RECENT ENGLISH DECISIONS.

High Court of Justice, Queen's Bench Division.

JOLLIFFE v. BAKER.

After a purchaser has taken a conveyance and paid the purchase-money no action can be maintained either at law or in equity, for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless such error amount to a breach of some contract or warranty contained in the conveyance itself or unless some fraud and deceit has been practised upon the purchaser.

The fraud which will entitle the purchaser to compensation is actual fraud. The mere description of the land as containing a larger quantity than appears upon subsequent measurement is not in itself such fraud.

Where land is described as "containing by estimation three acres or thereabouts" and it appears that the vendor himself purchased it by this description and believed it to contain that quantity, but in fact it only contained two acres, one rood and twelve perches, there is no breach of any warranty and the purchaser is not entitled to compensation.

Hart v. *Swaine*, 7 Ch. Div. 42, and *In re Turner and Skelton*, 13 Id. 130, disapproved.

APPEAL from the decision of the judge of the Hampshire, County Court.

The opinion of the court was delivered by

WATKIN WILLIAMS, J.—The question arises between vendor and purchaser of real property; the plaintiff, the purchaser, seeking to recover compensation from the defendant, the vendor, after the completion of the contract, on account of an alleged mis-statement as to the acreage of the property, made in the contract of sale and repeated in the conveyance, but made in good faith and without any intention to deceive.

The appeal comes before us on a special case stated by the judge, from which the facts appear to be as follows:—

In June 1881, the defendant advertised the property in question for sale, and, in reply to a letter of inquiry from the plaintiff, thus described it in a letter of the 1st of July 1881:—

"The property is situate at Stroud Wood; it consists of cottage, thatched, with four rooms, pigstye, cow-pen, garden and capital meadow, in all three acres; it has been occupied by Charles Lee for the past thirty years, and the rental is 16*l.* a year. Price, 275*l.*"

The plaintiff went and looked at the property, but it was never

measured, and, on July 28th 1881, a contract in writing was entered into between the parties for the purchase at 270*l.*; in this contract the property was described as "All that freehold cottage or tenement, garden and land, containing, by estimation, three acres or thereabouts." There were provisions for delivery of abstract of title, and making requisitions and objections, as follows: "The purchaser shall make his objections and requisitions (if any) in respect of the title and all matters appearing upon the abstract, or these presents, and send the same within fourteen days from the date of delivery of the abstract, and, in default of such objections and requisitions, and subject to such, shall be deemed to have accepted the title and to have waived all other objections and requisitions, and, if he shall insist on any objection which the vendor shall be unable or unwilling to remove or comply with, the vendor may, by notice in writing to be given to the purchaser, at any time, and, notwithstanding any negotiation or litigation in respect of such objection, annul the sale, and the purchaser shall have no claim on the vendor for the expense of investigating the title, or other expenses whatsoever, or for compensation."

The purchase was completed and the conveyance executed on August 25th 1881, and the purchase-money was paid and possession taken on the same day. In the conveyance the property was described as, "All that cottage or tenement and piece or parcel of meadow land to the same adjoining, containing, by estimation, one and a half acres, more or less, bounded on lands now or late of Dame Jane St. John Mildmay on the north part, and upon Stroud Wood on the east, south and west, and also all that piece or parcel of land, containing, by estimation, one and a half acres, more or less, sometime since purchased of the (Inclosure) Commissioners, adjoining to and now thrown with the said piece of meadow land."

The defendant had purchased the property in 1879 by the same description in every respect; he had never measured the land, and believed that the description as to acreage was correct, and he sold the property to the plaintiff in good faith, honestly believing the estimate to be correct.

In December 1881, the plaintiff, in consequence of statements that had been made to him, measured the land and found that it contained 2a. 1r. 12p., instead of about three acres, and he applied

to the defendant for compensation. The defendant refused to make compensation, and this action was brought to recover it. The county court judge found that there was no fraud or deceit on the part of the defendant, but decided that, notwithstanding there was no fraud, yet, as the actual quantity of land did not sufficiently answer the description in the contract and conveyance, the plaintiff was entitled to recover for the deficiency in quantity, and gave judgment for the plaintiff for 50*l*.

From this decision the defendant has appealed, and we have to determine whether it is correct.

Before considering the legal questions involved in the case, I will turn again for one moment to the facts. The land, the subject-matter of the sale, consisted of specific parcels defined by metes and bounds, and there was no mistake or error as to the extent of the parcels of land sold, which were seen and examined by the purchaser before the sale; the purchase-money was an entire lump sum for the lot; the vendor undoubtedly represented the property in the treaty for the sale as being, in all, three acres, and in the formal contract, and in the conveyance itself, it is described as "containing, by estimation, three acres, or thereabouts."

