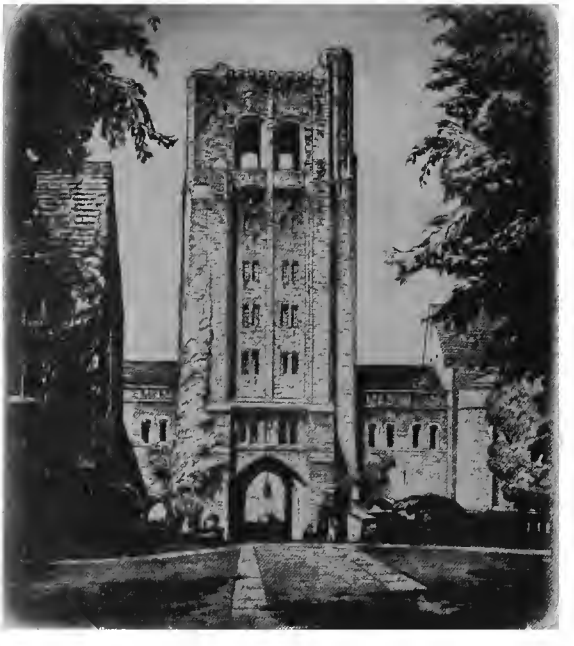

KERR

ON

FRAUD AND MISTAKE

INCLUDING

THE LAW RELATING TO MISREPRESENTATION GENERALLY, UNDUE INFLUENCE, FIDUCIARY RELATIONS, CONSTRUCTIVE NOTICE, SPECIFIC PERFORMANCE, &c.

FIFTH EDITION

BY

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OF LINCOLN'S INN, BARRISTER-AT-LAW.

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PREFACE.

THE present edition of this work has been brought down to November, 1919, and includes not only the English and Irish cases down to that date, but also the cases bearing on the subject decided by the Courts of India, Canada, Australia and New Zealand. Since the publication of the last edition many important alterations have taken place both in the law of Fraud and the law of Mistake, necessitating a thorough revision of the whole work. A large amount of new matter has been introduced, but it has been found possible to bring the book up to date without substantially increasing its dimensions. An enlarged Index will, it is hoped, add to the usefulness of the present edition.

S. E. W.

LINCOLN'S INN,
November, 1919.

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A TREATISE

ON THE

LAW OF FRAUD AND MISTAKE.

PART I.—FRAUD.

CHAPTER I.

GENERAL CONSIDERATIONS.

What is fraud.

FRAUD and mistake as grounds of relief are alike founded on ignorance. There can be no mistake where there is no ignorance; there can be no fraud where there is no mistake.

It is not easy to give a definition of what constitutes fraud in the extensive signification in which that term is understood by civil Courts of Justice. The Courts have always avoided hampering themselves by defining or laying down as a general proposition what shall be held to constitute fraud. Fraud is infinite in variety (*a*). The fertility of man's invention in devising new schemes of fraud is so great, that the Courts have always declined to define it, or to define undue influence, which is one of its many varieties, reserving to themselves the liberty to deal with it under whatever form it may present itself (*b*). Fraud, in the contemplation of a Civil Court of Justice, may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another (*c*). All surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one

(*a*) *Reddaway* v. *Banham*, 1896, A. C. p. 221; 65 L. J. Q. B. 381.
(*b*) *Allcard* v. *Skinner*, 36 C. D. p. 183; 56 L. J. Ch. 1052.
(*c*) Story, Eq. Jur. 187.

is considered as fraud (*d*). Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to (*e*).

The Roman jurisconsults attempted definitions of fraud, two of which are here given; "Dolum malum *Servius* quidem ita definit, machinationem quandam alterius decipiendi causa, cum aliud simulatur et aliud agitur. *Labeo* autem posse et sine simulatione id agi ut quis circumveniatur; posse et sine dolo malo aliud agi, aliud simulari; sicuti faciunt qui per ejusmodi dissimulationem deserviant et tuentur vel sua vel aliena; itaque, ipse sic definit, dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitum. Labeonis definitio vera est" (*f*).

The civil code of France, without giving a definition, provides in Art. 1116: "Fraud is a ground for avoiding a contract where the devices (*les manœuvres*) practised by one of the parties are such as to make it evident that without these devices the other parties would not have contracted. It is not presumed and ought to be proved." Art. 1117 provides: "La convention contractee par erreur, violence ou dol n'est point nulle de plein droit; elle donne seulement lieu a une action en nullite ou en rescision."

A distinguished American writer has given the following definition: "Fraud consists on the one hand (1) in one man's endeavouring by deception to alter another man's general rights; or (2) in one man's endeavouring by circumvention to alter the general rights of another; or on the other hand (3) in one man's endeavouring by deception to alter another man's particular rights; or (4) in one man's endeavouring by circumvention to alter the particular rights of another. And this may be compressed into the following: Fraud consists in the endeavour to alter rights by deception touching motives, or by circumvention not touching motives" (*g*).

(*d*) Finch, 439.
(*e*) *Green* v. *Nixon*, 23 Beav. 535; 27 L. J. Ch. 819; 113 R. R. 253.
(*f*) Dig. lib. iv., tit. 3, leg. 1. (*g*) Bigelow on Fraud, p. 5.

Elements of fraud.

However difficult it may be to define what fraud is in all cases, it is easy to point out some of the elements which must necessarily exist before a party can be said to have been defrauded. In the first place, it is essential that the means used should be successful in deceiving. However false and dishonest the artifices or contrivances may be by which one man may attempt to induce another to contract, they do not constitute a fraud if that other knows the truth and sees through the artifices or devices. *Haud enim decipitur qui scit se decipi.*

Next, there can be no fraud without an intention to deceive, though the motive is immaterial (*h*). This at least is true as regards an action of deceit which can only be supported by a fraudulent as distinguished from a negligent misrepresentation (*i*). An honest blunder in the use of language is not dishonest and unless there is a duty to be careful it is not actionable (*j*). But a statement recklessly made by a person under a duty to be reasonably careful in what he says and intended to be acted on will give rise to an action for damages (*k*). There are, however, many cases, as we shall presently see, where relief is granted on the ground of fraud or misrepresentation, though there is no moral culpability nor any intention to deceive.

Lastly, there must be damage to the party deceived, even where there is a wilful false representation, before a cause of action can arise. Fraud without damage or damage without fraud gives no cause of action (*l*). But fraud gives a cause of action if it leads to any sort of damage (*m*).

It is important to bear in mind that an action of deceit

(*h*) *Derry* v. *Peek*, 14 App. Ca. 359, 374; 58 L. J. Ch. 864.

(*i*) *Angus* v. *Clifford*, 1891, 2 Ch. 449; 60 L. J. Ch. 443; *Tomkinson* v. *Balkis Consolidated Co.*, 1891, 2 Q. B. 614; 60 L. J. Q. B. 558; and see *Dovey* v. *Cory*, 1901, A. C. 477; 70 L. J. Ch. 753.

(*j*) *Nocton* v. *Ashburton*, 1914, A. C. at 949; 83 L. J. Ch. at 791.

(*k*) *Pritty* v. *Child*, 71 L. J. K. B. 512.

(*l*) 3 Bulst. 95, per Croke, J.; *Pasley* v. *Freeman*, 3 T. R. 51, *per* Buller, J.; 1 R. R. 634; *Derry* v. *Peek*, 14 App. Ca. p. 343; 58 L. J. Ch. 864; *Richardson* v. *Hatrick*, 28 N. Z. L. R. 170; *Duncannon* v. *Haywood*, 6 Tas. L. R. 16; 11 C. L. R. 540.

(*m*) *Smith* v. *Kay*, 7 H. L. C. p. 775. *per* Lord Wensleydale, 30 L. J. Ch. 35; 115 R. R. 367.

differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed, it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone, for without proof of fraud no action of deceit is maintainable (*n*).

"Legal fraud."

Fraud vitiates everything, even judgments and orders of the Court. It would be idle, therefore, to attempt to enumerate all the cases in which it is a ground for relief. It should, however, be noted that fraud as a ground for relief is not necessarily moral fraud, and often falls far short of the moral obliquity which constitutes fraud in a popular sense. The expression "legal fraud" has often been taken exception to, and it has been said to be meaningless and undistinguishable from moral fraud or fraud in fact. Nevertheless, the expression has an intelligible meaning, is convenient in practice and is well understood (*o*). Numberless decisions go to prove what is indeed sufficiently obvious, that there is "legal" or, as it is perhaps better termed, "civil" fraud, which is a ground for relief even where there is no moral blame or actual fraud. This is especially noticeable in many cases of rescission of contract fraud upon powers and constructive fraud. The expression "legal fraud" has been generally taken exception to in actions of deceit, the reason no doubt being that as in such actions a fraudulent intention is essential, the difference between a fraudulent intention to deceive and the motive of the deception was lost sight of; but even here the distinction between legal and moral fraud seems to exist, for a false statement, though made with a good motive, may be a legal fraud (*p*), whereas it could hardly be regarded as a moral fraud.

(*n*) *Derry* v. *Peek*, 14 App. Ca. 359, 362; 58 L. J. Ch. 864.
(*o*) *Weir* v. *Bell*, 3 Ex. D. 238; 47 L. J. Ex. 704.
(*p*) *Smith* v. *Chadwick*, 9 App. Ca. p. 201; 53 L. J. Ch. 873.

"Legal fraud," therefore, may be said to mean fraud which is a ground for relief in law, and which, though it may not amount to actual fraud, has similar consequences. On the other hand, moral fraud is not necessarily legal fraud, for moral fraud, however gross, is not fraud in law unless it induces damage. The expression, therefore, is useful as marking a distinction which is real.

In the same way, the expression "constructive fraud," though little more than a *nomen collectivum*, is useful as pointing to a class of cases in which, though there may be no actual fraud, the same consequences follow.

Nothing short of a fraudulent intention in the strict sense will suffice for an action of deceit, and in this strict sense it is quite natural to say that there is no such thing as legal as distinguished from moral fraud. But when fraud is referred to in the wider sense used in Chancery it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes upon him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken to have known, and his conduct has in that sense always been called fraudulent even in such a case as a technical fraud on a power. It was thus that the expression "constructive fraud" came into existence (*q*).

Surprise.

The term "surprise" may here be referred to. Surprise, though a very old head of equity, is not a separate ground for relief, and has no technical signification. As a ground of relief it seems to fall either within mistake or undue advantage. The situation may not be due to fraud, but to take advantage of it may be considered constructive fraud. Mere surprise—that is, surprise arising from rash and indiscreet action or want of mature deliberation—is no ground for relief. It is not of itself a sufficient cause for setting

(*q*) *Nocton* v. *Ashburton*, 1914, A. C. at p. 954.

aside a transaction, apart from fundamental error or unconscionable advantage (*r*).

Mistake.

The distinction between fraud and mistake may seem perfectly obvious, but it is far from being so. Indeed, it is often difficult to say upon admitted facts whether the error which is complained of was occasioned by intentional fraud or by mere inadvertence or mistake (*s*). The much-discussed case of *Slim* v. *Croucher* is excellent proof of this, for though that case is now considered as a case of pure mistake, it is still a debatable point whether it was not a case of fraud (*t*). Mistake may be defined as ignorance not caused by the act of the other party. Misrepresentation is ignorance caused by the act of the other party without wrongful intention. Fraud is ignorance caused by the other party with wrongful intention (*u*).

Negligence.

The distinction between fraud and negligence is still less clearly defined. Indeed, most of the difficulty that has arisen with regard to fraudulent representation is due, as Bowen, L. J., points out in *Le Lievre* v. *Gould* (*w*), to a confusion of fraud and negligence. Lord Eldon speaks of "that gross negligence that amounts to evidence of fraud" or of a fraudulent intention (*x*). This statement, said Fry, L. J., is "certainly embarrassing, for negligence is the not doing of something from carelessness and want of thought or attention, whereas a fraudulent intention is a design to commit some fraud and leads men to do or omit doing a thing not carelessly but for a purpose" (*y*). There is, however, no real discrepancy between these two statements. Fry, L. J., defines what is a fraudulent intention; Lord Eldon merely states what may be evidence of a fraudulent intention. Negligence is not fraud, but negligence may be evidence of fraud (*z*) if it is "so gross as to be incompatible with the

(*r*) *Earl of Bath and Montague's Case*, 3 Ch. Ca. 55; *Evans* v. *Llewellyn*, 1 Cox, 333; 1 R. R. 49; cf. Story, 134, 251.

(*s*) *Wasatch Mining Co.* v. *Crescent Mining Co.*, 148 U. S. 293, 298.

(*t*) See *post*, p. 36.

(*u*) Pollock on Contracts, 439.

(*w*) *Post*, p. 26.

(*x*) 6 Ves. pp. 189, 190.

(*y*) *Northern Counties, &c.* v. *Whipp*, 26 C. D. p. 489; 53 L. J. Ch. 629.

(*z*) *Derry* v. *Peek*, 14 App. Ca. p. 375; 58 L. J. Ch. 864.

idea of honesty" (*a*). And on this ground it may be thought that *Slim* v. *Croucher* was rightly decided, for the reasons given in a subsequent chapter (*b*).

Warranty.

The line between fraud and warranty is often very narrow, and the same observation is true of the line between warranty and estoppel. Narrow, however, as the line often is, the three words denote fundamentally different legal conceptions which must not be confounded (*c*). How fine the distinction sometimes is between contract, warranty, and estoppel is shown by *Grosvenor Hotel* v. *Hamilton* (*d*).

There is a material distinction between a warranty and a representation. A representation may be substantially answered, but a warranty must be strictly complied with (*e*). The test by which a warranty is distinguished from a representation is this: Would a reasonable man have understood the defendant to intend his representation for an undertaking or warranty? Was he asserting a fact, or merely stating an opinion? (*f*). A breach of warranty does not entitle the plaintiff to avoid the contract; he must sue upon the breach of warranty, but a misrepresentation may entitle the plaintiff to avoid the contract (*g*). A defendant is liable for the consequences of a fraudulent warranty (*h*).

Estoppel.

The subject of estoppel will be dealt with in a subsequent chapter (*i*); but it may here be stated that the line is often very fine between fraud and estoppel, as is shown by the case of *Low* v. *Bouverie* (*k*) and the cases there cited, and it is not always easy to distinguish the two, notwithstanding that estoppel is only a rule of evidence, and an action cannot, as in

(*a*) *Le Lievre* v. *Gould*, 1893, 1 Q. B., p. 500; 62 L. J. Q. B. 353.
(*b*) *Post*, p. 36.
(*c*) *Low* v. *Bouverie*, 1891, 3 Ch. p. 102; 60 L. J. Ch. 594.
(*d*) 1894, 2 Q. B. 83.
(*e*) *De Hahn* v. *Hartley*, 1 T. R. 345; 1 R. R. 221; *Campania Naviera Vasconcada* v. *Churchill*, 1906, 1 K. B. 237; 75 L. J. K. B. 94.
(*f*) *Stucley* v. *Bailey*, 1 H. & C. 405; 31 L. J. Ex. 483; 130 R. R. 588; *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215; 70 L. J. K. B. 533.
(*g*) *Murray* v. *Mann*, 2 Ex. 538; 17 L. J. Ex. 256; 76 R. R. 686; *Street* v. *Blay*, 2 B. & Ad. 456; 36 R. R. 626.
(*h*) *Mullett* v. *Mason*, L. R. 1 C. P. 599; 35 L. J. C. P. 209.
(*i*) *Post*, Chap. II.
(*k*) 1891, 3 Ch. 82; 60 L. J. Ch. 594.

the case of fraud, be founded upon it (*l*). Fraud or bad faith is not essential to estoppel. It has, however, been said that fraud is a necessary ingredient in misrepresentation by passivity, that is, in cases of standing by (*m*). But this seems doubtful, for in *De Bussche* v. *Alt* (*n*) the Court of Appeal held that "holding out or lying by or acquiescence cannot, unless fraud be proved, be a ground for an action of deceit, but may work an estoppel."

It may here be observed that fraud, contract, and estoppel are not mutually exclusive, and that one and the same statement may be a fraud, a breach of contract, and operate by way of estoppel (*o*). You cannot, however, rely on estoppel and also on the real facts (*p*), and *quære* whether a person estopped can plead fraud by a third person (*q*).

Doctrine of "making representations good."

We have now to consider whether there is any right to relief outside these three grounds—whether, in short, there is a right to relief on the ground of mere representation not amounting to any of these three grounds. There are certainly many cases which seem to support the idea that under certain conditions such a representation may still be binding on the person making it (*r*). But it is said that "when these three effects are duly considered it appears that there is no other way in which it can be binding" (*s*). The "making representations good" is, it is said, an exploded doctrine, and "probably it will not be heard of again" (*t*). The deliberate opinion of so high an authority must of course carry great weight, but the question can hardly be considered as finally settled until the House of Lords expressly so decides. It may well be thought that the principle of making good a representation, and an obligation to take reasonable care in making representations to be acted on by others, is too sound and salutary a principle to be exploded by inference. The fact that some

(*l*) *Ibid.*
(*m*) Ewart on Estoppel, p. 92.
(*n*) 8 C. D. 286; 47 L. J. Ch. 386.
(*o*) *Brownlie* v. *Campbell*, 5 App. Ca., p. 953.
(*p*) *Scarf* v. *Jardine*, 7 App. Ca. 345, per Selbourne, L. C.; 51 L. J. Q. B. 612.
(*q*) *Onward Bldg. Soc.* v. *Smithson*, 1893, 1 Ch. 1; 62 L. J. Ch. 138.
(*r*) *Post*, Chap. VII., s. 1.
(*s*) Pollock on Contracts (8th ed.), p. 558.
(*t*) *Ibid.* (6th ed.), p. 719.

of the cases on which the principle was supposed to rest were cases of contract does not necessarily or finally dispose of the doctrine. The dicta of Brett, M.R. (*u*), in favour of the principle are alone sufficient to make us hesitate to discard it. Further, it has recently been held that a statement recklessly made and intended to be acted on by a person under a duty not to be reckless is a ground for an action of tort for breach of the duty (*x*).

Fraud not punishable as a crime.

Civil Courts of Justice do not affect to consider fraud in the light of a crime; it is not their province to punish (*y*); nor have they any censorial authority (*z*); they interfere in cases of fraud from a civil and not from a criminal point of view.

Jurisdiction over every species of fraud except fraud of a penal nature.

Civil Courts of Justice have an original, independent, and inherent jurisdiction to relieve against every species of fraud not being fraud of a penal nature. Every transfer or conveyance of property, by what means soever it be done, is vitiated by fraud. Deeds, obligations, contracts, awards, judgments, or decrees may be the instruments to which parties may resort to cover fraud, and through which they may obtain the most unrighteous advantages, but none of such devices or instruments will be permitted by a Court of equity to obstruct the requisitions of justice. If a case of fraud be established, the Court will set aside all transactions founded upon it by whatever machinery they may have been affected, and notwithstanding any contrivance by which it may have been attempted to protect them (*a*).

Distinction between legal and criminal jurisdiction.

The distinction between legal or equitable and criminal jurisdiction in matters of fraud is well laid down in *Burnes* v. *Pennell* (*b*). It is the superadded guilty intention which gives the criminal jurisdiction. A man may not have intended to deceive, and may have believed that he did not, when he was really suppressing the truth and suggesting what was false. If so, he is not liable to an indictment in a criminal court: but in a civil proceeding it is different. If a man makes a misrepresentation in point of fact, whether by suppressing

(*u*) *Cunnington* v. *Great Northern Rly. Co.*, 49 L. T. 393, 394.
(*x*) *Pritty* v. *Child*, 71 L. J. K. B. 512. (*y*) See 2 Atk. 43.
(*z*) See 2 V. & B. 298. (*a*) *Bowen* v. *Evans*, 2 H. L. C. 281; 81 R. R. 136.
(*b*) 2 H. L. C. 497; 81 R. R. 244.

the truth or suggesting what is false, however innocent his motive may have been, he is equally responsible in a civil proceeding as if he had while committing these acts done so with a view to injure others or to benefit himself (*c*). It matters not that there was no intention to cheat or injure the person to whom the statement was made (*d*).

Contract induced by fraud.

If the subject-matter of the transaction be a contract, no man is bound by a bargain into which he has been induced by fraud to enter, because assent is necessary to a valid contract, and there is no real assent when fraud and deception have been used as instruments to control the will and influence the assent. But a contract or other transaction induced or tainted by fraud is not void, but only voidable at the election of the party defrauded (*e*). Until it is avoided, the transaction is valid, so that third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party defrauded (*f*).

Voidable not void.

"The fact that the contract has been induced by fraud does not make the contract void or prevent the property passing, but merely gives the party defrauded a right on discovering the fraud to elect whether he shall continue to treat the contract as binding or disaffirm the contract and resume the property. If it can be shown that the party defrauded has at any time after knowledge of the fraud either by express words or by unequivocal acts affirmed the contract, his election is determined for ever. The party defrauded may keep the question open so long as he does nothing to affirm the contract. The question always is, has the person on whom the fraud has been practised, having notice of the fraud, elected not to avoid the contract? or, has he elected to

(*c*) *Peek* v. *Gurney*, L. R. 6 H. L. 409; *per* Lord Cairns; 13 Eq. 113, *per* Lord Romilly.

(*d*) *Derry* v. *Peek*, 14 A. C. p. 374; 58 L. J. Ch. 864.

(*e*) *Rawlins* v. *Wickham*, 3 D. & J. 322; 28 L. J. Ch. 188, 121; R. R. 134; *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 156.

(*f*) *Oakes* v. *Turquand*, L. R. 2 H. L. p. 375; 36 L. J. Ch. 949; *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 64; 39 L. J. Ch. 849; *Carter and Kenderdine*, 1897, 1 Ch. 776; 66 L. J. Ch. 408; *United Shoe Co.* v. *Brunet*, 1909, A. C. 330; 78 L. J. P. C. 101.

avoid it? or, has he made no election? As long as he has made no election he retains the right to determine it either way, subject to this—that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, he will lose his right to rescind" (*g*).

Goods obtained by larceny or a trick as distinguished from goods obtained by fraud.

Where a sale of goods is obtained by fraud the property in the goods is transferred by the contract (*h*) subject to be revested in the seller on his exercising his option to rescind when he discovers the fraud. But as between the seller and buyer a purchaser in good faith from the fraudulent buyer acquires an indefeasible title (*i*), unless the seller, on whom the onus lies, proves that the purchaser took with notice of the fraud or otherwise than in good faith (*j*). There is, however, a distinction between possession obtained under a contract of sale voidable for fraud and possession obtained by a trick amounting to larceny. In the former case the fraudulent buyer can, as we have seen, give a good title to a *bona fide* purchaser. In the latter case he cannot unless the purchaser buys in market overt (*k*).

Where, however, goods have been *stolen* and the offender is prosecuted to conviction, the property in the goods revests, notwithstanding any intermediate dealing with them, whether in market overt or otherwise (*l*). But where goods have been obtained by fraud not amounting to larceny, the property does not revest on conviction of the offender (*m*).

Instruments executed through a trick as distinguished from instruments executed through fraud.

A distinction must be taken between cases where a man executes an instrument with the mind and intention to execute it, though his assent may have been obtained by fraud, and cases where a man is by fraudulent contrivances induced to put his hand and seal to an instrument which he

(*g*) *Clough* v. *L. & N. W. Rly.*, L. R. 7 Ex. 34; 41 L. J. Ex. 17; and see *Oakes* v. *Turquand, supra; Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 317. (*h*) *Load* v. *Green*, 15 M. & W. 216; 15 L. J. Ex. 113; 71 R. R. 627.

(*i*) Sale of Goods Act, 1893, s. 24; *Phillips* v. *Brooks*, 1919, 2 K. B. 243.

(*j*) *Whitehorn* v. *Davison*, 1911, 1 K. B. 463; 80 L. J. K. B. 425.

