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N. J. Court of Errors and Appeals.

Between

CHARLES M. K. PAULISON AND WIFE,
Appellants,
and
JOHN H. VAN IDERSTEIN,
Appellee.

On appeal from Final Decree.

BRIEF OF JOHN R. EMERY, FOR APPELLEE.

I. The sale in question was a sale of a tract with known and well defined boundaries for a gross sum.

(Evidence upon this point.)

(*A.*) The deed and mortgage—the only written evidence of any contract between the parties, show such sale for a sum in gross.

The deed contains no statement or warranty as to contents of the tract by reference to city lots or otherwise, and the grantee would have no remedy on his part under it for an alleged deficiency in the contents. 10

(*b.*) The complainants alleging that the actual terms of sale were other than those which would be gathered from the deed and mortgage alone, the deed in its present form is an important guide to the Court, in determining the actual final contract, for the reasons: *First*, that being the consummation of the agreement, it is supposed to have merged and superseded all prior negotations.

Hampton vs. *Nicholson*, 8 C. E. G., 423.

Rosenkranz vs. *Snover*, 4 C. E. G., 420.

Second, that being a solemn act of the parties, unquestioned for six years, it must stand as the expression of their bargain, unless displaced by clear and conclusive evidence.

Bergen vs. *Giberson*, 11 C. E. G., 72, and cases cited.

Durant vs. *Bacot*, 2 M. C., 411, 414, (En. App.)

(*B.*) The evidence of the witnesses called to prove the contract—three in number.

(1.) *The defendant*, p. 103, l. 10, and p. 104, p. 125, l. 10.

10 Defendant's evidence entitled to great weight, for the reason that if the contract as stated by him was the one he honestly *intended to make*; no other contract, to which she has not intentionally consented, can be substituted.

(2.) Witness *Fritts*—

Direct examination, p. 60, l. 25, &c. Cross-examination, p. 71, l. 10, &c.

The statement in the direct examination is evidently or probably a statement of his understanding of the bargain, rather than of the actual language of the parties.

20 The direct examination shows that the final proposal accepted was that of a fixed sum for the whole tract.

(pp. 60, l. 35, &c., and 61, l. 1, 20.)

Cross examination elicits this more clearly, and that it was made after a calculation by complainant.

(pp. 71, l, 13, 40; 72, l. 1, 10; 72, l. 30, &c.)

(3.) The complainant Paulison himself; the unexecuted agreement (p. 137,) prepared by his sole direction, and procured by him—specifies the amount of the mortgage, and is a sale for a sum in gross.

30 True history of this agreement.

Fritts, p. 70, l. 5, &c.

Complainant's testimony throughout is careless, vague and contradictory; pp. 24, l. 25, and 25, l. 6, as to agreement signed, p. 26, l. 30, changes his mind about it, p. 27, l. 1, as to giving memorandum to Fritts to draw agreement at time of making.

Contradicted both by Fritts (above,) and defendant, 104, l. 15; his contradictions and confusion as to the *time and place of making* final agreement, which was an important point.

p. 21, l. 36—consideration ascertained in Fritts' office by referring to the map.

p. 22, l. 6, l. 22; map used at *time* of making agreement.

p. 27, l. 30, remembers *distinctly* computing areas and figures and thus deciding consideration, and on cross-examination, p. 47, l. 10, the *final agreement* was made *at Fritts' office.* 10

Now, pp. 48 and 49, begins to waver on the question of where the meeting was, and finally makes *two* agreements, one at Fritts' office, and another at his house in the evening.

p. 52, l. 18, says *amount* of mortgage was not mentioned at Fritts' office.

Defendant denies any such meeting, and the evidence of Fritts shows that there was no change whatever in the agreement; p. 72, l. 11.

Complainants' testimony as to the agreement, p. 19, l. 36; 20 manner of examination in this portion, such as to justify distrust.

Complainants' testimony admits that the actual agreement made was other than the one he testifies to, and that he made the *actual agreement* under mistake.

p, 23, l. 14, &c., p. 23, l. 40; pp. 24 and 25.

(4.) Defendant always insisted that he bought the whole tract by boundaries and not by the city lot, and was so understood to insist.

