Supreme Court of Canada
Hansen v. Franz, (1918) 57 S.C.R. 57
Date: 1918-03-11

P. C. Hansen and Lillie M. Hansen (Defendants) Appellants;

and

Henry Franz (Plaintiff) Respondent

1917: October 11; 1918: March 11.

Present:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Sale of land—Mistake as to area—Completion of purchase—Remedy of purchaser—Guarantee.

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Where, through no fault of the vendor, the quantity of land sold proves to be much less than that mentioned in the deed, and there is no warranty as to quantity, the purchaser is without remedy.

The description of the land sold as "containing 271 acres" or "271 acres more or less" is not such a warranty. Idington J. *contra.*

The undertaking in an agreement for sale afterwards embodied in the deed that the vendor would give a warranty deed does not help the purchaser even under the system as to land titles in Alberta. Idington J. *contra.*

Judgment of the Appellate Division (36 D.L.R. 349) reversed, Idington and Duff JJ. dissenting.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta[1], reversing the judgment on the trial in favour of the defendants.

The question for decision on the appeal is stated in the above head-note.

A. S. Matheson for the appellants.
Chrysler K.C. for the respondent.

THE CHIEF JUSTICE :—The appellant by deed dated 27th February, 1909, agreed to convey to the respondent his farm described as follows:—

> All that part of section three (3) Township eight (8) Range one (1) west of the fifth (5th) Principal Meridian, lying west of the river, said land containing two hundred and seventy-one (271) acres and being located in Alberta, Canada.

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[1] 12 Alta. L.R. 406; 36 D.L.R. 349.

This description is in accordance with that in the appellant's certificate of title from the South Alberta Land Registration District which adds, however,

> as shewn on a plan of survey of the said township signed at Ottawa, 24th August, 1898, by Edouard Deville, Surveyor-General of Dominion lands and of record in the Department of the Interior.

A transfer dated 15th Nov., 1910, as printed in the record, but which is undoubtedly an error for 1909, was made by the appellant to the respondent; and the latter has a certificate of title dated 1st December, 1909.

Through an error in the survey the property is described as containing 271 acres when as a fact it has been subsequently ascertained to contain only 164.80 acres. It is admitted that there was an innocent mistake common to both parties.

Except that the deficiency is so remarkably large there is nothing to distinguish this case from any other in which the contract calls for a larger area than the property actually contains.

Nothing is more clearly established in the practice of conveyancing, and it is so laid down in all the books, than the rule that after completion of the conveyance the purchaser who has had the opportunity of raising objection to any least deficiency in the quantity agreed to be conveyed has no further remedy. The so-called exceptions to the rule include a representation made at the sale collateral to the contract for sale and amounting to a warranty of the truth of the fact stated.

I can find in this case no evidence whatever either of an intention on the part of either party that there should be any warranty or that such was given. The testimony carries the matter no further than the written document which is the very ordinary statement of quantity in the property agreed to be sold and

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which it is admitted the appellant had the best reason for believing was correct. If we were to hold that there was ground for decreeing compensation in this case, I do not know how it could be refused in any case at all, as the established rule would be reversed and the conveyance with payment of the purchase money would cease to be a final settlement of the sale.

I agree further with Mr. Justice Stuart that no such claim as that on which the judgment appealed from is based ought to have been admitted upon the pleadings which

raise an entirely different one. Even if the respondent were entitled to any relief I do not think the judgment of the Appellate Division could stand. The agreement was for the sale of the farm at a named sum and this has been carried out. There can, I think, be no possible warrant for the court to substitute for the terms of the agreement a purchase price arrived at by a *pro rata* one on the acreage of the farm. This is no way to arrive at the damages sustained by the respondent.

The appeal should be allowed with costs.

DAVIES J.—I concur with my brother Anglin J. and I would allow this appeal with costs and restore the judgment of the trial judge.

IDINGTON J. (dissenting).—This appeal presents a case which is remarkable, not only by reason of its peculiar facts, but also by reason of the very peculiar state of our law relevant thereto, being such as it is. The facts are undisputed. The inferences therefrom may vary.

According to the law as presented by appellant we are asked to render a judgment which would produce not only a bare denial of justice but a shocking injustice. The judgment appealed from, no doubt, if

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left standing, would execute substantial justice between the parties.

The real question is whether or not the law is such as appellant contends.