(*k*) See 1907, 2 K. B. at p. 70; and see *Farquharson* v. *King*, 1902, A. C. 325; 71 L. J. K. B. 667.

(*l*) Sale of Goods Act, 1893, s. 24. (*m*) *Ibid.*

never intended and had no mind to execute. In the former case the document is said to be voidable only, and its creator must suffer; in the latter the document is void, and the loss falls on the innocent transferee (*n*). In *Thoroughgood's Case* (*o*) it was held that if an illiterate man have a deed falsely read over to him, and he then seals and delivers the deed, the deed was nevertheless not his deed. The doctrine is not, however, confined to the condition of an illiterate grantor (*p*). The position that if a grantor or covenantor be misled as to the actual contents of the deed, the deed does not bind him, is supported by many authorities (*q*). In *Vorley* v. *Cooke* (*r*) Stuart, V.-C., said that if a man having no mind or intention to execute a particular instrument does what he does with the mind and intention to execute a deed of a different kind and for a different purpose from that which by fraud and deceit was substituted, the deed is not voidable but void, and no estate passes at least as between the parties to the instrument and parties taking with notice. When, accordingly, a man executed a deed which was falsely and fraudulently represented as being a covenant to produce, when, in fact, it was a mortgage, the deed was held void as being a cheat and a trick (*s*). So also in *Foster* v. *M'Kinnon* (*t*), where the defendant's signature to a document was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, it was held that he

(*n*) The true principle, however, seems to be, not whether a person is literate or illiterate, nor whether the deed is void or voidable, nor under what conditions the document was executed, but whether the person who executed it is estopped from denying its validity. No document obtained by misrepresentation is binding on the person deceived, its character does not change, into whosesoever hands it may come; but as against persons who have been led by the document to change their position, the person deceived ought to be estopped from denying its validity: see Ewart on Estoppel, pp. 104, 434; cf. French Code, Art. 1117, *ante*, p. 2.

(*o*) 2 Co. Rep. 9 b. (*p*) Keilw. 70 Pl. 6; see *post*, p. 14.

(*q*) See Com. Dig. Fait B. 2; 1 Cr. & J. 312; see *Foster* v. *M'Kinnon*, L. R. 3 C. P. 711; 38 L. J. C. P. 310.

(*r*) 1 Giff. 234; 27 L. J. Ch. 185; 114 R. R. 413

(*s*) *Ibid*; *Lee* v. *Angas*, 15 W. R. 119.

(*t*) L. R. 4 C. P. 711; 38 L. J. C. P. 310.

was not liable, if he was not guilty of negligence, on the ground that he never intended to sign, and therefore in contemplation of law never did sign, the document to which his name was appended. So where a person is induced to sign a promissory note by a fraudulent representation that he is witnessing a deed, and there is no negligence on his part, he is not estopped from setting up the true facts as a defence to an action on the note (*u*).

In *Hunter* v. *Walters* (*x*), where a mortgagee executed the deed without reading it, believing the solicitor's assertion that it was only a transfer of the mortgagor's interest, and a mere form as far as concerned himself, it was held that the conveyance was not void, and that the mortgagee having confided in his solicitor to the extent of executing the conveyance without reading it, he must suffer for his agent's fraud, and not the stranger who dealt with the agent, upon the common rule of equity that the principal who trusts his agent is the party to suffer for the agent's fraud, and not the stranger who deals with the agent (*y*). Lord Justice James, without disputing the correctness of the equitable relief given in *Torley* v. *Cooke*, declined to support the dictum that the facts in that case would have sustained at law a plea *non est factum*. Lord Justice Mellish, speaking of the argument that a deed procured by false representation of the contents of the deed is at law necessarily void *ab initio*, said: "It is a doubtful question whether if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might by very simple means have satisfied himself as to what the contents of the deed really were, may not by executing it negligently be estopped as between himself and a person who innocently acts upon the faith of the deed being valid, and who accepts an estate under it" (*z*). The question, it seems, should be answered in

(*u*) *Lewis* v. *Clay*, 67 L. J. Q. B. 224. (*x*) 7 Ch. 75; 41 L. J. Ch. 175.

(*y*) See *Brocklesby* v. *Temperance Bldg. Soc.*, 1895, A. C. 173; 64 L. J. Ch. 433; cf. *Farquharson* v. *King*, 1902, A. C. 325; 71 L. J. K. B. 667; and *Turner* v. *Smith*, 1901, 1 Ch. 213; 70 L. J. Ch. 144.

(*z*) See *Cooper* v. *Vesey*, 20 C. D. 629; 51 L. J. Ch. 862; *Lewis* v. *Clay*, 67 L. J. Q. B. 224.

the affirmative (*a*). This at least is clear, that if a man knows that the deed is one purporting to deal with his property and he executes it, it is not sufficient for him in order to support a plea of *non est factum* to show that a misrepresentation was made to him as to the contents of the deed (*b*). To support such a plea the deed must be of a totally different character from what it was represented to be (*c*). The principle is not confined to the blind and illiterate. The test is whether the person has attached his signature with the intention that that which preceded his signature should be taken to be his act and deed. But he may have been content to make it his act and deed whatever it contained. If on the other hand he is misled as to the contents then his mind does not go with his pen and it is not his deed (*d*). It seems also that if a person sign a document by mistake and without negligence he is not bound by it although his signature was not obtained by fraud (*e*).

It seems that a deed cannot be valid as a mortgage and void on the plea of *non est factum* as to the personal covenants for payment (*f*).

Similar considerations attach to the case of forged instruments. No estate can pass under a forged instrument (*g*), but in special cases an innocent party whose title to property is derived under a forged instrument may, as against the party on whom the forgery has been practised, have a better equity to the retention of the property (*h*).

Which of two innocent persons to suffer?

The question in all this class of cases seems to be: Was the person upon whom the fraud was practised guilty of

(*a*) *King* v. *Smith*, 1900, 2 Ch. 425; 69 L. J. Ch. 598; *Howatson* v. *Webb*, *infra*; Ewart on Estoppel, 434; but see *National Prov. Bank* v. *Jackson*, 33 C. D. 1; *Onward Bldg. Soc.* v. *Smithson*, 1893, 1 Ch. 13, 14; 62 L. J. Ch. 138.

(*b*) *Howatson* v. *Webb*, 1908, 1 Ch. 1; 77 L. J. Ch. 32.

(*c*) *Ibid*; *Bagot* v. *Chapman*, 1907, 2 Ch. 222; 76 L. J. Ch. 523.

(*d*) *Carlisle Banking Co.* v. *Bragg*, 1911, 1 K. B. 489; 80 L. J. K. B. 472.

(*e*) *Bank of Ireland* v. *M'Manamy*, 1916, 2 Ir. R. 161.

(*f*) *Howatson* v. *Webb*, 1908, 1 Ch. 1.

(*g*) *Esdaile* v. *Le Nauze*, 1 Y. & C. 394; 4 L. J. Ex. 46; *Boursot* v. *Savage*, 2 Eq. 134; 35 L. J. Ch. 627; *Cooper* v. *Vesey*, 20 C. D. 629; 51 L. J. Ch. 862.

(*h*) *Jones* v. *Powles*, 3 M. & K. 581; 3 L. J. Ch. 210; 41 R. R. 137.

negligence (*i*), and negligence which was the proximate or effective cause of the fraud? (*j*) The rule that whenever one of two innocent persons must suffer by the act of a third person, he who has enabled the third person to occasion the loss must sustain it, requires some qualification, but what the qualification is or ought to be is still somewhat uncertain. Vaughan Williams, L. J., thought that one ought never to say that a person has enabled the third person to occasion the loss or commit the fraud unless the act was one which he intended to be acted upon by somebody (*k*). Lord Halsbury thought that the person who enabled the third person to occasion the loss must be guilty of some indiscretion (*l*). Stirling, L. J., thought that there must be neglect of some duty owing from him to the other innocent party (*m*). Farwell, J., also took that view (*n*), and Lord Lindley thought that the innocent party to suffer must have done something which in fact misled the other (*o*). This last view seems to be the correct one. At all events, the doctrine has never been applied where nothing has been done by one of the innocent parties which has in fact misled the other (*p*).

Original vice continues to taint a transaction founded on fraud.

If a transaction has been originally founded on fraud, the original vice will continue to taint it, however long the negotiation may continue, or into whatever ramifications it may extend (*q*). Not only is the person who has committed the fraud precluded from deriving any benefit under it, but an innocent person is so likewise, unless there has been some consideration moving from himself (*r*).

No length of time will protect fraud.

In equity no length of time will run to protect or screen

(*i*) *Foster* v. *M'Kinnon*, 4 C. P. 711; 38 L. J. C. P. 310; *Lewis* v. *Clay*, 67 L. J. Q. B. 224.

(*j*) *Baxendale* v. *Bennett*, 3 Q. B. D. 525; per Bramwell, L.J.; 47 L. J. Q. B. 624. (*k*) *Farquharson* v. *King & Co.*, 1901, 2 K. B. 697, 708, 713.

(*l*) *Farquharson* v. *King*, 1902, A. C. at p. 332; 71 L. J. K. B. 667.

(*m*) 1901, 2 K. B. at p. 720.

(*n*) *Rimmer* v. *Webster*, 1902, 2 Ch. 163; 71 L. J. Ch. 561.

(*o*) 1902, A. C. at p. 342. (*p*) *Ibid.*; but see 1907, 2 K. B. 735.

(*q*) *Reynell* v. *Sprye*, 1 D. M. & G. 660, 697; 21 L. J. Ch. 633; 91 R. R. 228; *Smith* v. *Kay*, s *H. L. C.* 750, 775; 30 L. J. Ch. 35; 115 R. R. 367.

(*r*) *Scholefield* v. *Templer*, Johns. 165; 4 D. & J. 429; 124 R. R. 324; *Topham* v. *Duke of Portland*, 1 D. J. & S. 569, *per* Turner, L. J.; 137 R. R. 301; 32 L. J. Ch. 606; *Morley* v. *Loughnan*, 1893, 1 Ch. p. 757; 62 L. J. Ch. 515.

fraud (*s*). The right of the party defrauded to have the transaction set aside is not affected by lapse of time, so long as he remains, without any fault of his own, in ignorance of the fraud which has been committed (*t*).

So, too, the remedy for a fraudulent breach of trust is not barred by the Trustee Act, 1888, s. 8; nor will a fraudulent trustee be released therefrom even by obtaining his discharge under the Bankruptcy Act, 1914, s. 28 (*u*).

So, too, the Public Authorities Protection Act, 1893, which limits the time within which an action can be brought against a public body, does not apply where the cause of action alleged is a fraud which induced the contract (*w*).

Concealed fraud.

The subject of concealed fraud will be dealt with in a subsequent chapter; but it may here be stated that when once fraud is established the rights of the party defrauded are not affected by the Statute of Limitations so long as he remains in ignorance of the fraud (*x*) and it is not necessary for him to prove that the wrongdoer actively concealed the fraud, it is sufficient if the fraud had not in fact been discovered (*y*). But if he delays his claim for recession for six years after the discovery of the fraud the Court will refuse to grant relief (*z*). Moreover the discovery of concealed fraud only gives a new cause of action when the fraud is the fraud of the defendant himself or of some one for whom he is directly responsible (*a*).

The concealed fraud which by the Real Property Limitation Act, 1833, s. 26, will prevent time running against the true owner of real estate must be the fraud of the person who sets up the statute, or of some one through whom he claims (*b*).

(*s*) *Allfrey* v. *Allfrey*, 1 Mac. & G. 99; 84 R. R. 15; *Bowen* v. *Evans*, 2 H. L. C. 257; 81 R. R. 136; *Walsham* v. *Stainton*, 1 D. J. & S. 678; 137 R. R. 342.

(*t*) *Blair* v. *Bromley*, 2 Ph. 361; 16 L. J. Ch. 495; *Rolfe* v. *Gregory*, 4 D. J. & S. 579; 146 R. R. 463; 34 L. J. Ch. 274; *Vane* v. *Vane*, 8 Ch. 383; 42 L. J. Ch. 299; but see *Re McCullum*, *infra*. (*u*) *Munns* v. *Burn*, 35 C. D. 266.

(*w*) *Pearson* v. *Dublin Corporation*, 1907, A. C. 351; 77 L. J. P. C. 1.

(*x*) *Oelkers* v. *Ellis*, 1914, 2 K. B. 139; 83 L. J. K. B. 658.

(*y*) *Ibid.*; *Bulli Coal Mining Co.* v. *Osborne*, 1899, A. C. 351, 363; 68 L. J. P. C. 52. (*z*) *Armstrong* v. *Jackson*, 1917, 2 K. B. 822; 86 L. J. K. B. 1375.

(*a*) *John* v. *Dodwell*, 1918, A. C. 563; 87 L. J. P. C. 92.

(*b*) *Re McCallum*, 1901, 1 Ch. 143; 70 L. J. Ch. 206; but see judgment of Rigby, L. J., *dissentiente*.

The qualification with regard to due diligence incorporated in Section 26 should perhaps be confined to land. At all events, it does not seem to apply to all cases, as, for instance, to partnership accounts (*c*).

Contracting out of fraud.

An express stipulation that fraud shall not vitiate a contract is bad in law. A contract whereby a person saves himself from false representation and the other party is not to have a remedy for fraud is illegal. Accordingly, a clause in a contract by which an employer disclaims responsibility for the accuracy of the statements in the contract, and as to which the other party is to satisfy himself, does not exempt the employer from liability for statements fraudulently made by himself or his agents (*d*).

A transaction cannot be repudiated by a man as far as it is onerous and adopted as far as it is beneficial.

A man cannot repudiate a transaction as far as it is onerous to himself and adopt it as far as it is beneficial. He must be able to deal with the whole either by adopting or rejecting it *in toto* (*e*). There may, however, be cases in which the transaction is severable and where the same transaction may be good as to part and for certain purposes, although voidable as to other parts and for other purposes (*f*). If a transaction is fair as between the parties to it, it is not invalid merely because it may have been concocted and brought about by a third party with a fraudulent intention of benefiting himself. In such a case, as far as regards the third party the whole may be looked upon as one transaction in order to judge of his motives and to put a construction upon his acts; but as regards the other two, who, though affected by one part of the transaction, may be total strangers to the other part, it is not only not necessary, but it would be unjust, to consider every part of the transaction affected by objections which, in fact, apply only to particular portions of it (*g*). If,

A transaction may be good as to parts and for certain purposes, and bad as to other parts and for other purposes.

(*c*) *Betjemann* v. *B.*, 1895, 2 Ch. 474; 64 L. J. Ch. 641.

(*d*) *Pearson* v. *Dublin Corporation*, 1907, A. C. 351; 77 L. J. P. C. 1, *per* Lord Atkinson.

(*e*) *Great Luxemburg Rly. Co.* v. *Magnan*, 25 Beav. 594; 119 R. R. 555; *Urquhart* v. *Macpherson*, 3 App. Ca. 831; *Sheffield Nickel Co.* v. *Unwin*, 2 Q. B. D. 223; 46 L. J. Q. B. 299.

(*f*) *Bellamy* v. *Sabine*, *infra*; *Carter and Kenderdine*, 1897, 1 Ch. 776; 66 L. J. Ch. 408; *United Shoe Co.* v. *Brunet*, 1909, A. C. 330; 78 L. J. P. C. 101.

(*g*) *Bellamy* v. *Sabine*, 2 Ph. p. 438; 17 L. J. Ch. 105; 78 R. R. 132.

for instance, a man brings about an arrangement between father and son, in order that he might afterwards deal with the son, the motive might be most improper, but the arrangement between father and son must be judged of upon its own merits (*h*). It has been said that an instrument which has been entered into between parties for a purpose which may be considered fraudulent as against a third party is not necessarily invalid as between themselves (*i*). This at least may be so where one of the parties is a *bona fide* purchaser (*k*).

Fraud by a third party, even when it produces on the mind of one of the contracting parties a mistake as to the nature of the contract, cannot be invoked by that party to set aside the contract. He has no remedy except against the author of the fraud for damages (*l*).

Duty of the Court in dealing with cases of alleged fraud

Although it is the undoubted duty of the Court to relieve persons who have been deceived by the fraud of others, it is equally the duty of the Court to "be careful that in its anxiety to correct frauds it does not enable persons who have joined with others in speculations, to convert their speculations into certainties at the expense of those with whom they have joined" (*m*).

The Court will not refuse relief to a party guilty of fraud unless the fraud has an immediate and necessary relation to the equity sued for (*n*).

(*h*) *Ibid.*

(*i*) *Shaw* v. *Jeffery*, 13 Moo. P. C. 432; 132 R. R. 129.

(*k*) *Halifax Co.* v. *Gledhill*, 1891, 1 Ch. 31; 60 L. J. Ch. 181.

(*l*) *Imperial Life Ass.* v. *Laliberte*, 29 Que. S. C. 183.

(*m*) *Jennings* v. *Broughton*, 5 D. M. & G. 126; 140, *per* Turner, L. J.; 23 L. J. Ch. 999; 104 R. R. 58; *Smith* v. *Chadwick*, 20 Ch. D. 67, *per* Jessel, M. R.; 53 L. J. Ch. 873.

(*n*) *Moody* v. *Cox*, 1917, 2 Ch. 71; 86 L. J. Ch. 424.

CHAPTER II.

MISREPRESENTATION—CONCEALMENT.

Misrepresentation.

THE largest class of cases in which Courts of Justice are called upon to give relief against fraud, is where there has been a misrepresentation.

Misrepresentation may be either innocent or fraudulent. If innocent, it may be a ground for recession of a transaction or a good defence to an action for specific performance. But a misrepresentation in order to support an action of deceit for damages must be fraudulent (*a*), or rather a falsehood (*b*).

Deceit.

A fraudulent misrepresentation, or as it is better called deceit, consists in leading a man into damage by wilfully or recklessly (*bb*) causing him to believe and act on a falsehood.

A representation in order to be fraudulent must be one (1) which is untrue in fact; (2) which defendant knows to be untrue or is indifferent as to its truth; (3) which was intended or calculated to induce the plaintiff to act upon it; and (4) which the plaintiff acts upon and suffers damage.

It is not, however, necessary that a misrepresentation to sustain an action of deceit should be made in express terms; it is sufficient if the words used are intended to convey a false inference (*c*).

Derry v. *Peek*

The whole subject of fraudulent misrepresentation has, however, been thrown into confusion by the decision in *Derry* v. *Peek* (*d*), or rather by the supposed effects of that decision —a decision which has given rise to an extraordinary amount of doubt, difficulty, discussion, and vigorous dissent. We may like it or not, but English Courts must now decline to recognize a positive duty of using any, even the lowest,

(*a*) *Angus* v. *Clifford*, 1891, 2 Ch. 449; 60 L. J. Ch. 443.
(*b*) *Wilde* v. *Gibson*, 1 H. L. C. p. 633; 73 R. R. 191.
(*bb*) *De Vall* v. *Gorman*, 58 Can. S. C. R. 259.
(*c*) *Delany* v. *Keogh*, 1905, 2 Ir. R. 267.
(*d*) 14 App. Ca. 337; 58 L. J. Ch. 864.

degree of diligence in making allegations about supposed matters of fact (*e*). The effect of the decision as regards the particular class of company cases to which the decision is immediately applicable, has been neutralized by the Directors' Liability Act, 1890, and the Companies Act, 1900, which are now embodied in the Companies Consolidation Act, 1908, ss. 81, 84. These Acts, however, are framed merely "to meet a particular grievance, and do not replace an unsound doctrine, which leads to unfortunate results, by a sounder principle which would avoid them" (*f*). They provide a partial remedy for the mischievous consequences of *Derry* v. *Peek* (*g*). If, however, the principle laid down in *Slim* v. *Croucher* is that contended for in a later page (*h*), the mischievous consequences of *Derry* v. *Peek* would disappear, or at least be greatly lessened. The facts in *Derry* v. *Peek* (*i*) were very simple. The defendants were directors of a tramway company, and issued a prospectus in which they stated that "the company has the right to use steam or mechanical motive power instead of horses." As a matter of fact the incorporating Act only provided that such power might be used with the consent of the Board of Trade. On the faith of the prospectus the plaintiff took shares in the company, the Board of Trade subsequently refusing to consent to the use of steam power, and the company being wound up, but possibly not in consequence of that refusal. Stirling, J., dismissed the action, saying "their grounds were not so unreasonable as to justify me in charging them with being guilty of fraud." The Court of Appeal reversed this decision on the ground that the statement was made recklessly and without reasonable grounds. The House of Lords reversed the judgment of the Court of Appeal, holding on the facts that the defendants did not knowingly make a false statement. That was really all that the case decided. But the lengthy judgment delivered by Lord Herschell, which, in fact, did little more than affirm the never-disputed

(*e*) Pollock, Fraud in B. India, p. 93.
(*f*) Lindley on Companies (Ed. 5), Supp. 2.
(*g*) See Pollock on Contracts, p. 558, *n*.
(*h*) *Post*, p. 38. (*i*) 14 App. Ca. 337; 58 L. J. Ch. 864.

principle that an action of deceit can only be supported by fraud, has given rise quite needlessly to endless doubts and difficulty. Lord Herschell did not lay down the proposition that want of reasonable ground for belief is not fraud, but is only evidence of fraud. The Court of Appeal thought, perhaps more reasonably, that a statement made without any reasonable ground for believing it must be taken to be fraudulent. The difference between the two is, however, not very great, and is simply a question of degree. The Court of Appeal thought the want of a reasonable ground for belief was conclusive; the House of Lords thought it was an important element to be taken into consideration. In many cases, if not in most, whichever principle is applied, the practical result would be the same.

The difficulties to which the decision in *Derry* v. *Peek* have given rise are due not so much to the decision itself as to the supposed effects of that decision—effects which we have alsewhere (*j*) endeavoured to show are more imaginary than real. Further, some of the subsequent cases in which the decision has been considered and explained tend rather to increase than diminish the difficulties. Instead of applying the simple and practical principle that a statement made without reasonable ground for believing it to be true must be taken to be fraudulent, we have now to go through a psychological process, to dive into the recesses of a man's mind and say whether he was dishonest, before we can say that his statement is fraudulent. An action of deceit can only be maintained against a person with "a wicked mind." This is one of the supposed results of *Derry* v. *Peek*, but it is scarcely a natural or inevitable result of that decision. It is one thing to say that there must be fraud in order to found an action of deceit; it is another and quite different thing to say that to support such an action you must prove that the defendant had "a wicked mind" (*k*).

In *Angus* v. *Clifford* (*l*) Lindley, L.J., said: "Speaking broadly of *Derry* v. *Peek*, I take it that it has settled once for

(*j*) *Post*, p. 35.

(*k*) *Post*, p. 30.

(*l*) 1891, 2 Ch. p. 463; 60 L. J. Ch. 443.

all the controversy which was well known to have given rise to very considerable difference of opinion as to whether an action for negligent misrepresentation as distinguished from fraudulent misrepresentation could be maintained. There was considerable authority to the effect that it could, and there was considerable authority to the effect that it could not; and as I understand *Derry* v. *Peek*, it settles that question in this way—that an action for a negligent as distinguished from a fraudulent misrepresentation in a company's prospectus cannot be supported." Farther on (p. 466) he added: "When you read the whole of that part of the judgment (of Lord Herschell, at p. 374), you must take the observations as to what is said about proof of fraud as subject to this, that the matter to be inquired into is fraud for negligent misrepresentation as distinguished from fraudulent misrepresentation could be maintained. There was considerable authority to the effect that it could, and there was considerable authority to the effect that it could not; and as I understand *Derry* v. *Peek*, it settles that question in this way—that an action for a negligent as distinguished from a fraudulent misrepresentation in a company's prospectus cannot be supported." Farther on (p. 466) he added: "When you read the whole of that part of the judgment (of Lord Herschell, at p. 374), you must take the observations as to what is said about proof of fraud as subject to this, that the matter to be inquired into is fraud or carelessness. If it is fraud, it is actionable; if it is not fraud but merely carelessness, it is not. The passages about knowledge—knowingly making it, and making a statement without believing its truth—are based upon the supposition that the matter was really before the mind of the person making the statement, and if the evidence is that he never really intended to mislead, that he did not see the effect or dream that the effect of what he was saying could mislead, and that that particular part of what he was saying was not present to his mind at all, that, I should say, was proof of carelessness rather than of fraud." Again (p. 469): "After *Derry* v. *Peek* an action of this kind cannot be

supported without proof of fraud, an intention to deceive, and it is not sufficient that there is a blundering carelessness, however gross, unless there is wilful recklessness, by which I mean wilfully shutting one's eyes, which is, of course, fraud."

