H. C. OF A. 1910.

GRACE v. TAYLOR.

Isaacs J.

overtime." There is no doubt this was overtime within sec. 6 of the Act for which she was entitled to be paid not less than 3d. per hour or at her option under sec. 37 of the *Factories and Shops Act* 1896. But she would not be entitled to 6d. for tea money merely because she had worked over 48 hours in the week. She could only be entitled to this under sec. 8 if she had worked after six o'clock in the evening on any working day. With the greatest respect to the learned Judge, he has omitted to preserve the distinction between these two sections.

Appeal allowed.

Solicitor, for appellant, *J. V. Tillett*, Crown Solicitor.
Solicitor, for respondent, *G. H. Leibins.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

DUNCANSON . . . . . APPELLANT; PLAINTIFF,

AND

HAYWOOD, ... RESPONDENT. DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1911.

HOBART, *Feb.* 13, 14, 15.

Griffith C.J., Barton and Isaacs JJ.

Contract—Sale of land—Action for deceit—Damages—Evidence—Special leave to appeal—Rescission of—No substantial injustice.

In an action by a purchaser of land against the vendor for deceit the jury found that there had been fraud, but gave no finding upon the question whether the plaintiff had suffered any damage. The Supreme Court of

Tasmania held that there was no evidence of damage and non-suited the plaintiff. Special leave to appeal to the High Court having been obtained,

Held, that, though there was evidence of damage upon which the Supreme Court might have ordered a new trial, yet the circumstances were such that there was no reason for thinking that the plaintiff had been really deceived or suffered any substantial injustice, and therefore that the special leave to appeal should be rescinded.

Special leave to appeal from the decision of the Supreme Court of Tasmania: *Duncanson* v. *Haywood*, 6 Tas. L.R., 16, rescinded.

APPEAL by special leave from the Supreme Court of Tasmania.

An action was brought in the Supreme Court of Tasmania by John Duncanson against Herbert Haywood in which it was alleged by the writ that the defendant, being the owner of certain land and hereditaments, was treating with the plaintiff for the sale of the same to the plaintiff and fraudulently and deceitfully stated and pretended to the plaintiff that the said land and hereditaments contained 162 acres in two blocks of 112 acres and 50 acres respectively, and further that the 112 acres was good land mostly under cultivation, whereby the plaintiff was induced to buy the two blocks of land at a certain price per acre and to pay to the defendant certain moneys in pursuance of such purchase, viz. £300, and that the plaintiff thereupon took possession of the land. The writ went on to allege that in truth and in fact the two blocks of land contained only 90 acres and 50 acres respectively and that the defendant fraudulently and deceitfully attempted to make up the area of 112 acres by adding a third block of land belonging to him containing 23 acres of worthless land, and that the plaintiff had thereby lost the value of 23 acres of good land at the agreed price and had since the date of the purchase lost the profits which he would have derived from the possession of the 23 acres of good land. The plaintiff claimed £500 and interest on £368 14s. at 6 per cent. per annum from the date of the writ until payment or judgment.

The defendant pleaded not guilty, and issue was joined.

The action was tried before a jury who answered certain questions put to them by the learned Judge who gave liberty to either party to move the Full Court to enter judgment. The Full

H. C. OF A. 1911.

DUNCANSON v. HAYWOOD.

Court subsequently non-suited the plaintiff with costs: *Duncanson* v. *Haywood* (1).

From this decision the plaintiff now by special leave appealed to the High Court.

The facts are sufficiently stated in the judgments hereunder.

Harold Crisp, for the appellant. There was evidence of damage. The proper rule for measuring the damages was laid down by the Full Court, viz., that it is the difference between the purchase money and the fair value of the land at the time of the sale: *Holmes* v. *Jones* (2); *McConnel* v. *Wright* (3); but they were wrong in saying that there was no evidence of the fair value of the land at the time of the sale. Assuming the 23 acres of land had been of the quality described by the respondent, the price at which it was sold is *primâ facie* evidence of its value at that time. That evidence is sufficient to support the jury's verdict, which, taken as a whole, amounts to a finding that the appellant suffered damage to the extent of £270.

M. J. Clarke and *W. M. Hodgman*, for the respondent. Even if there was some evidence of damage the findings of the jury, especially as to fraud, are unreasonable and against the weight of the evidence. The special leave to appeal should be rescinded because the case is not brought within the rule stated in *Dalgarno* v. *Hannah* (4).

Harold Crisp, in reply. An important question of law is involved, viz., whether the damages claimed could be properly recoverable in an action of deceit. There has been a miscarriage of justice in that a verdict of a jury has been taken from the appellant by the misapplication of a rule of law.

Cur. adv. vult.

The following judgments were read:—

Feb. 15.