The appellants and respondent in 1909 lived in the State of Washington. The respondent had a farm there which he valued at seven thousand dollars and the appellant, P. C. Hansen, agreed to buy at that price, pay three thousand five hundred dollars cash and transfer a piece of land in Alberta represented by him to contain two hundred and seventy-one acres. The cash part of the price was paid and then the appellants and the respondent executed an agreement, dated 27th February, 1909, made between the former as parties of the first part and the latter as party of the second part whereby it was witnessed:

> That the said party of the first part, in consideration of the covenants and agreements hereinafter made by the party of the second part, hereby covenants and agrees that he the said, first party will deliver unto the second party hereto a warranty deed shewing a clear title to the following described property, to wit:

> All that part of section three (3) Township eight (8) Range one (i) west of the Fifth (5th) Principal Meridian, lying west of the river, said land containing two hundred and seventy-one (271) acres, and being located in Alberta, Canada.

The instrument then proceeded to bind the party of the second part that he would

> in consideration of the covenants of the said first party

deliver a warranty deed conveying to him the lands described free of encumbrance.

It is to be observed that there is nothing in this instrument relative to the cash part of the transaction or indeed in any way pretending to set forth the entire actual bargain between the parties. It relates only to part of that entire contract. It is not an ordinary contract of purchase and sale yet may fall within the rules of law applicable thereto.

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The conveyance from respondent provided for by this instrument was duly given and his land resold by appellant. All that the appellant P. C. Hansen gave to respondent in way of assumed compliance with his covenant, above quoted, was by a transfer in the usual form under the "Alberta Land Titles Act," dated 15th November, 1909, in which the lands professed to be thereby transferred were described as follows:—

> That portion of section three (3) in Township eight (8) Range one (1) west of the Fifth Meridian, which lies to the west of the Old Man River as shewn on a plan of survey of the said Township signed at Ottawa 24th August, 1898, by Edouard Deville, Surveyor-General of Dominion Lands, and of record in the Department of the Interior containing two hundred and seventy-one acres more or less.

Which is followed by a reservation as follows:—

> Reserving unto His Majesty, His successors and assigns all gold and silver and unto the Calgary and Edmonton Land Company, Limited, their successors and assigns, all other minerals and the right to work the same.

It is to be again observed that this description bears a resemblance to yet is far from being identical with that in the covenant of 27th February, 1909, above quoted.

Can it be held in law to have been identical therewith? That is one of the questions to be considered herein.

This transfer professed on its face to have been made in consideration of $3,500 and the receipt thereof is therein acknowledged. There were no covenants expressed therein of any kind.

The "Land Titles Act" implies only one on the part of the vendor and that is one for further assurance of a very limited nature which does not touch what is involved herein.

The expression in the description used in the covenant of 27th February, 1909, was such as called for

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absolutely 271 acres, but is modified in the transfer to read 271 acres more or less.

Can the latter be said to be a fulfilment of the obligations in the former?

I pass the reservation of minerals, though a clear departure from the contract, because nothing is made of that herein, and confine my question to the rest of what appears.

That transfer was registered and a certificate of title issued, dated 1st December, 1909, constituting respondent the owner of an estate in fee simple in lands which are described substantially the same as in the transfer containing two hundred and seventy-one acres more or less.

It turned out upon investigation some months later that within that part of section three thus described there were only one hundred and sixty-four 8/10 acres instead of the promised two hundred and seventy-one acres.

The parties seem to have been friendly and it was for a long time assumed that their efforts at rectification made first by claims on the railway company which had sold the land to Hansen, and next upon the Dominion Government, made through, first one parliamentary representative and then through another, his successor, might bring relief. Ail that ended nowhere; but it accounts for the loss of time which had elapsed before resorting to the court on the 1st November, 1912.

Had the litigious spirit been predominant and suit entered immediately upon discovery and before respondent's Washington farm had been resold by Hansen, I think there can be little doubt but that rescission might have been had of the entire contracts between the parties.

It seems to be admitted that is now impossible.

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Hence authorities bearing upon that aspect of the case, of which a few are to be found, are almost useless for our present purpose. The latest application of the law relevant thereto,

at least up to the stage when a conveyance has been accepted, appears in *Lee* v. *Rayson*[2].

And the large number of decisions in specific performance cases, which have been cited to us, shewing that compensation has been many times insisted upon by the courts, seem still more remote from the business in hand.

In any such case as presented herein there would have been clearly either a refusal of specific performance or it would have been only granted with compensation.

