MEYER AND MEYER *vs.* TAINTON.

Sale of Land.—Deficiency.—Written contract.—Variation of.—Estoppel.

Where, in an action for performance of a contract for the sale of land which stated that the land was 1,500 *morgen in extent, more or less, and contained a "voetstoots" clause, such extent proving subsequently to be only* 567 *morgen, and the defendant refusing to complete payment of the price on the ground of fraud and* laesio enormis, *it was proved that one of the plaintiffs had said "I am not selling* 5 *or* 500 *morgen; if it is* 5 *morgen or* 2,000 *morgen, it is your land," and the defendant had made no objection, and immediately thereafter paid a portion of the first instalment of the price, the Court* held (1) *that the purchaser was estopped from saying that* 1,500 *morgen had not been delivered to him, and* (2) *that a new contract had been entered into varying the written contract, and gave judgment for the plaintiffs, with costs.*

1890. Aug. 15. ,, 16. ,, 19. ,, 20. 1891. Jan. 29.

Meyer and Meyer *vs.* Tainton.

This was an action instituted by J. Meyer and R. S. Meyer, owners of a portion of a certain farm Rietfontein against Tainton. The claim was for the performance of a certain contract entered into upon the 23rd October, 1889, and more particularly for the payment of £250 in cash, being the first instalment of the price, and of £3,500, the second instalment, and further for the passing of a first mortgage bond upon the property for £3,500, the balance of the purchase price of £8,000. The plea was one of fraud and *læsio enormis*, that defendant had bought 1,500 morgen, and that only 567 morgen had been delivered to him. The defendant also claimed in reconvention repayment of £750 already paid, and for compensation for damages.

One Keyter was a tenant of Johannes Meyer, and in October, 1889, held a power of attorney from J. Meyer and R. S. Meyer to sell their portion of Rietfontein. Tainton was introduced to him as a possible purchaser. Tainton wanted to hire the farm, with right to buy. Keyter refused to deal on these terms, and said he was commissioned to sell the farm out-and-out. On this occasion Keyter shewed

Tainton approximately where the beacons stood. He said that a considerable portion of the farm lay behind the ridge. Keyter represented the farm as being about 1500 morgen in extent. It had not been surveyed. Tainton now returned to Johannesburg, and then, or four days afterwards, despatched Parker to Rietfontein as his agent to try and get Keyter to sign a refusal. Keyter refused, but the day after he came to Johannesburg shewed Tainton his power to sell. It was then arranged between them that the price of the farm should be £8,000, and that Keyter as lessee should receive £750 for his interest in the lease. This arrangement was reduced to writing and Keyter took the document to Meyer for approval. Before the contract was drawn up Tainton asked Keyter how large the farm was, and Keyter replied that some of the beacons were behind the mountain, but he thought it was between 1,200 and 1,500 morgen. After the contract had been drawn up Tainton and Keyter went to see Thompson, Tainton's solicitor. Thompson said the farm ought to be surveyed before transfer. Accordingly on November 11th, 1889, Tainton, Keyter, R. Meyer, and Greathead, a surveyor, went to see the ground. The following day R. Meyer and Keyter met Tainton, when the latter said that the Meyers ought to undertake to deliver a certain number of morgen. Meyer replied, " Mr. Tainton, I am not selling you five morgen or 500 morgen, but whether it is five morgen or 2,000 it is your ground. If you repent of your bargain, you may cancel it." On November 12th Tainton paid £750 towards the first instalment, with the understanding that £250 should be paid further within a week or two. Before signing the contract Tainton had been informed by Parker, whom he sent to view the beacons, that he (Parker) considered the farm to be about 1,500 morgen. Parker was accustomed to deal with ground, and received subsequently an interest in Tainton's contract. At the time of the sale he had no interest in the contract.

Subsequently the farm was surveyed by Greathead, and found to contain only 567 morgen. The portion of Rietfontein in question lay between the property of the London Exploration Co. and that of the De Beers Mining Co., on both of which gold mining was going on. Tainton stated that he had bought the property as a speculation, because he thought that the railway would probably run through

1890.
Aug. 15.
„ 16.
„ 19.
„ 20.
1891.
Jan. 29.

Meyer and Meyer *vs.* Tainton.

the farm to Johannesburg, and as it possessed good water he expected to be able to dispose of his water rights to advantage.