In the same case (*m*) Bowen, L. J., said: "It always has been the law that a man must have a belief, because, as Lord Bramwell points out in the case of *Smith* v. *Chadwick* and Lord Herschell in *Derry* v. *Peek*, a man who affirms that he knows a thing affirms implicitly that he believes it, and if he does not believe it, that affirmation is false. It is not the less false because the affirmation he makes is an affirmation about the state of his own mind. A man may tell a lie about the state of his own mind, just as much as he can tell a lie about the state of the weather or the state of his own digestion. It makes, to be sure, the inquiry a difficult and complicated one, and probably an obscure one, as to what the state of his mind may have been: but once arrive at the inference of fact that the state of his mind was, to his own knowledge, not that which he describes it as being, then he has told a lie just as if he made an intentional misstatement of something outside his own mind and visible to the eyes of all men. A great deal of the argument which has been addressed to the Court arises, as it seems to me, under cover of the fallacious use, first of all, of the principle that you cannot look into a man's mind. It is said that you cannot do that: therefore what follows? It is said that you are to have fixed rules to tell you that he must have meant something one way or the other when certain exterior phenomena arise. The answer is that there is no such thing as an absolute criterion which gives you a certain index to a man's mind. There is nothing outside his mind which is an absolute indication of what is going on inside. So far from saying that you cannot look into a man's mind, you must look into it if you are going to find fraud against him; and unless you think you see what must have been in his mind, you cannot find him guilty of fraud. It seems to

(*m*) *Angus* v. *Clifford*, 1891, 2 Ch. p. 470; 60 L. J. Ch. 443.

me that a second cause from which a fallacious view arises is from the use of the word 'reckless.' Now what is the old common law direction to juries? . . . it was this, did he know the statement was false, or if not did he make it without knowing whether it was false and without caring? Not caring, in that context, did not mean not taking care: it mean indifference to the truth, the moral obliquity which consists in a wilful disregard of the importance of truth, and unless you keep it clear that that is the true meaning of the term, you are constantly in danger of confusing the evidence from which the inference of dishonesty in the mind may be drawn—evidence which consists in a great many cases of gross want of caution—with the inference of fraud or of dishonesty itself, which has to be drawn after you have weighed all the evidence."

"Now whether you take the inquiry in the one order or in the other, whether you regard it from the point of view that a man is bound to have some honest belief in a statement if he makes it, or whether you treat the matter in the inverse order, with regard to the necessity of finding at least some recklessness to truth—that is to say, some indifference to truth which amounts to dishonesty—in either view the result is the same. A man ought to have a belief that what he is saying is true; but a man may believe what he is saying—the expression which he uses—to be true, because he is honestly using the words in a sense of his own, which, however inappropriate, however stupid, however grossly careless, if you will, is the special sense in which he means to use the words, without any consciousness being present to his mind that they would convey to other reasonable persons a different sense from that in which he is using them—a man may believe a statement in that sense of his own, and yet the use of the language may be wholly improper, that is to say, in respect of want of caution in the use of it. It does not follow because a man uses language that he is conscious of the way in which it will be understood by those who read it. Unless he is conscious that it will be understood in a different manner from that in which he is

honestly though blunderingly using it, he is not fraudulent, he is not dishonest. An honest blunder in the use of language is not dishonest. What is honest is not dishonest. Lord Blackburn in *Smith* v. *Chadwick* points that out. The Lord Chancellor in *Arnison* v. *Smith* points it out. The Lord Chancellor points it out again in *Derry* v. *Peek*, as well as Lord Herschell, Lord Bramwell and Lord Watson, who agree with him."

In *Le Lievre* v. *Gould* (*n*) Esher, M. R., said: "The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be negligent as he pleases towards the whole world if he owes no duty to them. The case of *Heaven* v. *Pender* (*o*) has no bearing upon the present question. That case established that under certain circumstances one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property. That is the effect of the decision in *Heaven* v. *Pender*, but it has no application to the present case. This was pointed out by Romer, J., in *Scholes* v. *Brook* (*p*), though it was hardly necessary to do so. No doubt if *Cann* v. *Willson* (*q*) stood as good law it would cover the present case. But I do not hesitate to say that *Cann* v. *Willson* is not now law. Chitty, J., in deciding that case acted upon an erroneous proposition of law, which has been since overruled by the House of Lords in *Derry* v. *Peek* (*r*), when they restated the old law that in the absence of contract an action for negligence cannot be maintained where there is no fraud. If that were not so, then in a case in which an action is brought against directors of a company for misrepresentations contained in a prospectus

(*n*) 1893, 1 Q. B. p. 497; 62 L. J. Q. B. 353.
(*o*) 11 Q. B. D. 503; 52 L. J. Q. B. 702. (*p*) 63 L. T. 837.
(*q*) 39 C. D. 39; 57 L. J. Ch. 1034. (*r*) 14 App. Ca. 337; 58 L. J. Ch. 864.

it would never be necessary to prove that they had been guilty of fraud. But that was never so held, and there is a long list of cases which show that in such an action it is essential for the plaintiff to prove fraud. The Court of Appeal by their decision in *Peek* v. *Derry* appeared to have overthrown all those cases. They seem to have thought that there was a distinction between fraud in the Court of equity and fraud in common law. There is no such distinction. A charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any Court unless it is shown that he had a wicked mind. That is the effect of *Derry* v. *Peek* (*s*). What is meant by a wicked mind? If a man tells a wilful falsehood with the intention that it shall be acted upon by the person to whom he tells it, his mind is plainly wicked, and he must be said to be acting fraudulently. Again, a man must also be said to have a fraudulent mind if he recklessly makes a statement intending it to be acted upon and not caring whether it be true or false. I do not hesitate to say that a man who thus acts must have a wicked mind. But negligence, however great, does not of itself constitute fraud."

In the same case (*t*) Bowen, L. J., said: "There must be fraud in order to found an action of fraud. There are two reasons why there has been some confusion in the minds of some people with regard to that almost elementary proposition. The first is the fact that equity judges had to decide questions of law and fact together. An equity judge, when he had to deal with a question of fraud, discussed his reasons for coming to the conclusion that there had been fraud, and it very often happened that an equity judge decided that there was fraud in a case in which gross negligence had been proved. If the case had been tried with a jury, the judge would have pointed out to them that gross negligence might amount to evidence of fraud if it were so gross as to be incompatible with the idea of honesty, but that even gross negligence in the absence of dishonesty did not of itself amount to fraud. Cases of

(*s*) 14 App. Ca. 337; 58 L. J. Ch. 864.
(*t*) *Le Lievre* v. *Gould*, 1893, 1 Q. B. p. 500; 62 L. J. Q. B. 353.

gross negligence in which the Chancery judges decided that there had been fraud were piled up one upon another, until at last a notion came to be entertained that it was sufficient to prove gross negligence in order to establish fraud. That is not so. In all those cases fraud and dishonesty were the proper *ratio decidendi*, and gross negligence was only one of the elements which the judge had to consider in making up his mind whether the defendant's conduct had been dishonest. There was, as it seems to me, also a misapprehension on the part of those not conversant with *nisi prius* actions at common law with regard to the direction which was given to the jury. The direction always given was this: the jury were told before they found a verdict against a man charged with fraudulent misrepresentation they must be satisfied either that he had stated what was untrue, knowing that it was untrue and intending that the untruth should be acted upon, in which case—a wilful lie being a wicked thing—he was necessarily dishonest; or, at any rate, they must be satisfied that, if he did not know that the statement was untrue, he made it deliberately intending that it should be acted upon, and not knowing and not caring whether it was true or false. If a man makes a wilful statement, intending it to be acted upon, and he is reckless whether it is true or false, he has a wicked mind; but his mind is wicked not because he is negligent, but because he is dishonest in not caring about the truth of his statement. In the first case it is the knowledge of the falsehood, in the second it is the wicked indifference, which constitutes the fraud. There seems to have been some sort of an idea that when a jury was asked the second question, the expression 'not caring' had something to do with his not taking care. But that expression did not mean not taking care to find out whether the statement was true or false; it meant not caring in the man's own heart and conscience whether it was true or false—and that would be wicked indifference and recklessness."

If a man asserts that to be true within his own knowledge which he does not know to be true, or makes an assertion of fact as to which he is ignorant whether such assertion is true

or untrue, and it is, in fact, untrue, he is, in a civil point of view, as responsible as if he had asserted that which he knew to be untrue (*u*). This must mean that the persons referred to were conscious when making the assertion that they were ignorant whether it was true or untrue. For, if not, it might be said of any one who innocently makes a false statement. He must be ignorant that it is untrue, for otherwise he would not make it innocently; he must be ignorant that it is true, for by the hypothesis it is false (*x*). There is indeed fraud if, when a man thinks it highly probable a thing exists, he chooses to say that the thing exists, if it does not in fact exist (*y*).

Fraudulent intent.

An intention to deceive being a necessary element or ingredient of fraud, a false representation does not amount to a fraud at law, unless it be made with a fraudulent intent (*z*). There is a fraudulent intent if a man, with the view of misleading another into a course of action which may be injurious to him, make a representation which he knows to be false, or which he does not believe to be true (*a*). And the law justly imputes to every man an intention to produce those consequences which are the natural results of his acts (*b*). There must be an intention to deceive; it is not enough that there is a blundering carelessness, however gross, unless there is wilful recklessness, by which is meant wilfully shutting one's eyes, which is of course fraud (*c*). There is fraud in law if a man makes a representation which he knows to be false, or does not honestly believe to be true, and makes it with the view to induce another to act on the faith of it, who does so accordingly, and by so doing sustains damage, although he may have had no dishonest purpose in making

(*u*) *Reese River Mining Co.* v. *Smith*, L. R. 4 H. L. 79; *per* Lord Cairns; 39 L. J. Ch. 849; *Redgrave* v. *Hurd*, 20 C. D. 13, *per* Jessel, M. R.; 51 L. J. Ch. 113; *Lazarus* v. *Morrison*, 8 N. Z. Gaz. L. R. 717.

(*x*) *Derry* v. *Peek*, 14 App. Ca. p. 371; 58 L. J. Ch. 864.

(*y*) *Brownlie* v. *Campbell*, 5 App. Ca. 953, *per* Lord Blackburn.

(*z*) *Tackey* v. *McBain*, 1912, A. C. 186; 81 L. J. P. C. 130.

(*a*) *Thom* v. *Bigland*, 8 Ex. 725; 22 L. J. Ex. 243; 91 R. R. 730; *Arnison* v. *Smith*, 41 C. D. 348.

(*b*) *Smith* v. *Chadwick*, 9 App. Ca. 190, *per* Lord Selborne; 53 L. J. Ch. 873.

(*c*) *Angus* v. *Clifford*, 1891, 2 Ch. p. 469, *per* Lindley, L. J.; 60 L. J. Ch. 443.

the representation. It is immaterial that there may have been no intention on his part to benefit himself or to injure the person to whom the representation was made. It is enough that it be made wilfully and with the view to induce another to act upon it, who does so accordingly to his prejudice. The law imputes to him a fraudulent intent, although he may not have been in fact instigated by a morally bad motive. An intention to deceive, or a fraudulent intent in the legal acceptation of the term, depends upon the knowledge or belief respecting the falsehood of the statement, and not upon the actual dishonesty of purpose in making the statement (*d*). Where, for instance, the defendant had accepted a bill of exchange in the name of the drawee, purporting to do so by procuration, knowing that in fact he had no such authority, but fully believing that the acceptance would be sanctioned and the bill paid by the drawee, and the drawee repudiated the acceptance, it was held, though the jury negatived a fraudulent intention in fact, that the defendant had committed a fraud in law by making a representation which he knew to be untrue, and which he intended others to act upon (*e*).

Motive.

The motive as distinguished from the intention is immaterial. Although there might be no intention on the part of the defendant to obtain an advantage for himself, it would still be a fraud, for which he was responsible in law, if he made representations productive of loss to another, knowing such representations to be false. It is a fraud in law if a party makes representations which he knows to be false and injury ensues, although the motive from which the representations proceeded may not have been bad (*f*). "The motive of the person saying that which he knows not to be true to another with the intention to lead him to act on the faith of the

(*d*) *Foster* v. *Charles*, *infra*; *Wilde* v. *Gibson*, 1 H. L. C. 633, *per* Lord Campbell; 73 R. R. 191; *Smith* v. *Chadwick*, 9 App. Ca. p. 201; 53 L. J. Ch. 873; *Arnison* v. *Smith*, 41 C. D. 371.

(*e*) *Polhill* v. *Walters*, 3 B. & Ad. 114; 37 R. R. 344.

(*f*) *Foster* v. *Charles*, 7 Bing. 105; 9 L. J. C. P. 32; 31 R. R. 453; *Peek* v. *Gurney*, 13 Eq. 110; 43 L. J. Ch. 19; *Derry* v. *Peek*, 14 App. Ca. p. 374; 58 L. J. Ch. 864.

statement is immaterial. The defendants might honestly believe that the shares were a capital investment, and that they were doing the plaintiff a kindness by tricking him into buying them " (*g*).

It is not, however, always easy or possible to separate motive and intention, and where this is so, it would seem that dishonesty or a " wicked mind " is essential in order to constitute fraud (*h*).

Duty to disclose the truth on discovery that a representation was false.

Though a party making a representation may at the time believe it to be true, and have made it innocently, yet if after discovering that it was untrue he suffers the other party to continue in error and to act on the belief that no mistake has been made, this from the time of the discovery becomes in the contemplation of a Court of equity a fraudulent misrepresentation, even though not so originally (*i*). If, moreover, a man makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party who made the representation, but not to the knowledge of the party to whom the representation was made, and are so altered that the alteration may affect the course of conduct which may be pursued by the party to whom the representation was made, it is the duty of the party who has made the representation to communicate to the party to whom he made it the alteration of those circumstances. The party to whom the representation has been made will be entitled to rescind, or, if the truth is disclosed before completion, to avoid his contract (*k*). Thus where a man, for the purpose of insuring his life, signed a declaration that he was in good health, but before the policy was completed he consulted a physician, who told him that he was in

(*g*) *Smith* v. *Chadwick*, 9 App. Ca. 201, *per* Lord Blackburn; 53 L. J. Ch. 873; *Derry* v. *Peek*, 14 App. Ca. 365; 58 L. J. Ch. 864.

(*h*) *Angus* v. *Clifford*, *ante*, p. 23; *Le Lievre* v. *Gould*, *ante*, p. 26.

(*i*) *Reynell* v. *Sprye*, 1 D. M. & G. 660, 709; 21 L. J. Ch. 633; 91 R. R. 228; *Davies* v. *London & Provincial Ins. Co.*, 8 C. D. 474; 47 L. J. Ch. 511; *Redgrave* v. *Hurd*, 20 C. D. 1; 51 L. J. Ch. 113. See *Marnham* v. *Weaver*, 80 L. T. 412.

(*k*) *Traill* v. *Baring*, 4 D. J. & S. 329; 33 L. J. Ch. 521; 146 R. R. 334; *Davies* v. *London and Provinical Ins. Co.*, *supra*; *Re Scottish Petroleum Co.*, 23 C. D. 413, 438.

a dangerous state of health; it was held that the non-communication to the company of his change in health was fraudulent, and vitiated the policy (*l*). So also where an insurance company proposed to another office a re-insurance on a life, representing, as was then the fact, that they retained a large portion of the risk, but before the re-insurance was carried into effect they got rid of the whole of the risk on the life by re-insurance with a third office without communicating that fact to the other office, it was held that the insurance was obtained by fraud, and must be cancelled (*m*).

When a representation has been made in the *bonâ fide* belief that it is true, and the party who has made it afterwards finds out that it is untrue, he can no longer honestly keep silence on the subject, thereby allowing the other person to go on upon a statement which was honestly made at the time, but which he has not retracted when he has become aware that it can be no longer persevered in; that would be fraud (*n*). A man is not allowed to get a benefit from a statement which he now admits to be false. You have moral fraud where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency; no man ought to seek to take advantage of his own false statements (*o*).

The truth must be brought clearly home to the deceived. In *Arnison* v. *Smith* (*p*) it was held that directors were bound to bring their contradiction of the misrepresentation before the stock-holders in the most distinct terms, and that it was not enough to send round a circular with a statement of the truth but without any direct reference to the misrepresentation.

On the other hand, a representation that was false at the time it was made may, by a change of circumstances, become a true representation at the time it is acted on. So where a company issued a prospectus, representing that more than

(*l*) *British Equitable Ins. Co.* v. *Great Western Rly. Co.*, 38 L. J. Ch. 314. See *Scott* v. *Coulson*, 1903, 2 Ch. 249; 72 L. J. Ch. 600.

(*m*) *Traill* v. *Baring*, 4 D. J. & S. 318; 33 L. J. Ch. 521.

(*n*) *Brownlie* v. *Campbell*, 5 App. Ca. 950, *per* Lord Blackburn.

(*o*) *Redgrave* v. *Hurd*, 20 C. D. 12, *per* Jessel, M. R.; 51 L. J. Ch. 113.

(*p*) 41 C. D. 348, C. A.

half the capital had been subscribed, whereby a man was induced to apply for shares, and the representation was not true at the time when the prospectus was issued, but it had become true at the time of his application; it was held that there was no misrepresentation entitling him to relief (*q*).

Reasonable ground for believing a representation to be true.

"In my opinion," said Lord Herschell, "making a false statement through want of care falls far short of and is a very different thing from fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. At the same time I desire to say distinctly that when a false statement has been made, the question whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in *Brownlie* v. *Campbell*, a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false" (*r*).

The alleged *bonâ fide* belief in an untrue statement can be tested only by considering the grounds of such belief, and if an untrue statement is made founded upon a belief destitute of all reasonable grounds, or which the least inquiry would immediately correct, that is evidence of fraud (*s*). "There may be such an absence of reasonable ground for his belief as, in

(*q*) *Ship* v. *Crosskill*, 10 Eq. 73; 39 L. J. Ch. 550; but see *McConnel* v. *Wright*, 1903, 1 Ch. 546; 72 L. J. Ch. 347.

(*r*) *Derry* v. *Peek*, 14 App. Ca. p. 375, *per* Lord Herschell; 58 L. J. Ch. 864.

(*s*) *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 162; *Derry* v. *Peek*, 14 App. Ca. p. 369; 58 L. J. Ch. 864.

spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges" (*t*).

Reports of others.

A man must examine into the truth of representations made to him by others, before putting them forward as true, or as of his own knowledge. He cannot be allowed to escape from the effect of positive representations of matters of fact upon the ground that he relied upon representations made to him by an agent employed by him for the purpose of getting information for him. If a man makes a representation in such a manner as to import a knowledge of the facts to which the representation refers, and the representation is not materially qualified by a reference to any other person as the source of information, he cannot be heard to say, on a claim for the rescission of the transaction, if the representation proves to be untrue, that he made the representation on the authority of his agent, and honestly believed it to be true. If a company give credit to, and assume as true, the reports which are made to them by their agents, and represent as facts the matters stated in those reports, and persons are induced to enter into contracts on the foundations of the assumption of the representations which have been made to them, they cannot be heard to say, on a claim for a rescission of the transaction, if the representations prove to be untrue, that they honestly believe them to be true. If the company, instead of stating a thing as a fact, state merely that they have received reports from their agents, and that they have reason to believe the reports to be true, the case may be different (*u*).

Where a prospectus is issued on the faith of statements of fact expressly based on the report of an expert, the accuracy of the statements is *primâ facie* the basis of the contract. If the company does not intend to contract on that basis, it must dissociate itself from the report, otherwise any material inaccuracy in the statements, though based on the report,

(*t*) *Derry* v. *Peek*, 14 App. Ca. p. 369; 58 L. J. Ch. 864.

(*u*) *Smith's Case, Re Reese River Silver Mining Co.*, 2 Ch. 604, 611, 615; 36 L. J. Ch. 618; *Ross* v. *Estates Investment Co.*, 3 Eq. 138; 3 Ch. 682; 37 L. J. Ch. 873; *Henderson* v. *Lacon*, 5 Eq. 261; *Att.-Gen.* v. *Ray*, 9 Ch. 405; 43 L. J. Ch. 478.

will be a ground for rescission. In such a case calculations of future profits based on a report may be a material misrepresentation (*w*). The same principles apply to a report made by a director of the company (*x*).

But though it is immaterial in an action for rescission that a director may have believed statements made by his agents, yet where the action is for damages the case is different, and the belief may be material. If directors act within their powers, if they act with such care as is reasonably to be expected from them having regard to their knowledge and experience, and if they act honestly for the benefit of the company, they discharge their duty (*y*). The fact that if a director had made inquiries he might have discovered that he was being deceived is not in itself sufficient to prove that he did not act with reasonable care (*z*).

Misrepresentation by a man upon whom a duty is cast to know the truth.

It was formerly held that a misrepresentation was a fraud at law, although made innocently, and with an honest belief in its truth, if made by a man who ought in the due discharge of his duty to have known the truth, or who formerly knew, and ought to have remembered, the fact which negatives the representation, and be made under such circumstances or in such a way as to induce a reasonable man to believe that it was true, and was meant to be acted on, and had been acted on by him accordingly to his prejudice. If a duty was cast upon a man to know the truth, and he made a misrepresentation in such a way as to induce a reasonable man to believe that it was true, and was meant to be acted on, he could not be heard to say that he made it through mistake, or ignorance, or forgetfulness (*a*). Where accordingly the trustee of a fund represented to a proposed assignee that the assignor

(*w*) *Re Pacaya Rubber Co.*, 1914, 1 Ch. 542; 83 L. J. Ch. 432; but see and cf. *Re Brazilian Rubber Plantations*, 1911, 1 Ch. 425; 80 L. J. Ch. 221.

(*x*) *Mair* v. *Rio Grande Rubber Estates*, 1913, A. C. 853; 83 L. J. P. C. 35.

(*y*) *Lagunas Co.* v. *Lagunas Syn.*, 1899, 2 Ch. 392; 68 L. J. Ch. 699.

(*z*) *Dovey* v. *Cory*, 1901, A. C. 477; 70 L. J. Ch. 753.

(*a*) *Moens* v. *Heyworth*, 10 M. & W. 147; 62 R. R. 554; *Pulsford* v. *Richards*, 17 Beav. 95; 22 L. J. Ch. 559; *Price* v. *Macaulay*, 2 D. M. & G. 345; 95 R. R. 129; *Hutton* v. *Rossiter*, 7 D. M. & G. 9 24 L. J. Ch. 106; 109 R. R. 1; *Rawlins* v. *Wickham*, 3 D. & J. 304; 28 L. J. Ch. 188; 121 R. R. 134; *Swan* v. *North British Australasian Co.*, 2 H. & C. 183; 31 L. J. Ex. 425; 133 R. R. 639; *Brownlie* v. *Campbell*, 5 App. Ca. 936.

was entitled to the fund and could make the assignment, forgetting that there was a prior incumbrance upon it, of which he had received notice, he was held bound to make good the representation (*b*). So also where a man wrote a letter stating that he was willing to grant a lease, knowing that it was to be shown to a person proposing to lend money to the lessee upon the security of the lease, and it appeared that he had before granted a concurrent lease of the same property which he alleged that he had forgotten, he was held responsible for his statement and for the repayment of the loan made on the faith of it (*c*).