In his evidence P. C Hansen was asked and answered as follows:—

> *Mr. McDonald:* You do admit that you told him your land had 271 acres in it?
>
> A. I think I told Henry there was 271 acres, at least I told him that is what the deed called for.
>
> *Mr. Matheson* You thought at that time there were 271 acres?
>
> A. Yes, certainly, because I had the deed for it.

and from his examination for discovery there is the following evidence:—

> 13: Q. Did you ever mention to him the number of acres that were there? A. I told him that according to the deed it was 271 or 272 acres, I think. That is my recollection. Of course it was a long time ago.
>
> 14. Q. And at that time he had not had any opportunity of measuring the land or examining it? A. No.
>
> 15. Q. As a matter of fact how many acres are there in that piece?
>
> A. Well, that is pretty hard for me to say, you know, I never measured it. I bought the land and 1 got a title for it and of course I bought hundreds of acres of land and I have never measured a piece of land yet. I have always taken the title for it.

This has been relied upon, as evidencing a collateral warranty, enabling two of the learned judges in the Appellate Division to hold respondent entitled to

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relief, though recognizing the general rule that after a contract of sale and purchase has been executed by the delivery of the conveyance there can be no relief got by a purchaser, by reason of any failure on the part of the vendor to give thereby what he had bargained to give, unless there has been actual fraud on his part or some covenant in the deed of conveyance upon which he can sue.

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[2] [1917] 1 Ch. 613.

Mr. Justice Beck agreed in the result but apparently on the ground that the general rule thus recognized was not, in the Alberta jurisdiction, where an agreement for the sale of land is not followed by a deed of grant, but by a transfer, which in his opinion is, in effect, only an order to the registrar to cancel the vendor's certificate of title, and to issue a new one in the purchaser's name leaving, in his opinion, in full force and effect all the covenants of the agreement for sale.

There certainly is much to be said for this view if, as I understand, the system introduced by the "Land Titles 'Act" into Alberta, that it forbids covenants in the instrument of transfer, and that in itself it is of no value until recognized, and given vitality by the registrar's certificate, which in truth is what passes the title; and also if we have regard to the origin and development of the rule in question.

But unfortunately the doctrine it represents has not been confined to transactions relative to the sale of some interests in land.

It is set forth by that very able judge, the late Lord Justice James, in the case of *Leggott* v. *Barrett*[3], at foot of page 30, as follows:—

> but I cannot help saying I think it is very important, according to my view of the law of contracts, both at common law and in equity, that

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> if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself. * * * unless there be a suit for rescinding the deed on the ground of fraud, or for altering it on the ground of mistake.

This was said, not in a case relative to the sale of land, but where the only questions involved depended upon the terms of a dissolution of partnership, and how far the defendant was bound by the terms as expressed in the deed of dissolution, which had been preceded by an agreement in writing possibly capable of a wider import than in the said deed.

In the same case Lord Justice Brett, perhaps somewhat more concisely, said as follows:—

> I entirely agree with my Lord that where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is

[3] 15 Ch. D, 306.

> afterwards reduced into a deed, the rights of the parties are governed in the first case entirely by the writing, and in the second case entirely by the deed; and if there be any difference between the words and the written document in the first case, or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document and by the governing part of that document.

It might be argued that it was not necessary for the decision of that case to express any such opinions and hence these expressions should be held to be mere *obiter dicta.* Indeed, Brett L. J. distinctly says he could see no difference at all between the preliminary contract and the deed.

Be that as it may, the definition of the doctrine as expressed by James L.J. has received acceptance by others on the Bench, and writers of text books.

Why, as it is thus expressed, there should be found ground for relief in the case of mistake which, I take it,

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means mutual mistake, and then only limited to the case of a possible alteration of the deed, must puzzle any one but those conversant with the peculiarities which our judge-made law has so frequently developed.

And I may be permitted to remark that if we look for its parallel in the wider field of law applied to mercantile transactions we will not easily find its application to have been permitted there to frustrate the execution of justice.

We will find that the common sense of mankind engaged in these pursuits has so impressed the judicial mind therewith, that it has so developed the law, as generally to furnish implications that execute the purposes of the contracting parties and thereby escape the undesirable consequences of a rigid adherence to such a rule.

The rigid application of the doctrine has doubtless received a greater measure of success, if I might say so, in relation to contracts respecting land than in those relative to mercantile transactions. This has probably arisen because the former have been more generally conducted, than the latter, through skilled men ready to apply that due diligence, which courts are apt to insist upon, in the way of procuring safeguarding covenants following careful examination of what is being bought or sold.

But what measure of diligence should be required of men dealing in wild lands? Must they have a survey made?

I am almost tempted to ask if when and where the reason for the rule ceases should it not then also cease to operate?