Kilgour, p. 41, line 5, &c. 30

Tice, p. 84, l. 30; p. 85, l. 33; p. 87, l. 15.

The result of the testimony, viewed in its most liberal aspect to complainant, is that the complainants made the contents of the tract (by the measure of city lots,) the *basis* of their contract with defendant, but that the *actual contract* was for the tract at a sum in gross, and that it was so intended by all parties.

The mistake then was not in the contract made, which was in the form all parties intended, but in the *basis* on which it was made by complainants, and in a matter inducing the contract.

If this be the true situation, the Court has no power to make *another contract* for another sum in gross, or for a sale by contents.

(II.) The sale being of a tract with known boundaries and for a gross sum, and the mistake alleged being one for which
10 the complainants are solely responsible, it is questionable whether they would under any circumstances be entitled to relief.

Andrews vs. *Rue*, 5 Vroom, 402.

Weart vs. *Rose*, 1 C. E. Gr., 290.

Clark vs. *Carpenter*, 4 C. E. Gr., 328.

Okell vs *Whittaker*, 1 De G. and Sm., 83, S. C. 2 Ph. 338.

1 *St. Eq. Juris.*, § 144, a.

Ketchum vs. *Stout*, 20 Ohio, 453.

These are all cases where the *purchaser* applied for relief
20 *and was refused.*

Cases denying relief against party's own mistakes, which were discoverable:

Voorhies vs. *Murphy*, 11 C. E. Gr., 434.

Haggerty vs. *McCanna*, 10 C. E. Gr., 48.

Dillett vs. *Kemble*, Io., 67.

(III.) But admitting that complainants in a case of material mistake as to the basis of the contract, are entitled to relief; the *proper and only* relief is a rescission of the contract and a restoration of the parties to the *status in quo.*

30 *St. Eq. Juris.*, 138 h and 138 i.

Daniel vs. *Story*, 1 Story, 172.

Belknap vs. *Sealey*, 2 Dues, 570.

Ketchum vs. *Stout*, 20 Ohio, 453-463.

Defendant is the more entitled to insist upon this, for he never would have purchased had the price been as now claimed.

pp. 102, l. 15 &c.; 123, l. 20; 106, l. 20, &c.

Fritts, p. 39, l. 1, &c.

Complainants were informed of the mistake before any

conveyance had been made by defendant. The pressure of this consideration is apparent throughout their whole case, and the effort for relief through Paulison's careless testimony is futile.

Bill, p. 5. Allegation that it was not discovered until *after considerable* portion sold.

Paulison, p. 30, l. 17. Learned of error *many months* after assignment. *Knows* this.

Paulison, p. 23, l. 10. First knowledge *nearly a year* after sale. 10

Again, p. 51, l. 138. It was in *the Spring of* 1870. Being confronted with survey ordered by him and finished January 17, 1870, (p. 51, l. 9), he admits (p. 51, l. 14) that *he was mistaken* as to the date of interview with Strange, the surveyor, and that it might have been *four* months before.

He hedges again, (p. 56, l. 20.)

The day he was informed was September 27, 1869.

Strange, p. 75, l. 30; p. 77, l. 37.

At that time defendant had made no sales, was sick of his bargain, and would have been glad to give it up. 20

Vanderstein, p. 114, l. 6.

Kilgour, p. 39, l. 33.

The complainants appear to have already realized an enormous profit on their lands at the terms complained of.

(p. 53, l. 20. 70 acres for $23,000.)

Although advised of the mistaken calculation in the sale to defendant in time to repair any loss, they are careful to make no effort to correct it, which would involve a return of the property upon their hands, and exact from defendant, as so much certain and in hand, the whole price he agreed 30 to pay. Then remaining quiet during the lapse of six years, while defendant improves the property, brings it into condition for sale, bears its taxes and assessments, invests considerable additional sums to facilitate its sale, and after great difficulty and delay at last disposes of it, the complainants now reappear to ask the aid of a Court of Equity and conscience in appropriating the rewards of the defendant's labors and risks.

The balance remaining to defendant, if the claim of plain-

tiffs be allowed, wouldn't be a *decent commission* for selling the property.