All this, however, is supposed to have been altered by *Derry* v. *Peek*, and is said to be no longer law (*d*). *Burrowes* v. *Lock*, it is said, can now only be supported on the ground of estoppel, and *Slim* v. *Croucher* cannot be supported on the ground either of warranty or of estoppel, and is therefore inconsistent with and overruled by *Derry* v. *Peek*. The result is that a person may make a serious representation which he knew or ought to have known was false to a person to whom he owed a duty, and escape liability by simply saying that he forgot. This "unsound" principle and unfortunate effect of *Derry* v. *Peek* is so opposed to equity and common sense that it ought not to be adopted, unless it is clear that the House of Lords intended to overrule the cases in question, or unless that is the necessary and inevitable consequence of their decision. Let us see how far this is so. In the first place, was there any intention to overrule the cases in question? There is, so far as we are aware, nowhere to be found any indication that the House of Lords ever had any such intention. On the contrary, *Slim* v. *Croucher* and similar cases have been several times referred to as belonging to a different category, but not as being bad law. In *Peek* v. *Gurney* (*e*), *Brownlie* v.

(*b*) *Burrowes* v. *Lock*, 10 Ves. 470; 8 R. R. 856.

(*c*) *Slim* v. *Croucher*, 1 D. F. & J. 518; 29 L. J. Ch. 273; 125 R. R. 529.

(*d*) *Low* v. *Bouverie*, 1891, 3 Ch. 82; 60 L. J. Ch. 594; *Nocton* v. *Ashburton*, *post*, p. 38; but see *Pritty* v. *Child*, 71 L. J. K. B. 512, where a reckless statement was held to give rise to an action of tort; see *ante*, pp. 9, 19.

(*e*) L. R. 6 H. L. p. 390; 43 L. J. Ch. 19.

Campbell (*f*), and *Derry* v. *Peek* (*g*), they are referred to sometimes with approval, and always without disapproval. It may, therefore, we think, be taken that there was no such intention.

Now let us see whether *Slim* v. *Croucher* and similar cases are overruled as a necessary consequence of the decision in *Derry* v. *Peek*. It has, we think, been too readily assumed that *Slim* v. *Croucher* cannot be supported on the ground of fraud. It is true that in that case Lord Campbell said there was no "moral fraud," but this may be taken to mean nothing more than that there was no direct evidence of fraud. Gross negligence there was, and gross negligence, as we have seen, may amount to fraud; and that, it may well be, was the ground of the decision. In fact, Lord Campbell's explanation of what is a false statement seems almost conclusive on the point. Referring to Lord Eldon's remark that a person must make a representation good, "if he knows it to be false," he explains those words to mean, "if he makes a representation as to what he ought to have known and did at one time know, although he *alleges* that at the particular moment that he made the representation he had forgotten it" (*h*). Further, Lord Campbell cites with approval the following passage from the judgment in *Burrowes* v. *Lock*:—"What can the plaintiff do to make out a case of this kind but show (1) that the fact as represented is false; (2) that the person making the representation had a knowledge of a fact contrary to it? The plaintiff cannot dive into the recesses of his heart so as to know whether he did or did not recollect the fact, and it is no excuse to say he did not recollect it" (*i*). As was quaintly said by Brian, C.J., ages ago, "the thought of a man is not triable, for the devil has not knowledge of men's thoughts" (*j*). Again, the remark of Knight-Bruce, L. J., that "a country whose administration of justice did not afford redress in a case

(*f*) 5 App. Ca. 935. (*g*) 14 App. Ca. p. 360; 48 L. J. Ch. 864.

(*h*) 1 D. F. & J. p. 525.

(*i*) 10 Ves. p. 475. This is almost identical with the dictum in *Derry* v. *Peek*, p. 369, that there may be such an absence of reasonable ground for belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges. (*j*) See 1901, A. C. at p. 247.

of this description would not be in a state of civilization," could hardly be applicable to anything short of fraud. Again, Lord Selborne (*k*), referring to *Slim* v. *Croucher*, said, "There the whole value of the intended security depended upon the answer to the question to be given by a person within whose knowledge the fact ought to have been, and in point of fact at one time or another necessarily was. If his memory had failed, still it was the case of a person who once had certain knowledge of the fact and who could have no right to assert one way or the other a fact as of his own knowledge upon such a subject unless he possessed that knowledge; and if he did assert it he was bound to make the assertion good. The mere fact of forgetfulness by a man who has known a certain fact, who is asked whether that fact has happened or not, and says positively that it did or did not, cannot possibly be an excuse; because if he had spoken the simple truth he would have said, 'I do not recollect whether it is so or not.' If the fact be that he does not recollect, then by saying that the fact was so or by saying that the fact was not so, he takes upon himself the responsibility of a positive statement upon the faith of which he knows that the other man is going to deal for valuable consideration." Lastly, Lord Chelmsford in *Western Bank of Scotland* v. *Addie* (*l*), said, "The alleged *bonâ fide* belief in an untrue statement can be tested only by considering the grounds of such belief, and if an untrue statement is made, founded upon a belief destitute of all reasonable grounds, or which the least inquiry would immediately correct, it may fairly be characterized as misrepresentation and deceit." That is directly applicable to *Slim* v. *Croucher*, and if we substitute the words "may be evidence of" for the words "may fairly be characterized as" it is also perfectly consistent with *Derry* v. *Peek*. Indeed, according to Lord Herschell himself (*m*), the only way to test belief is to "apply the standard of conduct which our own experience of the ways of men has enabled us to form, by asking ourselves whether a reasonable man would be likely under the circum-

(*k*) *Brownlie* v. *Campbell*, 5 App. Ca. p. 936.
(*l*) L. R. 1 H. L. Sc. 145. (*m*) *Derry* v. *Peek*, 14 App. Ca. p. 380.

stances so to believe." Surely this is the same thing as asking whether a reasonable man ought to have so believed.

The true and only sound principle to be derived from the cases represented by *Slim* v. *Croucher* is this: that a representation is fraudulent not only when the person making it knows it to be false, but also when, as Jessel, M. R., pointed out (*n*), he ought to have known, or must be taken to have known, that it was false. This is a sound and intelligible principle, and is, moreover, not inconsistent with *Derry* v. *Peek*. A false statement which a person ought to have known was false, and which he must therefore be taken to have known was false, cannot be said to be *honestly* believed in. "A false statement," said Lord Herschell (*o*), "made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud." "The test is," said his Lordship (*p*), "whether a reasonable man would be likely, under the circumstances, so to believe." Applying this test to *Slim* v. *Croucher*, is it possible to conceive that any reasonable man could forget that he had granted a lease, especially when asked to grant another lease of the same property, and knowing that money was going to be lent on the security of the second lease? If the true principle to be deduced from *Slim* v. *Croucher* and that class of cases is as we have suggested it to be, then it would seem to cover and harmonize most if not all of the cases, it would remove most if not all of the difficulties, and avoid those psychological questions as to the state of a man's mind which cause so much confusion.

Nocton v. *Ashburton.*

Since the above lines were written the case of *Nocton* v. *Ashburton* (*q*) has been decided in which some interesting observations were made by Lord Haldane on *Derry* v. *Peek*, though they do not in any way meet the objections above stated as to the supposed effects of the judgments in the latter case. He says, "There appears to be an impression that the necessity which recent authorities have established of proving moral fraud in order to succeed in an action of deceit has narrowed the scope of this remedy." That, however, is not

(*n*) 20 C. D. 27, 44, 67.
(*p*) *Ibid.* p. 380.
(*o*) *Derry* v. *Peek*, 14 App. Ca. 337.
(*q*) 1914, A. C. 932.

the question. The question is not whether *Derry* v. *Peek* has narrowed the scope of an action for deceit, but whether it has narrowed the remedy for fraud generally. No one doubts that a *mens rea* is essential in an action of deceit. But what many people do doubt is the soundness of the view which can find nothing fraudulent in such cases as *Slim* v. *Croucher*. There is nothing in *Nocton* v. *Ashburton* to remove that doubt, and the law remains in the same unsatisfactory state as it did before.

Misrepresentation of authority.

The rule established in *Collen* v. *Wright* (*r*), as stated by the Lord Chancellor in *Salvesen* v. *Rederi Aktiebolaget Nordstjernan* (*s*), is that a person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent is answerable to the person who so contracts for any damage which he may sustain by reason of the assertion of authority being untrue. The rule is not an exception to the rule that an innocent representation gives rise to no cause of action. It is a separate and independent rule of law, and as such it is not confined to the bare case where the transaction is simply one of contract, but it extends to every transaction of business into which a third party is induced to enter by a representation that the person with whom he is doing business has the authority of some other person (*t*). It is immaterial whether the supposed agent knew of the defect of his authority or not (*u*). The proposition in *Smout* v. *Ilbery* that there must be some wrong or omission on the part of the agent in order to make him personally liable must be taken to be overruled (*x*). The question is not as to his honesty or *bonâ fides*; his liability arises from an implied undertaking that the authority which he professes to have does in fact exist (*y*).

(*r*) 8 E. & B. 647; 27 L. J. Q. B. 215; 110 R. R. 611.

(*s*) 1905, A. C. 302, 309; 74 L. J. P. C. 96.

(*t*) *Starkey* v. *Bank of England*, 1903, A. C. 114, 118; 72 L. J. Ch. 402; approving *Dickson* v. *Reuter's Telegram Co.*, 3 C. P. D. 1, 7; 47 L. J. C. P. 1.

(*u*) See *Dickson* v. *Reuter's Telegram Co.*, *supra*.

(*x*) *Halbot* v. *Lens*, 1901, 1 Ch. 344; 70 L. J. Ch. 125.

(*y*) *Yonge* v. *Toynbee*, 1910, 1 K. B. 216, 226; 79 L. J. K. B. 208; overruling *Salton* v. *New Beeston Co.*, 1900, 1 Ch. 43; 69 L. J. Ch. 20.

The rule only applies where the existence of the authority is relied upon, and therefore does not apply if the person purporting to act as agent expressly disclaims any present authority (*z*). The rule does not apply to every case where a person misrepresents a fact relating to a third person, but only where he represents that he is clothed with an authority or fills a particular character (*a*).

Distinction between a warranty and a representation.

The line between fraud and warranty is often very narrow, and the same observation is true of the line between warranty and estoppel. Narrow, however, as the line often is, the three words denote fundamentally different legal conceptions which must not be confounded (*b*). "If you choose to say, and say without inquiry, 'I warrant that,' that is a contract. If you say, 'I know it,' and if you say that in order to save the trouble of inquiring, that is a false representation—you are saying what is false to induce them to act upon it" (*c*).

A representation is a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstance relating to it (*d*). A representation is not a part of the written instrument, but is collateral to it, and entirely independent of it (*e*). The insertion of the representation in the instrument does not alter its nature. Though a representation is sometimes contained in a written instrument, it is not an integral part of the contract, and consequently the contract is not broken, though the representation proves to be untrue (*f*). In order that a statement or representation may amount to a warranty, it must appear that it was intended to form a substantive part of the contract (*g*). A warranty is an express or implied statement of something which the party making it undertakes shall be a substantive part of the contract, and though part of the con-

(*z*) *Halbot* v. *Lens*, 1901, 1 Ch. 344; 70 L. J. Ch. 125.

(*a*) *Salvesen* v. *Rederi, &c.*, 1905, A. C. 302, 311; 74 L. J. P. C. 96.

(*b*) *Low* v. *Bouverie*, 1891, 3 Ch. p. 102; 60 L. J. P. C. 594.

(*c*) *Brownlie* v. *Campbell*, 5 App. Ca. p. 952, *per* Lord Blackburn.

(*d*) *Behn* v. *Burness*, 3 B. & S. 753; 32 L. J. Q. B. 204.

(*e*) *Goram* v. *Sweeting*, 2 Wms. Saund. 201. See *Kain* v. *Old*, 2 B. & C. 634, *per* Lord Tenterden; 26 R. R. 497; *Cornfoot* v. *Fowke*, 6 M. & W. 370, *per* Lord Cranworth; 55 R. R. 655.

(*f*) *Behn* v. *Burness*, 3 B. & S. 753; 32 L. J. Q. B. 204.

(*g*) *Ibid.*

tract, yet collateral to the express object of it (*h*). For instance, a contract for the sale of a house with windows overlooking land of a third person does not imply any warranty or representation that such windows have a right to access of light over such land (*i*). So the words "shipped in good order and condition" in a bill of lading do not import a warranty though they amount to a representation (*k*). A representation of intention does not amount to a warranty (*l*). If a representation or statement is not of the essence of the contract, there is no warranty (*m*). The circumstance of a man selling a particular thing by its proper description is not a warranty, but a non-compliance with a contract which he has engaged to fulfil (*n*). To constitute a warranty, it is not necessary that the word "warrant" should occur in the bargain (*o*); and, on the other hand, the use of the word "warrant" or "warranty" is not conclusive, the question being what is the true intention of the contract as a whole. A stipulation may be a condition, though called a "warranty" (*p*). Any affirmance or representation made at the time of sale is a warranty if it appears to have been so intended and understood by the parties (*q*); and in determining whether it was so intended a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion on a matter of which

(*h*) *Chanter* v. *Hopkins*, 4 M. & W. 404, *per* Lord Abinger; 51 R. R. 650; *Azemar* v. *Casella*, L. R. 2 C. P. p. 679; 36 L. J. C. P. 263; *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215; 70 L. J. K. B. 533.

(*i*) *Greenhalgh* v. *Brindley*, 1901, 2 Ch. 324; 70 L. J. Ch. 740.

(*k*) *Compania Naviera Vascongada* v. *Churchill*, 1906, 1 K. B. 237; 75 L. J. K. B. 94.

(*l*) *Benham* v. *United Guarantee, &c., Ass. Co.*, 7 Exch. 744; 21 L. J. Ex. 317.

(*m*) *Taylor* v. *Bullen*, 5 Exch. 779; 20 L. J. Ex. 21; 82 R. R. 875; *Vernede* v. Weber, 1 H. & N. 311; 25 L. J. Ex. 326; 108 R. R. 587.

(*n*) *Chanter* v. *Hopkins*, 4 M. & W. 404, *per* Lord Abinger; 51 R. R. 650; *Stucley* v. *Baily*, 1 H. & C. 415, *per* Martin, B., 31 L. J. Ex. 483; 130 R. R. 588.

(*o*) *Hopkins* v. *Tanqueray*, 15 C. B. 137, *per* Jervis, C. J., 23 L. J. C. P. 162; *Stucley* v. *Baily*, 1 H. & C. 417; 31 L. J. Ex. 483.

(*p*) *Barnard* v. *Faber*, 1893, 1 Q. B. 340; 62 L. J. Q. B. 159; Sale of Goods Act, 1893, s. 11.

(*q*) *Pasley* v. *Freeman*, 3 T. R. 57, *per* Buller, J.; 1 R. R. 634; *Stucley* v. *Bailey*, 1 H. & C. 405; 31 L. J. Ex. 483.

the vendor has no special knowledge, and on which the buyer may be expected to exercise his own judgment (*r*). Nor is it necessary that the statement or representation should be simultaneous with the close of the bargain. If it be part of the contract, it matters not at what period of the negotiation it was made (*s*). If a statement amounts to a warranty, the party making it is bound by his warranty. The fact that he may have made the statement in honest mistake, or that the statement may be not in a material matter, cannot be taken into consideration (*t*).

The term "warranty" is used in two senses. It is either a condition on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract altogether, and so be released from performing his part of it, or it is an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for compensation in damages. The question whether a statement, though intended to be a substantive part of the contract, is a condition precedent, or an independent agreement, is sometimes raised in the construction of charterparties with reference to stipulations that some future thing shall be done or shall happen, and has given rise to very nice distinctions. Thus, a statement that a vessel is to sail, or be made ready to receive a cargo, on or before a given day, has been held to be a condition, while a stipulation that she shall sail with all convenient speed, or within a reasonable time, has been held to be only an agreement (*u*).

An affirmation made upon the sale or letting of real property as to the state of the property may amount to a warranty if the like conditions exist as in the case of a warranty on the sale of a chattel. Where, therefore, the lessor of a house

(*r*) *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215; 70 L. J. K. B. 533.

(*s*) *Hopkins* v. *Tanqueray*, 15 C. B. 137, *per* Jervis, C. J., 23 L. J. C. P. 162; 100 R. R. 271.

(*t*) *Attwood* v. *Small*, 6 Cl. & Fin. 232; 49 R. R. 115; *Anderson* v. *Fitzgerald*, 4 H. L. C. 504, *per* Lord Cranworth; 94 R. R. 202; *Bannerman* v. *White*, 10 C. B. N. S. 844; 31 L. J. C. P. 28; *Behn* v *Burness*, 3 B. & S. 754, 759; 32 L. J. Q. B. 204; *Head* v. *Tattersall*, L. R. 7 Ex. 11.

(*u*) *Behn* v. *Burness*, 3 B. & S. 754; 32 L. J. Q. B. 204.

represented that the drains were in good order, the representation was held to be a warranty collateral to the lease, and he tenant could sue for a breach of it (*x*).

Affirmations in policies of insurance are in the nature of warranties. In the case of policies of marine insurance, and policies against fire, a warranty is also a condition. It is an implied condition of the validity of the policy that the party proposing the insurance should make a true and complete representation respecting the property which he seeks to insure. Such policies are therefore vitiated by any material misrepresentations, even though not fraudulently made (*y*). In the case of life assurances, however, it is not an implied condition of the validity of the policy that the party proposing the insurance should make a true and complete representation respecting the life proposed for insurance. If there be no express warranty or condition on the part of the insured, a policy of life assurance is not vitiated by false representations, unless there be fraud (*z*). If there be a proviso in a policy of assurance, that any untrue statements shall avoid the policy, the policy is vitiated by any statement false in fact, whether material or not (*a*).

The same principle applies to the purchase of Government annuities on lives in which the information required by the Act forms the basis of the grant of the annuity, and accordingly an annuity applied for and granted under a misrepresentation, though unintentional, in the information required as to the age of a person was set aside after his death (*b*).

In order that a misrepresentation may support an action, it is essential that it should be material in its nature, that it

Misrepresentation must be material and a determining ground of the transaction.

(*x*) *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215; 70 L. J. K. B. 533; but see *Greswolde Williams* v. *Barneby*, 49 W. R. 203.

(*y*) *Bannerman* v. *White*, 10 C. B. N. S. 860; 31 L. J. C. P. 28; 128 R. R. 953; *Ionides* v. *Pacific Ins. Co.*, L. R. 6 Q. B. 674; 7 Q. B. 520; 41 L. J. Q. B. 190; *Rivaz* v. *Gerussi*, 6 Q. B. D. 222; 50 L. J. Q. B. 176; *Hambrough* v. *Mutual, &c.*, 1895, W. N. 18.

(*z*) *Wheelton* v. *Hardisty*, 8 E. & B. 232; 27 L. J. Q. B. 241; 112 R. R. 535; *Hemmings* v. *Sceptre Life Ass.*, 1905, 1 Ch. 365; 74 L. J. Ch. 231.

(*a*) *Anderson* v. *Fitzgerald*, 4 H. L. C. 484; 94 R. R. 202; *Macdonald* v. *Law Union Ins. Co.*, L. R. 9 Q. B. 328; 43 L. J. Q. B. 131; *London Ass. Co.* v. *Mansel*, 11 C. D. 367; 48 L. J. Ch. 331.

(*b*) *Att.-Gen.* v. *Ray*, 9 Ch. 397; 43 L. J. Ch. 478.

should be intended to be acted upon and should be a determining ground of the transaction (*c*). The misrepresentation must, in the language of the Roman law, be *dolus dans locum contractui* (*d*). There must be the assertion of a fact on which the person entering into the transaction relied, and in the absence of which it is reasonable to infer that he would not have entered into it at all (*e*), or at least not on the same terms (*f*). Both facts must concur; there must be false and material representations, and the party seeking relief should have acted upon the faith and credit of such representations (*g*). To say that statements are false is one thing; to say that a man was deceived by them to enter into a transaction is another thing (*h*). A misrepresentation to be material must be one necessarily influencing and inducing the transaction (*i*), and affecting and going to its very essence and substance (*k*). Misrepresentations which are of such a nature as, if true, to add substantially to the value of property (*l*), or are calculated

(*c*) *Jennings* v. *Broughton*, 5 D. M. & G. 136; 23 L. J. Ch. 999; *Smith* v. *Chadwick*, 9 App. Ca. p. 190; 53 L. J. Ch. 873; *Arnison* v. *Smith*, 41 C. D. 368; *Angus* v. *Clifford*, 1891, 2 Ch. p. 479; 60 L. J. Ch. 443.

(*d*) Fraud is divided by the civiliana into *dolus dans locum contractui* and *dolus incidens*, or accidental fraud. The former is that which haa been the cauae or determining motive of the tranaaction; that, in other worda, without which the party defrauded would not have contracted. Incidental or accidental fraud is that by which a man, otherwiae intending to contract, is deceived aa to aome accessory or accident of the contract; for example, as to the quality of the object of sale or ita price. Duranton, vol. 10, liv. 3, a. 169; Toull. Dr. Civ., liv. 3, tit. 3, c. 2, a. 5, art. 90; Bedarride, sur Dol. p. 45. Thia distinction does not obtain in the common law, and is not admitted in equity.

(*e*) *Flight* v. *Booth*, 1 Bing. N. C. 370; 41 R. R. 599; *Pulsford* v. *Richards*, 17 Beav. 87, 96; 22 L. J. Ch. 559; 99 R. R. 48; *Eaglesfield* v. *Londonderry*, 4 C. D. 709; *Jacobs* v. *Revell*, 1900, 2 Ch. 858; 69 L. J. Ch. 879; *Puckett and Smith*, 1902, 2 Ch. 258; 71 L. J. Ch. 666; *Lee* v. *Rayson*, 1917, 1 Ch. 613; 86 L. J. Ch. 405.

(*f*) 6 M. & W. 378, *per* Lord Abinger.

(*g*) *Cargill* v. *Bower;* 10 C. D. 517; 47 L. J. Ch. 649; *Smith* v. *Chadwick*, 9 App. Ca. p. 190; 53 L. J. Ch. 873.

(*h*) *Jennings* v. *Broughton*, 5 D. M. & G. 126; 23 L. J. Ch. 999.

(*i*) *Re Reese River Silver Mining Co., Smith's Case*, 2 Ch. 611; 36 L. J. Ch. 618.

(*k*) *Hallows* v. *Fernie*, 3 Eq. 536; 3 Ch. 467; 36 L. J. Ch. 267.

(*l*) *Torrance* v. *Bolton*, 8 Ch. 118; 42 L. J. Ch. 177; cf. *Blaiberg* v. *Keeves*, 1906, 2 Ch. 175; 75 L. J. Ch. 464.

to increase substantially its apparent value (*m*), are material. A misrepresentation goes for nothing unless it is a proximate and immediate cause of the transaction (*n*). It is not enough that it may have remotely or indirectly contributed to the transaction or may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place. The transaction must be a necessary and not merely an indirect result of the representation (*o*). It is not, however, necessary that the representation should have been the sole cause of the transaction. It is enough that it may have constituted a material inducement. If any one of several statements, all in their nature more or less capable of leading the party to whom they are addressed to adopt a particular line of conduct, be untrue, the whole transaction is considered as having been fraudulently obtained, for it is impossible to say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed (*p*). It is not essential that some specific allegation of fact should be proved to be false. If a number of statements give a false impression, the prospectus is none the less false, although it may be difficult to show that any specific statement is untrue (*q*). If the plaintiff's mind was disturbed by the misstatements of the defendant and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference (*r*). If the statement would tend to induce him to enter into the contract, or would be part of the inducement, the inference is that he acted on the inducement, unless he knew the facts or avowedly

(*m*) *Small* v. *Attwood*, You. 461; *Dimmock* v. *Hallett*, 2 Ch. 27; 36 L. J. Ch. 146.