It was stated that the county court judge, in the decision at which he arrived, acted upon and followed the undoubtedly high authority of two opinions recently expressed by FRY, L. J., in *Hart* v. *Swaine*, 7 Ch. D. 42, and Sir GEORGE JESSEL, in *In re Turner and Skelton*, 13 Ch. D. 130, which are said to have laid down the proposition broadly that a purchaser, even after completion and after conveyance, and in the absence of actual fraud, was entitled to claim compensation for errors and inaccuracies in the particulars of the land sold, and it was strenuously argued before us that, although the county court judge had negatived actual moral fraud, yet that the case was one coming within the principle of legal fraud, entitling the purchaser to relief even after conveyance.

In direct opposition to these were cited three decisions of MALINS, V. C., in the last of which he distinctly disputed the correctness of Sir GEORGE JESSEL'S decision, and declined to follow it, and it is in this conflict of the most recent authorities that we have to determine the question.

I propose at once to examine the conflicting authorities that have been cited to us. The first in order of date is *Hart* v.

Swaine, decided in 1877. It was an action by the purchaser against the vendor of real estate, to set aside, after conveyance, the sale of a piece of land sold as freehold, which afterwards was discovered to be copyhold. The defendant sold the land in question, about four acres, to the plaintiff in February 1876, and conveyed it to him as freehold. It appeared that the defendant had bought the land, together with other land, in 1871, from one Chamberlain, who informed him that a portion of the land he was selling was copyhold. In fact the copyhold portion had been an allotment under an Inclosure Act in respect of other copyhold lands the property of the Chamberlains, and there was nothing in the abstract of title showing that any of the land offered for sale was copyhold, and the defendant, for his own convenience, took a conveyance of the whole from Chamberlain as freehold. It appeared also, that early in 1876, and before the defendant sold to the plaintiff, the defendant had put up the four acres for sale by public auction, and on that occasion a Mr. Smith, publicly stated in the auction-room, that the land was copyhold, and not freehold, and no sale was then effected. From this statement I collect that the defendant had then proposed to sell the property as freehold, when Mr. Smith stated that it was copyhold, and that he afterwards, within a month, sold the property to the plaintiff, asserting it to be, and selling it as, freehold. FRY, L. J., set aside the sale, and ordered the defendant to repay the purchase-money with interest and expenses. The decision, if I may say so without appearing impertinent, is equally consistent with sound law as with sound sense, but the reasoning upon which it is founded is, if I may say so without presumption, unsatisfactory, and has proved misleading. At the conclusion of the case, FRY, L. J., said: "I see no evidence of actual fraud on the part of the defendant; he has only made a mistake. But as he has taken upon himself to assert that the land is freehold, am I at liberty to look into the state of his mind?" And further on he says: "The defendant took upon himself to assert that to be true which has turned out to be false, and he made this assertion for the purpose of benefiting himself. Though he may have done this, believing it to be true, the result appears to me to be that which is expressed in the judgment of MAULE, J., in *Evans* v. *Edmonds*, 13 C. B. 777, where he says, 'I conceive if a man having no knowledge whatever upon the subject, takes upon himself to represent a certain state of facts to

exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still have been fraudulently made'—that is to say," continues FRY, L. J., "the defendant having taken upon himself, with a view to securing a benefit to himself, to assert that the property was freehold, has, in the view of a court of law, committed a fraud." Having further cited the case of *Rawlins* v. *Wickham*, 3 De G. & J. 316, he concluded by saying, "It appears to me, therefore, that in this case there has been a legal fraud committed by the defendant, and that I am bound by the authorities to give the plaintiffs the relief they ask."

In the first place, it seems, looking to the facts of *Hart* v. *Swaine*, *supra*, that it can scarcely be cited as an authority in support of the doctrine that the so-called legal fraud, without actual moral fraud, is a sufficient ground for setting aside a conveyance. There was in that case ample evidence of fraud in the common meaning of the term. The defendant, even if he did not know his statement to be false, could not possibly have known it to be true in the sense that, *secundum subjectam materiem*, the plaintiff had a right to suppose from his statements that he did know it; and it is certainly unfortunate that the language of MAULE, J., in *Evans* v. *Edmonds*, *supra*, should have been cited as an authority for the proposition that there can be an actionable legal fraud in the absence of moral fraud, because *Evans* v. *Edmonds*, *supra*, was a case of the most flagrant fraud and treachery to be found in our books. In that case the plaintiff, as trustee under a separation deed between the defendant and his wife, sued for arrears of an annuity which the defendant had covenanted to pay. The defendant, in a plea very inartificially drawn, pleaded that he was induced to enter into the deed by false and fraudulent misrepresentation of the plaintiff, to the effect that the wife was a chaste person, and that he (the plaintiff) was a virtuous person, and fit to be a trustee, whereas the plaintiff had treacherously and perfidiously seduced the wife and concealed the fact from the defendant, and fraudulently induced the defendant to enter into the separation deed in order that he might seduce away the wife

and keep up his adulterous intercourse with her. At the trial the jury found the plea to be true, and gave their verdict for the defendant. The plaintiff then moved for judgment *non obstante veredicto*, upon the ground that the plea was bad, having omitted the necessary averment of the plaintiff's knowledge at the time of making the representation that the wife was unchaste. The only point was whether the omission of this technical averment was cured and supplemented by the verdict, inasmuch as actual fraud in fact was necessarily involved in the finding of the jury. The objection after verdict was obviously frivolous and absurd, and the observations of MAULE, J., in answering it, were conceived in a vein of the keenest irony and satire when he said that a person might make such a representation fraudulently, as the jury had found, consistently with his not knowing it at the time to be false, which was not averred.