Whole amount received by defendant from sales, as follows:

Killgore, ...		$7,700 00	
Killgore, ...		3,933 75	
Outwater, ...		2,975 00	
Hall, ...		7,000 00	
			$21,608 75
10 Deduct paid	Neff lot, . .	$1,500 00	
	River Street House,	3,800 00	
	Mortgage, . .	7,100 00	
	Expenses, . .	1,600 00	
	Taxes, . . .	1,000 00	
			15,000 00
Bal. to answer Plaintiffs' claim, about			$6,000 00

Pretence, that delay owing to *state of defendant's mind*, a sham and pretence.

20 *Paulison*, p. 30, l. 25. Strange never heard of.

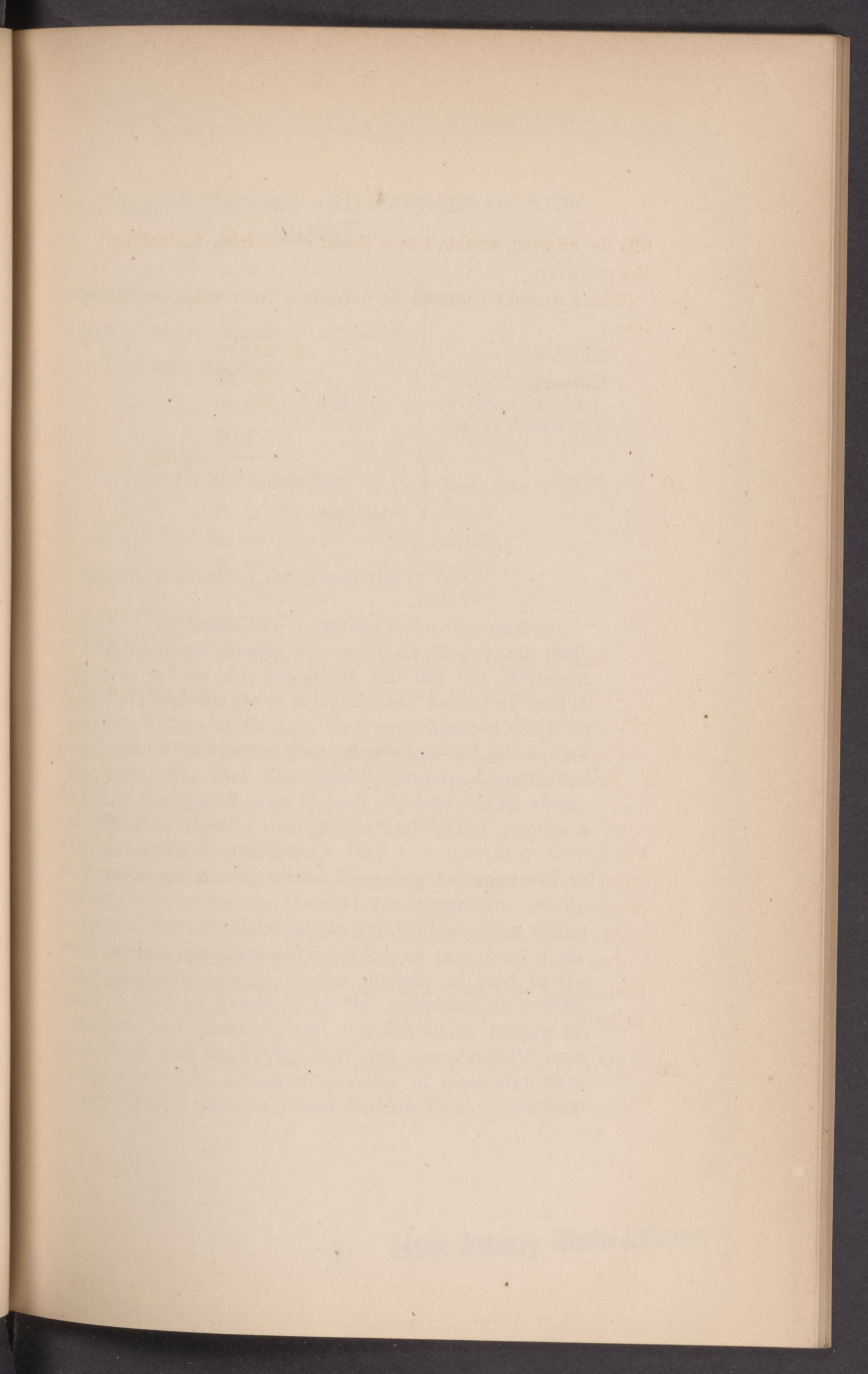
Tice, p. 83, l. 32.

