Armstrong, for the defendants. The Association could not create an interest in the land inconsistent with the terms of the grant, and a lease of a room in the building is such an interest.

[GRIFFITH C.J.—The Association are entitled to possession of the room, and the only question is whether the right procedure has been adopted to obtain that possession.]

Per curiam. Special leave to appeal will be refused.

Special leave to appeal refused.

Solicitor, *A. C. Roberts.*

B. L.

[HIGH COURT OF AUSTRALIA.]

GANS . . . . . APPELLANT;
PLAINTIFF,

AND

RILEY AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Contract—Rescission—Unconscionable bargain—Evidence.

In an action to set aside an agreement for a sale of property on the grounds that the price was grossly inadequate, and that it was made under circumstances of oppression almost amounting to actual fraud, judgment was given for the defendants. On appeal to the High Court,

Held, that the appeal should be dismissed on the ground that the evidence did not establish either that the price was grossly inadequate or that there was fraud, and on the further ground that, as the parties could not be restored *in integrum*, the plaintiff's only remedy would be an action in the nature of

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an action for deceit of which actual damage was an essential element, and that there was no evidence of such damage.

Decision of the Supreme Court of Victoria (*Hood* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Daniel Jacob Gans against James Henry Riley, Joseph de Saxe, Isidor Isaacson, Alexander Barnett Sternberg, Joseph Walter Isaacs, Lionel Marcus Bernard Marks, Percy Isidor Isaacs, Edith Isaacs, and the Gans and de Saxe Manufacturing and Agency Co. Proprietary Ltd., seeking substantially a rescission of a certain agreement dated 10th March 1908, and made with the defendant James Henry Riley by the plaintiff and other shareholders in the above-named company (being the persons named as defendants other than Riley) and the company. The nature of such agreement is stated in the judgment of *Griffith* C.J. hereunder, where the other material facts also appear.

The action was heard by *Hood* J., who gave judgment for the defendants with costs.

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

Arthur, for the appellant, referred to *Robinson* v. *Abbott* (1); *Chesterfield (Earl of)* v. *Janssen* (2); *White & Tudor's Leading Cases*, 6th ed., vol. I., p. 667; *Dowsett* v. *Reid* (3).

[ISAACS J. referred to *Ballantyne* v. *Raphael* (4); *Nevill* v. *Snelling* (5).]

Starke, for the respondent James Henry Riley,

McArthur K.C. and *Macindoe*, for the respondents Joseph de Saxe, Lionel M. B. Marks, Joseph Walter Isaacs, Percy Isidor Isaacs, and Edith Isaacs,

Jacobs, for the respondents Isidor Isaacson and Alexander Barnett Sternberg, and

(1) 20 V.L.R., 346; 16 A.L.T., 101.
(2) 2 Ves., 125.
(3) 15 C.L.R., 695.
(4) 15 V.L.R., 538.
(5) 15 Ch. D., 679.

Irvine K.C. and *Schutt*, for the respondents the Gans and de Saxe Manufacturing and Agency Co. Proprietary Ltd., were not called upon.

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GRIFFITH C.J. This is a perfectly hopeless appeal. The case was launched as a case of an agreement for a sale of property at a grossly inadequate price under circumstances of pressure almost amounting to actual fraud. The subject matter of the alleged sale was 20,000 shares in a proprietary company in which there were 33,000 shares in all. The transaction was, in substance, very much as if a firm of traders in desperate straits were to agree to admit a new partner on the terms that he should have two-thirds of the partnership assets and should lend the new partnership a sum of money to enable them to carry on their business. That is the substance of the transaction.

The first step in the case was to prove that the consideration for the sale was grossly inadequate. It appears that at the time when the agreement was made the company were in an almost hopeless condition, and could not carry on any longer without outside help. They owed a creditor in Germany £7,000, which was substantially trust money that they had applied to their own purposes, and of which the creditor insisted upon immediate payment. They could not find the money. Their bank, to which they were largely indebted, would not help them further, and their position was desperate. Under these circumstances the respondent Riley agreed to acquire substantially a two-thirds interest in the company, and to advance to the company £5,000 by way of immediate loan, with the almost certain prospect of having to make or provide for immediate further advances of large sums. He did in fact become liable for sums amounting to about £30,000. It is suggested that, although the company was in such desperate straits, its assets, if realized under favourable circumstances, would have resulted in a considerable surplus. I cannot see upon the evidence any grounds for supposing that there would have been any surplus at all. The inference I should draw, if I were called upon to draw one, would be that the assets of the company would probably not have realized enough to satisfy their debts. In such circumstances it would

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Griffith C.J.

be difficult to say that a man who came to the relief of the company, paying down £5,000 of his own money and undertaking other heavy responsibilities, paid a grossly inadequate price. On this point the appellant absolutely fails.

There are many other fatal objections to this suit, of which I will only mention one. The transaction took place four years ago. Since then the company has carried on business, and Riley is liable for a very large sum of money on its account. The Court will not rescind a contract unless the parties can be restored *in integrum*, which is impossible here.

The only possible remedy for the appellant would be an action in the nature of an action for deceit, in which actual damage is an essential element of the cause of action. In order to show such damage it would be necessary to show that the value of the plaintiff's chance of getting some dividend if the company had gone into liquidation was greater than the value of his interest in the assets of the company as it now exists. There is absolutely no evidence on either point to enable an inference to be drawn in the appellant's favour. That, in itself, is a fatal objection to his action. I have said nothing as to the fraud alleged, of which the learned Judge of first instance thought there was no evidence.

BARTON J. I quite agree that there is no reason for disturbing the conclusions of *Hood* J.

ISAACS J. I agree. It is not Mr. *Arthur's* fault that he does not succeed. The only gross inadequacy in the case that I can see is in the plaintiff's evidence.

Appeal dismissed with costs.

Solicitor, for the appellant, *J. Woolf.*
Solicitors, for the respondents, *Pavey, Wilson & Cohen.*

B. L.

END OF VOL. XV.