Nor is the other case cited by FRY, L. J.,—namely, *Rawlins* v. *Wickham*, *supra*,—any better authority for this doctrine of legal as distinguished from moral fraud. In that case the plaintiff had entered into partnership with two persons named Bailey and Wickham, as bankers, and paid 2300*l.* for his share, upon the faith of a statement of accounts and balance-sheet handed to him by both of them, showing the bank to be in a solvent condition; the plaintiff discovering afterwards that the accounts and balance-sheet were false, brought an action at law against them both for damages for false and fraudulent misrepresentation. During the pendency of this action Wickham died. The plaintiff proceeded with his action against Bailey, and recovered damages amounting to about 12,000*l.*; failing to obtain satisfaction from Bailey, he filed his bill against Wickham's executors and Bailey for a dissolution of the partnership, and claimed a return of his 2300*l.* and an indemnity. There was strong ground for believing that Wickham had no knowledge that the accounts were false, and this was urged as a ground why his estate should not be made responsible. A decree, however, was made dissolving the partnership, and directing the money to be repaid out of Wickham's estate, TURNER, L. J., saying, "A representation was made by Wickham of a fact of the truth or falsehood of which he knew nothing. It has turned out that this representation was contrary to the fact. There was not, as I think, any moral fraud, but there was legal fraud, and the result is that the estate of Mr. Wickham must answer for the fraud."

Whatever may have been the language of the judgment, I venture, with great deference, to say that the decision rests, and may be supported upon the sound, broad foundation of the well-known principle of law, that every partner undertakes and engages for the fidelity of his co-partners in the execution of matters within the scope of the authority conferred upon them; and all that could be decided in that case was that Wickham, even though an innocent partner, could not escape from the consequences of the fraudulent misrepresentation of his partner in a transaction which he had authorized him to carry out, and there was no necessity to resort to any doctrine of fraud.

The next in order of the alleged conflicting authorities were two decisions of MALINS, V. C., in which he decided that in the absence of fraud a purchaser cannot obtain compensation after conveyance for misrepresentation, even though such misrepresentation related to the subject-matter of the conveyance.

The first of these cases was *Manson* v. *Thacker*, 7 Ch. D. 620. It was an application by a purchaser of real property, known as Norway Wharf, for compensation in respect of an underground culvert not disclosed by the particulars of sale, wherein the property was described as "available" as a building site for a warehouse, and by the sixteenth condition of which it was provided "that, if any error or mis-statement should appear to have been made in the particulars, such error or mis-statement was not to annul the sale, or to entitle the purchaser to be discharged from his purchase, but compensation was to be made to or by the purchaser as the case might be, and the amount was to be settled by a judge at Chambers." The contract was completed, and the conveyance executed, in February 1877, and in July following, the purchaser discovered a culvert running underneath the land, and that he had no right to interfere with it. The mouth of the culvert was visible at low water. The vice-chancellor, assuming that the purchaser would have been entitled to compensation if he had come before completion, held that, after the conveyance had been executed, and the purchase-money paid and possession taken, he was not entitled to compensation. He declined to follow the case of *Bos* v. *Helsham*, L. R., 2 Ex. 72, which I shall refer to hereafter, where the Court of Exchequer held that such a clause entitled the purchaser to compensation after the completion of the purchase, and he considered that in *Hart* v. *Swaine*, *supra*, the

whole contract was vitiated by what he called legal fraud, by which, however, I understand him to have meant that which would have been treated as a fraud even in a court of law.

The second case was *Besley* v. *Besley*, 9 Ch. D. 103. That was an action for the administration of the estate of one Besley, a type-founder, and a claim was made upon the estate under the following circumstances: In 1861 Besley sold his business to the claimants for 10,000*l.*, and, amongst other things, it was agreed that Besley should grant them an underlease of the premises for the residue of the term for which he held the same, except the last two days, at 225*l.* a year; the purchase was completed, and by an underlease prepared by Besley's solicitor the premises were demised for twenty-three years less ten days. It was afterwards discovered that the term had only sixteen years to run instead of twenty-three, and that Besley had consequently granted the lease for seven years longer than he had power to do, and the claimants were obliged, at the end of sixteen years, to pay a rent of 400*l.* a year. It was admitted that this was done by mistake. The vice-chancellor decided that the claim was inadmissible, stating that a purchaser must be wise in time, and is bound to look into the facts connected with the subject-matter of his purchase before completion of the contract, and that after the execution of the conveyance, in the absence of fraud, he comes too late.