GRIFFITH C.J. This is an appeal by special leave from a decision of the Supreme Court of Tasmania directing judgment

(1) 6 Tas. L.R., 16.
(2) 4 C.L.R., 1692.
(3) (1903) 1 Ch., 546.
(4) 1 C.L.R., 1, at p. 8.

of non-suit to be entered after a trial before a Judge and jury. The action was for damages for deceit in connection with a contract for the sale of land by the defendant to the plaintiff. The declaration alleged that the defendant falsely represented to the plaintiff that the land contained 162 acres, in two blocks of 112 acres and 50 acres respectively, and that the 112 acre block was good land mostly under cultivation, whereas in truth the blocks contained 90 acres and 50 acres respectively, and the defendant fraudulently and deceitfully attempted to make up the area of the 112 acre block by adding a third block of land belonging to him containing 23 acres of worthless land, whereby the plaintiff lost the value of 23 acres of good land. The agreed price was a lump sum of £1,800. In the agreement of sale, which was dated 6th November 1908, the land was described as "all those 162 acres portion of farm lately owned by J. P. Cowle bounded by Boatwright on the south, Mitchell on the east, Dempster and Bishop on the north, and Haywood on the west."

Possession was to be, and was in fact, given on 1st April 1909, The area of the land of which possession was given was 162 acres, and the plaintiff has ever since retained possession of it.

At the trial the jury found, in answer to questions submitted to them (1) that there was fraud, and (2) that the difference in value between the 23 acres of first class land the plaintiff claimed to be short of and the 23 acres substituted or added was £270. In answer to a question whether the whole of the land which the plaintiff actually got had been since the date of the sale of equal less or greater value than £1,800, they said that the evidence was not sufficient to enable them to give an accurate estimate of the value of the property since the date of sale.

On these findings liberty was given to either party to move for judgment. Both parties moved accordingly. The plaintiff contended that damages should be assessed on the basis that the agreed price was the actual value of the land assuming it to be of the quality represented, so that if the quality was inferior to that represented the difference in value resulting from the inferiority was the measure of damage. This contention would have been sound if the action had been upon a warranty, but it has no application to an action for damages for deceit, and was

H. C. OF A. 1911.

DUNCANSON v. HAYWOOD.

Griffith C.J.

properly rejected by the Supreme Court. They said that the true measure of damages was the difference between the purchase money and the fair value of the land of which possession was given. So far, no exception can be taken to their decision. But they went on to say that the plaintiff had failed to prove any damage upon that basis, and accordingly directed judgment of non-suit. In this I think they were in error. The plaintiff could not have judgment on the findings of the jury, since they had not found affirmatively that he had sustained any damage. But the non-suit supposes that the plaintiff had given no evidence of damage. Now, although there is no presumption that the agreed price of property sold is the actual value of it assuming it to be of the quality described, yet the agreement to give that price is evidence of the value as against the vendor; especially if (as in the present case) it is arrived at after negotiations between parties at arms' length. There was, therefore, evidence which ought to have been left to the jury, and the non-suit was erroneous.

If there were no more in the case it would follow that as the trial was abortive there should be a new trial in whole or part. But there are other circumstances in the case, upon which Mr. *Clarke* asks us to rescind the order of special leave.

The evidence of damage afforded by the agreement itself was met by a considerable body of evidence, which, if believed, would show that, even if the land of which possession was given was inferior in quality to that agreed to be sold, the land actually delivered was worth at least £1,800. If this evidence had been accepted by the jury the plaintiff's action would have failed. Without referring to the evidence in detail it is sufficient to say that in my view of it there is no good reason for thinking that if the case went for a new trial upon the same evidence the plaintiff would recover substantial damages.

There are also other circumstances in the case relating to the alleged fraudulent representation, to which I think we may have regard in considering whether the order for leave should be rescinded. The finding of fraud was not impeached by the defendant before the Full Court, but I do not think that we are precluded from considering the evidence on the point. The plaintiff's case depended upon his own sworn testimony which was

uncorroborated. It appeared that the 162 acres of which delivery was given and accepted comprised three separate blocks originally granted to three different persons, and comprising respectively 89 acres, 23 acres and 50 acres. The 89 acre block was in the form of a parallelogram bounded on the west by a creek called Chasm Creek, from which its northern and southern boundaries run east and west for a little more than half a mile. The 23 acre block lay to the east of the eastern boundary of the 89 acre block, the northern boundary of the smaller block intersecting the eastern boundary of the larger block at a distance of about 7 chains from its north-eastern corner. The southern boundary of the 23 acres was nearly in a line with the southern boundary of the 89 acres but did not join it, being intercepted by a small part of the 50 acre block, which was a long parallelogram of land extending to the south. There was a wire fence along the eastern boundary of the 89 acre block, dividing it, at the north, from the land of an adjoining owner named Mitchell for a distance of about 7 chains, then from the 23 acre block for a distance of 7 or 8 chains, and then from the obtruding portion of the 50 acre block. In the wire fence were two slip rails affording access from the 89 acre block to the 23 acre and 50 acre blocks, which were not separated from each other by any fence, and were not enclosed on the eastern side. The position and nature of the 23 acre block were such that by itself it was inaccessible and practically worthless, but if held with the 89 acre block it would add considerably to the value of that block.

