against the agent Yenco here. Also it appears from the evidence that Yenco fraudulently caused the representation of Alati to be made and on this basis too he would be liable. Though it is against general principle to allow special leave on a costs issue (*Glen* v. *Union Trustee Co. of Australia Ltd.* (3)) yet there are exceptional cases as indicated in *Ritter* v. *Godfrey* (4). The defendant's appeal should be dismissed since there has been further deterioration of the lease which was allowed to lapse since the judge's findings.

N. J. Moynihan, in reply.

Cur. adv. vult.

Nov. 29.

The following written judgments were delivered :—

DIXON C.J., WEBB, KITTO AND TAYLOR JJ. This is an appeal from a judgment of the Supreme Court of Queensland (*Townley* J.) given in an action in which the present respondent was the plaintiff and the present appellant was one of two defendants. The litigation related to the purchase by the respondent from the appellant of a fruit business carried on in leasehold premises at Toowong for the price of £700. The respondent alleged that he had been induced to enter into the contract of purchase by three fraudulent misrepresentations as to the takings of the business made respectively by the appellant's co-defendant, one Yenco, acting as the appellant's agent, by a company B. F. Canniffe Pty. Ltd., acting as the agent of both defendants, and by the appellant himself. The respondent also alleged, " alternatively ", that in consideration of his entering into the contract and paying the agreed price the appellant had warranted that the average takings of the business were £100 per week. He claimed rescission of the contract, the return of the purchase money, and damages.

At the trial the respondent proved the making of all three misrepresentations, but he failed to satisfy the learned judge that in

(1) (1881) 16 Ch. D. 270.
(2) (1916) 21 C.L.R. 469, at p. 476.
(3) (1936) 54 C.L.R. 463.
(4) (1920) 2 K.B. 47.

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entering into the contract he had relied upon those made by Yenco and B. F. Canniffe Pty. Ltd. As against Yenco, therefore, the action failed. His Honour found, however, that the respondent did rely upon the representation which had been made by the appellant himself. This was in the form of a statement contained in the contract itself that the average takings were £100 per week. The learned judge held that this statement was a representation made by the appellant to the respondent, made, that is, at the time when the form of contract containing it was presented to the respondent for signature; and his Honour further found that the statement was false in fact, and that the plaintiff made it either knowing it to be false or recklessly not caring whether it was true or false. These findings were justified by the evidence, and nothing need be said about this aspect of the case except that the learned judge was clearly right in rejecting a contention submitted on behalf of the appellant to the effect that the representation was true because it would be necessary only to take a period of not less than fourteen weeks before the date of the contract and it would be found that the average weekly takings would work out at £100 or more. The natural and intended meaning of the representation plainly was that the volume of trade being currently done in the business at the time of the representation was such that the takings, though they might fall below £100 in some individual weeks, were of that standard on the whole. The fact, however, was that £100 had not been reached in any of the nine weeks which immediately preceded the date of the contract. The general tendency was downwards, and in the week in which the contract was signed the takings turned out to be only £80 8s. 0d. The business was to some extent seasonal in character, the takings of such a business in winter being normally lower than in summer. To describe the appellant's business in June, which was the month of the contract, as one in which the average takings were £100 a week was to create an entirely erroneous idea of its capacity.

The relief which his Honour granted as against the appellant, in addition to a declaration that the contract was lawfully rescinded by the respondent and that all executed copies of it be cancelled, was (1) an order that the respondent re-assign to the appellant a lease of the business premises which the appellant had assigned to the respondent pursuant to the contract, and deliver to the appellant all other property the subject of the contract; (2) an order that upon such re-assignment and delivery the appellant repay to the respondent the £700 purchase money together with interest from the date of payment to the date of repayment (a sum lying

in court to be applied in part satisfaction of the amount repayable); (3) an order that the appellant pay to the respondent as damages the amount of certain conveyancing costs and stamp duty incurred by the respondent in consequence of the contract; (4) an order that the respondent pay a reasonable rental (the amount to be ascertained upon an inquiry) for the period of the respondent's possession of the business and property up to the date of delivering the same to the appellant, and (5) an order that the appellant pay the respondent's costs of the action.