I next come to the undoubted good authority of Sir GEORGE JESSEL on the other side, in the case of *In re Turner and Skelton, supra*, which was an application under the Vendors' and Purchasers' Act 1874, on the part of a purchaser seeking compensation from the vendor, for an error as to the quantity of the land, not discovered until after the conveyance had been executed. The facts were these: By the contract the vendors agreed to sell, and the purchaser to buy, a piece of land described in a schedule as containing 6a. 2r. 10p., or thereabouts, for 600*l.*, and, by the conditions of sale, it was provided that if any error or mis-statement should be found in the schedule, it should not annul the sale, but compensation should be made in respect thereof. After the completion of the purchase and execution of the conveyance, the purchaser discovered, by measurement of the piece of land, that it only contained 5a. 0r. 7p. Sir GEORGE JESSEL, in deciding in favor of the claim, said, "I will first consider what the law is where there is no special contract between vendor and purchaser

as to compensation. There are cases in which a purchaser may lose his right to compensation by doing certain acts which show an intention on his part to fulfil the contract, and to waive any claim in respect of misdescription of the property;" and he cites a passage from Dart's Vendors and Purchasers, stating that a purchaser may lose his right to resist specific performance, and his right to compensation by certain conduct on his part, and proceeds: "No book can be produced to show that it was thought to be settled law that a purchaser loses his right to compensation by taking a conveyance, and on what principle should he do so? The theory is, that he has contracted to take compensation, if there is any variation from the particulars. Why, then, should he lose it by taking a conveyance? The only reason that can be alleged is, that everything is supposed to be settled between the parties, but why should that be an obstacle to the right of the purchaser when the defect is discovered afterwards? * * * As to the authorities, they are all, with one exception (*Manson* v. *Thacker*, *supra*,) the other way;" and he cites *Cann* v. *Cann*, 3 Sim. 447, which, he says, was not distinguishable from the case before him, and *Bos* v. *Helsham*, *supra*, in which the Court of Exchequer decided in the same way, and he proceeds to say: "With these authorities, one would think the law was settled, but MALINS, V. C., has, in *Manson* v. *Thacker*, *supra*, decided the other way. * * * Considering *Cann* v. *Cann*, *supra*, and *Bos* v. *Helsham*, *supra*, I should consider myself bound by authority, and I cannot imagine that MALINS, V. C., intended to overrule the previous cases."

In the still more recent case of *Allen* v. *Richardson*, 13 Ch. D. 524, the same question again arose before MALINS, V. C., and that learned judge, who was himself a very experienced conveyancer and learned real property lawyer, in adhering to his former opinion, said: "I can only say that I very much regret that I am obliged to take an entirely different view from that of a judge who is entitled to so much respect as the Master of the Rolls. All I can say is, that I retain strongly my former opinion, and upon that opinion I shall act until it is overruled. Until I find it laid down by the Court of Appeal that a purchaser is to be allowed to be lax in the conduct of his business, that he is to be allowed to lie by carelessly, and discover things after the completion of the purchase which he ought to have discovered before, I shall adhere to

my own view, because I believe that such a rule would be detrimental to the best interests of persons possessed of property. * * * I entirely dissent from all that the Master of the Rolls appears to have said."

In order to test the correctness of these propositions of Sir GEORGE JESSEL, I turn to the two authorities that he cites, and to the standard works of Mr. Dart and Lord ST. LEONARDS upon vendors and purchasers.

In *Cann* v. *Cann, supra*, the question arose in an administration suit. Certain premises had been put up for sale by auction under an order of the court. The premises were represented by the vendors, in the particulars, as being then in the occupation of tenants at a rent of 55*l.* a year. One of the conditions of sale provided that, if there should appear any error or mistake whatever respecting the estate it should not annul the sale, but a compensation should be given. Upon the faith of the representation as to the rent one Phipson became the purchaser, the purchase-money was paid to the credit of the cause and the estate was conveyed to Phipson. After he was let into possession he discovered that the representation as to rent was false, as the rent was only 40*l.* a year; he then presented a petition in the cause praying for compensation out of the fund in court. Now here was a case in which, in the first place, there was a special contract for compensation between the parties; and, secondly, there was a distinct and most material false representation and actionable fraud by the vendor; and, thirdly, the petition was presented in relation to a purchase carried out under the order of the court in an administration suit, the proceeds of the sale being still in the hands of the court. SHADWELL, V. C., said: "The question is whether, there having been a misrepresentation in respect of which the purchaser had a right of action, the circumstance of his having taken a conveyance has destroyed that right. The right of the petitioner is not at all affected by that circumstance, and, as the court would not have permitted him to bring an action for damages on account of the misrepresentation, I am of opinion he is entitled to be recouped out of the purchase-money."

