

SELECTIONS.

dum. In such a contract many clauses are obviously ancillary, and therefore rightly treated by the courts as non-essential; thus, for instance, conditions as to time are considered as not "of the essence of the contract" unless it is so stipulated, or to be inferred from the circumstances. Further, a vendor in describing real estate is so exposed to error, on the ground of wrong measurement, or of defect of title unknown to or forgotten by him, that it would be manifestly unfair to rescind the contract for some slight mistake which could, perhaps, only have been avoided by an expense disproportionate to the value of the property sold; and the "want of mutuality," an evil which cannot always be avoided in the rescission or enforcement of contracts, would appear more glaring if the purchaser were allowed to rescind or complete at his option, whenever the vendor had made an unimportant error in describing the property.

The essentiality of a misdescription is not determined in the abstract, but the court has regard to the purchaser's desire at the date of the contract, e.g., his intention to use the land in a particular way and to his position, e.g. as the owner of adjacent land. Thus, in one case*, the court took into consideration the fact that the purchaser was a timber-merchant and had bought the estate for the sake of the timber trees. The cases illustrating what are and what are not "essential" misdescriptions are very numerous; but without entering into much detail they may be classified as misdescriptions affecting (1) the identity of the property; (2) the tenure, quantum of vendor's estate, or nature of vendor's interest; (3) the size; (4) the situation and physical conditions; (5) the incumbrances, contingencies and liabilities affecting the property; (6) the rent or profits produced by it.

(1) Misdescriptions affecting the identity of the property are essential; thus, where a house numbered 2 was described as "No. 4," the contract was rescinded, although No. 2 was the same sort of house as No. 4, and in better repair. (2) Misdescriptions affecting the tenure, etc. Such misdescriptions are, as a rule, essential; e.g., describing leasehold or copyhold as "freehold," or an underlease as a "lease,"

or a reversion or a life estate as "fee simple;" but describing freehold as "copyhold," is probably non-essential*, and a slight error in the length of the term in describing leasehold property, e.g., a 97 years' lease described as 99 years, is not essential. (3) Misdescriptions affecting the size of the property will be treated as essential if the deficiency is large in proportion to the whole acreage, or if the part which is wanting is necessary to the enjoyment of the residue, or possesses some special value in the purchaser's eyes, or would, if possessed by another, be liable to affect the purchaser's enjoyment of the residue. (4) Misdescriptions affecting the situation, etc. of the property. In some of the earlier cases misdescriptions as to the situation of the property were treated as non-essential which would now be regarded as essential; thus, where an estate in Kent was described as being situate in Essex, the contract was enforced, although the purchaser declared that his object in purchasing was to become a freeholder of Essex†. Such misdescriptions seem, in fact, hardly distinguishable from misdescriptions as to identity; see No. (1). Misdescription as to the state of repair is not essential, except in the case of a house wanted by the purchaser for immediate occupation. Ornamental timber is an essential matter in the purchase of a residential estate; ordinary timber is non-essential, unless the purchaser is a timber-merchant buying for the express purpose of cutting the timber. The absence of houses, water supply, or frontage, described as belonging to the property, is essential. (5) Incumbrances, etc. The absence of title to tithes where an estate is sold tithe-free is usually essential; but the existence of small rent-charges not mentioned by the vendor is not essential. Rights of mining and common, restrictive covenants, rights of sporting, and, in the case of land sold as building land, rights of way are essen-

* See *Twining v. Morrice*, 2 Bro. C. C. 326; secus, *Ayles v. Cox*, 16 Beav. 23, where, however, Lord Romilly's statement, "it is unnecessary for a man who has contracted to purchase one thing to explain why he refuses to accept another," seems incorrect, as the cases show, that unless the error is obviously essential the purchaser must explain why it is essential to him.

† *Shirley v. Davis*, cited with disapproval in *Drewe v. Hanson*, 6 Ves. 678.

* *Lord Brooke v. Rounthwaite*, 5 Hare, 298.