The contract was dated 7th June 1954, though in fact it was executed two days later. It was on a printed form with typewritten additions. By cl. 1 the appellant agreed to sell and the respondent agreed to purchase, for the price of £700, what was described as all the right title and interest of the appellant in and to a certain fruit business carried on on premises and situated at High Street, Toowong, together with the goodwill of the business and the stock-in-trade, fixtures, fittings, plant, trade utensils, implements, licences and quotas used by the appellant in connection therewith as set forth in a schedule, on a walk-in walk-out basis. The schedule mentioned only a counter, fixtures and fittings, and scales, without giving details of any of them. By cl. 7 the appellant agreed to assign or cause to be assigned to the respondent the lease or agreement for a lease (if any) or tenancy and obtain the landlord's consent thereto. Clause 20 described the term of the lease or tenancy as three years from July 1953 with the option of a further two years, and stated that the rental was £3 5s. 0d. per week. Clause 21 was headed in print "21. Special Clause", and it proceeded in typewriting: "Vendor states that the average takings are £100 per week".

On 15th June 1954 the appellant executed in favour of the respondent, and with the consent of the landlords, an assignment of the lease referred to in the contract, the assignment being expressed to take effect as from 16th June 1954. On or about the latter date, which was a Wednesday, the respondent took over the running of the business. He had had no previous experience in such a business, and the learned trial judge has found that this fact was in the knowledge and contemplation of the appellant. Moreover, a new competing business, called a "super-market", was about to be opened in premises opposite, and this also, his Honour has found, was a fact known to the appellant. The respondent carried on the business without being guilty of any default, and indeed if anything on his part contributed to the deterioration which subsequently occurred it was only his inexperience.

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The takings proved immediately to be much less than £100 per week. The three remaining days of the week in which the respondent commenced to run the business brought in only £24 4s. 9d., and the following week, ending on 26th June 1954, only £44 12s. 1d. At the end of the latter week the respondent consulted his solicitors.

On the footing which must be accepted, that the contract had been induced by a fraudulent representation made by the appellant to the respondent, the latter had a choice of courses open to him. He might sue for damages for breach of the warranty contained in cl. 21, for the statement in that clause clearly formed one of the terms of the contract and was not only a representation; but he could not do this and rescind the contract for misrepresentation. Secondly, he might sue to recover as damages for fraud the difference between the price he had paid and the fair value of the property at the time of the contract (*Holmes* v. *Jones* (1)), but that again would involve affirming the purchase. Or, thirdly, provided that he was in a position to restore to the appellant substantially that which he had received under the contract, he might avoid the purchase and sue to recover his purchase money back from the appellant, with interest and also with damages for any loss which he may have suffered through carrying on the business in the meantime: cf. *Salmond and Williams* on *Contracts* (2nd ed.), (1945), p. 269.

On 29th June 1954 the respondent issued (and presumably served) the writ by which the present proceedings were commenced. *Townley* J. was of opinion that by so doing he elected to adopt the third of the courses available to him. Notwithstanding some ambiguity in the statement of claim indorsed on the writ, this seems clearly enough to be correct. The allegation of the making of a warranty, expressed as it is as providing an alternative cause of action, appears only to be included in order that the respondent might fall back upon it in the event of his being held disentitled to rescind; and the claim for damages, though expressed generally, should no doubt be read as extending to such damages only as might turn out to be appropriate according as the respondent should succeed on rescission or breach of warranty. Primarily, it was on the basis of rescission that relief was claimed, and the appellant cannot have been in any doubt that the respondent by commencing the action was assuming to rescind, and was asserting a consequential right to get his money back. There was clearly no change of front on the part of the respondent when, upon the action coming to trial, he formally abandoned his claim for damages

(1) (1907) 4 C.L.R. 1692.

for breach of warranty. It will be seen that upon discovering the falsity of the representation which had been made to him he acted promptly and without having done anything which could amount to an affirmation of the purchase. The validity of his rescission depended, therefore, only upon the question whether *restitutio in integrum* was possible in the circumstances as they existed at the commencement of the action.

Before approaching that question, it will be convenient to mention the events which occurred thereafter. The defence was delivered on 4th August 1954, and issue was joined on the following day. On 10th August 1954, the respondent obtained from the landlords a document under seal whereby they undertook and agreed, for a consideration of ten shillings, that they would consent to any re-assignment of the lease by the respondent to the appellant in the event of the respondent succeeding in his claim for rescission. The trial took place on 29th and 30th September 1954. Up to that time the respondent had continued to carry on the business, languishing though it was, taking never more than forty pounds in a week and only £7 3s. 3d., £11 5s. 1d. and £14 3s. 0d. respectively in the last three weeks. In many weeks he made a loss, even without allowing for wages for himself. On 22nd November 1954, the judge announced his findings of fact. He then heard further argument on the question of *restitutio in integrum* and reserved judgment. The respondent still continued to carry on the business for a while, but when the case was called for judgment, on 17th December 1954, the judge was informed before he made his order that the respondent had closed down the business and left the premises, and that the landlord had re-entered. His Honour, however, proceeded to make the order which is the subject of this appeal.