Passing all these suggestions and coming to the question of the observation of the rule as stated above,

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we find (in 1883) the case of *Palmer* v. *Johnson*[4], decided by A. L. Smith J. holding expressly that a purchaser, after conveyance and without any covenant therein upon which he could rely, might resort to a stipulation in the original contract providing for compensation in case of error, misstatement or omission being discovered in the particulars—otherwise meaning the terms of sale.

In this he professed to follow the law as laid down in *Bos* v. *Helsham*[5], and *In re Turner and Skelton*[6]. He discarded the decision by V.-C. Malins, in the case of *Manson* v. *Thacker*[7], a short time previously and essentially of the same nature in its leading features. The reason assigned by him for so doing was that Malins V.-C. had rested his decision upon the grounds that the purchaser should by the exercise of due diligence have observed the misstatement before conveyance executed.

This decision of A. L. Smith J. was upheld in the Court of Appeal[8]. Of that appellate court Brett M.R., whose opinion expressive of the rule of law applicable to the case of an executory contract followed by an executed contract and the resultant consequences thereof, has been quoted above, was the first to give his opinion in support of the decision by A. L. Smith J.

One might be tempted to suggest that the two opinions are irreconcilable; but Brett M.R., speaking doubtless of the argument which had pressed that view, says as follows:—

> Smith L.J. in his judgment, from which this appeal is brought, points out all that was there meant, "All that was there held was," he says, "that where the parties enter into a preliminary contract which is afterwards to be carried out by a deed to be executed, there the com-

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> plete contract is to be found in the deed, and that the court has no right whatever to look at the preliminary contract," but *Bos* v. *Helsham*[9], had decided that this particular contract for

[4] 12 Q.B.D. 32.
[5] L.R. 2 Ex, 72.
[6] 13 Ch.D. 130.
[7] 7 Ch.D. 620.
[8] 13 Q.B.D. 351.
[9] L.R. 2 Ex. 72.

compensation was one which was not to be carried out by the deed of conveyance, and therefore it did not come within the principle of the law and was not merged in the deed.

With great respect for the memories of these judges I doubt if the explanation is quite satisfactory. It certainly did not occur to the astute mind of Jessel M.R. in his more elaborate judgment in, *In re Turner and Skelton*[10], or to that of Malins V.-C. in *Manson* v. *Thacker*[11], where each had to grapple with the same doctrine though of course not with the identical expression of it.

Moreover, the opinion of James L.J. expressly covered the law of contracts both at common law and in equity. By the latter, as lucidly shewn in the case of *Holroyd* v. *Marshall*[12], at page 209, there is in a sense no need for a formal conveyance, as a valid contract for a present transfer passes at once the beneficial interest to the vendee.

The fair deduction from these cases is, I submit, a narrowing of the rule and limiting it to the mere effect of the conveyance of the legal estate which does not as a matter of course seem to have such elemental force in it as to extinguish anything in the contract of purchase but what is strictly limited to the passing of that common law legal estate.

And what of it when it fails to pass title to the substantial part of that which the parties believed they were contracting for? Does the doctrine only rest upon a mere play upon words, or was it developed from and does it rest upon the requirement of due diligence and subject to the limitations so implied.

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However, if the distinction drawn by Brett M.R. be sound, then it is very helpful in maintaining the judgment appealed from by reason of its limiting the operation of the rule simply to what may be a mere fractional part of the contract, leaving all else intact and operative.

As already pointed out, not only was there the verbal assurance of there being in fact two hundred and seventy-one acres offered, which the appellant admits, but also there was an express contract under seal for a warranty deed of two hundred and seventy-one acres, which never has been given, indeed could not be effectively given in the Province of Alberta. The respondent, doubtless relying upon the assurance of appellant, P. C. Hansen, was induced to accept a certificate of title which professed to be for two hundred and

[10] 13 Ch.D. 130.
[11] 7 Ch.D. 620.
[12] 10 H.L.Cas. 191.

seventy-one acres "more or less" but in fact falls one hundred and six acres short of the two hundred and seventy-one acres promised.

True there was not a specific agreement for compensation but there was a collateral agreement upon which, applying ordinary reason and common sense, the respondent was quite as much entitled to rely for his protection which would, upon being enforced, bring him the equivalent result in damages. And under the peculiar circumstances of the giving of the written contract, which did not profess to deal with the entire transaction between the parties, I think its nature and purport may well be looked to as shedding light upon the meaning and intention of the verbal assurance that there were two hundred and seventy-one acres to be given.