(IV.) The only standing which plaintiffs can have is for the specific performance of their alleged contract, and an appeal to *this* remedy is always addressed to the discretion of the Court.

Merrit vs. *Brown*, 4 C. E. Gr. 286.

The land was bought for sale in smaller parcels, and defendant was entitled to know the price he was paying for his property.

30 (V.) There was a misjoinder of complainants.



COURT OF ERRORS AND APPEALS OF NEW JERSEY.

BETWEEN— CHARLES M. K. PAULISON AND ANNA PAULISON, his wife, *Appellants.* *and* JOHN H. VAN IDERSTINE, *Appellee.*	*Points of argument of John C. Paulison for Complt's.*

Questions involved are principally of fact.

One of the controlling questions to be answered is :

Did the complainants, on or about March 1st, 1869, agree to sell to the defendant, and did the defendant agree to purchase of the complainants, a tract of land in the then Village of Passaic, for a consideration equal to the product of the number of city lots of 2,500 square feet each, that that tract actually contained, multiplied by $350, the agreed price of each city lot? If an affirmative answer is given, then justice and equity require a decree for the complainants.

Another question is, if the foregoing be answered in the negative : Does not the evidence compel the conclusion that the complainants and defendant were either both misled, mistaken and deceived, at the time of the agreement and sale, as to the quantity of land in the tract of land in question, or the complainants misled, mistaken and deceived, and the defendant, having information and knowledge that the complainants were conveying to him a greater quantity of land than they supposed they were, or intended doing, for the considera-

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tion of $10,900, which information the defendant wrongfully and fraudulently withheld from the complainants.

In either of which latter cases we claim the complainants are likewise entitled to a recovery.

1

That the first interrogatory above is true, that the sale was by the city lot, at $350 for each lot, and that the map, Paulison addition No. 2, was relied on by complainants, as being accurate, in making calculation to ascertain the number of lots in the tract, is proven by the following testimony :

A. That of Paulison, on pages 20 to 24, and 27, 29, 49, 54, 55, 56.

B. That of Fritts, pages 58 to 64.

C. The unexecuted agreement, page 38.

D. Deed, page 140.

E. The testimony of John F. Kilgour, pages 34 to 41.

2

Van Iderstine so understood the sale.

A. Testimony of Paulison, pages 21, 22, 27, 45, 46, 48 49, 55.

B. Testimony of Fritts, pages 59 to 65, 72, 73.

C. Testimony of Kilgour, pages 33 to 41.

D. Testimony of Tice, pages 83, 84, 86.

E. Testimony of Van Iderstine, pages 109, 119 to 127.

F. Testimony of Fritts in rebuttal, pages 130, 131, 132.

3

The error alleged in the bill, on pages 2 and 3, relying on which Paulison made his calculation as to number of lots in the tract, is admitted in answer, page 16, and proved by Strange, pages 75 and 76.

4

As to second interrogatory above, that either complainant and defendant were mutually mistaken as to quantity of subject matter of their contract or else complainant was mistaken and deceived, and defendant knew or had reason to believe that there was an error in the map and consequent calculation, advantageous to himself and disadvantageous to complainants, which he fraudulently concealed from complainants.

a. Testimony of Paulison, pages 23, 25, 27, 28, 30, 32.
b. Testimony of Fritts, pages 59, 60, 64, 65, 66, 73.
c. Testimony of Strange, page 75.
d. Testimony of Tice, pages 83, 84, 86, 87.
e. Testimony of Kilgour, pages 34 to 37.
f. Answer of Van Iderstine, page 15.
g. Testimony of Van Iderstine, pages 104, 123, 124, 126.

