

SELECTIONS.

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**COMPENSATION FOR MISDESCRIPTION
IN SALES OF LAND.**

Considerable variation is noticeable in the practice of the Courts of Equity in granting compensation to a purchaser for a misdescription innocently made by the vendor in a contract of sale of real property. This has been caused partly by the fluctuation of feeling as to the propriety of substituting new contracts for the contracts made by the parties, partly by the fact that the courts, in following prior decisions, have not always distinguished between cases in which the vendor sought to have the contract enforced with compensation for the misdescription, and cases in which the purchaser was the party desiring to have compensation granted, and partly also from the variety of opinion necessarily to be found on the Bench when such questions are asked as, "Does the misdescription relate to an essential matter?" and, "Can compensation be fairly assessed?"

An examination of the cases will, however, the writer ventures to think, show that the following rules are usually observed by the court in granting compensation.

First, in the absence of any previous agreement between the parties:

1. The court will, at the desire of the purchaser, rescind the contract if there has been an essential misdescription, although the vendor would prefer to complete giving compensation.

2. The court will, at the desire of the vendor, decree partial performance with compensation, if the misdescription was non-essential [and if compensation can be fairly assessed], although the purchaser would prefer to abandon the contract.

3. The court will, at the desire of the purchaser, decree partial performance with compensation, although the misdescription was one which would usually be regarded as essential, and even though the vendor would prefer to abandon the contract, provided that the misdescription

was contained in the written contract, and that compensation can be fairly assessed. If the misdescription was not contained in the written contract, the purchaser's only remedy is rescission. If the misdescription was contained in the written contract, but compensation cannot be assessed, the purchaser may [at his option] rescind [or accept an indemnity (?)].

Strictly speaking, the words, "abatement of purchase-money," should be used instead of "compensation;" but the ordinary phraseology may be retained, as there is no ambiguity in it.

The words "essential" and "non-essential" in the above rules need definition:

An "essential misdescription" is one whereby the purchaser was induced to purchase something which, but for such misdescription, he would never have purchased at all.

A "non-essential misdescription" is one the only effect of which was to induce the purchaser to give a higher price than he would otherwise have given.

The words "essential" and "non-essential" represent the expressions "very material," "substantial," "substantially and materially different," "very exaggerated description," and "small," "trifling," "infinitesimal," "slight variation," "minor and subsidiary," which are to be found in the cases. In a former number of this Review* Mr. Bigelow suggests that where mistake has been made with reference to an agreed term of a contract, the question of the materiality of the term ought to be excluded; "the parties," he continues, "by making it a subject of agreement have made it material, and the courts have no right to put a different construction upon it." The term mistake as used in the article quoted would include misdescription arising from mistake on the vendor's part. Tested by Mr. Bigelow's suggested principle, all misdescriptions contained in the written contract even though innocently made would seem to be material. Whether the suggested principle is applicable to ordinary mercantile contracts, or not, it certainly is inapplicable to contracts for the sale of land, especially the usual contract entered into upon a sale by auction, and consisting of particulars and conditions of sale and a memoran-

* July, 1885, at p. 299.