I observe the attempt faintly made by Hansen to fall back upon what the deed, as he alleges, had expressed. A comparison of the dates and other facts

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leaves, as highly probable, the inference that at the time he spoke of giving such assurance he had never seen what he calls the deed. If it was present at the bargaining I fail, to see why the conveyancers drawing up the written covenant did not incorporate the language used therein. Not only did he fail to catch the expression "more or less" therein, but also the entire wording of the description varies so much from either that in the so-called deed from the railway company to Hansen or the certificate of the registrar, that I am driven to the conclusion that neither was at hand.

The transfer from the railway company to Hansen is dated 20th Feb., 1909; the affidavit of execution thereof is dated 22nd Feb., 1909; the affidavit of Kemmis as to value, doubtless for the registrar's use in fixing fees, is dated 26th Feb., 1909; and the certificate of the registrar is dated 1st day of March, 1909.

Having regard to the relative localities where these several acts where respectively done, and the dwelling place of the parties concerned herein, and place where the bargaining and execution of the covenant took place, it is extremely improbable that Hansen on the 27th February, or before, had had any opportunity of seeing, much less of speaking from, the deed as he suggests.

These facts and dates are important not only as a means of rendering more definite the terms of the verbal assurance he gave, but also as reflecting what purpose was intended in the giving of that assurance.

I have not the slightest doubt it was fully intended to persuade respondent to rely upon it, and that he did rely upon it and none the less so because it was followed or accompanied by a covenant emphatically consistent therewith.

Such being the facts, I am unable to distinguish

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between the force and effect thereof and what was in the case of *De Lassalle* v. *Guildford*[13], given effect to, in the way of a warranty for good drainage given by an intended lessor to an intended lessee who was induced to take and took possession under a lease which had no covenant relative to drainage. That was an action for damages and so far as I can see could have been successfully answered if maintainable by just such arguments as appellants have presented here, relying upon the line of authority I have already dealt with.

Let us test the matter in another way, as exemplified in the case of *Piggott* v. *Stratton*[14], when the representation of a vendor that he was bound by some lease from others not to build so as to obstruct a sea-view of those choosing to build on land he was selling, was held enforceable by injunction, though the same argument doubtless was used as herein, and as is implied in the doctrine in question, that the vendee should have protected himself by a covenant in the deed but had not. How is that decision consistent with the doctrine? It is only possible to make it so by assuming that the law never intended to deprive purchasers of the plain rights which a solemn representation carries with it even when mistakenly made in good faith.

The converse of this case, as it were, where there was no evidence of representation to be relied upon and nothing enabling the plaintiff to claim the benefit of restrictive covenants, came up in the case of *Renals* v. *Cowlishaw*[15], when Hall V.-C. dismissed the action and was upheld in doing so by the Court of Appeal[16].

The principles involved in that case come to be dealt with in the case of *Spicer* v. *Martin*[17], where,

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[13] [1901] 2 K.B. 215.
[14] 1 DeG. F. & J. 33.
[15] 9 Ch.D. 125.
[16] 11 Ch.D. 866.
[17] 14 App. Cas. 12.

after conveyance, it was discovered that the purchaser might lose the benefits of restrictive covenants unless an injunction granted and it was granted accordingly and upheld on somewhat different grounds from mere misrepresentation.

The case of *Lagunas Nitrate Co.* v. *Lagunas Syndicate*[18], at pages 402, 403, 413-15, 417, 434 and 456, shews how a defendant was, long after conveyance, in absence of fraud, and where rescission had become impossible, granted damages plaintiff was entitled to, arising out of the condition of the property at the time of conveyance not having been such as plaintiffs were entitled to have it. Yet there was no covenant in the conveyance to rely upon. Again, the case of *Clarke* v. *Ramuz*[19], dependent upon the doctrine of equity, which I have already adverted to, of the vendee being the trustee of the purchaser from the time the contract of purchase had been formed, shews how, even after conveyance, the duty of such vendor to protect the property from deterioration has been enforced.

There had been in that case some earth in substantial quantities-removed from the property after the making of the contract of sale, but before the conveyance, and the vendee was condemned to pay damages on discovery after the conveyance.

This case seems rather a decisive answer to the argument founded upon due diligence. Surely the vendee could have seen the earth in question had been taken without the knowledge of either vendee or vendor.

All these cases I refer to, not as strictly in point decisive of the question raised herein but of how much care is to be taken in applying some expressions of opinion of very able judges which, if given effect to

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in the widest sense the language used might be capable of, would lead to doing an injustice which the courts have in these cases striven to avoid on one ground or another.