(*n*) *New Brunswick Rly. Co.* v. *Conybeare*, 9 H. L. C. 711; 31 L. J. Ch. 297; 131 R. R. 415; *Barrett's Case*, 3 D. J. & S. 30; *Peek* v. *Gurney*, L. R. 6 H. L. 412; 43 L. J. Ch. 19.

(*o*) *Burns* v. *Pennell*, 2 H. L. C. 497, 531; 81 R. R. 244; *Nicol's Case*, 3 D. & J. 387, 439; 28 L. J. Ch. 257; 121 R. R. 169; *New Brunswick Rly. Co.* v. *Conybeare*, 9 H. L. C. 711; *supra*; *Greenhalgh* v. *Brindley*, 1901, 2 Ch. 324; 70 L. J. Ch. 740.

(*p*) *Smith* v. *Kay*, 7 H. L. C. 750; 775; 30 L. J. Ch. 35; 115 R. R. 367.

(*q*) *Aaron's Reefs* v. *Twiss*, 1896, A. C. 273, 281; 65 L. J. P. C. 54.

(*r*) *Edgington* v. *Fitzmaurice*, 29 C. D. 481, *per* Bowen, L. J.

did not rely on the statement (*s*). A man who has made a false representation in respect of material matter must, in order to be able to rely on the defence that the transaction was not entered into on the faith of the representation, be able to prove to demonstration that it was relied on (*t*). It is not enough for him to say that there were other representations by which the transaction may have been induced (*u*); nor can he be heard to say what the other party would have done, had no misrepresentation been made (*x*). "If it was a materially influencing motive, then, unless it had been present, the conduct of the plaintiff might have been different—which is sufficient" (*y*). The test, therefore, of material inducement is not whether the plaintiff's action *would*, but whether it *might*, have been different if the misrepresentation had not been made.

Words, moreover, it must be remembered, are to be construed in courts of justice in the sense in which the person using them wished and believed that they should be understood by the person to whom they were addressed (*z*), and representations must be construed with reference to the circumstances present to the minds of all the parties when they were made (*a*).

The materiality of a representation depends on the circumstances. The following cases may be cited as examples:—

Upon an insurance office effecting a re-insurance of a risk with another office, the representation that they retained themselves a substantial share in the risk was held to be material,

(*s*) *Arnison* v. *Smith*, 41 C. D. p. 369.

(*t*) *Rawlings* v. *Wickham*, 3 D. & J. 394; 28 L. J. Ch. 188; 121 R. R. 134; *Smith* v. *Kay*, 7 H. L. C. 750, 775; 30 L. J. Ch. 35; *Kisch* v. *Central Venezuela Rly. Co.*, 3 D. J. & S. 122; 36 L. J. Ch. 849; 142 R. R. 39; *Arnison* v. *Smith*, 41 C. D. p. 369.

(*u*) *Nicol's Case*, 3 D. & J. 387, 439; 28 L. J. Ch. 257; 121 R. R. 169; *Edgington* v. *Fitzmaurice*, 29 C. D. 459.

(*x*) *Reynell* v. *Sprye*, 1 D. M. & G. 660; 21 L. J. Ch. 633; 91 R. R. 228; *Smith* v. *Kay*, 7 H. L. C. 750, 770; 30 L. J. Ch. 35; 115 R. R. 367; *Traill* v. *Baring*, 4 D. J. & S. 330; 33 L. J. Ch. 521; 146 R. R. 334.

(*y*) *Peek* v. *Derry*, 37 C. D. 574, 584.

(*z*) *Pigott* v. *Stratton*, 1 D. F. & J. 50, *per* Lord Campbell; 29 L. J. Ch. 1; 125 R. R. 336. (*a*) *Dicconson* v. *Talbot*, 6 Ch. 40, *per* Mellish, L. J.

and the non-disclosure that they had in fact got rid of all risk vitiated the re-insurance (*b*). Where defendants raised money on debentures for the purpose of paying off pressing liabilities, but stated in their prospectus that the money was for the purpose of developing their trade, the statement was held to be material, because "a man who lends money reasonably wishes to know for what purpose it is borrowed, and he is more willing to advance it if he knows that it is not wanted to pay off liabilities already incurred" (*c*). So also a representation respecting a person's credit, that he was possessed of a certain amount of capital, without stating that it was borrowed capital and not his own, was held to be a material misrepresentation to a person thereby induced to trust him (*d*). So also on a sale of goods for ready money, if the purchaser gives a cheque which he knows he has no funds to meet, this amounts to a misrepresentation of a material fact, which vitiates the sale, and entitles the seller to rescind the contract (*e*). Where, on the other hand, upon the negotiation for a loan of money, the lenders represented that it was lent by a joint-stock loan company, but it was in fact lent by themselves only, who called themselves the company, which did not otherwise exist, the misrepresentation was held to be immaterial, the real inducement to the borrower being the advance of the money (*f*). So also where a buyer, in negotiating a purchase, alleged falsely as the reason for the limited amount of his offer that his partners would not consent to his giving more, it was held to be immaterial to the validity of the contract (*g*). But where one Isaac Gordon, an extortionate money-lender, induced the defendant to borrow from him by fraudulently concealing his identity and representing that the name of the lender was Addison, it was held that the misrepresentation was material (*h*).

(*b*) *Traill* v. *Baring*, 4 D. J. & S. 318; 33 L. J. Ch. 521.
(*c*) *Edgington* v. *Fitzmaurice*, 29 C. D. p. 480.
(*d*) *Corbett* v. *Brown*, 8 Bing. 33; 1 L. J. C. P. 13; 34 R. R. 615.
(*e*) *Loughnan* v. *Barry*, L. R. 6 C. L. 457.
(*f*) *Green* v. *Gosden*, 3 M. & G. 446; 11 L. J. C. P. 4.
(*g*) *Vernon* v. *Keys*, 12 East, 632; 11 R. R. 499.
(*h*) *Gordon* v. *Street*, 1899, 2 Q. B. 641; 69 L. J. Q. B. 45; see *Page* v. *Clark*, 31 O. L. R. 94.

Reliance on the representation.

A misrepresentation to be of any avail whatever must enure to the date of the transaction in question (*i*). If a man to whom a representation has been made knows at the time or discovers before entering into a transaction that the representation is false (*k*), or resorts to other means of knowledge open to him, and chooses to judge for himself in the matter, he cannot avail himself of the fact that there has been misrepresentation, or say that he has acted on the faith of the representation (*l*). Where accordingly an iron company had sent some of their directors for the express purpose of verifying the representations of a man respecting his works, who expressed their satisfaction with the proofs produced it was held that the company had, by choosing to judge for themselves in the matter, precluded themselves from being able to say that they had been deceived by the representations of the vendor, and that it was their own fault if they had not availed themselves of all the knowledge or means of knowledge open to them (*m*). So also where a man had, before purchasing shares in a mine, visited the mine and examined into its condition, it was held that he had not relied on representations made to him by the vendor, and was not entitled to avoid the contract on the ground that they were false, the alleged misstatements being such as he was competent to detect (*n*).

The allegation of misrepresentation may be effectually met by proof that the party complaining was well aware and cognizant of the real facts of the case (*o*); but the proof of knowledge must be clear and conclusive. Misrepresentation is not to be got rid of by constructive notice (*p*). A man

(*i*) *Irvine* v. *Kirkpatrick*, 7 Bell, Sc. Ap. 186.

(*k*) *Ibid.*; *Vigers* v. *Pike*, 8 Cl. & Fin. 650; 54 R. R. 114; *Brooke* v. *Routhwaite*, 5 Ha. 298, 306; 15 L. J. Ch. 332; 71 R. R. 115; *Nelson* v. *Stocker*, 4 D. & J. 465; 28 L. J. Ch. 760; 124 R. R. 339.

(*l*) *Lysney* v. *Selby*, 2 Lord Raymond, 1118, 1120; *Smith* v. *Chadwick*, 20 C. D. p. 75; 53 L. J. Ch. 873; *Arnison* v. *Smith*, 41 C. D. p. 369. See *Pearson* v. *Dublin Corp.*, 1907, A. C. 351; 77 L. J. P. C. 1.

(*m*) *Attwood* v. *Small*, 6 Cl. & Fin. 232; 49 R. R. 115. See *Redgrave* v. *Hurd*, 20 C. D. 16; 51 L. J. Ch. 113.

(*n*) *Jennings* v. *Broughton*, 17 Beav. 234, 5 D. M. & G. 126; 23 L. J. Ch. 999; 104 R. R. 58.

(*o*) See *Eaglesfield* v. *Londonderry*, 4 C. D. 709.

(*p*) *Jones* v. *Rimmer*, 14 C. D. 590; *per* Jessel, M. R.; 49 L. J. Ch. 775.

who by misrepresentation or concealment has misled another cannot be heard to say that he might have known the truth by proper inquiry, but must, in order to be able to rely on the defence that he knew the representation to be untrue, be able to establish the fact upon incontestable evidence and beyond the possibility of a doubt. "If a person," said Jessel, M.R., in *Redgrave* v. *Hurd* (*q*), "makes a material representation to another to induce him to enter into a contract, and the other enters into that contract, it is not sufficient to say that the party to whom the representation was made does not prove that he entered into the contract relying upon the representation. If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it; and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms or showed clearly by his conduct that he did not rely on the representation." The inference, however, does not seem to be one of law, but, as Lord Blackburn said in *Smith* v. *Chadwick* (*r*), "a fair inference of fact."

If the subject-matter is not property in this country, where probably independent inquiry would be made and inspection might take place, but property at such a distance that any person purchasing it is obliged to rely on the statement made with respect to it, the argument is the stronger that reliance has been placed on the representations (*s*). If a definite or particular statement be made as to the contents of property, and the statement be untrue, it is not enough that the party to whom the representation was made may have been acquainted with the property. A very intimate knowledge of the premises will not necessarily imply knowledge of their exact contents, while the particularity of the statement

(*q*) 20 C. D. 21; 51 L. J. Ch. 113.
(*r*) 9 App. Ca. 196; 53 L. J. Ch. 873.
(*s*) *Smith's Case, Re Reese River Silver Mining Co.*, 2 Ch. 614; 36 L. J. Ch. 618.

will naturally convey the notion of exact admeasurement (*t*). The fact that he had the means of knowing or of obtaining information of the truth which he did not use is not sufficient (*u*). It is not indeed enough that he may have been wanting in caution. A man who has made false representations, by which he has induced another to enter into a transaction, cannot turn round on the person whom he has defrauded and say that he ought to have been more prudent and ought not to have concluded the representations to be true in the sense which the language used naturally and fairly imports (*x*). Nor is it enough that there may be circumstances in the case which, in the absence of the representation, might have been sufficient to put him on inquiry. The doctrine of notice has no application where a distinct representation has been made (*y*). Equal means of knowledge is immaterial where there is an express representation, for the plaintiff is thereby put off his guard (*z*). The party who has made the representation cannot be allowed to say that he told him where further information was to be got, or recommended him to take advice, and even put into his hands the means of discovering the truth. No man can complain that another has relied too implicitly on the truth of what he himself stated (*a*). If a vendor has stated in his proposals the value of the property, he cannot, except under special circumstances, complain that the purchaser has taken the value of the property to be such as he

(*t*) *Hill* v. *Buckley*, 17 Ves. 394; 11 R. R. 109. See *King* v. *Wilson*, 6 Beav. 124; 60 R. R. 32.

(*u*) *Lysney* v. *Selby*, 2 Lord Raym. 1118, 1120; *Dobell* v. *Stevens*, 3 B. & C. 623; 3 L. J. K. B. 89; *Rawlins* v. *Wickham*, 3 D. & J. 319; 28 L. J. Ch. 188; 121 R. R. 134; *Aberaman Iron Works* v. *Wickens*, 4 Ch. 101.

(*x*) *Redgrave* v. *Hurd*, 20 C. D. 1; 51 L. J. Ch. 113.

(*y*) *Pope* v. *Garland*, 4 Y. & C. 394; 10 L. J. Ex. 13; 54 R. R. 492; *Wilson* v. *Short*, 6 Ha. 366, 377; 17 L. J. Ch. 289; 77 R. R. 139; *Drysdale* v. *Mace*, 2 Sm. & G. 225, 230, 5 D. M. & G. 103; 23 L. J. Ch. 518; 97 R. R. 184; *Cox* v. *Middleton*, 2 Drew. 209; 23 L. J. Ch. 618; 100 R. R. 90; *Rawlins* v. *Wickham*, 3 D. & J. 318; 28 L. J. Ch. 188; *Kisch* v. *Central Venezuela Rly. Co.*, 3 D. J. & S. 122; 36 L. J. Ch. 849; 142 R. R. 39; *Redgrave* v. *Hurd*, 20 C. D. 21; 51 L. J. Ch. 113.

(*z*) *Dobell* v. *Stevens*, 3 B. & C. 623; 3 L. J. K. B. 89; 27 R. R. 441.

(*a*) *Reynell* v. *Sprye*, 1 D. M. & G. 660; 710; 21 L. J. Ch. 633; 91 R. R. 228; *Rawlins* v. *Wickham*, *supra*; *Redgrave* v. *Hurd*, *supra*. See *Pearson* v. *Dublin Corp.*, 1907, A. C. 351; 77 L. J. P. C. 1.

represented it to be (*b*). The effect of what would be otherwise notice may be destroyed not only by actual misrepresentation, but by anything calculated to deceive or even to lull suspicion upon a particular point (*c*). A vendor of property on lease, for instance, is not justified in parading upon his particulars of sale the existence of covenants beneficial to the estate which he knows or has good reason to believe cannot be enforced (*d*).

Misrepresentation must be in respect of a definite fact, and not merely a statement of opinion.

A misrepresentation, to be material, should be in respect of an ascertainable fact, as distinguished from a mere matter of opinion (*e*). But a statement of opinion may, like a statement of intention (*f*), be a statement of fact, and would support an action of deceit, if fraudulent and material; for instance, a statement that a particular opinion is held when it is not held. The result of the cases seems to be that there is no action of deceit for the statement of an opinion which exists and is honestly entertained, but there is an action if it does not exist and is not honestly entertained (*g*). A representation which merely amounts to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its nature and terms, or is merely a loose, conjectural, or exaggerated statement, goes for nothing, though it may not be true, for a man is not justified in placing reliance on it (*h*). Mere exaggeration is a totally different thing from misrepresentation of a precise or definite fact (*i*). Such statements, for instance, as assertions as to the value of property (*k*), or representations by the agent of the vendor of land that the

(*b*) *Perfect* v. *Lane*, 3 D. F. & J. 369; 31 L. J. Ch. 489; 130 R. R. 176.

(*c*) *Dykes* v. *Blake*, 4 Bing. N. C. 463, 476; 44 R. R. 761.

(*d*) *Flint* v. *Woodin*, 9 Ha. 618; 89 R. R. 602.

(*e*) *Jennings* v. *Broughton*, 5 D. M. & G. 134; 23 L. J. Ch. 999; 104 R. R. 58; *Leyland* v. *Illingworth*, 2 D. F. & J. 248; 129 R. R. 88; *Bellairs* v. *Tucker*, 13 Q. B. D. 562; *Pritty* v. *Child*, 71 L. J. K. B. 512.

(*f*) *Edgington* v. *Fitzmaurice*, 29 C. D. 459, 479, 483.

(*g*) *Peek* v. *Derry*, 37 C. D. p. 571.

(*h*) *Haycraft* v. *Creasy*, 2 East, 92; 6 R. R. 380; *Kisch* v. *Central Venezuela Rly. Co.*, 3 D. J. & S. 122; 142 R. R. 39; 36 L. J. Ch. 849; *Dimmock* v. *Hallett*, 2 Ch. 27; 36 L. J. Ch. 146; *Anderson* v. *Pacific Ins. Co.*, L. R. 7 C. P. 65.

(*i*) *Ross* v. *Estates Investment Co.*, 3 Eq. 136; 3 Ch. 682; 37 L. J. Ch. 873; *Bellairs* v. *Tucker*, 13 Q. B. D. 562.

(*k*) *Ingram* v. *Thorp*, 7 Ha. 74; 82 R. R. 25.

title is good (*l*), or mere general terms of commendation (*m*), or mere flourishing or exaggerated statements as to the profits and prospects of a company (*n*), or as to the situation of property (*o*), or mere loose, conjectural, or exaggerated assertions with respect to a subject-matter, which is a matter of speculation, or is essentially of an uncertain nature (*p*), are only expressions of opinion or judgment, as to which honest men may well differ materially. Mere general assertions of a vendor of property as to its value, or the price he has been offered for it, or in regard to its condition, qualities, and characteristics—as, for instance, that land is fertile and improvable, or that soil is adapted for a particular mode of culture, or is well watered, or is capable of producing crops, or supporting cattle, or that a house is a desirable residence, &c.—are assumed to be so commonly made by persons having property for sale, that a purchaser cannot safely place confidence in them. Affirmations of the sort are always understood as affording to a purchaser no ground for neglecting to examine for himself, and ascertain the real condition of the property. They are, strictly speaking, *gratis dicta*, and a man who relies on them does so at his peril, and must take the consequences (*q*). Although such affirmations may be erroneous or false, they will not, except in extreme cases, be regarded as evidence of a fraudulent intent (*r*), though they may amount to a warranty (*s*). A statement of value may, however, be so plainly false, as to make it impossible for

(*l*) *Hume* v. *Pocock*, 1 Ch. 385; 35 L. J. Ch. 751.

(*m*) *Trower* v. *Newcome*, 3 Mer. 704; 17 R. R. 171; *Scott* v. *Hansom*, 1 R. & M. 129; 27 R. R. 141; *Dimmock* v. *Hallett*, 2 Ch. 26; 36 L. J. Ch. 146; *cf. Smith* v. *Land Corporation*, 28 C. D. 7.

(*n*) *New Brunswick, &c., Rly. Co.* v. *Conybeare*, 9 H. L. 711, 729; 31 L. J. Ch. 297; 131 R. R. 15; *Jackson* v. *Turquand*, L. R. 4 H. L. 309; 39 L. J. Ch. 11; *Bellairs* v. *Tucker*, 13 Q. B. D. 562.

(*o*) *Colby* v. *Gadsden*, 34 Beav. 416.

(*p*) *Jennings* v. *Broughton*, 5 D. M. & G. 136; 23 L. J. Ch. 999; 104 R. R. 58; *Stephens* v. *Venables*, 31 Beav. 124; 135 R. R. 369.

(*q*) 1 Roll. Ab. 101, pl. 16; *Trower* v. *Newcome*, 3 Mar. 704; 17 R. R. 171; *Scott* v. *Hanson*, 1 R. & M. 129; 27 R. R. 141; but see *Smith* v. *Land Corporation, infra; Strome* v. *Craig*, 15 W. L. R. 197.

(*r*) *Dimmock* v. *Hallett*, 2 Ch. 26; 36 L. J. Ch. 146.

(*s*) *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215; 70 L. J. K. B. 533.

the party to have believed what he stated (*t*). So, also, statements with respect to the quality or condition of land will, if erroneous or false, amount in extreme cases to a misrepresentation in law (*u*).

An assertion that a third person has offered a specified sum for the property, though false, is, like mere statements in value, an assertion of so vague and loose a character that a purchaser is not justified in relying on it (*w*). So a false representation by a vendor as to the price he paid for an article is mere "dealers' talk," and *caveat emptor* applies (*x*).

But notwithstanding the maxim about *simplex commendatio*, language of general commendation—such as a statement that the person in possession is a most desirable tenant—is deemed to include the assertion that the vendor does not know of any fact inconsistent with it; and a contract obtained by describing the tenant as "most desirable" when he had only paid his rent under pressure was set aside (*y*).

The difference between a false averment in matter of fact, and a like falsehood in matter of opinion, is well illustrated by familiar cases in the books. If the owner of an estate affirm that it will let or sell for a given sum, when, in fact, such sum cannot be obtained, it is a matter of judgment, and so the parties must have considered it (*z*). But if an owner falsely affirm that an estate is let for a certain sum, when it is, in fact, let for a smaller sum, or that the profits of a business are more than, in fact, they are, and thereby induces a purchaser to give a higher price for the property, it is fraud, because the matter lies within the private knowledge of the owner (*a*). If, again, the owner of the land represent that it is well watered, the statement will not, although erroneous or

(*t*) *Wall* v. *Stubbs*, 1 Madd. 80; 15 R. R. 210; *Ingram* v. *Thorp*, 7 Ha. 74; 82 R. R. 25.

(*u*) *Dimmock* v. *Hallett*, *supra*.

(*w*) Sug. V. & P. 3; 1 Roll. Ab. 101, Pl. 16.

(*x*) *Young* v. *McMillan*, 40 N. S. R. 52.

(*y*) *Smith* v. *Land Corporation*, 28 C. D. 7.

(*z*) *Pasley* v. *Freeman*, 3 T. R. 51; 1 R. R. 634.

(*a*) *Lysney* v. *Selby*, 2 Lord Raym. 1118; *Dobell* v. *Stevens*, 3 B. & C. 632; 3 L. J. K. B. 89; 27 R. R. 441; *Hutchinson* v. *Morley*, 7 Scott, 341; 50 R. R. 852; *Dimmock* v. *Hallett*, 2 Ch. 28; 36 L. J. Ch. 146.

false, amount in law to a misrepresentation, except in extreme cases (*b*); but there is misrepresentation, if the representation be calculated to lead the person to whom it is made to believe that there is a natural supply of water on the property, whereas the fact is that the property, though well supplied with water, derives its supply artificially from the waterworks of a town, and by payment of rates (*c*).

In *Vernon* v. *Keys* (*d*), the true rule was stated to be that the seller was liable to an action of deceit, if he fraudulently misrepresents the quality of the thing sold in some particulars which the buyer has not equal means of knowledge with himself; or if he do so in such a manner as to induce the buyer to forbear making the inquiries which, for his own security and advantage, he would otherwise have made.

Exaggeration as distinguished from misrepresentation.

The rule that exaggeration, as distinguished from misrepresentation, goes for nothing, applies with peculiar force to the case of statement in the prospectuses of companies. The promoters of adventures are so prone to form sanguine expectations as to the prospects of the schemes which they introduce to the public, that some high colouring and some exaggeration in the description of the advantages which are likely to be enjoyed by the subscribers to the undertaking, may generally be expected in such documents. No prudent man can, owing to the well-known prevalence of exaggeration in such documents, accept the prospects which are held out by the originators of every new scheme, without considerable abatement. But though the representations in the prospectus of a company ought not, perhaps, to be tried by as strict a test as is applied in other cases, they are required to be fair, honest, and *bonâ fide*. There must be no misstatement of any material facts or circumstances (*e*). Exaggeration is a totally different thing from misrepresentation of any precise

(*b*) *Trower* v. *Newcome*, 3 Mer. 704; 17 R. R. 171.

(*c*) *Leyland* v. *Illingworth*, 2 D. F. & J. 253; 129 R. R. 88.

(*d*) 12 East, 632; 11 R. R. 499.

(*e*) *Kisch* v. *Central Rly. Co. of Venezuela*, 3 D. J. & S. 122; 36 L. J. Ch. 849; 142 R. R. 39; *Denton* v. *Macneil*, 2 Eq. 352; *Central Rly. Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 113; 36 L. J. Ch. 849; *Hallows* v. *Fernie*, 3 Ch. 467; 36 L. J. Ch. 267; *Bellairs* v. *Tucker*, 13 Q. B. D. 573, *ante*, p. 51.

or definite facts, as to which there must be *uberrima fides* on the part of the contractors (*f*).