Bos v. *Helsham, supra*, was an action at law for compensation under a contract of sale, containing the clause that, if any error whatever should appear in the particulars of sale, it should not

annul the sale, but in such case a reasonable compensation should be given. The defendants pleaded, on equitable grounds, that they had by deed conveyed the property according to the contract, to the plaintiff, who accepted the conveyance and paid the purchase-money, and the purchase was then finally completed, and that after the completion the plaintiff discovered, and then for the first time gave notice of, the alleged error. To this there was a demurrer. KELLY, C. B., and the Court of Exchequer gave judgment for the plaintiff, upon the ground that, by the terms of the special contract, the defendant had agreed to make compensation for any errors in the particulars, and that there was no limitation of this to errors discovered before completion, and CHANNELL, B., bases his judgment solely upon the interpretation of the express contract between the parties, considering that it was wholly beside the question to consider what would have been the rights of the parties in equity apart from express agreement. The attention of the learned judges in that case does not appear to have been directed to the point that the compensation clause in such contracts is introduced into the conditions of sale for the benefit of the vendors, and to protect them against what would otherwise have been the right of the purchaser in equity to resist specific performance of the contract on the ground of inconsiderable errors and inaccuracies in the particulars: see *Whittemore* v. *Whittemore*, L. R., 8 Eq. 603. Nor was their attention called to the point that, so far as such conditions form part of any contract, they are entirely merged in, and superseded by, the formal deed of conveyance.

In Dart's Vendors and Purchasers, ch. 14, s. 5, the rule is thus laid down: "With some few special exceptions a purchaser, after the conveyance is executed by all necessary parties, has no remedy at law or in equity in respect of defects, either in the title to, or quantity or quality of, the estate, which are not covered by the vendor's covenants." And in section 6 he enumerates the special exceptions in which there is a remedy after conveyance, and these are all cases either of actual falsehood and fraud on the part of the vendor entitling the purchaser to a rescission of the contract, or where there is a total absence of the subject-matter of the intended contract, and he expressly says that a "bill filed after conveyance simply for compensation in respect of defects will be dismissed;" and Lord ST. LEONARD'S book is to the same effect.

This is how the modern authorities stand, and I own that, if it

had not been for the opinions attributed to Sir GEORGE JESSEL and FRY, L. J., in the cases referred to, I should have thought the rules applicable to the case tolerably clear. After the best consideration that I am able to give to these conflicting authorities, I am of opinion, in the first place, that it has been the established practice of the Court of Chancery that a bill for compensation, properly so called, the purchaser retaining the property, could not be entertained after the completion of the contract and execution of the conveyance, and that the jurisdiction under which compensation was granted was exercised only as ancillary to specific performance, and was never exercised independently. The evidence of this is principally negative, but it was distinctly recognised and stated in the case of *Newham* v. *May*, 13 Price 749. In that case the purchaser of freehold houses filed his bill after conveyance, praying for compensation for the difference in value of the property by reason of the amount of rent having been misrepresented by the vendor. The bill was dismissed, ALEXANDER, C. B., stating it as his opinion that the remedy in such cases was by action at law for damages, and that the jurisdiction of equity in cases of compensation had grown up only as ancillary to and incidentally necessary to effectuate decrees of specific performance of contracts for the sale of real property.

A similar opinion was expressed by Lord ELDON in *Todd* v. *Gee*, 17 Ves. 273, in which he followed the course of earlier authorities: see *Gwillim* v. *Stone*, 14 Ves. 128, and *Blore* v. *Sutton*, 3 Mer. 237. This rule seems to me also to rest upon sound principles of law and equity; because, if it were otherwise, a purchaser might, after conveyance, and while still insisting upon retaining the estate, ask for an abatement of the agreed purchase-money, which would be wholly contrary to every principle. If he came before conveyance he might, if misled, even by an innocent error, fairly say to the vendor, "I have been misled, and do not wish to have the estate, and if you insist upon my performing the contract and taking it, a fair abatement from the price ought to be made," in which case the vendor would be placed in a fair position, because if he was unwilling to part with his estate at the reduced price he might retain it; on the other hand, if the purchaser were entitled to insist upon retaining the estate, and at the same time claim an abatement of the price, the result would be that the vendor, on account of a perfectly innocent and unintentional error,

might be compelled to part with his estate for a price that he never had, and never would have, agreed to, which appears to me contrary, not only to the express terms of the contract, but to every principle both of law and justice. Nor can I reconcile Sir GEORGE JESSEL'S statement, that "the theory is that the purchaser has contracted to take compensation if there is any variation from the particulars," with his assertion that "the purchaser may lose his right to compensation by showing an intention to fulfil the contract, and waive any claim in respect of misdescription," because if his right rested upon contract simply, so as not to be affected by the purchaser completing and taking a conveyance, I am unable to understand how his intention to fulfil and to waive such claim could affect his actual rights under the contract. I am further of opinion, secondly, that after the purchaser has taken a conveyance and the purchase-money has been paid, no action can be maintained either at law or in equity for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless such error amount to a breach of some contract or warranty contained in the conveyance itself, or unless some fraud and deceit has been practised upon the purchaser.