And the more I consider them the more I find it necessary to observe the terms of the covenant to give the respondent two hundred and seventy-one acres. It was not a mere symbol of numbers that appellant agreed to give but of so many acres of ground.

[18] [1899] 2 Ch. 392.
[19] [1891] 2 Q.B. 456.

It must not be overlooked that men, when dealing in wild lands, think of the acreage thereof and not of the illusory description a surveyor's blundering work had put upon paper.

I am quite aware that, in *Doe d. Meyrick* v. *Meyrick*[20], and other cases, the rule has been laid down that, where in a deed there has been a general and specific description of the property, only that specifically described will pass. But I think we must ever observe, as was done in *Ringer* v. *Cann*[21] by Baron Parke and cited with approval by Wood V.-C. in *Jenner* v. *Jenner*[22], at page 366, the object of the parties.

And the fact should not be overlooked that what is thus attempted to be put off upon the confiding purchaser as worth three thousand five hundred dollars to secure which to respondent was the object of the parties here, had almost immediately before been bought for sixteen hundred and twenty-six dollars by the appellant P. C. Hansen.

This is not the case of only an immaterial or small fractional part of that bargained about being in question, but more nearly resembles that which was involved in the case of *Cole* v. *Pope*[23], where, without actual fraud as here, the price had been paid and a

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conveyance got by a purchaser of what in truth as it turned put the vendor had no title to and the purchaser was held entitled to recover his purchase money.

The decision in the case of *Joliffe* v. *Baker*[24], so much relied upon, is, if we examine closely the facts, possibly reconcilable with justice and common sense.

The vendor in the opening letter of negotiations had stated in his description of the property, the quantity of land to be three acres, but the description in the contract of purchase, drawn up later and after the purchaser had come to inspect and presumably inspected the premises, alleged the property to "contain by estimation three acres or thereabouts." It turned out that there were only two acres, one rood and twelve perches. The price was £270. There were upon it a four-room cottage, a pig-sty, cow-pen, garden, and a capital meadow, which facts suggest that the shortage in mere acreage was probably in the eyes of the parties but a comparatively trifling part of the whole of that

[20] 2 Cr. & J. 223.
[21] 3M.&W. 343.
[22] L.R. 1 Eq. 361.
[23] 29 Can. S.C.R. 291.
[24] 11 Q.B.D. 255, at p. 2.68.

which was sold (although assessed at £50), and might well fall within the allowance therefor in the description.

There was nothing in that case upon which the plaintiff could by any possibility hang a claim of warranty beyond the not very uncommon one that the purchaser taking and paying for a thing which turns out to be a trifle less valuable than he had expected, and hence was driven to rely upon alleged fraud, which was quite untenable.

The court could not find anything in the conveyance upon which to found a warranty of quantity when that was expressly referred to as by estimation. I fail to see much resemblance between that case and this.

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In closing his long judgment Mr. Justice Williams refers to a number of cases of defect in the quantity including *Portman* v. *Mill*[25], and says he cannot extract a rule therefrom. Neither can I, yet I cannot escape feeling a suspicion derived from the tone of his closing remarks, that had he been confronted with such a case as the *Portman Case* (1) or that herein he might have found a remedy.

It is observable that it was only in the next year that A. L. Smith J. who had concurred in the result decided *Palmer* v. *Johnson*[26], cited above and I may add that the greater number of the other decisions I have referred to, and rely upon herein, were decided since the *Joliffe Case* [27] and shew clearly that there can be found a collateral warranty resting upon the representation made; and especially so, when as herein that is equally consistent therewith followed by a covenant not yet fulfilled, instead of being followed, as in the *Joliffe* Case(3), by an agreement which by its very terms so modified the representations as to render the representation worthless.

I need not enter upon the question of what a collateral warranty may or must consist of, for I agree, speaking generally, with what Mr. Justice Walsh has set forth in that regard, and the meaning thereof is illustrated by the cases I have cited.

Although holding with him that which he relies upon to be sufficient reason for dismissing the appeal, I am yet inclined to think that the covenant under seal was not extinguished by what transpired. The gist of the rule in question relative to an executory

[25] 2 Russ. 570.
[26] 12 Q.B.D. 32.
[27] 11 Q.B.D. 255, at p. 268.

contract being extinguished by the executed contract, implies that it has been substantially executed and

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thus has carried out the purpose and attained the object of the contracting parties.

Can it be said to have been executed in this case unless we assume that the respondent's assent to the transactions relied upon as its execution was induced by the representation?