Curlewis, with him *Leonard*, for plaintiffs: Plaintiffs found their action upon a written contract, of which §§ 1 and 5 are to be taken into consideration. Has a definite parcel of ground consisting of 1500 morgen been sold? Or has the piece of ground sold, although 1500 morgen more or less was spoken of, been guaranteed? The answer is that plaintiffs have sold their ground as it is, and then proceed to say we understand that it is about 1500 morgen in extent more or less, " but the sellers do not bind themselves to sell any certain and definite number of morgen." It now appears that the farm is only 567 morgen in extent, but the defendant is bound to accept it as it is. There has been no fraud upon defendant. The defendant bought for purely speculative purposes (*cf. Fry* vs. *Reynolds*, 2 *Menzies*, p. 153, *in fin*). In this particular case it was not so much his intention to get 1,500 morgen, but to get possession of the piece of ground belonging to plaintiffs for speculative purposes. This is proved, if by nothing else, by the price which defendant was willing to give (*cf. Van Leeuwen*, vol. 2. p. 147, § 7 (*Kotzé's Translation*). *Voet*. 18. 1. 7; *Grotius* 3. 14. 33; *Groenewegen, De Legibus Abrogatis* 21. 2. *l*. 45).

The defendant does not claim a *quanti minoris*. He has also failed to produce any evidence whatever about the value of the ground. Everything goes to shew that he bought for purely speculative purposes.

Wessels, with him *Auret* and *Cloete*, for defendant: It is not necessary to plead *quanti minoris*. That is a plea which the law will imply, and it is not necessary to plead it explicitly. It is a question of simple proportion. If 1,500 morgen cost £8,000, then the value of 567 morgen is proportionately less. The case of *Fry* vs. *Reynolds* is not applicable. In that case the sale was in terms of a " Deed of Transfer," and defendant was bound thereby. In this case the contract is of a different nature (*cf. Grotius' Introduction*, 3. 14. 33, and *Schorer ad Grotium loc. cit.*; *cf. Consultatien*, vol. 1. *cons*. 263). The condition in the contract in this opinion is very similar to § 5 of the present contract (*cf. Consult*. vol. vi., *cons*. 56, p. 437, which is an opinion of *Grotius*. As

soon as there is any specification of a definite number or amount, then the "*voetstoots*" clause is of no avail. If the variation is of more than one morgen, or the unit used for definition, then the "*voetstoots*" clause ceases to apply.

1890. Aug. 15. „ 16. „ 19. „ 20. 1891. Jan. 29.

Meyer and Meyer *vs.* Tainton.

Posteà, August 19th.

Wessels, continuation of argument: As has been said already, the real question is—what is the meaning of § 5 of the contract? By Roman-Dutch Law, if the difference in morgen is small, then it is negligible. But if the difference is large, then the plaintiffs must make a reduction in proportion thereto. (*Grotius* iii., 14. 33.) *Groenewegen ad loc. cit.* seems to contradict *Grotius*, but the contradiction is only apparent. *Groenewegen* is speaking of a certain formula—a definite form of words inserted in the contract and nothing more. (*Cf. Consult.* 1 *cons.* 263. *Consult.* 6, *cons.* 56.) In the latter opinion the clause is almost precisely the same as in the case we are dealing with. (*Cf. Voet*, 18. 1. 7. *Neostad. Decis.* 18. *Coren., Decis.* 19. *Van der Keessel, Theses Selectae* 638.) *Schorer ad Grotium* agrees with *Voet*. In fact, all the authorities, read properly, support the doctrine laid down by *Grotius* in his Introduction. *Van Leeuwen, Roman-Dutch Law*, 4. 18. 7, quotes *Dig.* 19. *tit.* 1. 1. and *Id.* 1. 6. 39. But the *leges* cited by *van Leeuwen* do not support what he lays down in his Roman-Dutch Law. *Glück*, vol. 16. tit. 1. § 981, p. 83. *Cocceius, Jus Controvers. ad lib.* 18. tit. 1. *quest.*, 8. p. 822. *Groenewegen ad Dig.* 21. 2. *l.* 45. *De Legibus Abrogatis* and *Pothier ad id. Rechtsgel. Advysen. vol.* 2, *obs.* 75 does not disagree with the view of *Grotius*. *Benjamin on Sales*, p. 569, 2nd Ed. *Gluck*, vol. 16, § 981, p. 166. "*Si fundus quinquaginta*," etc. Thus the price must be diminished in the proportion 1500 : £8,000 ; 567 :