Disparagement of property by a purchaser.

As, on the one hand, mere assertions of value by the vendor of property are not fraudulent in law, though erroneous or false; so, on the other hand, a disparagement of property by a purchaser is not a fraud (*g*). Nor is a buyer liable for misrepresenting a seller's chance of sale or probability of his getting a better price. It is a false representation in a matter merely *gratis dictum* by the bidder, in respect of which he is under no legal duty to the seller for the correctness of his statement, upon which the seller would be incautious to rely (*h*). So, also, is a representation by a purchaser to a seller, that his partners would not consent to his giving more than a certain sum, though false, merely a *gratis dictum* (*i*).

Vendor may put upon purchaser the responsibility of informing him as to value.

But though the value of property is generally a matter of opinion, a vendor may put upon a purchaser the responsibility of informing him correctly as to the market value, or any other fact known to him, affecting the value of property, and if the purchaser answers untruly there is a fraud. He is not bound to answer in such cases, but if he does he is bound to speak the truth (*k*). In a case accordingly, where the seller was ignorant of the value of the property and the purchaser knew that she knew nothing about it, and the seller asked the purchaser the value of the property and relied upon his statement, which was greatly below the value, the sale was set aside on the ground that it was not a mere purchaser's assessment, but a deliberate statement made to her by a person having full knowledge, which statement was asked by her for her guidance and was acted on by her in reliance on its good faith and accuracy (*l*).

Representations as to price and moneys spent upon land.

The representations of a vendor of real estate to the vendee as to the price which he has paid for it are, in respect of the reliance to be placed on them, to be regarded generally in the same light as representations respecting its value, or the offers

(*f*) *Ross* v. *Estates Investment Co.*, 3 Eq. 122, 136; 37 L. J. Ch. 873.
(*g*) *Tate* v. *Williamson*, 2 Ch. 65.
(*h*) *Vernon* v. *Keys*, 12 East, 637; 11 R. R. 499.
(*i*) *Ibid.* (*k*) *Coaks* v. *Boswell*, 11 App. Ca. 235; 55 L. J. Ch. 761.
(*l*) *Haygarth* v. *Wearing*, 12 Eq. 320, 328; 40 L. J. Ch. 577.

which have been made for it. A purchaser is not justified in placing confidence in them (*m*). But a false affirmation by a vendor as to the actual cost of property (*n*), or as to the amount spent upon it by him in improvements (*o*), may amount to a fraudulent misrepresentation.

A vendor is not bound to disclose to the vendee the true ownership of the property he is engaged in selling, but he is bound to abstain from making any misrepresentations respecting the ownership (*p*).

False representation as to intention.

As distinguished from the false representation of a fact, the false representation as to a matter of intention, not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud at law (*q*), nor does it afford a ground for relief in equity (*r*). Where a man, who had given a bond to another, upon which judgment had been entered up, had married upon the declaration of the person who held the bond and warrant of attorney that she had abandoned the claim, and would never trouble him about it, the Court would not restrain her from enforcing at law the judgment on the warrant of attorney (*s*). But if the representation, though in form a representation as to a matter of intention, amounts in effect to a representation as to a matter of fact, relief may be had in equity. Where a man was induced to grant a lease upon a representation by the lessee that he intended to use the premises for a stated purpose, whereas he intended to use, and did use, them for a different and illegal purpose, the

(*m*) 20 Eq. 123, *per* Bacon, V.-C. *Young* v. *McMillan*, 40 N. S. R. 52.

(*n*) *Kent* v. *Freehold Land Co.* 4 Eq. 599; 37 L. J. Ch. 653; *Lindsey Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 243.

(*o*) *Ross* v. *Estates Investment Co.*, 3 Eq. 136, 3 Ch. 682; 37 L. J. Ch. 873.

(*p*) *Hill* v. *Gray*, 1 Stark. 434; 18 R. R. 802; but comp. *Fellowes* v. *Gwydyr*, 1 R. & M. 83; 32 R. R. 148.

(*q*) *Vernon* v. *Keys*, 12 East, 637; 11 R. R. 499; *Hemingway* v. *Hamilton*, 4 M. & W. 122; 51 R. R. 497; *Feret* v. *Hill*, 15 C. B. 225; 23 L. J. C. P. 185; 100 R. R. 318.

(*r*) *Jorden* v. *Money*, 5 H. L. C. 185; 23 L. J. Ch. 865; 101 R. R. 116; *Bold* v. *Hutchinson*, 5 D. M & G. 558; 104 R. R. 196; *Chadwick* v. *Manning*, 1896, A. C. 231; 65 L. J. P. C. 42; but see *Clydesdale Bank* v. *Paton*, 1896, A. C. p. 394; 65 L. J. P. C. 73.

(*s*) *Jorden* v. *Money*, 5 H. L. C. 185; 23 L. J. Ch. 865; 101 R. R. 116. See *Cross* v. *Sprigg*, 6 Ha. 553; 18 L. J. Ch. 204; 77 R. R. 236; *Maunsell* v. *White*, 4 H. L. C. 1039; 94 R. R. 532.

fraud, though not sufficient to avoid the lease at law, would have been a ground for relief in equity (*t*). So where an insurance agent represented to the assured that if she continued to pay premiums for four years longer she would get a free policy, that is a representation of fact and not a mere promise (*u*). In *Edgington* v. *Fitzmaurice*, the defendants issued a prospectus inviting subscriptions for debentures, the declared object of the loan being to complete buildings, buy vans and horses, and develop trade, whereas the true object was to pay off pressing liabilities. Cotton, L. J., agreed that the statement in the prospectus was "one of intention, but it is nevertheless a statement of fact; and if it could not be fairly said that the objects of the issue of the debentures were those which were stated in the prospectus, the defendants were stating a fact which was not true." Bowen, L. J., added: "There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion" (*v*). That which is in form a promise may be in another aspect a representation (*w*). Where a lessor represented to the intended lessee, that he could not obstruct the sea view from the houses to be built by the lessee, because he himself was under covenants which restricted him from so doing, but after the building lease had been taken, and the houses built, the lessor surrendered his lease and took a new lease omitting the restrictive covenants, the Court, considering the representation to have been in effect a representation as to a matter of fact, restrained the lessor by injunction from building so as to obstruct the sea view (*x*).

Representation of something to be done in the future.

It is necessary to distinguish where an alleged ground of false representation is set up between a representation of an existing fact which is untrue, and a promise to do something

(*t*) *Feret* v. *Hill*, 15 C. B. 207; 23 L. J. C. P. 185; 100 R. R. 318, which was an action of ejectment; Pollock, Contracts, 389.

(*u*) *Kettlewell* v. *Refuge Assurance Co.*, 1908, 1 K. B. 545; 1909, A. C. 243; 77 L. J. K. B. 421.

(*v*) *Edgington* v. *Fitzmaurice*, 29 C. D. 459, 479, 483.

(*w*) *Clydesdale Bank* v. *Paton*, 1896, A. C. p. 394; 65 L. J. P. C. 73.

(*x*) *Piggott* v. *Stratton*, John, 359; 1 D. F. & J. 49; 29 L. J. Ch. 1; 135 R. R. 336.

in future, and to consider what the bargain is (*y*). But the existing intention of a party at the time of contracting is a matter of fact, and may be material to the validity of a contract, so that if it be proved that a person has fraudulently misrepresented his intentions in some material point for the purpose of inducing a contract, it may be a sufficient ground for avoiding the contract. Thus a man buying goods must be taken to have made an implied representation that he intended to pay for them, so that if it be clearly made out that at that time he did not intend to pay for them, a case of fraudulent misrepresentation is made out, and the seller may avoid the sale, and recover back the goods from the buyer, or from any person to whom he has transferred them with notice of the sale (*z*), and although he has notice of an act of bankruptcy by the buyer (*a*), and even after a receiving order has been made (*b*). So, also, when a lessee having power to assign only with the consent of his landlord, which the landlord had promised to give upon his finding a respectable tenant, was induced to assign the lease by a false representation of the assignee that a certain intended tenant was a respectable man, it was held that the representation, although only of an intended tenant, involved a sufficiently material fact to avoid the agreement (*c*). But a misrepresentation by the defendant that premises to be leased to the plaintiff would be vacant at a certain date was held in a Canadian case not to be sufficient in an action of deceit (*d*), nor was a representation that the defendant would grant a right of way (*e*).

There is a clear distinction between (1) a misrepresentation in point of fact, (2) a representation that something exists at that moment which does not exist, and (3) a representation

(*y*) *Ex p. Burrell*, 1 C. D. 552; *per* Mellish, L.J., 45 L. J. B. 68.

(*z*) *Load* v. *Green*, 15 M. & W. 216; 15 L. J. Ex. 113; 71 R. R. 627; *White* v. *Garden*, 10 C. B. 919; 20 L. J. C. P. 166; 84 R. R. 846; *Ex p. Whittaker*, 10 Ch. 449, *per* Mellish, L.J. ; 44 L. J. B. 91.

(*a*) *Re Eastgate*, 1905, 1 K. B. 465; 74 L. J. K. B. 324.

(*b*) *Tilley* v. *Bowman*, 1910, 1 K. B. 745; 79 L. J. K. B. 547.

(*c*) *Canham* v. *Barry*, 15 C. B. 597; 24 L. J. C. P. 100. See *Feret* v. *Hill*, 15 C. B. 207; 23 L. J. C. P. 185; 100 R. R. 318.

(*d*) *Smythe* v. *Mills*, 7 W. L. R. 557; 17 Man. L. R. 349.

(*e*) *McLernon* v. *Connor*, 9 W. A. L. R. 141.

that something will be done in the future. Of course a representation that something will be done in the future cannot either be true or false at the moment it is made, and although it may be called a representation, if it is anything, it is a contract or promise (*f*). But that which is in form a promise may be a representation (*g*).

A representation which amounts to a mere expression of intention must be distinguished from a representation which amounts to a contract (*h*). If a representation amounts to, or is in the nature of, a guaranty, it must be in writing and signed in compliance with Lord Tenterden's Act (*i*). Where a man previously to the marriage of his daughter said he intended to leave her 10,000*l.* which was to be settled in a particular way, and that the person about to marry her was for this reason to settle 5,000*l.* on her, and the party did make the settlement and married the lady, the engagement was held binding, for the circumstances amounted to a contract (*k*). If, on the other hand, a man previously to the marriage of a relation tells him that he has made his will and left him his property, and that he is confident he never would alter his will to his disadvantage, or tells him before his marriage to his daughter that he would leave her so much money, this is a mere expression of intention, on which the person to whom it is addressed is not justified in relying (*l*). So, also, when an unattested paper signed by A., and handed by him to B., stated that as a mark of his esteem and great friendship, he agreed to allow him 500*l.* a year, and that after

(*f*) 7 Ch. 804, *per* Mellish, L.J.

(*g*) *Clydesdale Bank* v. *Paton*, 1896, A. C. p. 394; 65 L. J. P. C. 73; *Kettlewell* v. *Refuge Assurance Co.*, 1908, 1 K. B. 545; 77 L. J. K. B. 421.

(*h*) *Hammersley* v. *De Biel*, 12 Cl. & Fin. 45; 69 R. R. 18; *Maunsell* v. *White*, 4 H. L. C. 1056; 94 R. R. 532; *Maddison* v. *Alderson*, 8 App. Ca. p. 473, 52 L. J. K. B. 737.

(*i*) 9 Geo. IV. c. 14, s. 6; *Longman* v. *Bath Electric Tramways*, 1905, 1 Ch. 646; 74 L. J. Ch. 424, *post*, Ch. vii., s. 2.

(*k*) *Hammersley* v. *De Biel*, 12 Cl. & Fin. 45; 69 R. R. 18; *Maunsell* v. *White*, 4 H. L. C. p. 1051; 94 R. R. 532; *Re Holland*, 1901, 2 Ch. 145, 1902, 2 Ch. 360; 71 L. J. Ch. 518.

(*l*) *Bold* v. *Hutchinson*, 5 D. M. & G. 558; 104 R. R. 196; *Maunsell* v. *White*, 4 H. L. C. 1039; 94 R. R. 532.

his death he had in lieu thereof bequeathed him 10,000*l.*, and B. took the paper to a lady who consented to his marriage with her daughter on the faith of the engagement contained in the paper, but no communication took place between the lady and A., and the marriage took place, it was held that there was no such connection between A.'s promise or representation, and the consent given by the lady, as to sustain a claim against A.'s estate (*m*). A representation which amounts to an engagement is enforced not as being a representation of an intention, but as amounting to a contract (*n*). There is no middle term, no *tertium quid*, between a representation so made to be effective for such a purpose and being effective for it and a contract (*o*).

Misrepresentation as to matter of law.

A misrepresentation of a matter of law does not constitute a fraud, because the law is presumed to be equally within the knowledge of all the parties. Thus the misrepresentation of the legal effect of a written agreement which a party signs with a full knowledge of its contents is not a sufficient ground for avoiding the agreement (*p*). So, also, where the directors of a company borrowed money, and issued to the lender a bond in a form that they represented to be valid, but which, according to the general law of such companies, was invalid, it was held that they were not responsible for their representation, as it was merely a matter of law, and was made to a person who was equally informed of the facts, and to whom they held no fiduciary relation as advisers (*q*). So, also, when an agent in a recognised position as the director of a company, represents that he has authority by virtue of his office to bind the company, the extent of the authority incident to the office being a matter of general law within the knowledge of the party to whom the representation is made, the latter must trust to such representation of authority at his own risk (*r*). So a representation by directors that they are authorised to

(*m*) *Dashwood* v. *Jermyn*, 12 C. D. 776.
(*n*) *Maunsell* v. *White*, 4 H. L C. p. 1056; 94 R. R. 532.
(*o*) 4 H. L. C. p. 1056, *per* Lord Cranworth.
(*p*) *Lewis* v. *Jones*, 4 B. & C. 506; 28 R. R. 360.
(*q*) *Rashdall* v. *Ford*, 2 Eq. 750; 35 L. J. Ch. 769.
(*r*) *Beattie* v. *Lord Ebury*, 7 Ch. 777, L. R. 7 H. L. 102; 44 L. J. Ch. 20.

buy and hold shares in another company is a representation of law, upon which if untrue they cannot be made personally liable (*s*). But where directors gave debenture stock in payment of work done, and the stock turned out to have been issued in excess of the stock which they had power to issue, it was held that they might be personally sued on their representation that they had power to issue the stock (*t*). Where an agent represents himself to be an authorized agent under a power of attorney, the extent of his authority depends upon the construction of the power and not upon his assertion respecting it (*t*). Nor does the principle of relief in equity on the ground of misrepresentation by third persons extend to an innocent statement of the law. If, for example, a person asks another what the law was upon a particular point and acts upon the representation so made, and thereby alters his position to his prejudice, he cannot maintain an action in equity against the latter to make good the representation (*w*). So where an insurance agent incorrectly but innocently represented that a policy would be legally valid, it was held that the parties were *in pari delicto* and the premiums could not be recovered back (*x*). Still, as Bowen, L.J., said: "I am not prepared to say, and I doubt whether a man who wilfully misrepresented the law would be allowed in equity to retain any benefit he got by such misrepresentation" (*y*). Indeed it has been recently decided that where a person has paid premiums on the statement made fraudulently that a policy would be legally valid, the premiums can be recovered (*z*).

(*s*) *McIntyre* v. *Swyny*, 14 N. S. W. R. 436.

(*t*) *Firbank's Executors* v. *Humphreys*, 18 Q. B. D. 54; 56 L. J. Q. B. 57.

(*u*) *Ibid.*, *per* Mellish, L. J.

(*w*) *Ibid.*; *Rashdall* v. *Ford*, 2 Eq. 750; 35 L. J. Ch. 769.

(*x*) *Harse* v. *Pearl Life Ass. Co.* 1904, 1 K. B. 558; 73 L. J. K. B. 373; but see *Hughes* v. *Liverpool, &c.*, *infra*.

(*y*) *West London Commercial Bank* v. *Kitson*, 13 Q. B. D. 362; 53 L. J. Q. B. 345.

(*z*) *British Workman's Ass. Co.* v. *Cunliffe*, 18 Times L. R. 502; *Kettlewell* v. *Refuge Ass. Co.* 1908, 1 K. B. 545; 77 L. J. K. B. 421; aff. 1909 A. C. 243, 78 L. J. K. B. 519; *Hughes* v. *Liverpool Friendly Society*, 1916, 2 K. B. 482; 85 L. J. K. B. 1643.

In a case where the solicitors of trustees of a fund accepted notice from a mortgagee of part of the fund on behalf of the trustees, it was held that as they were acting under an opinion erroneous in point of law, their employment as solicitors enabled them to accept service, they were not liable (*a*). So, also, the assertion by a man of what he thinks himself entitled in point of law to assert is not a misrepresentation, though it may not strictly be correct (*b*).

But matters of private right, although depending on rules of law and legal rules of construction, are in general to be considered as matters of fact in reference to fraud, and therefore it seems that the misrepresentation of the legal effect of a written agreement which the other party is thereby induced to sign, if otherwise fraudulent, would be sufficient ground for avoiding an agreement (*c*). It has been said that "a statement of fact which involves, as most facts, a conclusion of law, is still a statement of fact and not a statement of law." Such are statements regarding personal status, the possession of property, and other statements regarding matters of private right (*d*).

Misrepresentation need not be in express terms.

To constitute a fraudulent representation, the representation need not be made in terms expressly stating the existence of some fact which does not exist. If a statement be made by a man in such terms as would naturally lead the person to whom it was made to suppose the existence of a certain state of facts, and if such statement be so made designedly and fraudulently, it is as much a fraudulent misrepresentation as if the statement of an untrue fact were made in express terms (*e*). A man, moreover, who makes a representation is

(*a*) *Saffron Walden, &c., Society* v. *Rayner*, 14 C. D. 406; 49 L. J. Ch. 465.

(*b*) *Wilde* v. *Gibson*, 1 H. L. C. 626; 73 R. R. 191; *New Brunswick, &c., Rly. Co.* v. *Conybeare*, 9 H. L. C. 711; 31 L. J. Ch. 297; 131 R. R. 415; *Brett* v. *Clowser*, 5 C. P. D. 376; *Brownlie* v. *Campbell*, 5 App. Ca. 931.

(*c*) *Hirschfield* v. *London & North Western Rly. Co.*, 2 Q. G. D. 1; 46 L. J. Q. B. 1; *Onward Building Society* v. *Smithson*, 1893, 1 Ch. 1; 62 L. J. Ch. 138.

(*d*) *Eaglesfield* v. *Lord Londonderry*, 4 C. D. 702, *per* Jessel, M. R.

(*e*) *Lee* v. *Jones*, 17 C. B. N. S. 510, *per* Crompton, J.; 34 L. J. C. P. 131; 142 R. R. 467; *Lowndes* v. *Lane*, 2 Cox, 363; *Walker* v. *Symonds*, 3 Sw. 73; 19 R. R. 155; *Drysdale* v. *Mace*, 5 D. M. & G. 103; 23 L. J. Ch. 518; 97 R. R. 184; *Flint* v. *Woodin*, 9 Ha. 621; 89 R. R. 602; *Delany* v. *Keogh*, 1905, 2 Ir. R. 267.

not only answerable for what he in his own mind intended to represent, but he is answerable for what any one might reasonably suppose to be the meaning of the words he used (*f*). If a defendant has made a statement capable of two meanings, one false and one true, and if the plaintiff swears that he understood it in the false sense, the defendant will not be heard to say that he meant it in the true sense (*g*).

A representation may be false by reason only of positive misstatements contained in it, but by reason of intentional suppression whereby the information it gives assumes a false colour, giving a false impression, and leading necessarily, or almost necessarily, to an erroneous conclusion (*h*).

There is a misrepresentation if a statement be so made that the acuteness and industry of the person to whom it is made is set to sleep, and he is induced to believe the contrary of what is the real state of the case (*i*). If, for instance, there is a misrepresentation as to the terms of a particular covenant, which turned out to be of a much more stringent description (*k*); or if omission be made of a covenant involving an onerous obligation (*l*); or if particulars of sale are minute as to the value of the property, so as to induce a purchaser to believe that all material particulars have been furnished, but a material particular has been kept back (*m*), there is fraud. So also where conditions of sale are so obscurely worded that when taken in connection with the particulars of sale they are likely to mislead an ordinary purchaser as to the nature of the property (*n*), or are so framed as to deceive a purchaser and throw him off his guard by suppressing facts, and so

(*f*) *Arkwright* v. *Newbold*, 17 C. D. 320; 50 L. J. Ch. 372.

(*g*) *Smith* v. *Chadwick*, 9 App. Ca. 187; 53 L. J. Ch. 873.

(*h*) *Peek* v. *Gurney*, L. R. 6 H. L. 400, 403; 43 L. J. Ch. 19.

(*i*) *Pope* v. *Garland*, 4 Y. C. 401; 10 L. J. Ex. 13; 54 R. R. 492; *Peek* v. *Gurney*, L. R. 6 H. L. 391; 43 L. J. Ch. 19; *Gluckstein* v. *Barnes*, 1900, A. C. 240; 69 L. J. Ch. 385.

(*k*) *Flight* v. *Booth*, 1 Bing. N. C. 377; 41 R. R. 599; *Van* v. *Corpe*, 3 M. & K. 269; *Flight* v. *Barton*, *ibid.* 282. See *Puckett and Smith*, 1902, 2 Ch. 258; 71 L. J. Ch. 666.

(*l*) *Cullen* v. *O'Meara*, I. R. 4 C. R. 138. See *Molyneux* v. *Hawtrey*, 1903 2 K. B. 487; 72 L. J. K. B. 873.

(*m*) *Jones* v. *Rimmer*, 14 C. D. 588; 49 L. J. Ch. 775.

(*n*) *Torrence* v. *Bolton*, 8 Ch. 118; 42 L. J. Ch. 177.

masking a gross defect on the title (*o*), there is fraud. So also when a condition of sale induces the purchaser to believe that a recital accurately represents a will, which it does not, it is a fraudulent and misleading condition (*p*).

A representation though true to the letter may be in substance a misrepresentation (*q*). There is a misrepresentation if a statement is calculated to mislead or throw the person to whom it is made off his guard, though it may be literally true (*r*). It is not enough to use words which, read with caution and sifted to the bottom, might have given to the reader a clue to their meaning (*s*). The test is whether, taking the whole thing together, there is a false representation. If a number of statements give a false impression there is none the less a false representation because it may be difficult to show that any specific statement is untrue (*t*). Where particulars of sale contain a statement which is literally true but which is capable of another meaning, and such other meaning is more likely to be taken than the true one by a man reading the particulars, the purchaser, if he knows nothing of the real facts and understands the particulars in the one sense, is entitled to say that the vendor has deceived him (*u*).

If a man states a thing partially, he may make a false statement as much as if he had misstated it altogether. Every word he says may be true, but if he leaves out something which qualifies it, he may make a false statement (*x*).

There is misrepresentation if a man represents not the whole of the facts, but only a portion, and omits what he ought to have known was a very material fact. It is an

(*o*) *Boyd* v. *Dickson*, I. R. 10 Eq. 254.

(*p*) *Else* v. *Else*, 13 Eq. 200; 41 L. J. Ch. 213.

(*q*) *Moens* v. *Heyworth*, 10 M. & W. 158; 62 R. R. 554; *M'Culloch* v. *Gregory*, 1 K. & J. 286; 24 L. J. Ch. 246; 103 R. R. 86; *Clarke* v. *Dickson*, 6 C. B. N. S. 453; 27 L. J. Q. B. 223; 113 R. R. 583.