5

It became fraud on part of defendant when he discovered the error after his purchase (if he did not know thereof before) especially after his sale and his refusal to pay or account for difference.

Defendant discovered error before Sept. 27, 1869, and made first deed to Kilgour December 16th, 1869, of 20 lots for $375 per lot, and bargained for these 20 lots some time before this date, and gave refusal to Kilgour at same time for 10 more at same price, pages 39, 40 and 143.

Chancellor made great error on this point in his opinion, see page 4 of supplement l. 32.

6

Paulison would not have sold for consideration he received, had he known of error.

Testimony of Paulison, pages 23, 24, 28, 53.
Testimony of Fritts, page 66.

7

Van Iderstine sold all this property, 45 lots, by city lot at $375 per lot for 30 lots, and between $500 and $600 per lot for balance, and has received all the consideration money in cash.

Testimony of Fritts, p. 66.
Testimony of Kilgour, pages 33, 34, 36, 37, 38.
Testimony of Outwater, p 81.
Testimony of Hall, pages 89, 90.
Testimony of Van Iderstine, p. 128.

8

Van Iderstine expostulated with by Tice, Bogert and others, for purpose of bringing about amicable adjustment. Hence suit not sooner brought.

Testimony of Paulison, pages 31, 53 and 54.
Testimony of Tice, pages 84 to 86.
Testimony of Fritts, pages 131, 134.

9

Facts proved by complainants, not denied by defendant.

I. Error in map, pages 3, 32.

II. Paulison misled by it. He relied upon it, pages 23, 25, 125.

III. Paulison made calculation from it in reaching price, based on figures of map and did so in defendant's presence, and with defendant's knowledge, and both together gave data to Fritts, pages 21, 22, 27, 48, 104.

IV. Paulison would not have conveyed, had he known of error, page 23.

V. $10,900 was true consideration, and all Paulison has received, pages 28, 105.

VI. Market value of this property in March, 1869, was fully $350 per city lot, pages 28, 34, 35, 37, 66, 83, 84.

VII. Paulison sold Neff lot, Feb'y, 1869, at over $350 a lot, pages 130, 131, 146.

VIII. Paulison uniform custom, as well as custom throughout city, was to sell by city lot, pages 29, 38, 54.

IX. Paulison assigned $7,100 mortgage before error was discovered by him, pages 30, 75, 143.

X. If defendant did not know of error in map and that Paulison was conveying to him move land for the consideration agreed on than he intended to do, or would have done had he known the real quantity in this tract at time of sale, then he got more land than either intended he should get or supposed he was receiving, and so admitted to Kilgour, Strange and Tice, pages 35, 75, 84 86, 87.

XI. Pending negotiations with defendant, price was raised by complainants for this tract from $325 to $350 per city lot, and defendant was so informed by Fritts, pages 58, 122.

XII. Defendant expected to deal on basis of city lot.

Testimony of Van Iderstine, pages 119 to 127.

XIII. Defendant conveyed to Kilgour on December 16th, 1869, 20 lots at $375 per lot, on March 28th, 1871, 10 lots at $375 each. To Outwater on April 15th, 1872, nearly 6 lots at over $510 per lot, and to Hall December 2nd, 1872, 12 lots at over $581 per lot, and has received the cash for whole, pages 33 to 37, 81, 89, 90, 109 and 128.

10

Discrepancies in defendant's testimony and its unreliability.

A. In answer says $11,000 was *exact* amount of consideration, pages 15 and 16.

In testimony says $10,900 was exact consideration, p. 105.

B. In testimony says map was produced and used by Fritts at first interview and number of lots mentioned pages 120, 126.

In answer shows this reference to map and statement of number of lots must have been some time after first interview, and so corroborates Fritts' testimony, p. 15.

C. In answer denies that quantity of land either by city lot or measurement front and rear was spoken of at all during whole negotiation, p. 16.

In testimony admits both, pages 120, 126.

D. Says he bought Neff property before he sold any, p. 109.

Not so; see Neff deed, p. 147, and p. 137.

E. Defendant don't know whether or not he bought Neff corner before he alleges he discovered the error, p. 108 75 and 147.