If the case had to be decided according to the principles of the common law, it might have been argued that at the date when the respondent issued his writ he was not entitled to rescind the purchase, because he was not then in a position to return to the appellant *in specie* that which he had received under the contract, in the same plight as that in which he had received it : *Clarke* v. *Dickson* (1). But it is necessary here to apply the doctrines of equity, and equity has always regarded as valid the disaffirmance of a contract induced by fraud even though precise *restitutio in integrum* is not possible, if the situation is such that, by the exercise of its powers, including the power to take accounts of profits and to direct inquiries as to allowances proper to be made for deterioration, it can do what is practically just between the parties, and by so

(1) (1858) E.B. & E. 148 [120 E.R. 463].

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doing restore them substantially to the *status quo*: *Erlanger* v. *New Sombrero Phosphate Co.* (1); *Brown* v. *Smitt* (2); *Spence* v. *Crawford* (3). It is not that equity asserts a power by its decree to avoid a contract which the defrauded party himself has no right to disaffirm, and to revest property the title to which the party cannot affect. Rescission for misrepresentation is always the act of the party himself: *Reese River Silver Mining Co.* v. *Smith* (4). The function of a court in which proceedings for rescission are taken is to adjudicate upon the validity of a purported disaffirmance as an act avoiding the transaction *ab initio*, and, if it is valid, to give effect to it and make appropriate consequential orders: see *Abram Steamship Co. Ltd.* v. *Westville Shipping Co. Ltd.* (5). The difference between the legal and the equitable rules on the subject simply was that equity, having means which the common law lacked to ascertain and provide for the adjustments necessary to be made between the parties in cases where a simple handing back of property or repayment of money would not put them in as good a position as before they entered into their transaction, was able to see the possibility of *restitutio in integrum*, and therefore to concede the right of a defrauded party to rescind, in a much wider variety of cases than those which the common law could recognize as admitting of rescission. Of course, a rescission which the common law courts would not accept as valid cannot of its own force revest the legal title to property which had passed, but if a court of equity would treat it as effectual the equitable title to such property revests upon the rescission.

In the present case, what changes affecting the possibility of restitution had occurred in the short period between 16th June when the respondent took possession of the business and 29th June when he issued the writ? He had had possession of the premises, and although that might have sufficed at common law to preclude rescission: *Blackburn* v. *Smith* (6), it could hardly do so in equity, since a money payment could compensate for any difference there might be between the rental value of the premises and the rent paid by the respondent to the landlords. The title to the term created by the lease had been vested in the respondent by assignment, but that was subject to any right which he had to disaffirm the transaction. The title would revest in equity

(1) (1878) 3 App. Cas. 1218, at pp. 1278, 1279.
(2) (1924) 34 C.L.R. 160, at pp. 165, 169.
(3) (1939) 3 All E.R. 271, at pp. 279, 280.
(4) (1869) L.R. 4 H.L. 64, at p. 73.
(5) (1923) A.C. 773.
(6) (1848) 2 Ex. 783, at p. 792 [154 E.R. 707, at p. 711].

when he elected to rescind, and he was in a position to make a legal re-assignment with the landlords' consent. He had taken over (as he said in evidence) about twenty pounds worth of stock, but while of course he could not restore that to the appellant *in specie* he could pay or allow for its value, and nothing more could in justice be required. The business itself had deteriorated but this would not matter, for, as the trial judge has found, it was not due to any fault on the respondent's part, and even at common law the necessity to return property in its original condition was qualified so as to allow for incidents for which the buyer was not responsible, such as those to which the property was liable either from its inherent nature (cf. *Newbigging* v. *Adam* (1); *Adam* v. *Newbigging* (2)) or in the course of the exercise by the buyer of those rights over it which the contract gave: *Head* v. *Tattersall* (3). No other change had occurred. The case was therefore typical of the class of cases in which a defrauded purchaser is regarded by a court exercising equitable jurisdiction as entitled to rescind the purchase and obtain a decree, on proper terms, declaring and giving effect to the rescission as an avoidance of the transaction from the beginning.