(*r*) *Dimmock* v. *Hallett*, 2 Ch. 28; 36 L. J. Ch. 146; *Ross* v. *Estates Investment Co.*, 3 Ch. 682; 37 L. J. Ch. 873; *Peek* v. *Gurney*, L. R. 6 H. L. 400; 43 L. J. Ch. 19.

(*s*) *Gluckstein* v. *Barnes*, 1900, A. C. 240; 69 L. J. Ch. 385.

(*t*) 1896, A. C. at p. 281; cf. 1900, 1 Ch. at p. 434.

(*u*) *Cato* v. *Thompson*, 9 Q. B. D. 619.

(*x*) *Arkwright* v. *Newbold*, 17 C. D. 318, *per* James, L. J.; 50 L. J. Ch. 372.

untruthful representation by reason of suppression and concealment of truth, not untruthful in the sense of direct falsehood, but untruthful because it is intended to convey to the public an impression different from the reality, and because it is known by the person who makes it, or ought to be known by him, to be materially different from that which was the real state of the case (*y*). It is the duty of the vendor of property to make himself acquainted with all the peculiarities and incidents of the property which he is going to sell, and when he describes the property for the information of a purchaser it is his duty to describe everything which it is material for him to know in order to judge of the nature and value of the property. It is not for him just to tell what is not actually untrue, leaving out a great deal that is true, and leaving it to the purchaser to inquire whether there is any error or omission in the description or not (*z*). It is *primâ facie* the duty of a vendor to disclose all that is necessary to protect himself, and not the duty of the purchaser to demand inspection before entering into a contract (*a*). He must not, in short, omit what it is essential for the purchaser to know (*b*).

It is not enough for a director who is also a vendor to the company to insert words in the prospectus which, read with caution and sifted to the bottom, might have given to the reader a clue to their meaning (*c*).

In conditions of sale there must not be any representation or condition which can mislead the purchaser as to the facts within the knowledge of the vendor, and the vendor is not at liberty to require the purchaser to assume as the root of his title that which documents in his possession show not to be the fact, even though those documents may show a perfectly good title on another ground. The requirement or insistence in conditions of sale that a certain state of things shall be

(*y*) *Emma Silver Mining Co.* v. *Grant*, 11 C. D. 935.

(*z*) *Brandling* v. *Plummer*, 2 Drew. 430; 23 L. J. Ch. 960. See *Broad* v. *Munton*, 12 C. D. 136; 48 L. J. Ch. 837.

(*a*) *White and Smith*, 1896, 1 Ch. 637; 65 L. J. Ch. 481.

(*b*) *Brewer* v. *Brown*, 28 C. D. 309; 54 L. J. Ch. 605.

(*c*) *Gluckstein* v. *Barnes*, 1900, A. C. 240; 69 L. J. Ch. 385.

assumed, does by implication contain an assertion that no facts are known to the persons who require it, which would make that assumption a wrong one according to the facts. A condition is therefore bad as misleading, if it requires the purchaser to assume what the vendor knows to be false, or if it states that the state of the title is not accurately known when in fact it is known to the vendor (*d*). But a condition requiring a purchaser to assume certain facts is not misleading if the vendor believes the facts to be true, even though the condition is intended to cover a flaw which goes to the root of the title (*e*). Though a purchaser will not be bound if a vendor makes an untrue statement in the conditions of sale and then tries to bind a purchaser by a condition, the case is otherwise if the vendor merely does not state everything in the conditions of sale, but invites the purchaser to come and see a certain document for himself, which the conditions of sale tell him is of importance. In such a case the purchaser will be bound by a condition that he shall assume the truth of the document (*f*).

A misrepresentation is usually by words; but it may be as well by acts or deeds as by words; by artifices to mislead as well as by actual assertions. Even in chaffering about goods there may be such misrepresentations as to avoid a contract. A man who by act or deed falsely and fraudulently impresses the mind of another with a certain belief whereby he is misled to his injury is as much guilty of a misrepresentation as if he had deliberately asserted a falsehood (*g*). So a man who buys goods represents by the act that he intends to pay for them (*h*).

Intent to mislead or to be acted on.

It is not enough that there has been a misrepresentation, and that the misrepresentation has conduced in some way to the transaction in question. It is necessary that the mis-

(*d*) *Broad* v. *Munton*, 12 C. D. 150, *per* Cotton, L.J.; 48 L. J. Ch. 837; *Scott and Alvarez*, 1895, 1 Ch. 596; 64 L. J. Ch. 376.

(*e*) *Re Sandbach*, 1891, 1 Ch. 99; 60 L. J. Ch. 60; *Blaiberg* v. *Keeves*, 1906, 2 Ch. 175; 75 L. J. Ch. 464.

(*f*) *Blenkhorn* v. *Penrose*, 29 W. R. 238, 43 L. T. 668.

(*g*) *Burnes* v. *Pennell*, 2 H. L. C. 497; 81 R. R. 244.

(*h*) *Ex p. Whittaker*, 10 Ch. 446; 44 L. J. B. 41.

representation should have been made in relation to the transaction in question, and with the direct intent to induce the party to whom it is immediately made, or a third party, to act in the way that occasions the injury (*i*). An innocent misrepresentation which is not intended to be acted upon gives rise to no liability (*k*). A representation which has been made some time before the date of the transaction in question is not sufficient, unless it can be clearly shown to have been immediately connected with it (*l*). A representation to be of any avail whatever must, unless under special circumstances, have been made at the time of the treaty (*m*), and should not have any relation to any collateral matter or other relation or dealing between the parties (*n*).

Misrepresentation must be attended with damage.

Misrepresentation, however, goes for nothing either at law or in equity unless a man has been misled thereby to his prejudice. Fraud without damage is not sufficient to support an action (*o*). But it is enough if the representation operates to the prejudice of a man to a very small extent. Fraud gives a cause of action if it leads to any sort of damage (*p*). But in order that a false representation should give a cause of action the damage must be immediate and not the remote effect of the representation (*q*). Misrepresentation which does not itself cause damage, but is merely incidental to some lawful act which does cause damage, is not actionable. Where,

(*i*) *Burnes* v. *Pennell*, 2 H. L. C. 497, 529; 81 R. R. 244; *Smith* v. *Kay*, 7 H. L. C. 750, 775; 30 L. J. Ch. 35; 115 R. R. 367; *National Exchange Co.* v. *Drew*, 2 Macq. 120, 387, 440; *Denne* v. *Light*, 8 D. M. & G. 774; 26 L. J. Ch. 459; 114 R. R. 328; *Barry* v. *Croskey*, 2 J. & H. 1, L. R. 6 H. L. 412; *Smith* v. *Chadwick*, 9 App. Ca. 190; 53 L. J. Ch. 873; *Arnison* v. *Smith*, 41 C. D. 348.

(*k*) *Collins* v. *Evans*, 5 Q. B. 820; 13 L. J. Q. B. 180; explained 1905, A. C. 400; and see *Pearson* v. *Dublin Corp.*, 1907, A. C. 351; 77 L. J. P. C. 1.

(*l*) *Burnes* v. *Pennell*, 2 H. L. C. 497, 530; 81 R. R. 244. See *Maunsell* v *White*, 4 H. L. C. 1060, *per* Lord St. Leonards; 94 R. R. 532; *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 155.

(*m*) *Harris* v. *Kemble*, 1 Sm. 122; 35 R. R. 83; *per* Sir J. Leach, M.R. See *Smith* v. *Kay*, 7 H. L. C. 750, *infra*.

(*n*) *Harris* v. *Kemble*, 1 Sim. 122, 5 Bligh, N. S. 730; 35 R. R. 83; *National Exchange Co.* v. *Drew*, 2 Macq., 103.

(*o*) *Polhill* v. *Walter*, 3 B. & Ad. 114; 37 R. R. 344; *Edgington* v. *Fitzmaurice*, 24 C. D. 482; *Derry* v. *Peek*, 14 App. Ca. p. 343; 58 L. J. Ch. 864; *Ajello* v. *Worsley*, 1898, 1 Ch. 274; 67 L. J. Ch. 172.

(*p*) *Smith* v. *Kay*, 7 H. L. C. 750, 775; 30 L. J. Ch. 35; 115 R. R. 367.

(*q*) *Barry* v. *Croskey*, 2 J. & H. 1; *Ajello* v. *Worsley*, *supra*.

therefore, a trader acting *bonâ fide* causes injury to the trade of another by advertising or otherwise offering for sale at less than retail price goods of the other's manufacture, not having such goods in stock at the time, but only an expectation of acquiring them, the misrepresentation implied in the advertisement is not one to which the damage can be attributed so as to support an action (*r*). So a representation by a purchaser that he is buying for himself and not for a third party to whom he knew the vendor would not sell, although false, is not material to the contract, and does not result in such immediate damage as would entitle the vendor to rescind (*s*).

Concealment.

Misrepresentation may consist as well in the concealment of what is true as in the assertion of what is false (*t*). If a man conceals a fact that is material to the transaction, knowing that the other party acts on the presumption that no such fact exists, it is as much a fraud as if the existence of such fact were expressly denied or the reverse of it expressly stated (*u*). Concealment to be of any avail whatever, either at law or in equity, must be *dolus dans locum contractui*. There must be the suppression of a fact, the knowledge of which it is reasonable to infer would have made the other party to the transaction abstain from it altogether. Concealment of a fact is not material if the statement of that fact would not have induced a man (otherwise desirous of entering into the transaction) to abstain from it (*v*). A concealment to be material must be the concealment of something that the party concealing was under some legal or equitable obligation to disclose (*w*), and

(*r*) *Ajello* v. *Worsley*, 1898, 1 Ch. 274; 67 L. J. Ch. 172.

(*s*) *Nicholson* v. *Peterson*, 8 W. L. R. 750; 18 Man. L. R. 106.

(*t*) *Central Rly. Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 114; 36 L. J. Ch. 849; 142 R. R. 39; *Oakes* v. *Turquand*, *ibid.* 326; 36 L. J. Ch. 949.

(*u*) *Peek* v. *Gurney*, L. R. 6 H. L. 400; 43 L. J. Ch. 19.

(*v*) *Pulsford* v. *Richards*, 17 Beav. 98; 22 L. J. Ch. 559; 99 R. R. 48; *Peek* v. *Gurney*, *supra*. See *Kisch* v. *Central Venezuela Rly. Co.*, 3 D. J. & S. 122; 36 L. J. Ch. 849; 142 R. R. 39.

(*w*) *Irvine* v. *Kirkpatrick*, 7 Bell, Sc. Ap. 186; *Horsfall* v. *Thomas*, 1 H. & C. 100, *per* Bramwell, B., 31 L. J. Ex. 322; 130 R. R. 394; *London Ass. Co.* v. *Mansel*, 11 C. D. 367; 48 L. J. Ch. 331. See *Greenfield* v. *Edwards*, 2 D. J. & S. 582, 598; 139 R. R. 244; *Central Venezuela Rly. Co.* v. *Kisch*, L. R. 2 H. L. 112; 36 L. J. Ch. 849.

where there has been such concealment honesty of purpose will not avail as a defence to an action for rescission (*x*).

Mere non-disclosure apart from circumstances importing a duty of informing the other party, or evidencing a fraudulent intention in not informing him, is not in general a sufficient ground for avoiding a contract (*y*). The non-disclosure must be such as to make that which is disclosed misleading (*z*). Where, therefore, plaintiff's solicitor knew the result of proceedings before the chief clerk, and arranged a compromise with defendant, who was ignorant thereof, it was held that there was no obligation on the plaintiff's solicitor to disclose the result of the proceedings, and that plaintiff was entitled to specific performance of the compromise (*a*). So where a person purchased a house with windows looking over the land of a third person, the non-disclosure of a deed acknowledging that the vendor was not entitled to light was not a ground for refusing specific performance (*b*). "There is no allegation of fraud," said Lord Blackburn (*c*), "and short of that the mere concealment of a material fact, except in policies of assurance, does not avoid a contract." There are many things which a man might desire to have communicated to him if they existed at the time of making the contract, as that the plaintiff is in debt, or subject to other liabilities, the discovery of which would yet not entitle the defendant to refuse to fulfil his engagement. It might be right to disclose such things, and yet it has never been held that the discovery of them justified a party in breaking his contract. But a promise to marry a woman is impliedly conditional upon the fact of her being chaste, and consequently the fact of unchastity, if not disclosed, would avoid the contract (*d*).

(*x*) *Lagunas Co.* v. *Lagunas Syn.*, 1899, 2 Ch. 392, *per* Rigby, L.J., 68 L. J. Ch. 699.

(*y*) *Kelly* v. *Enderton*, 1913, A. C. 191; 82 L. J. P. C. 57; *Scott Fell & Co.* v. *Lloyd*, 4 C. L. R. 572; 7 S. R. 512.

(*z*) *McKeown* v. *Boudard*, 65 L. J. Ch. 446, 735; *Re Christineville Rubber Estates*, 81 L. J. Ch. 63.

(*a*) *Turner* v. *Green*, 1895, 2 Ch. 205; 64 L. J. Ch. 539.

(*b*) *Greenhalgh* v. *Brindley*, 1901, 2 Ch. 324; 70 L. J. Ch. 740.

(*c*) *Fletcher* v. *Krell*, 42 L. J. Q. B. 55.

(*d*) *Baker* v. *Cartwright*, 10 C. B. N. S. 124, *per* Cockburn, C. J.; 30 L. J. C. P. 64.

It is also essential that the concealment should be in reference to the particular transaction (*e*), and should enure to the date of it. If a party to a transaction conceals, however fraudulently, a material fact from another with whom he is treating, but that other, notwithstanding the concealment, gets at the fact concealed before he enters into the transaction, the concealment goes for nothing. It is of no avail if the party has become in any way acquainted with the truth (*f*). *Scientia utrinque par pares contrahentes facit.* The law will not interpose where both parties to the transaction are equally well informed as to the actual condition or value of the subject-matter of the transaction (*g*).

If on the other hand a person has *bonâ fide* entered into a transaction and subsequently discovers that he has been defrauded, he is not entitled to conceal the fraud as against an innocent third party for the purpose of making his own title good (*h*).

The law requires men in their dealings with each other to exercise proper vigilance and apply their attention to those particulars which may be supposed to be within the reach of their observation and judgment, and not to close their eyes to the means of information which are accessible to them: *vagilantibus non dormientibus, jura subveniunt.* If parties are at arms' length, either of them may remain silent and avail himself of his superior knowledge as to facts and circumstances equally open to the observation of both, or equally within the reach of their ordinary diligence, and is under no obligation to draw the attention of the other to circumstances affecting the value of the property in question, although he may know him to be ignorant of them. If, for example, a man treats for the purchase of an estate knowing that there is a mine under the land, and the other party makes no inquiry,

(*e*) *Green* v. *Gosden*, 3 M. & G. 446; 11 L. J. C. P. 4.

(*f*) *Irvine* v. *Kirkpatrick*, 7 Bell, Sc. Ap. 186, 237; but see *Arnison* v. *Smith*, 41 C. D. 348.

(*g*) Sug. V. & P. 1; *Knight* v. *Marjoribanks*, 11 Beav. 348, 2 Mac. & G. 10; 83 R. R. 166; *Re Law*, 1905, 1 Ch. 140; 74 L. J. Ch. 169.

(*h*) *Marnham* v. *Weaver*, 80 L. T. 412.

the former is not bound to inform him of the fact (*i*). So also a first mortgagee with power of sale, who has made an advantageous contract for the sale of the mortgaged premises, may buy up the interest of a second mortgagee who supposed the property was insufficient to pay off both mortgages, without informing him of the contract (*k*).

A very little, however, is sufficient to affect the application of the principle. If a single word be dropped by a purchaser which tends to mislead the vendor, the principle will not be allowed to operate (*l*). "A single word," said Lord Campbell, in *Walters* v. *Morgan* (*m*), "or even a nod, or a wink, or a shake of the head, or a smile from the purchaser, intended to induce the vendor to believe the existence of a non-existing fact which might influence the price of the subject to be sold, is a fraud at law. So *à fortiori* would a contrivance on the part of the purchaser better informed than the vendor of the real value of the subject to be sold, to hurry the vendor into an agreement without giving him the opportunity of being fully informed of its real value, or time to deliberate and take advice respecting the conditions of the bargain." If a purchaser conceal the fact of the death or dangerous illness of a person of which the seller is ignorant, and by which the value of the property is materially increased, there is fraud (*n*). On a sale under the direction of the Court a person offering to buy is not under any extraordinary duty of disclosure (*o*).

A vendor may not, on the other hand, use any art or practise any artifice to conceal defects, or make any representation for the purpose of throwing the buyer off his guard, or use any device to induce the buyer to omit inquiry or

(*i*) *Fox* v. *Macreth*, 2 Bro. C. C. 420; 2 R. R. 55; *Turner* v. *Harvey*, Jac. 169, 178; 23 R. R. 15; *Stikeman* v. *Dawson*, 1 De G. & S. 90; 16 L. J. Ch. 205; 75 R. R. 47; *Wilde* v. *Gibson*, 1 H. L. C. 605; 73 R. R. 191; *Walters* v. *Morgan*, 3 D. F. & J. 723; 130 R. R. 309.

(*k*) *Dolman* v. *Nokes*, 22 Beav. 402; 111 R. R. 414.

(*l*) *Turner* v. *Harvey*, Jac. 169, 178; 23 R. R. 15; *Dolman* v. *Nokes*, *supra*.

(*m*) 3 D. F. & J. 724.

(*n*) *Turner* v. *Harvey*, *supra*; *Scott* v. *Coulson*, 1903, 2 Ch. 249; 72 L. J. Ch. 600. See *Popham* v. *Brooke*, 5 Russ. 9; 6 L. J. Ch. 184.

(*o*) *Coaks* v. *Boswell*, 11 App. Ca. 232; 55 L. J. Ch. 761.

examination into the defects of the thing sold. If he says or does anything whatever with an intention to divert the eye or obscure the observation of the buyer even in relation to open defects, or to prevent his use of any present means of observation, there is fraud (*p*). As, for example, where a man having a log of mahogany to sell, turned it over so as to conceal a hole in the underneath side (*q*). So also where a man sold a vessel "with all faults," and before the sale took her from the ways on which she lay and kept her afloat in a dock in order to prevent an examination of her bottom, which he knew to be unsound, the purchaser was held entitled to avoid the sale on account of fraud (*r*).

So also if a vendor were to describe the property as let upon lease under certain specified covenants, beneficial to the reversion, which, however, he knew could not be enforced, this would probably be considered delusive (*s*). So also if a vendor knowing of an incumbrance on an estate sells without disclosing the fact, and with knowledge that the purchaser is a stranger to it, and under representations inducing him to buy, he acts fraudulently and violates integrity and fair dealing (*t*). The same rule applies to the case where a party pays money in ignorance of circumstances with which the receiver is acquainted, and does not disclose, and which, if disclosed, would have prevented the payment. In that case the parties do not deal on equal terms, and the money is held to be unfairly obtained and may be recovered back (*u*). Where M. was fraudulently induced to lend money to W. on certain fictitious leases, which had been previously mortgaged to C., who was paid off by M., when the latter advanced the money to W., at which date C. had become

(*p*) *Hill* v. *Gray*, 1 Stark. 434; 18 R. R. 802; *Pillmore* v. *Hood*, 5 Bing. N. C. 97; 50 R. R. 622; *Dobell* v. *Stevens*, 3 B. & C. 623; 3 L. J. K. B. 89; 27 R. R. 441; *Edwards* v. *Wickwar*, 1 Eq. 68; 35 L. J. Ch. 309.

(*q*) *Udell* v. *Atherton*, 7 H. & N. 172; 30 L. J. Ex. 337; 126 R. R. 383.

(*r*) *Baglehole* v. *Walters*, 3 Camp. 154; 13 R. R. 778; *Schneider* v. *Heath*, *ibid.* 506; 14 R. R. 825.

(*s*) *Flint* v. *Woodin*, 9 Ha. 621; 89 R. R. 602.

(*t*) 1 Ves. 96, *per* Lord Hardwicke.

(*u*) *Martin* v. *Morgan*, 1 Brod. & Bing. 289; 21 R. R. 603. See *Heane* v. *Rogers*, 9 B. & C. 577, *per* Bayley, J.; 7 L. J. K. B. 285.

aware that the leases were fictitious, but made no disclosure of the fact to M., and executed a re-assignment to him, it was held that C. was liable to M. for the loss and damage sustained by him (*x*). So also although a vendor is in general under no obligation to disclose the price at which he has himself purchased or contracted to purchase the subject of sale, there may be a fraud upon a purchaser if he misrepresent the price given (*y*).

So also, and upon the same principle, there is fraud, if a man, wishing to advance an undertaking, in which he was interested, determines to purchase shares in it, and another person also interested in the undertaking takes advantage of the knowledge he possesses of the intention of the former to defeat the particular act, whereby he sought to accomplish his object, and to substitute in the place of it a mode of disposing of a portion of his own interest in the undertaking (*z*).

Silence and reticence.

Mere reticence does not amount to a legal fraud, however it may be viewed by moralists. Either party may be innocently silent as to ground open to both to exercise their judgment upon. If the parties are at arms' length, neither of them is under any obligation to call the atteution of the opposite party to facts or circumstances which lie properly within his knowledge, although he may see that they are not actually within his knowledge (*a*). "It has never, it is believed, been held by our Courts that there is any general obligation to disclosure on the part of a vendor or purchaser of chattels or realty, though the person maintaining silence may know that the other party is acting under an erroneous impression" (*b*). Mere silence as regards a material fact, which one party is not bound to disclose to the other, is not a ground for rescission or a defence to specific performance (*c*). But mere silence in a prospectus as to a material fact, though

(*x*) *Marnham* v. *Weaver*, 80 L. T. 412.

(*y*) *Ante*, p. 55. (*z*) *Blake* v. *Mowatt*, 21 Beav. 614; 111 R. R. 220.

(*a*) *Archbold* v. *Lord Howth*, L. R. Ir. 2 C. L. 608; See *Walters* v. *Morgan*, 3 D. F. & J. 723; 130 R. R. 309.

(*b*) Fry on Spec. Perf. 3rd ed., p. 329.

(*c*) *Turner v. Green*, 1895, 2 Ch. 205; 64 L. J. Ch. 539; *Greenhalgh* v. *Brindley*, 1901, 2 Ch. 324; 70 L. J. Ch. 740; *Seddon* v. *North Eastern Salt Co.*, 1905, 1 Ch. 326; 74 L. J. Ch. 199.

not a ground for an action of deceit, may be a ground for rescission (*d*), the non-disclosure, however, must be such as to make what is disclosed misleading and fraudulent (*e*). Mere silence as to facts capable of influencing a buyer's judgment, but not such as the seller professes or undertakes to communicate, is not of itself any breach of duty (*f*). "Silence is innocent and safe where there is no duty to speak" (*g*). If one party asks a question which the other is not bound to answer, and it is not answered, he is not entitled to treat the other's silence as a representation if there is nothing more than silence (*h*). But a man may by mere silence, without active concealment, produce a false impression on the mind of another, and if he does so there is a fraud. "Where," said Lord Blackburn, in *Brownlie* v. *Campbell* (*i*), "there is a duty or obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was bound to say, if that be done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, there is fraud."

So on a sale of a lease containing unusual and onerous covenants it is the duty of the vendor, before the contract is made, to disclose the existence of the covenants to a purchaser ignorant of them (*j*).