I am disposed to attach more importance to the indirect effect, not limiting it to the words "Warranty deed" but the entire tenor of the written covenant, than Mr. Justice Walsh does, as shewing the purpose of the appellant in making the representation he did and of the respondent in accepting it.

Let us revert, in that connection, to a consideration of the doctrine of its extinction as respectively expressed by James and Brett LL.J. and some of the reasons for its existence.

Brett L.J. distinctly puts it upon the ground of the superior nature of the later writing substituting the oral agreement, or deed substituting the prior writing.

If that expresses its meaning we have before us in this case a covenant under seal which is followed by a transfer which is not under seal and a certificate o title which is neither under seal nor given any force or vitality by virtue of any seal.

The superior document, if common law notions relative to the value of a seal are to prevail, is that covenant, under seal, which has never been fulfilled if due effect is to be given to all the language used relevant to what was contracted for. And as the superior document has never been fulfilled may I suggest it has not been extinguished?

A reason for part of the operation of the rule laid down by those learned judges, which, however, is not given expression to by them, is that rule of law against the admission of oral evidence varying that which has

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been written. The real reason, I submit, for the rule in question is, that, in such transactions as the sale of real estate, the parties are presumed to have used due diligence and care

and to have expressed in the later and final writing, what they mutually had agreed upon and hence it cannot be varied by oral evidence.

As governing what in the vast majority of cases happens in England or Ontario, the rule is a wise one and not lightly to be set aside, but as Mr. Justice Beck has suggested is it under the circumstances in which parties find themselves in those jurisdictions in which the Torrens system of passing titles prevails, likely to be as useful or workable as elsewhere?

And when we find in the reports of the courts of our western provinces the number of cases we do, where its observance may be suspected of having produced injustice, it becomes our duty not too hastily to extend its operation but to scrutinize closely the facts in each case and see if in truth they permit the operation of the rule.

We have seen how by later development that which may be held to be a collateral part of the purchase contract is not supposed to be extinguished by only that relevant to the passing of the legal estate.

Does not all that bring us back to the original question of whether or not any such passing of title can be said to have taken place in pursuance of a covenant under seal, to convey by a method clearly impossible as contracted for, two hundred and seventy-one acres of land when that which has been given neither in fact nor in form executes the purpose of the covenant?

I doubt it so much that I cannot see my way to allow an appeal by a judgment that would rest upon an affirmative answer to the query I put.

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As already stated I hold the representation made, coupled with the covenant as illuminating the meaning and purpose thereof, such a warranty as relied upon below.

I have examined all the authorities cited and many more to ascertain whether or not it really is law as suggested that a man can misrepresent and mislead no matter how innocent of fraud, and profit thereby at the expense of another who has had no fair opportunity to test the truth of the representation.

I submit there is no justification for imputing to the law such inevitable and unjust results as herein claimed for expressions, in terms too wide, of a doctrine that is supposed to be so well known and daily relied upon as that in question.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—I think the appeal should be dismissed with costs.

ANGLIN J.—I am with respect of the opinion that this appeal should be allowed and the judgment of the learned trial judge restored.

The plaintiff (respondent) very properly concedes that, owing to his delay in instituting this action, the absence of fraud and the impossibility of a *restitutio in integrum* he is not entitled to the equitable remedy of rescission. His alternative claim to recover damages he rests on (a) a warranty as to the quantity of land which he asserts is implied in the agreement for sale by the words in the description of the land to be transferred, "containing two hundred and: seventy-one acres," which follow its designation (in itself definite, unequivocal and complete) as that part of a defined section lying west of the river; and (b) an alleged

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collateral warranty consisting in a verbal representation that the parcel in fact contained 271 acres.

There can be no question as to the identity of the parcel with which the parties were dealing. The plaintiff got the land for which he bargained. Both he and the defendant were quite innocently mistaken, as to the acreage, which was only 164.80 instead of 271. There is, therefore, neither a suggestion nor ground for a suggestion of fraud. The preliminary contract contains no provision for compensation for any deficiency in the quantity or quality of the estate. It may also be worth noting that before he took his transfer the plaintiff had learned that there was a very considerable deficiency in the quantity of the land, although he ascertained its precise extent only afterwards.

In the transfer itself and in the certificate of title obtained by the plaintiff words of designation, the equivalent of those used in the preliminary agreement, are followed by the words,

> containing two hundred and seventy-one acres more or less.