Curlewis, in reply: Granting, for the sake of argument, that Mr. *Wessels*' interpretation of the law is correct, still it does not apply in this case. We have in this case particular and special stipulations which are not *contra bonos mores*. Parties may vary their rights under the law, and in other ways limit and define their position by means of special stipulations. (*Cf. Coren, obs.* 19.) §§ 1 and 5 of the contract must be read together. The words "supposed to contain" are used, although there is also a declaration that the beacons

1890.
Aug. 15.
„ 16.
„ 19.
„ 20.
1891.
Jan. 29.

Meyer and Meyer *vs.* Tainton.

have been pointed out. The thing was sold *corpore* and not *per mensuram*. There can be no question of a *quanti minoris*. This is not really what defendant asks. He accuses plaintiffs of fraud in his plea, and this charge has been withdrawn during the hearing of the case. *Fry* vs. *Reynolds*, in *Menzies'* Reports, is applicable and is in point. The case in *Consult.* vol. i. *cons.* 263 was a case of sale *per mensuram*, for the question was definitely so stated for the jurist. This is also the case with the opinion of *Grotius in Consult.* vol. 6. cons. 65. *Groenewegen ad Grot. Man.* iii. 14. n. 80 and *De Legibus Abrogatis ad Dig. de eviction, l.* 45 is in plaintiffs' favour. In the case cited in *Cocceius* a definite number of morgen was bought. *Neostadius* refers to a decision of 1613. *Coren*, on the contrary, gives a decision in 1627. *Observat.* 19, and only what was said in *Coren per tot.* is closely applicable to this case and all its circumstances. The truth is that defendant bought a certain piece of ground for certain purposes, *viz.*, as a speculation. He did not care much about the extent so long as he got everything which the plaintiffs possessed. This is the meaning of clause 5 of the contract sued upon, and it is borne out by all the evidence.

Cur. adv. vult.

Posteà, January 29th. 1891.

KOTZÉ, C.J.: In this case an action has been instituted for the performance of a contract of purchase and sale of a certain portion of ground, portion of the farm Rietfontein, situated in the district of Heidelberg, and included in the Witwatersrand Goldfields. The contract was entered into in writing on October 23rd, 1889, between the parties, and contains among others the following clauses: "The said M. G. Keyter (as agent of Meyer) sells hereby, and the said C. F. Tainton buys certain portions of the farm Rietfontein, in the district of Heidelberg, as conveyed to the said R. S. Meyer and J. P. Meyer, the beacons of which portions were pointed out by the seller to the purchaser." "The extent of the portions hereby sold is taken to be that included within the beacons pointed out, and is understood to contain 1,500 morgen, more or less; but the seller does not bind

himself to deliver any specified or definite number of morgen." It appeared subsequently that the farm only contained 567 morgen, and the question is now as to whether the defendant is obliged, having regard to the provision about the size of the farm in the contract, *viz.*, " 1,500 morgen, more or less," to be content with 567 morgen. A very learned and interesting argument has been addressed to the Court by both sides. But it appears to me from the evidence that it will not be necessary to consider that argument any further, important as it may be, or to examine the authorities referred to. I find the following facts proved in the case. On November 12th, 1889, after beacons had been pointed out, and after the land surveyor Greathead had communicated to defendant his opinion that he thought the portion bought seemed less than 1,000 morgen, the defendant wished the seller to insert in the contract of October 23rd a stipulation that he would sell or deliver a certain definite number of morgen. To this plaintiff replied: " I am not selling you 5 morgen or 500 morgen, but if it is 5 morgen or 2,000, it is your ground. If you repent of your bargain you may cancel it." To this defendant, who was buying the ground as a speculation and not to farm upon, did not make any objection, and then and there he paid £750 in part satisfaction of the first instalment of the purchase price. Now, in view of this evidence the purchaser is estopped from saying that 1,500 morgen more or less were not delivered to him, whatever might have been the finding of the Court in the absence of such evidence. Although the contract is in writing, parties may still subsequently agree mutually how a clause referring to the extent of the ground appearing in the written document shall be understood and interpreted, or they may vary it altogether, and if they do so, then in effect they enter into a new contract with regard to the clause, and that is what has happened here. A similar rule exists in English Law, as laid down in *Goss* vs. *Lord Nugent*, 5 B. & A., mentioned by Leake and other writers on the Law of Contracts. Consequently judgment must be in favour of plaintiffs in terms of the summons, with costs.

DE KORTE, J., concerned.