I will now apply these tests to the present case; and, first, was there any fraud practised upon the purchaser? And to this I answer unhesitatingly that there was not. The facts upon which this point rests are shortly these. Upon the treaty for the sale the vendor represented the quantity of land as being three acres, whereas it was only 2a. 1r. 12p., and consequently the representation was untrue in fact. This representation was qualified afterwards by the language both of the contract and the conveyance, and the county court judge acquits the vendor of fraud.

This, in my opinion, ought to be decisive upon the question in favor of the vendor, but it was strenuously and ably argued before us that this positive and untrue representation amounted to and constituted a legal fraud, which entitled the purchaser to relief. It was contended that if a man takes upon himself to make a positive representation of fact in order, for his own benefit, to induce another person to act upon it, and the representation is acted upon, and it was at the time untrue in fact, that amounts to a fraud; and it was contended that that was exactly the present case, and that, notwithstanding the finding of the county court judge negativing fraud, his decision could be supported, taking the

admitted facts, upon the ground that there was here legal, if not moral, fraud.

It cannot be denied that for some years in the history of our jurisprudence great doubt hung over the question whether, in order to maintain the common-law action of deceit, it was necessary to establish actual moral fraud on the part of the defendant. In 1840 the Court of Exchequer decided, in *Cornfoot* v. *Fowke*, 6 M. & W. 358, that an untrue representation, upon the faith of which an agreement was entered into to take a furnished house, must, in order to avoid the agreement, have been not only untrue, but actually false and fraudulent, on the part of the person making it. On the other hand, in the year 1842, the Court of Queen's Bench, in the case of *Fuller* v. *Wilson*, 3 Q. B. N. S. 58, entirely dissented from the opinion of the Court of Exchequer, and decided, in an action brought by a purchaser of a house against the vendor for misrepresentation as to the house being free from rates and taxes, that, whether there was moral fraud or not, if the purchaser was actually deceived in his bargain, that was sufficient. The controversy between the two courts continued for several years, until the point was decided in the Exchequer Chamber in 1845, in the case of *Ormrod* v. *Huth*, 14 M. & W. 651, where it was laid down that an action of deceit was not maintainable without showing that the representation was false to the knowledge of the person making it, or that he acted fraudulently in making it; and this must be taken now to be the settled and established law. In other words, ever since 1845, it has been clear and established law that, in considering the principles governing this class of cases, the term "fraud" must be used and understood in the common meaning of the word, as it is ordinarily used in the English language, and as implying some base conduct and moral turpitude. With all deference to those who have persistently continued to use the expression "legal fraud," which, I believe, was first introduced by Lord KENYON, in 1801, it is certainly a matter of regret that the expression has ever been introduced into legal language. I adopt, with regard to that expression, the words of Lord BRAMWELL in *Weir* v. *Bell*, 3 Ex. D. 238, where he says, "I do not understand legal fraud. To my mind it has no more meaning than legal heat, legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud except where some duty is shown and correlative right, and some violation of that duty and

right. And when these exist it is much better that they should be stated and acted on than that recourse should be had to a phrase illogical and unmeaning with the consequent uncertainty."

Armed with this authority of Lord BRAMWELL, I reject the phrase "legal fraud," as distinguished from "moral fraud and deceit," as wholly inapplicable and inappropriate to legal discussion, and I simply ask the question in the present case, Do the facts disclose a case of fraud? and I reply, unhesitatingly, that they do not. Perhaps it is scarcely necessary to add that there can be no doubt that if a man affirms something as a positive fact concerning which he has no knowledge whatever, knowing neither whether it is a fact or not, and does so intending to induce another person to act upon it as a fact and for his own benefit, regardless whether the fact is so or not, then that is the strongest possible evidence of fraud in the plain meaning of the word, because by the hypothesis he could not have known that to be true as a fact which he pretended to know, and which he represented to be a fact. Still, even in such a case as that, the fraudulent element must be found to exist as a fact, and cannot be adopted as a mere inference of law. See *Taylor* v. *Ashton*, 11 M. & W. 415; *Thom* v. *Bigland*, 8 Ex. 725; *Rex* v. *Mawbey*, 6 T. R. 619, in which LAWRENCE, J., says: "Where a man swears to a particular fact without knowing at the time whether the fact be true or false, it is as much perjury as if he knew the fact to be false;" and see *Haycraft* v. *Creasy*, 2 East 92, where the defendant had said to the plaintiff that he knew as a fact of his own knowledge that he might trust a certain person to any amount, and it turned out that that person was in fact an imposter and without means, and that the defendant consequently could not in one sense have actually known what he said to be true, but that being himself duped he believed it. Lord KENYON left the case to the jury as a case of fraud, not in the sense which affixes the stain of moral turpitude, but falling within the definition of legal fraud, and the jury under this direction found a verdict for the plaintiff; but this was afterwards set aside by the court, on the ground that it was essential that the jury should find that the defendant had acted in bad faith, and *malo animo* and *fraudulenter*.

