

only party alleged to have any knowledge of the circumstances relied on by the petitioner, and upon which the charge of misrepresentation is founded, the absence of the answers of the other vendors furnishes no sufficient reason for postponing a decision of the question in controversy.

In the answer which has been filed, all misrepresentation, in reference to the quantity of land, or in any other respect, is expressly denied, and the ground taken, that the sale was for a gross sum, and not by the acre, and that the survey of which the petition speaks, was not made to ascertain the number of acres, but for the purpose of ascertaining the lines and courses of the land. The answer, however, admits that in the course of the conversation of the respondent with the agent of the vendee, with whom the contract was made, relative to the land, the agent inquired if he, respondent, knew the quantity of land, that the respondent told him he did not, he had never seen it surveyed, but had heard his brother say the old plat called for one hundred and seventy-three acres. The counsel for the petitioner, in his written argument says, that if he is allowed an opportunity, he will prove that on examination, no such plat as that spoken of has been found, and he insists, that such an answer as was given to the question put by the agent of the vendee, would make it fraudulent to enforce the contract. It appears by the written contract in this case that the land was not sold for a stipulated price per acre, but for a gross sum, and there is no pretence, if the rules of evidence would allow the contrary to be shown, that the written contract does not express the intentions of the contracting parties. And although it may be perfectly true and such is believed to be the law, that, even in the case of a sale for a gross sum, fraud or wilful misrepresentation of the quantity, would afford ground of relief, yet if the representation of the quantity be mere matter of description, and not of the essence of the contract, as where there are qualifying words, as "more or less" or "by estimation," the vendee must be understood as assuming upon himself the risk of the quantity.

The language of Mr. Justice Story in 4 *Mason*, 417, adopted