The evidence of misrepresentation may be shortly summarized. The plaintiff said that the land was brought under his notice by the defendant's agent, one Jones, who described it as consisting of two blocks of 112 acres and 50 acres respectively, and that he visited the land with the defendant and Jones, when the defendant pointed out the boundaries. Jones at that time was under the impression that there were two blocks only, but in February 1909 the defendant informed him and he informed the plaintiff that there were three. This fact was also apparent from the Government map of the district, which was hanging in Jones's office when the land was first brought to the plaintiff's notice. Plaintiff deposed that as they were walking on the land defendant

H. C. OF A. 1911.

DUNCANSON v. HAYWOOD.

Griffith C.J.

pointed out the wire fence "which he said was the eastern boundary of the 112 acre block." It does not appear whether the words "112 acre block" are the words of the defendant or words which the plaintiff used in giving evidence to denote the land which he himself thought was a block of 112 acres. If the words used by the defendant were "the eastern boundary of the block," they were true in the sense in which he would naturally use them. The plaintiff further says that while they were near the wire fence the defendant "waving his hand towards the 23 acres said 'There's a piece of land that's no use to anyone,'" whereupon he said "Does that belong to you, Mr. Haywood?" to which plaintiff replied: "No, that's Mitchell's land, and I don't know whatever he took it up for." Now it appears according to plaintiff's evidence that when the defendant thus "waved his hand" they were standing at a distance of about 150 yards from Mitchell's land which adjoined the 23 acres on the north, at a point where the land was so rough that there was no access from one block to the other. It seems *primâ facie* improbable that a man should have made such a statement with regard to land which was really his own and which he was trying to sell to the person to whom he made it. The whole point is in the words "towards the 23 acres." The plaintiff says that he did not then know of the existence of the 23 acre block, so that the statement must be read as "towards land on the other side of the fence." Then the question arises "what land?" If the land indicated by the wave of the hand lay in a north-easterly direction from the place where they were standing it was Mitchell's land of which he was speaking. It is to be observed also that the defendant and not the plaintiff introduced this subject, for the purpose, if the plaintiff's version is accepted, of telling a gratuitous falsehood. Upon this slender foundation the plaintiff rests his whole case. He says that he was induced to believe that the 23 acres, which were of inferior quality, were not part of the land which he was invited to buy, that the land which was offered to him as containing 112 acres was the 89 acre block only, most of which he had inspected and the quality of which was good, and that he was thus induced to agree to give £1,800 for the whole 162 acres a total made up, he says, at £15 per acre for 112 acres, £100 for

the 50 acres and £20 for the use of a paddock and cottage. If this were the true version of the facts it would seem that he never agreed to buy the 23 acres at all, and that he could have claimed possession of the 89 acres and 50 acres with compensation for deficiency. This however he did not do. Possession of the whole 162 acres was taken, as already said, on 1st April 1909. Plaintiff says that he did not discover that the 23 acres were included in his purchase until June. Correspondence then passed between his solicitor and defendant's solicitor as to the title, but it was not until October that any misrepresentation was suggested to have been made. This, I think, may well be regarded as a somewhat shadowy case. On the other hand, the defendant gave an entirely different version of the facts. He said that he took the plaintiff through the 23 acre block, and showed it to him as part of the land under offer. Another witness deposed that in January 1909 the plaintiff went with him to that block, made various inquiries about the value of the timber upon it, pointed out a part of it which he thought would grow good potatoes, and talked of making a road through it from the 50 acre block to Mitchell's corner (the north-east corner of the 89 acre block).

There was other corroborative evidence tending to show that plaintiff was aware of the actual state of facts before he signed the agreement.

It is not necessary to express any opinion whether under these circumstances the finding of fraud could have been successfully impeached, and I express no opinion on the point.

But I am of opinion that if all the facts to which I have referred, both as to the alleged fraud and as to damages, had been present to the mind of the Court when the special leave was asked for it would not have been granted. There is no good ground in my judgment to suppose that the plaintiff has suffered any substantial injustice, and the error of the Supreme Court was not as to a matter of law of general importance, but as to the weight to be given to an agreed price as evidence of value.

In my judgment the case does not fall within any of the categories of cases in which special leave to appeal should be looked

I think therefore that the leave should be rescinded.

H. C. OF A. 1911.

DUNCANSON v. HAYWOOD.

Barton J.

BARTON J. I also am of opinion that the proper course is to rescind the order for special leave.

I have but little to add, as the learned Chief Justice has dealt exhaustively with the matter.