Perhaps it is also here necessary to guard against the supposition that a class of cases have been here included which come

under an entirely different principle of law, for instance, cases where money may be recovered back where it has been paid under a mistake of fact, or where there has been a mutual mistake as to the subject-matter, as in *Bingham* v. *Bingham*, 1 Ves. Sen. 126, where a man purchased his own estate; or where there turns out to be no subject-matter in existence, as in *Hitchcock* v. *Giddings*, 4 Price 135, and *Hastie* v. *Couturier*, 9 Ex. 102, and *Gompertz* v. *Bartlett*, 2 E. & B. 849; or where by reason of an innocent reticence or misrepresentation of fact in effecting a marine insurance the parties are not *ad idem*, and there is no contract from the beginning. All these cases belong to a different branch of the law, and form no real exception to the principle governing the present decision.

In support of the proposition that the rule is the same in equity as at law, after conveyance, I may refer to *Wilde* v. *Gibson*, 1 H. L. C. 605. In that case Mademoiselle D'Este, afterwards Lady Wilde, sold certain building lands upon the cliff at Ramsgate to Mr. Gibson. The lands were described in the treaty for sale as adjoining a certain liberty way belonging to the town of Ramsgate, and unaffected by any right or liberty of way over them. After the purchase was completed Mr. Gibson discovered that the public way, called the liberty way, passed through the property at one point, and that the vendor's mother had executed a deed poll to the authorities of the town acknowledging the right of way, and covenanting to pay 2*s.* 6*d.* a year for the privilege of inclosing the portion of land over which it ran, and to open it whenever required. This 2*s.* 6*d.* had been regularly paid down to the date of the sale. Gibson filed his bill to set aside the conveyance, and KNIGHT BRUCE, V. C., entirely acquitting Mademoiselle D'Este of personal fraud or deception in the matter, set aside the conveyance. Upon appeal to the House of Lords this decree was reversed. Lord COTTENHAM based his decision upon this, that the plaintiff, Gibson, had rested his case in his bill upon personal misrepresentation and fraud, and upon that had founded his claim for setting aside his completed purchase, that he had only proved constructive notice, and that nothing short of positive knowledge could be sufficient for that purpose. Lord CAMPBELL said: "In the court below the distinction between a bill for carrying into execution an executory contract and a bill to set aside a conveyance that had been executed, has not been distinctly borne in mind; with regard to the

first, if there be misrepresentation or concealment which is material to the purchaser, a Court of Equity will not compel him to complete the purchase, but where the conveyance has been executed, * * * a Court of Equity will set aside the conveyance only on the ground of actual fraud; and there would be no safety for the transactions of mankind, if, upon discovery being made, at any distance of time, of a material fact not disclosed to the purchaser, of which the vendor had merely constructive notice, a conveyance which had been executed could be set aside." See, also, the observations of COTTON, L. J., in the recent case of *Arkwright* v. *Newbold*, 17 Ch. D. 301; and *Bree* v. *Holbeck*, Doug. 654; *Legge* v. *Croker*, 1 Ball & Bea. 506; *Pasley* v. *Freeman*, 2 Sm. L. C., 8th ed., p. 66, and the authorities there cited.

The only further question remaining is whether there was here any breach of any contract or warranty contained in the conveyance itself. Now, in answering this question, we must turn to the conveyance, and there we find the land described as two parcels, each defined in the most particular manner by metes and bounds and other details, and each "as containing by estimation, one and a half acres or thereabouts."

It turned out when the lands came to be measured that the two parcels together amounted only to 2a. 1r. 12p., and the question is, does this amount to a breach of warranty as to quantity? It will be noted that the conveyance does not say, "containing by admeasurement so and so," but "containing by estimation so and so or thereabouts." I am not aware that any exact definition has been judicially given to these words, although there have been several cases illustrating their meaning—for example, it has been held that a discrepancy of five acres out of forty-one was not so serious as to amount to a breach: *Winch* v. *Winchester*, 1 V. & B. 375. On the other hand, a difference of 100 acres out of 349 was considered too serious to be covered by the qualifying expression: *Portman* v. *Mill*, 2 Russ. 570.

I am not able to extract any principle from these cases, but I would venture to say that the real question is whether the parcels had or had not in truth and in fact been estimated to contain the quantity stated or thereabouts? If the discrepancy were very small there would be very little difficulty in believing that it might have been so estimated; if the error was very great the statement might be rejected as incredible; but still I would venture to say

that in each case it is a question of fact whether the quantity has been so estimated or not; and by this I mean, of course, a real genuine estimate, and not a merely illusory one. Now, what is the evidence upon the point in the present case? It appears that the defendant had himself bought the land by the description that it contained by estimation three acres or thereabouts, that he never measured it, and that he, in fact, believed it to be three acres; that the plaintiff himself saw the land and was content to take it at the estimated quantity, and believed it to amount to three acres, and there is nothing, except the bare fact of the error, to show that this estimate was an irrational, still less an impossible one.

