

be more or less than 1,100 plum trees, but that that is about the number. . . I fail to see how such a statement could have misled the plaintiff.

The question is, what effect is to be given to the representation . . . with reference to the number of plum trees. The evidence does not establish any positive fraud on Dr. Guesner's part. There is nothing to shew that he was not speaking in perfect good faith when saying that there were about 1,100 plum trees. . . . If his opinion was not an honest one, it was for the plaintiff to have given such evidence as would warrant that conclusion. . . . There was an absence of actual fraud.

The plaintiff has failed to prove that the estimate was not an honest one. The contract between the parties is an executed one, and has also been adopted by the plaintiff by his taking possession, cultivating, and gathering a crop of fruit from the land. In such a case, in the absence of actual, positive fraud, the Court will not, I think, set aside the transaction. . . .

[Reference to *Bell v. Macklin*, 15 S. C. R. 581; *Brownlie v. Campbell*, 5 App. Cas. 925; *Petrie v. Guelph Lumber Co.*, 11 S. C. R. 450.]

The claim for a rescission must fail.

The next question is, whether the plaintiff is entitled to damages for deceit.

In an action of deceit the plaintiff must shew misrepresentations amounting to fraud on the part of the defendant, and also misrepresentations sufficiently substantial to warrant the inference that but for such misstatements the plaintiff would not have entered into the contract. . . .

[Reference to *Smith v. Chadwick*, 20 Ch. D. 27, 45, 9 App. Cas. 187; *Derry v. Peek*, 14 App. Cas. 373.]

No doubt, it was possible for Dr. Guesner to have informed himself accurately as to the exact number of plum trees, and, had he done so, and then represented that there were in all about 1,100 plum trees—the number in fact being under 966—there would be some evidence that his estimate was not made in good faith. But here, at least, he was merely loose in his representation. By the exercise of greater care he could have ascertained the exact number of plum trees. But, as stated by Lord Herschell in *Derry v. Peek*, 14 App. Cas. at p. 375: "Even making a false statement through want of care falls far short and is a very different thing from fraud, and the same may be said of the false representation honestly believed though on insufficient grounds."

Further, the evidence does not shew that the plaintiff would not have entered into the contract but for the representation as to the number of plum trees; for all that appears, the plaintiff might