The Supreme Court on appeal stated the measure of damage correctly; but did not consider that the plaintiff (now appellant) had proved damage according to that measure. The last was a subsidiary question on which this Court would not have given special leave had it been as fully advised of all the elements of the case as it now is. See *Dalgarno* v. *Hannah* (1); *Prince* v. *Gagnon* (2); and *Daily Telegraph Newspaper Co. Ltd.* v. *McLaughlin* (3). That being the only definite question of law directly involved in the appeal, it seems to me clear that our order should now be rescinded.

I should like to say further that I thoroughly agree with what his Honor has said as to the weakness of the evidence of fraud taken as a whole.

ISAACS J. The judgment appealed against was one directing a non-suit on the ground that there was no evidence of damage. Technically that conclusion cannot be sustained because there was evidence upon which the jury might have found that the value of the land including the 23 acres was at the time of the sale less than £1,800, the price mentioned in the contract. Besides the contract of sale itself, there was the evidence of prior negotiations and the testimony of the plaintiff as to the way the price was ultimately arrived at between the parties. Consequently if the question turned simply on the technical accuracy of the judgment of non-suit the appellant would succeed. And at first sight that should be the case. The jury, by a majority of 5 to 2 as it appears, found that he was defrauded into agreeing to the contract price; and resting the matter there, it would be altogether improper that any man who had defrauded another should escape the duty of restitution through the happy accident of a judicial slip. It was to prevent such an apparent injustice that leave to appeal was granted.

Now, however, when the facts come to be closely exam[illegible]62 acre

(1) 1 C.L.R., 1. (2) 8 App. Cas., 103. (3) (1904) A.C., 776.

seems to me that no injustice is likely to be occasioned by leaving the case as it was left by the Supreme Court. Though there was evidence on which the jury might have found that the appellant had made a prejudicial bargain, they were not asked to find, and did not in fact find, upon that essential issue. Therefore the appellant cannot have final judgment in his favour. The best he could have would be a re-trial to ascertain whether he had sustained any, and if so what, damage, and as it would be unfair to send the case for re-trial upon that issue only—stamping the respondent at the outset before another jury as guilty of a fraud without the qualification of any explanation he could offer—the whole action would have to be re-tried. This would be at best a dilatory and expensive proceeding, and, as it appears to me, even the victor might sustain some loss in the process. And after examining the facts relative to the alleged fraud, with a view only of determining whether or not in our discretion we consider justice would be best served by directing or not directing the new trial, I think the whole weight of the evidence and probabilities falls preponderatingly on the side of the respondent. The charge of fraud was a belated one; the fraud alleged was so unnatural in its origin and perpetration, so readily open to detection, and afterwards so simply and quickly admitted according to the evidence, that without firm corroboration it is difficult to understand how in the face of the strong and natural contradictory evidence any ordinary men of the world could be prevailed upon to accept the suggestion. I do not wonder at the minority of the jury refusing to adopt that view; and while on this appeal it is no function of mine formally to reverse the finding of the jury, I decline to assist it.

I think the appellant has been confused in his recollection and impressions, and mistaken as to the precise events of the negotiations between himself and the respondent. The undisputed facts tell powerfully against the probability of his version. In respect of the central matter complained of, namely, the affirmation by respondent that one block of 112 acres contained "all good land," the appellant is not corroborated where corroboration would be looked for, namely, by his witness present at the time, and it is inconsistent with the testimony of the respondent. I therefore

H. C. OF A. 1910.

DUNCANSON v. HAYWOOD.

Isaacs J.

do not see that justice would be assisted by driving the parties to further protracted litigation, leading possibly to further appeals.

The appellant stands simply non-suited; if he chooses to try his fortunes further he may do so, but without the aid of this Court. This judgment will not prevent him doing so if he wishes.

But so far from encouraging him to adopt that course, I entirely agree that, there being no question of general importance involved, the proper order in the circumstances is to rescind the leave to appeal and leave the parties to occupy the position in which they were placed by the judgment of the Supreme Court.

Special leave to appeal rescinded.

Solicitors, for the appellant, *Crisp & Crisp*, for *D. C. Urquhart*, Devonport.

Solicitors, for the respondent, *Ewing, Hodgman & Seagar*, for *Wilfred Hodgman*, Burnie.

B. L.

[HIGH COURT OF AUSTRALIA.]

JAMES WILLIAM EVANS . . . . . APPELLANT;
PLAINTIFF,

AND

JAMES LESLIE WILLIAMS . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1910.

SYDNEY, *Nov.* 22, 23; *Dec.* 12, 16.

Griffith C.J., Barton and Isaacs JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Contract—Construction — Implied term — Agreement by Crown with holder of statutory office—Agreement to give up statutory fees in consideration of payment of fixed salary by Crown—Power of Crown to terminate contract.