The words, "more or less," cannot cover a deficiency of 106.20 acres in a parcel supposed to contain 271 acres. *Portman* v. *Mill*[28]. I do not, therefore, see any material difference between the description in the transfer and certificate and that in the preliminary

[28] 2 Russ. 570.

agreement. Moreover, since the transfer was made in the form prescribed and customary in the Province of Alberta, it must be taken to be the form of conveyance for which the parties to the agreement in ended to stipulate. I am, therefore, with respect, unable to assent to the view, which I understand Mr. Justice Beck to express, that the doctrine of merger of the preliminary agreement in the conveyance is inapplicable to such a transfer.

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I agree with Mr. Justice Walsh that (at all events in the absence of evidence as to the meaning according to the law of the State of Washington of the term "warranty deed" used in the agreement) the provision for such a deed cannot be taken to import a stipulation that the transfer to be given under the "Alberta Land Titles Act" should contain a warranty of the quantity of the land. If that should be its meaning a serious obstacle to reliance being placed upon such a stipulation would probably be presented by the acceptance, especially with knowledge of a deficiency, of a transfer without any such warranty.

But whether the transfer itself or the preliminary agreement is looked to, I am of the opinion that the words "containing two hundred and seventy-one acres" or "containing two hundred and seventy-one acres more or less" are merely a part of the description, probably to be regarded as *falsa demonstratio* (see cases collected in 10 Hals., p. 407, n. (*g*)), and not importing a covenant or warranty as to quantity which could found a demand either for compensation or for damages after the completion of the contract. *Penrose* v. *Knight*[29]; *Follis* v. *Porter*[30]; *Clayton* v. *Leech*[31]; Dart on Vendors and Purchasers (1905 ed.), p. 812; Williams on Vendors & Purchasers (1911 ed.), pp. 6, 10, 11. In an action to enforce the contract while still executory a court of equity might of course entertain a claim for compensation as incidental to its jurisdiction to grant specific performance. The right to that relief would not rest upon breach of any warranty implied in a statement of quantity in the description but would be based upon the equitable doctrine of mistake. After completion, however, unless

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a case can be made for rescission *(Debenham* v. *Sawbridge*[32]), the only remedy is by an action at law for damages. Neither innocent mistake nor innocent misrepresentation will support such an action. It must either be in tort for deceit or upon contract for breach of

[29] Cass. Dig. (2 ed.) 776.
[30] 11 Gr. 442.
[31] 41 Ch.D. 103.
[32] [1901] 2 Ch. 98, at p. 109.

warranty. *Jolliffe* v. *Baker*[33], at pages 267-9. Moral fraud, the essential of deceit, is entirely absent. The transfer does not contain any contract of warranty. Lord Moulton, in *Heilbut* v. *Buckleton*[34], at page 47, states the nature of such a contract and indicates the difficulty of establishing it when not expressed. There is no covenant in the transfer which gives a remedy. As Mr. Justice Stuart has said, we have been referred to no case where it has been decided that in a conveyance a statement of the number of acres contained in the parcel following the description of it amounts to a warranty. That appears to have been rather assumed in *Jolliffe* v. *Baker* (2), (in other aspects a strong authority for the defendant) in the latter part of the judgment of Watkins Williams J. (pp. 273-4). But that learned judge held that the terms of the description, regarded as a warranty, were literally true and that there had been no breach. That case is clearly not authority for the proposition that a mere statement of quantity in a description of land imports a warranty.

The claim based upon an alleged verbal warranty is in a position even more unsatisfactory. The only representation as to quantity of which there is any evidence amounted, in my opinion, to nothing more than a statement by the defendant that his own deed called for 271 acres—as in fact it did. Whether

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a vendor's representation on a sale imports a warranty is always a question of intention. The existence of that intention must be established. It is a matter of fact to be determined upon "the totality of the evidence." *Heilbut* v. *Buckleton*[35]. I am unable to discover in the record any evidence which would justify a finding that the defendant intended to make, or that the plaintiff understood him to make, a contract of warranty. On the contrary, the reference by the defendant, when speaking to the plaintiff of the quantity of land, to the description in his deed would to me rather seem to exclude the idea that any such undertaking was contemplated. Moreover, I doubt whether the statement of claim can be regarded as alleging a collateral warranty. If not, it would be unsafe for an appellate court to base a judgment on the existence of an intention which was not put in issue, which the defendant had not a fair opportunity of meeting, and upon which we are deprived of the advantage of a finding by the trial judge.

Appeal allowed with costs.

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[33] 11 Q.B.D. 255.
[34] [1913] A.C. 30.
[35] [1913] A.C. 30, at pages 43, 50.