There remains, however, the question whether the respondent lost his right to such a decree by his conduct in discontinuing the business and leaving the premises before judgment was given in the action. The remedy is discretionary (*Story* on *Equity*, 3rd English ed. (1920), pp. 293, 294, 295), and if the respondent had acted unconscientiously during the pendency of the action, as by causing the loss of a valuable leasehold and goodwill by discontinuing the business and abandoning the premises without giving the appellant a reasonable opportunity to take them back, no doubt the court might refuse relief. But nothing of that kind happened. The term was, of course, still vested at law in the respondent, and it is not impossible that, despite low takings and actual losses, the business had some residual goodwill. But it is impossible to convict the respondent of any unfairness in the circumstances. The service of the writ had given the appellant clear notice that if the case alleged against him were made out at the trial the business and the lease would be held to have been his all along. He knew from the judge's announcement of his findings that in fact the issues of fact in the case had gone against him. He could have applied for the appointment by the court of a receiver and manager to preserve the property pending the determination of the case, but he made

(1) (1886) 34 Ch. D. 582, at p. 588.
(2) (1888) 13 App. Cas. 308, at p. 330.
(3) (1871) L.R. 7 Exch. 7, at p. 12.

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no such application. He did not even make any offer to the respondent to take the property back or suggest any *modus vivendi*. He took his chance, contenting himself with such maintenance of the business as the respondent's continuing conduct of it might afford. But the respondent was under no duty to go on indefinitely, working for nothing and incurring losses, especially after the judge had announced findings of fact in his favour. It does not appear from the material before us whether he gave the appellant any specific warning of his intention to give up the business and leave the premises, but, even if he did not, the appellant had ample opportunity to protect his interests, and his inaction is far more likely to have been due to an opinion that neither the lease nor the business was worth worrying about, particularly in view of the competition which the "super-market" had created, than to any expectation that the respondent would obligingly continue to act as an unpaid manager.

For these reasons the appeal must fail. It is desirable, however, to make one or two variations in the judgment of the Supreme Court, because, as framed, it makes the respondent's right to be repaid his purchase money conditional upon his re-assigning the lease to the appellant and delivering to the appellant all other property the subject of the contract. The lease cannot now be re-assigned, and the other property referred to would include the stock-in-trade which obviously cannot now be returned, and the chattels referred to in the schedule to the contract which now may or may not be available for re-delivery. The judgment should therefore be varied so as to order the plaintiff to return to the defendant Alati such of the chattels mentioned in the schedule to the contract as he is able to return, and to order the defendant to repay to the plaintiff the balance of the purchase money (£700) and interest thereon which shall remain after deducting the value as at the date of the contract of such of the scheduled chattels as the plaintiff cannot return, the value as at that date of the stock-in-trade which the plaintiff received from the defendant under the contract, the damages awarded in the judgment of the Supreme Court, and any amount which ought to be allowed in the defendant's favour in respect of the plaintiff's use of any of the property comprised in the contract.

It remains to consider an application which was made by the respondent. The appellant's co-defendant in the action, Yenco, was sued on the footing that, acting as agent for the appellant and within the scope of his authority as such, he had represented to the respondent that the average takings of the business amounted to

£130 per week. *Townley* J., although he found that this misrepresentation was made by Yenco as the appellant's agent, refused to grant the respondent any relief in respect of it, because, as has already been mentioned, he found that the latter had not relied upon it in entering into the contract. His Honour gave judgment for Yenco with costs against the respondent. Upon the appellant instituting his appeal, the respondent gave notice to the effect that he would seek, either by way of cross-appeal or by applying for special leave to appeal, to obtain a reversal of the findings upon which the judgment for Yenco was based, and, in the alternative, to have the order for costs in Yenco's favour deleted, substantially on the ground that to award costs to a party who had been a fraudulent actor in the subject transaction was a wrong exercise of discretion. It was not open to him to pursue either object by way of cross-appeal, for the appellant had no interest in the points involved: *In re Cavander's Trusts* (1). He accordingly applied for special leave to appeal. It was pointed out on his behalf that at the trial the respondent had not been cross-examined on his statement in evidence that Yenco's representations that the average takings were £130 per week were an inducement to him to enter into the contract. There is, however, much force in the observation which *Townley* J. made as to the difficulty in being satisfied that, once the respondent knew that a statement by the vendor that the average takings were £100 per week appeared in the contract, he continued to rely upon the prior representations that they amounted to £130 per week. As to the costs, it is enough to say that this does not appear to be a case in which a court of appeal would be likely to interfere with the trial judge's exercise of discretion. The case is not one for special leave.

