

mutual mistake as to the nature of the title of the appellant, and it would be inequitable to compel him to convey the water lot and his life interest in the devised land and to make an abatement of the purchase-money to the extent of the proportion of it which is attributable to the estate in remainder in fee which is vested in his children, and still more inequitable to require him to compensate the respondent company for the loss it may have sustained by not being able to acquire the whole of the land which was the subject of the contract of sale; (2) the effect of the judgment will be to cause injury to those entitled in remainder to the devised land; (3) the effect of it will be to require the appellant to commit a breach of trust by conveying the water lot for an estate in fee simple.

The appellant also contends that damages should not have been awarded; that the only damages to which the respondent company is entitled are the costs of investigating the title; and that damages beyond this are recoverable only where there has been fraud or misrepresentation, and then only in an action of deceit; and that, at all events, where specific performance as to part, with an abatement, is ordered, the purchaser is not entitled to any damages.

Ordinarily, where the vendor is unable to convey the whole of the land which he has contracted to sell, the purchaser has two courses open to him: either to refuse to complete the purchase, in which case he may sue for damages; or to require the vendor to convey that to which he can make title, and to submit to a proportionate reduction or abatement of the purchase-money in respect of the remainder of the land.

Where a purchaser takes the first of these courses, if the inability of the vendor to perform his contract is due to want of title or a defect in title, the rule is that the damages recoverable for the breach of contract are limited to the expenses the purchaser has incurred. This rule is without exception, and applies even where the vendor enters into the contract knowing that he has no title to the land nor any means of obtaining it, though in that case the purchaser may have a remedy by action of deceit: *Bain v. Fothergill* (1874), L.R. 7 H.L. 158.

No doubt, the principle of that case has application only where the contract remains executory, and it is not applicable where the vendor, to save himself trouble or moderate expense, or from mere caprice, absolutely refuses or wilfully neglects to perform to the best of his ability his part of the contract: per Street, J., in *Rankin v. Sterling* (1902), 3 O.L.R. 646, 651, citing