F. His attempt to contradict Mr. Tice, pages 117, 118.

G. Improbable that Fritts could have told him Paulison had sold to Neff at $300. Sale was for over $350 per lot, pages 121, 130, 131.

H. Defendant says he knew property in vicinity of this was selling for $200 to $300 per lot, page 125.

He knew this property was worth more.

a. From Neff sale, February, 1869, at $350.

b. His own sale to Kilgour, in December, 1869 at $375.

c. His own purchase of Neff lot, February, 1870, for over $500.

I. Defendant pretends removal of barn by complainants was not spoken of till meeting at Paulison's house, when deeds were passed, pages 104 and 105. It was an unexecuted agreement, page 139.

J. Says he would like to have deeded this property back at any time in 1869, before he sold a part of it, and would have been willing to have given him something too to have taken the deed back, page 117.

Yet before he sold any, he told Mr. Tice that he had more land than he thought he had and had made a good bargain, page 84, 87.

And Strange that he thought he had more land than map showed, page 75.

Authorities on above points :

1. Equity grants relief where either fraud or gross mistake exists in regard to quantity of land conveyed, or when contract would not have been entered into if facts had been known.

Weart *v.* Rose, 1 C. E. Green, 290, and cases cited.
1 Story, Eq. Jur., section 141 et seq.
5 E. L. R. Eq., series 1.

2. Equity will correct mistakes arising from mere misapprehension and without fraud or contrivance.

Skillman *v.* Teeplee, Sax. 232.
Bingham *v.* Same, 1 Ves., 126, and 2 Ves., 126.

As a description in deed whereby more or less land was conveyed than the parties intended. Read *v.*Creamer,

1 Gr. Ch. 277. Or a lot different from one the parties intended.

Potts *v.* Arnold, 4 Hal Ch., 322.
Young *v.* Paul, 2 Stock., 401.

3. Equity grants relief to prevent manifest injustice and wrong. N. J. Franklinite Co. *v.* Ames, 1 Beas., 66, 512.

4. Equity will grant relief when *neither* party knows the facts, mutual mistake.

Nicholson *v.* Janeway, 1 C. E. Green, 285.
Deane *v.* Carr, 2 Gr. Ch., 513.
McKelway *v.* Cook, 3 Gr. Ch., 102.
Titus *v.* Phillips, 3 C. E. G., 541, reversing ib. 77.
Armstrong *v.* Armstrong, 5 C. E. Green, 357.
Williams *v.* Caverly, 1 Ves. Ch., 211.
17 John, 372, Lyman *v.* Mutual Ins. Co. of N. Y.

a. Where a mistake in a bond is clearly proved, equity will relieve even against sureties.

Smith *v.* Allen, Sax. 43.

b. Where mistake is one of fact, blended with law, relief will be granted.

Garwood *v.* Eldridge, 1 Gr. Ch. 145.

c. Relief granted where by mistake of both parties to deed, it did not cover land intended, and money paid on account of purchase decreed to be repaid, and bond and mortgage given by purchaser to be cancelled.

Blair *v.* McDonald, 1 Hal. Ch., 327.

d. A mortgage was corrected where, after the price for

all the premises had been paid, a mistake in the quantity was found.

Waldron *v.* Letson, 2 McCarter, 126.

e. After acceptance of deed for land, possession taken and payment of purchase money, an action may be maintained where there is mistake by omission or repugnancy in the description, and deed may be reformed.

Conover *v.* Wardell, 7 C. E. Green, 492.

5. Where a tract of land is sold in gross, containing approximately a certain number of acres, a small variation will not be considered, but where the difference is considerable, so as to compel conclusion that parties did not have so great a discrepancy in contemplation, relief will be granted to party injured.

Clark *v.* Carpenter, 4 C. E. Green, 328.
Couse *v.* Boyles, 3 Gr. Ch., 212.
Weart *v.* Rose, 1 C. E. Green, 290.
Thomas *v.* Perry, Pet. C. C., 49.
1 Story, Eq. Juris., section 140.
17 Vesey, 401, Hill *v.* Buckley.

And where sale is by the acre, and number of acres is of essence of contract, the purchaser in case of deficiency is entitled in equity to a corresponding reduction from the price.

