

survey of the property shewing the lands to be wholly within the metes and bounds of the lands described in the assignment of the lease," say: "We had certain objections to the title which our Mr. Drayton saw you personally about, and which were all disposed of to his satisfaction, with the understanding that a survey was to be produced for his inspection."

It is clear, I think, that, having regard to these circumstances, it is not now open to the defendant to raise this objection.

The remaining objection to be considered is that as to the effect of the existence of the easement or right of way.

I am unable to find that the defendant was aware of the existence of it at the time the contract was entered into, and the fact is, I think, that he had no knowledge of its existence until a survey was made in the latter part of July. Nor had anything that had taken place the effect of waiving the right of the defendant to refuse to complete on the ground that the plaintiff was unwilling or unable to procure a release of the easement or right, if the existence of it entitled the defendant to refuse to complete.

The correspondence between the solicitors down to the time of the discovery of the existence of the easement took place, as far as the defendant and his solicitors were concerned, in ignorance of there being any such easement; but the plaintiff knew of its existence, and did not disclose it to the defendant, though I acquit him of any intention to mislead or of any improper motive in not disclosing it. See as to this *Heywood v. Mallilieu*, 25 Ch. D. 357.

This contract does not contain the usual condition as to compensation, but, even where there is that condition, it will not entitle the vendor to enforce the contract against an unwilling purchaser where there is misdescription upon a point material to the due enjoyment of the property: *Dart*, 7th ed., pp. 151-2, and cases there cited.

The description of the property as contained in the agreement was, in my opinion, owing to the existence of the easement or right of way, inaccurate upon a point material to the due enjoyment of the property, and the defendant is not, in my view of the law, bound to take, instead of that which the plaintiff contracted to sell to him, the land described in the agreement subject to this easement or right of way, although there would pass with it an easement over a part of