I come to the conclusion upon these facts that the land had been actually, and in fact, estimated at three acres or thereabouts, and that the plaintiff, upon whom the *onus* of proof lay to establish the contrary, did not do so, and that there was consequently no breach of any warranty.

I think, therefore, that the judgment of the county court judge was erroneous, and ought to be reversed, and judgment ought to be given for the defendant.

Judgment reversed.

The same rule had long ago been adopted in America. For in *Williams* v. *Hathaway*, 19 Pick. 387 (1837), the deed described the land by metes and bounds, and as "containing fifteen acres," and the consideration was one entire sum for the tract and not so much per acre. After the conveyance, the purchaser measured the tract, and it "fell short by one acre and fifty-five rods." Thereupon the purchaser brought an action of assumpsit against the vendor to recover back a proportionate part of the purchase-money. But it was held he could not recover, although the land in fact was sold by public auction "for $5.05 by the acre." Since the deed merged all prior proposals and stipulations, and by the deed it appeared that the plaintiff paid a certain sum "for the whole land described and identified," it was held that the deed was conclusive as to the entirety of the sale. It was also held to make no difference that the vendor after the sale said (though not to the purchaser), that "if the land did not hold out fifteen acres, he would make it right." For such a promise did not rest upon any legal consideration, there being no legal liability to refund in such cases. The same point had been also decided in New York, as early as 1816, in *Smith* v. *Ware*, 13 Johns. 257, in which the deed described the land as "supposed to contain ninety-three acres," and the whole consideration was $419.50. In fact, the lot fell short five or six acres. In that case, also, the vendor had promised to pay for the deficiency, but the court held the purchaser had no redress for any part of the purchase-money.

It is equally well settled that the purchaser in such cases has no remedy upon the usual covenants in his deed, when the boundaries of the tract conveyed are correctly described, since the description by boundaries is conclusive, and the ad-

dition of the quantity is but immaterial description: *Powell* v. *Clark*, 5 Mass. 355 (1809).

And, it seems, a court of equity will not *ordinarily* give relief in such cases on the ground of mistake, especially where the words "more or less" are inserted in the deed. *Marvin* v. *Bennett*, 8 Paige Ch. 321 (1840), in which the chancellor said: "Where land is sold at a certain price by the 'acre or foot,' and it turns out that by the mutual mistake of the parties, there is considerable deficiency in the quantity, courts of equity have so far interfered in some cases as to relieve the purchaser from the payment for the deficiency. But even in such cases a slight variation in quantity will not afford a ground for the interference of this court to correct a mistake. And where a lot or farm is sold 'in gross' or by its boundaries, and is conveyed by a deed containing the words 'more or less,' such words being inserted upon deliberation, as in this case, because neither party professed to know the precise quantity contained within the boundaries of the deed, certainly no court ought to interfere to make a new contract for the parties which they did not think proper to make for themselves, unless upon clear evidence of fraud or intentional misrepresentation."

See, also, *Noble* v. *Googins*, 99 Mass. 231 (1868), in which the deed described the lot as "measuring about two hundred and twenty feet on Borden street, more or less." In fact, it measured only one hundred and seventy feet on that street. In an action for the agreed price, the purchaser claimed an abatement on account of the deficiency in the quantity. But he was held liable for the whole amount, and the doctrine on this point was thus stated by GRAY, J.: "It has been declared by a great weight of authority, in accordance, as we think, with the soundest reason, that in an agreement for the sale and purchase of land for an entire sum, either a description of the land by its boundaries, or the insertion of the words 'more or less,' or equivalent words, will control a statement of the quantity of the land or of the length of one of the boundary lines, so that neither party will be entitled to relief on account of a deficiency or a surplus, unless in case of so great a difference as will naturally raise the presumption of fraud or gross mistake in the very essence of the contract:" *Stebbins* v. *Eddy*, 4 Mason 414; 1 Story Eq. 144 *a*, 195; 4 Kent Com. (6th ed.) 467 and note; *Marvin* v. *Bennett*, 8 Paige 321.; 26 Wend. 169; *Morris Canal Co.* v. *Emmett*, 9 Paige 168; *Faure* v. *Martin*, 3 Selden 219; *Ketchum* v. *Stout*, 20 Ohio 453; *Stull* v. *Hurrt*, 9 Gill 446; *Weart* v. *Rose*, 1 C. E. Green 290. On the other hand, if the variation between the lot described and that conveyed be very considerable, the rule may be different. Consult *Paine* v. *Upton*, 87 N. Y. 327; *Darling* v. *Osborne*, 51 Vt. 148, two of the modern cases on this subject, and the cases there referred to.

EDMUND H. BENNETT.

Boston, Feb. 1st 1884.