Weart *v.* Rose, 1 C. E. Green, 290, above, and 1 Sugden on Vendors, 369.

Another qualification to general rule is where difference between actual and the estimated quantity of land sold in the gross is so great as to warrant the conclusion that the parties would not have contracted had the truth

been known, in such case the party injured is entitled to relief on the ground of gross mistake.

1 Story Eq. Juris, sections 140 to 157, 163, 204.
Belknap *v.* Seeley, 2 Duer. 570.
Couse *v.* Boyles, (above) 3 Gr. Ch. 212.
Queswell *v.* Woodlief, 2 Hen and Mun. 173 note.
Nelson *v.* Matthews, ib 164.
Harrison *v.* Talbot, 2 Dana, 258.

Where inadequacy of price is so gross as to be presumption of fraud.

Wintermute *v.* Snyder, 2 Gr. Ch. 490.

Equity grants relief against mistakes in favor of complainant seeking relief affirmatively as in favor of defendant.

17 John R., 377, Lyman *v.* Utica Ins. Co.

In 7 C. E. Green, Loss *v.* Obry
Court says :—"To correct deeds for fraud or mistakes in them is one of ancient and well established heads of Eq. Juris., and it is the duty of the Court where such fraud or mistake is clearly proved, to correct it by any means in its power to effect the amendment and object of it."

Also 1 Story Eq. Juris. sections 152, 1,600.
Baker *v.* Paine, 1 Ves. Sen. 457 and 317.
1 Atk. 545, Motturx *v.* London Assurance Co.
Sup. Ct. U. S., Bradford *v.* Union Bank Tenn., 13 How. 57.
2 John Ch. 585, Gillespie *v.* Moore.
4 John Ch. 85.
Waldron *v.* Letson, 2 McCarter 126.
Firmstone *v.* DeCamp, 2 C. E. Green 317.

Surprise if created by misconduct or inadvertence of *third* person is ground of relief.

Parkhurst *v.* Cory, 3 Stock 233.

6. "A principal by seeking to retain any benefit resulting from the transaction becomes a particept criminis however innocent of fraud in its inception."

1 Story Eq. Juris. 193 a.
Nicholson *v.* Janeway, 1 C. E. Green 285.

"Nor would case have been materially altered if all defendants had been equally ignorant of the fact. It appears not only in cases of concelment but also to cases of mutual mistake or ignorance of fact."

1 Story Eq. 140.

When discrepancy was discovered by the defendant he was bound upon every principle of common justice to make it known to the complainant and pay him for difference. And to go forward with the knowledge he then possessed, make sale of property and retain proceeds for his own use was a palpable fraud, and defendant cannot be allowed to allege delay in prosecuting him as a reason for not granting relief prayed for.

See Couse *v.* Boyles (above) 3 Gr. Ch. p. 218.

7. Alleged laches.

A suit for declaration of *resulting trust* does not require same degree of diligence as one for a specific performance, as where two purchase land and the consideration is wholly paid by one, a possession by other for 17 years will not bar relief.

Lawrence *v.* Lawrence, 6 C. E. Green 317.

Relief not denied by reason of laches to establish a trust, if delay is satisfactorily explained.

Bent *v.* Smith, 7 C. E. Green, 560.

8 Where party files his answer and does not in it allege anything against jurisdiction of Court, it is a submission to jurisdiction, and he may not question the jurisdiction on hearing or allege that complainant had adequate remedy at law.

Morris Canal and Banking Co. *v.* Jersey City.
1 Beasley 252, p. 259 and 260, and cases there cited.
Holmes *v.* Jersey City, 1 Beasley 311.
Ct of Appeals.

9. On alleged misjoinder the effect of decisions in

9 C. E. Green, 184 Annin *v.* Annin.
11 C. E. Green, 128, Tautum *v.* Coleman and 1 McCarter, 423, Johnson *v.* Vail.

Is that where interest of husband is *adverse* to that of wife usual practice is to make husband party defendant, and if he has been made plaintiff with wife to allow amendment by wife joining next friend, and making husband defendant.

But no case holds that where interest is not adverse to wife, his joining as complainant would be improper.

JOHN C. PAULISON,
for Compl'ts.