In the result the judgment of the Supreme Court should be varied in the manner described, and the appeal should be dismissed. The application for special leave to appeal should be refused.

FULLAGAR J. I agree with the judgment of the majority of the Court, subject to this, that I wish to state very briefly for myself what I conceive to be the position where, as here, a purchaser, who has purported to rescind a contract, remains in possession pending the determination of his right to rescind. I had to consider this matter on another occasion in *Hodder* v. *Watters* (2). That was not in fact a case of rescission for fraud. It was a case in which a contract for the sale of property, which included the goodwill of a business, had been made subject to the consent of the Treasurer

(1) (1881) 16 Ch. D. 270.

(2) (1946) V.L.R. 222.

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under the *National Security* (*Economic Organization*) *Regulations*, and the Treasurer had refused his consent. The purchaser had gone into possession, and, after the refusal of consent, she remained in possession during negotiations for a sale at a lower price, and for a short period after those negotiations had finally broken down. It seems to me that the same principles should be applicable in such a case as the present.

The fundamental factor in the situation is, of course, the rule that *restitutio in integrum* is a condition of rescission. It seems to me necessarily to follow from this that a purchaser remaining in possession after giving notice of rescission is under a duty to take reasonable care to preserve the property, so that what he has received from the other party may, so far as reasonably practicable, be restored to that other party. If the property includes the goodwill of a business, then I think that the purchaser in possession must carry on that business and take reasonable care to preserve the goodwill. If he commits a breach of this duty, and deterioration results, one of two consequences may follow according to the circumstances of the particular case. The court may find, having regard to the conduct of the purchaser, that it would not be equitable to decree rescission. Or, while not thinking it proper to refuse a decree, the court may make it a condition of the decree that the purchaser shall compensate the vendor in respect of the deterioration of the property.

I do not think that the purchaser is bound to remain in possession. On the other hand, I think that he would commit a breach of his duty if he simply abandoned the property without notice to the vendor. If he gave reasonable notice to the vendor offering to restore possession of the property to him, I think that the vendor would act at his own risk if he declined to take the opportunity offered to him, and that he could make no claim for compensation if the purchaser then left the property and it were subsequently held that he was entitled to rescind : cf. *Maturin* v. *Tredennick* (1), which is cited by *Townley* J. in his judgment. There the property sold consisted of contributing shares in a company, and, after the purchaser had given notice of rescission, a call was made, of which the vendor had notice. He did not pay the call, and the shares were forfeited. It was held that he had acted at his own risk, and there was a decree for rescission.

It is, of course, in many cases open to either party to apply for an order appointing a receiver or a receiver and manager, but

(1) (1864) 10 L.T. 331.

often the expense incurred in and by such an appointment would be out of proportion to the amount involved.

The application of these principles to the present case, is, I think, a matter of some difficulty. But I think the correct view of the facts is that the defendant failed to establish that any loss had really been suffered through any breach of duty or unreasonable conduct on the part of the plaintiff. One is left with a strong impression that the establishment and development of the "supermarket" were big factors in this case.

I agree with the order proposed.

(1) *Judgment of the Supreme Court of Queensland varied by substituting for the first four orders therein contained the following :—*

1. *That on a date to be fixed by the Supreme Court after the ascertainment by agreement or inquiry of the amounts referred to in order 2 hereof, the plaintiff do deliver or tender to the defendant Alati in such manner as the Supreme Court shall direct such (if any) of the chattels mentioned in the schedule to the contract (Exhibit 6) as are in his possession or control at the time of the inquiry.*

2. *That in default of agreement between the parties an inquiry be held to ascertain :*

   (a) *the value, as at the date of the said contract, of such of the said chattels as are not in the plaintiff's possession or control ;*

   (b) *the value as at the date of the said contract of the stock-in-trade received by the plaintiff from the said defendant ; and*

   (c) *whether any, and if so what, amount ought to be allowed in favour of the said defendant for the use by the plaintiff of the property comprised in the contract.*

3. *That on the date fixed as aforesaid and upon the plaintiff's delivering or tendering to the said defendant in the manner determined by the Supreme Court such of the said chattels (if any) as are found to be in the plaintiff's possession or control, the said defendant do pay to the plaintiff a sum calculated by adding together the amounts ascertained*