"As a general rule, when there are two contracting parties, each may hold his tongue, but if one says something, it may create an obligation to say something more" (*k*). In *Coaks* v. *Boswell* (*l*), Lord Selborne said: "Inasmuch as a purchaser, generally speaking, is under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment when bargaining for his own interest, no

(*d*) *Components Tube Co. v. Naylor*, 1900, 2 Ir. R. 1.
(*e*) *Re Christineville Rubber Estates*, 81 L. J. Ch. 63.
(*f*) *Coaks* v. *Boswell*, 11 App. Ca. 232; 55 L. J. Ch. 761.
(*g*) *Chadwick* v. *Manning*, 1896, A. C. p. 238; 65 L. J. P. C. 42.
(*h*) *Laidlaw* v. *Organ*, 2 Wheat. 178.
(*i*) 5 App. Ca. 950.
(*j*) *Molyneaux* v. *Hawtrey*, 1903, 2 K. B. 487; 72 L. J. K. B. 873.
(*k*) *Arkwright* v. *Newbold*, 17 C. D. 310, *per* Fry, C. J.; 50 L. J. Ch. 372.
(*l*) 11 App. Ca. 235; 55 L. J. Ch. 761.

deceit can be implied from his mere silence, unless he undertakes or professes to communicate them. This, however, he may be held to do if he makes some other communication which, without the addition of those facts, would be necessarily or naturally or probably misleading. If it is a just conclusion that he did this intentionally, and with a view to mislead on any material point, that is fraud; and it is a sufficient ground for setting aside a contract if the vendor was in fact so misled. A man is presumed to intend the necessary or natural consequences of his own words and acts; and the *evidentia rei* would therefore be sufficient without other proof of intention." If the seller knows the buyer to be acting under a mistake or in ignorance as to some quality or matter connected with the subject of sale, and not to be acting on his own inspection or judgment, and do not undeceive him, the silence of the seller as a means of misleading him may amount to a fraudulent concealment entitling the buyer to avoid the sale (*m*). When, for example, a man employed to sell a picture had refused to state the name of the owner, and afterwards becoming aware that the buyer was under a delusion as to the ownership which enhanced the price, did not remove the delusion, but took advantage of it to effect the sale, it was held that the buyer might avoid the sale on the ground of fraud (*n*).

If a man interested is present and hears any false or imperfect representation made, and does not set it right, he is fixed by the representation (*o*). So if a man knows that a bank is relying on his forged signature to a bill, he must divulge the fact before he sees the position of the bank altered for the worse (*p*).

When a statement or representation has been made in the *bonâ fide* belief that it is true, and the party who has made

(*m*) *Smith* v. *Hughes*, L. R. 6 Q. B. 605, *per* Cockburn, C. J.; 40 L. J. Q. B. 221.

(*n*) *Hill* v. *Gray*, 1 Stark. 434; 18 R. R. 802; but see *Keates* v. *Lord Cadogan*, 10 C. B. 600; 20 L. J. C. P. 76; 84 R. R. 715; *Peek* v. *Gurney*, L. R. 6 H. L. p. 391; 43 L. J. Ch. 19.

(*o*) *Davies* v. *Davies*, 6 Jur. N. S. 1322. See *Smith* v. *Bank of Scotland*, 1 Dow, 272; 14 R. R. 67.

(*p*) *M'Kenzie* v. *British Linen Co.*, 6 App. Ca. 82.

it afterwards comes to find out that it is untrue and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on upon a statement which was honestly made at the time it was made, but which he has not retracted when he has become aware that it can no longer be honestly persevered in (*q*). This principle also applies to third persons who, by not making disclosure, assist the person who made the misrepresentation in continuing the deception (*r*).

When the purchasers of an estate, being the owners of an adjoining colliery, in negotiating the contract had not disclosed the fact that they had already worked a considerable quantity of coal from under the estate through their colliery, it was held that the vendor was entitled to have the contract set aside (*s*). "If a man," said Lord Hatherley (*t*), "knows that he has committed a trespass of a very serious character upon his neighbour's property, and finding it convenient to screen himself from the consequences makes a proposal for the purchase of that property, he ought to communicate to the person with whom he is dealing the exact circumstances of the case. . . . The proposal which he makes is not in reality a simple proposal for purchase of the property: it involves a buying up of rights which the owner has acquired against him, and of which the owner is not aware."

No duty to disclose patent faults.

A vendor is by the civil law bound to warrant the thing he sells or conveys, albeit there be no express warranty; but the common law binds him not, unless there be a warranty either in deed or law. *Caveat emptor* is the ordinary rule of the common law (*u*), though it is a rule which, as Lord Campbell said, is nearly eaten up with exceptions. If the defects in the subject-matter of sale are patent, or such as might and

(*q*) *Brownlie* v. *Campbell*, 5 App. Ca. 950, *per* Lord Blackburn; *Redgrave* v. *Hurd*, 20 C. D. 1; 51 L. J. Ch. 113; *Scott* v. *Coulson*, 1903, 2 Ch. 249; 72 L. J. Ch. 600.

(*r*) *Marnham* v. *Weaver*, 80 L. T. 412; *ante*, p. 70.

(*s*) *Phillips* v. *Homfray*, 6 Ch. 770; 59 L. J. Ch. 547.

(*t*) *Ibid.* 779.

(*u*) Co. Litt. 102a, Hob. 99.

should be discovered by the exercise of ordinary vigilance, and the buyer has an opportunity of inspecting it, the law does not require the seller to aid and assist the observation of the purchaser (*x*). It is otherwise, however, if the vendor takes upon himself to inform the purchaser, and the purchaser agrees to trust to him with regard to particulars which he could ascertain himself by inspection (*y*). Defects, however, which are latent, or circumstances materially affecting the subject-matter of sale of which the purchaser has no means, or at least has not equal means, of obtaining knowledge must, if known to the seller, be disclosed. But mere concealment will not justify an action for damages or rescission unless it is equal to a representation that the fact does not exist. The concealment must be aggressive. It is not enough that the defect is material, that the vendor knows of it, and knows that the buyer is deceived by the concealment (*z*). Where, for instance, particulars of sale described the subject of sale as a certain interest, if any, the vendor knowing at the time that it was of no value, whereas the purchaser had no means of ascertaining whether it was of any value or not, the transaction was held fraudulent (*a*). So also on the sale of a ship, which had a rotten keel, and the seller purposely took her off the ways after she had been advertised for sale and floated her in order to conceal the defect, the seller was bound to disclose it (*b*). So where a man sold an estate to another knowing or having reason to know at the time, but concealing the fact that part of the land was an encroachment upon a common to which he had no title, the sale was set aside as having been effected by fraud (*c*). So also where a lessor of a

Duty to disclose latent faults, &c.

(*x*) *Grant* v. *Munt*, Coop. 173; 14 R. R. 231; *Horsfall* v. *Thomas*, 1 H. & C. 100; 130 R. R. 394; 31 L. J. Ex. 322; *Smith* v. *Hughes*, L. R. 6 Q. B. 597; 40 L. J. Q. B. 221.

(*y*) *Lynsey* v. *Selby*, 2 Raym. 1120.

(*z*) *Ward* v. *Hobbs*, 4 App. Ca. 13; 48 L. J. C. P. 281; see *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215; 70 L. J. K. B. 533; *Carlish* v. *Salt*, 1906, 1 Ch. 335; 75 L. J. Ch. 175, *post*, p. 117.

(*a*) *Smith* v. *Harrison*, 26 L. J. Ch. 412; 112 R. R. 412.

(*b*) *Schneider* v. *Heath*, 3 Camp. 506; 14 R. R. 825; cf. *Baglehole* v. *Walters*, 3 Camp. 154; 13 R. R. 778.

(*c*) *Edwards* v. *M'Cleay*, 2 Sw. 287; 14 R. R. 261.

mine did not disclose the fact that a material portion of the mine was under land between high and low water mark, to which he had no title, it was held a sufficient ground to set aside the lease at the suit of the lessee, who had no means of knowing the defect (*d*). So also if one of the parties to a transaction knows that the solicitor of the other party has not disclosed to him some matter of a material nature, the concealment may be fraudulent (*e*).

A vendor, however, is not bound to state that the property has been recently valued at a sum greatly less than the intended purchaser's money, or that the tenant has complained of the rent as being excessive (*f*).

On a sale under the direction of the Court a person offering to buy is not under any extraordinary duty of disclosure. It is not the law that because information on some material point is offered or given on request by a purchaser from the Court, it must therefore be given on all others as to which it is neither offered nor requested and concerning which there is no implied representation, positive or negative, direct or indirect, in what is actually stated (*g*).

Chattels sold "with all faults."

A vendor may, on the sale of chattels, expressly stipulate that the buyer is to take the chattels "with all faults." In such case it is immaterial how many faults there are within his knowledge; but he may not use any artifice to disguise them, or to prevent the buyer from discovering them (*h*). A person knowingly selling a chattel with a material defect without disclosing it to the buyer entitles the buyer to avoid the sale (*i*). In order to defeat the effect of a sale "with all faults," the representation or fraud must be something as clear in statement in an opposite direction (*k*), and if the vendor aggressively conceal defects or falsely makes repre-

(*d*) *Mostyn* v. *West Mostyn Coll. Co.*, 1 C. P. D. 145; 45 L. J. C. P. 401.

(*e*) *Solomon* v. *Honywood*, 12 W. R. 572.

(*f*) *Abbott* v. *Sworder*, 4 De G. & S. 448, 460; 22 L. J. Ch. 235; 87 R. R. 439; cf. *Moody* v. *Cox*, 1917, 2 Ch. 71; 86 L. J. Ch. 424.

(*g*) *Coaks* v. *Boswell*, 11 App. Ca. 232; 55 L. J. Ch. 761.

(*h*) *Schneider* v. *Heath*, 3 Camp. 506, *supra*.

(*i*) *Emmerton* v. *Matthews*, 7 H. & N. 586; 31 L. J. Ex. 139; 126 R. R. 567; Sale of Goods Act, 1893, s. 14.

(*k*) *Ward* v. *Hobbs*, 4 App. Ca. 13, *per* Lord Cairns; 48 L. J. C. P. 281.

sentations with regard to them, he furnishes the buyer with "something as clear in an opposite direction." Where therefore animals are sold in a market "with all faults," and it is expressly stated that no warranty will be given, there is no representation by the vendor that they are free from disease; but if he goes on expressly to say that, so far as he knows or believes, the animals are free from disease, and it can be proved that to his knowledge the animals were diseased, there is a fraudulent representation (*l*).

But the chattel must answer the description and the circumstances under which it is sold (*m*). Thus the sale of a vessel described as "copper fastened" to be taken "with all faults, without allowance for any defect whatsoever," was construed to mean only such defects as were consistent with the description, and not to exclude a misdescription in the vessel not being "copper fastened" which was held to be warranted (*n*).

Where, however, a vessel was sold under the description of "teak-built A 1," and to be taken "with all faults, and without any allowance for any defect or error," the additional stipulation against "error" was held to extend to errors of description, and the seller was not responsible for the ship not being as described (*o*).

A purchaser may by express contract to take the property with the risk of error in the particulars of sale debar himself from complaining afterwards of error in the particulars. In a case accordingly where it was expressly stated that the purchaser shall take the property with all risk of error in the particulars, and a representation is made which is true according to the knowledge and belief of him who makes it, any error is covered by the express contract of the purchaser to take the property with the risk of error in the particulars (*p*).

The maxim *caveat emptor* is a rule which, as Lord Campbell said, is almost eaten up with exceptions, and it only applies *Caveat emptor.*

(*l*) *Ward* v. *Hobbs*, *supra*.
(*m*) Sale of Goods Act, 1893, s. 14.
(*n*) *Shepherd* v. *Kain*, 5 B. & Ald. 240; 24 R. R. 344.
(*o*) *Taylor* v. *Bullen*, 5 Ex. 779; 20 L. J. Ex. 21; 82 R. R. 875.
(*p*) *Brownlie* v. *Campbell*, 5 App. Ca. 931; *Re Sandbach*, 1891, 1 Ch. 99; 60 L. J. Ch. 60; *Blaiberg* v. *Keeves*, 1906, 2 Ch. 175; 75 L. J. Ch. 464; *ante*, p. 66.

where the parties know or ought to know that they are each judging for himself (*q*). It applies with certain specific restrictions and qualifications both to the title and quality of the subject-matter of sale. In the case of real estate the vendor must produce to the purchaser all documents of title in his possession or power, and give information of all material facts not apparent thereon (*r*). Any charge upon the estate, or right restrictive of the purchaser's absolute enjoyment of it, and the release of which cannot be procured by the vendors, should be stated; or the omission may, in many cases, render the sale voidable by the purchaser (*s*); *e.g.*, a right of sporting over the estate (*t*), a right of common every third year (*u*), a right to dig for mines (*x*), a liability to repair the church chancel (*y*), onerous covenants in a lease (*z*), or any other right or liability which cannot fairly admit of compensation (*a*), or would render the estate different in substance from what the purchaser was justified in believing it to be (*b*), would, if undisclosed, have that effect (*c*).

Disclosure on sale of real estate.

A vendor need not, however, direct attention to defects, &c., apparent on the title deeds (*d*), or to any matter of which the purchaser has actual or constructive notice (*e*). But if the seller be informed by the purchaser of his object in buying, and the lease contains covenants which defeat that object, mere silence is fraudulent concealment (*f*). If there has been

(*q*) Benjamin on Sales, 4th ed. 637.

(*r*) *Edwards* v. *M'Cleay*, Coop. 308; 14 R. R. 261; Dart, V. & P. 102.

(*s*) Dart, V. & P. 126.

(*t*) *Burnell* v. *Brown*, 1 J. & W. 172; 21 R. R. 136.

(*u*) *Gibson* v. *Spurrier*, Pea. Ad. C. 50; 4 R. R. 887.

(*x*) *Seaman* v. *Vawdrey*, 16 Ves. 390; 10 R. R. 207.

(*y*) *Forteblow* v. *Shirley*, cited 2 Sw. 223.

(*z*) *Haedicke and Lipski*, 1901, 2 Ch. 666; 70 L. J. Ch. 811; *Molyneux* v. *Hawtrey*, 1903, 2 K. B. 487; 72 L. J. K. B. 873.

(*a*) Dart, V. & P. 127. See *Leyland and Taylor*, 1900, 2 Ch. 625; 69 L. J. Ch. 764.

(*b*) *Post*, pp. 117, 118

(*c*) See, further, Dart, V. & P. 128.

(*d*) Sug. V. & P. 8

(*e*) Dart, V. & P. 102, 127; *Leyland and Taylor*, 1900, 2 Ch. 625; 69 L. J. Ch. 764.

(*f*) *Flight* v. *Barton*, 3 M. & K. 282; *Flight* v. *Booth*, 1 Bing. N. C. 370; 41 R. R. 599; *Puckett and Smith*, 1902, 2 Ch. 258; 71 L. J. Ch. 666.

no fraudulent concealment on the part of the seller, but the title turns out to be defective, the rule *caveat emptor* applies, and the purchaser has no remedy, unless he takes a special covenant or warranty (*g*). A seller selling in good faith is not responsible for the goodness of the title beyond the extent of his covenants (*h*).

There is no implied warranty on a demise of real or leasehold property that it is fit for the purposes for which it is taken (*i*). The purchaser takes the risk of its quality and condition, unless he protects himself by an express agreement on the subject (*k*). But where land is sold with a warranty that it answers a certain description, and a conveyance is afterwards executed which contains no covenant answering to the warranty, an action can be brought on the warranty (*l*). But in the letting of a furnished house there is an implied condition that it shall be in a good and tenantable condition, and reasonably fit for human occupation from the day on which the tenancy is to begin (*m*), but there is no implied agreement that it shall continue fit for occupation during the term (*n*). There is no implied duty cast on the owner of a house in a ruinous and unsafe condition to inform a proposed tenant that it is unfit for habitation, nor will an action of deceit lie against him for omitting to disclose the fact (*o*); but a seller must not, during a treaty for a while intending a sale, endeavour to conceal a defect, or to divert a purchaser's attention from it (*p*).

Where land is sold by auction with a warranty that the sanitary arrangements are in perfect order, and a conveyance

(*g*) *Parkinson* v. *Lee*, 2 East, 323, *per* Lawrence, J.; 6 R. R. 429; *Besley* v. *B.*, 9 C. D. 103; *Clayton* v. *Leach*, 41 C. D. 103.

(*h*) See *Soper* v. *Arnold*, 14 App. Ca. 433; 59 L. J. Ch. 214.

(*i*) *Keates* v. *Cadogan*, 10 C. B. 591; 20 L. J. C. P. 76; 84 R. R. 715; *Chester* v. *Powell*, 52 L. T. 722.

(*k*) *Surplice* v. *Farnsworth*, 7 M. & G. 576; 13 L. J. C. P. 215; 66 R. R. 760; *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215; 70 L. J. Ch. 533.

(*l*) *De Lassalle* v. *Guildford*, *supra*; but see *Greswolde-Williams* v. *Barneby*, 49 W. R. 203.

(*m*) *Wilson* v. *Finch Hatton*, 2 Ex. D. 336; 46 L. J. Ex. 489.

(*n*) *Sarson* v. *Roberts*, 1895, 2 Q. B. 395; 65 L. J. Q. B. 37.

(*o*) *Keates* v. *Cadogan*, *supra*; and see *Chester* v. *Powell*, 52 L. T. 722.

(*p*) Dart, V. & P. 99.

is afterwards executed which contains no covenant corresponding to the warranty, no action can be brought on the warranty (*q*).

Caveat emptor in the case of a sale of goods.

In the case of a sale of goods and chattels, the rule *caveat emptor* applies to the title, unless the seller knows that he has no title and conceals the fact, or unless the surrounding circumstances of the case are such that a warranty may be implied (*r*). In the ordinary case, for instance, of the sale of goods in a shop, there is a warranty of title, for the seller, by the very act of selling, holds himself out to the buyer that he is the owner of the articles he offers for sale (*s*). If, however, the surrounding circumstances are such that the seller must be taken to be merely selling such a title as he has himself in the goods, the maxim applies, and there is no warranty of title (*t*).

When, for example, a pawnbroker sold an article by auction as a forfeited pledge, he was held to affirm only that the article had been pledged to him and was irredeemable, and his warranty was limited to that effect (*u*). So also a sale of goods seized under an execution was held to import no warranty of title (*x*).

The question as to the application of the maxim *caveat emptor* on the sale of goods in respect to the quality of the goods, was very fully considered by the Court of Queen's Bench in *Jones* v. *Just* (*y*). The cases on the subject were distinguished as falling under five different heads:

"1stly. Where goods are in *esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect is latent,

(*q*) *Greswolde-Williams* v. *Barneby*, 49 W. R. 203; but see *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215; 70 L. J. Ch. 533; where it was otherwise decided in the case of a lease.

(*r*) *Morley* v. *Attenborough*, 3 Ex. 500; 18 L. J. Ex. 148; 77 R. R. 709; *Hall* v. *Conder*, 2 C. B. N. S. 40; 26 L. J. C. P. 138; 109 R. R. 590; *Eichholz* v. *Bannister*, 17 C. B. N. S. 708; 34 L. J. C. P. 105; 142 R. R. 594.

(*s*) *Eichholz* v. *Bannister*, *supra*; Sale of Goods Act, 1893, s. 12.

(*t*) *Morley* v. *Attenborough*, *supra*; *Hall* v. *Conder*, *supra*; *Bagueley* v. *Hawley*, L. R. 2 C. P. 629; 36 L. J. C. P. 328.

(*u*) *Morley* v. *Attenborough*, *supra*.

(*x*) *Chapman* v. *Speller*, 14 Q. B. 621; 19 L. J. Q. B. 239; 80 R. R. 342.

(*y*) L. R. 3 Q. B. 197, 202; 37 L. J. Q. B. 89.

and not discoverable on examination, at least where the seller is neither the manufacturer nor the grower (*z*). The buyer, in such case, has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality, or are merchantable (*a*).

"2ndly. Where there is a sale of a definite existing chattel specially described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty (*b*).

"3rdly. Where a known described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known described and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer (*c*).

"4thly. Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied (*d*). In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.

"5thly. Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchant-

(*z*) *Parkinson* v. *Lee*, 2 East, 314; 6 R. R. 429.

(*a*) *Emmerton* v. *Matthews*, 7 H. & N. 586; 31 L. J. Ex. 139; 126 R. R. 567.

(*b*) *Barr* v. *Gibson*, 3 M. & W. 390; 49 R. R. 650.

(*c*) *Chanter* v. *Hopkins*, 4 M. & W. 399; 51 R. R. 650; *Ollivant* v. *Bayley*, 5 Q. B. 288; 13 L. J. Q. B. 34; 64 R. R. 501.

(*d*) *Jones* v. *Bright*, 5 Bing. 533; 30 R. R. 728; *Randall* v. *Newson*, 2 Q. B. D. 102; 46 L. J. Q. B. 259; *Jones* v. *Padgett*, 24 Q. B. D. 650; 59 L. J. Q. B. 261.

able article (*e*). In every contract to supply goods of a specified description which the buyer has no opportunity of inspecting, the goods must not only in fact answer the specific description, but must also be saleable and merchantable under that description" (*f*).

The principles above stated may be resolved into the proposition that a condition or warranty as to fitness or quality is implied only so far as the buyer does not buy on his own judgment. If the buyer's purpose be communicated to the seller, the seller must supply goods fit for that purpose, and if bought under a commercial description he must supply merchantable goods. Where the goods are bought by sample the buyer must trust to his own judgment as regards the sample, but on the seller's judgment as regards the correspondence of the bulk with the sample (*g*).

The Sale of Goods Act, 1893, ss. 14, 15, adopts the three implied conditions as to fitness, merchantable quality and correspondence with sample. The purpose, however, for which the goods are required need not appear in the contract itself, but may be proved *aliunde* (*h*). Nor is it any longer material that the buyer had an opportunity of inspecting the goods, the question whether he bought on his own judgment being now in every case a question of fact (*i*). It must also be remembered that by s. 55 the implied conditions may be varied or negatived by express agreement or usage.

Caveat emptor does not mean in law or in Latin that the buyer must take chance; it means that he must take care. It applies to the purchaser of specific things as a horse or a picture upon which the buyer can exercise his own judgment; it applies also whenever the buyer voluntarily chooses what he buys, and also where by usage or otherwise it is a term of the contract express or implied that the buyer shall not rely

(*e*) *Laing* v. *Fidgeon*, 4 Camp. 169; 16 R. R. 589; *Shepherd* v. *Pybus*, 3 M. & G. 868; 11 L. J. C. P. 101.

(*f*) *Jones* v. *Just*, L. R. 3 Q. B. 197; 37 L. J. Q. B. 89.

(*g*) *Mody* v. *Gregson*, L. R. 4 Ex. 52; 38 L. J. Ex. 12; *Drummond* v. *Van Ingen*, 12 A. C. 284; 56 L. J. Q. B. 563.

(*h*) *Jacobs* v. *Scott*, 1899, 2 Fraser, 70.

(*i*) *Wallis* v. *Russell*, 1902, 2 Ir. R. at p. 597.

on the skill or judgment of the seller. But it has no application where the seller has undertaken and the buyer has left it to the seller to supply goods to be used for a purpose known to both parties at the time of sale. And in any such case the buyer's opportunity of inspection is immaterial (*k*).

On the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought, though it does not possess that quality. Even if the vendor was aware that the purchaser thought the article possessed that quality and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit, for whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake not induced by the act of the vendor. When a specific lot of goods is sold by sample, which the purchaser inspects instead of the bulk, the law is exactly the same if the sample truly represents the bulk (*l*). In the sale of goods by sample, the vendor warrants the quality of the bulk to be equal to that of the sample (*m*), but the sample must be free from any secret defect of manufacture, not discoverable on inspection and unknown to both parties (*n*). When goods are sold by sample, the implied warranty of merchantable quality is excluded only with respect to such matters as could be judged of by the sample (*o*).

Caveat emptor in case of sale of shares.

The rule *caveat emptor* renders it lawful for a man holding shares in an insolvent company to sell them to any one willing to buy them, and in the absence of misrepresentation

(*k*) *Wallis* v. *Russell*, 1902, 2 Ir. R. 585, 615, *per* Fitzgibbon, L. J.; *Priest* v. *Last*, 1903, 2 K. B. 148; 72 L. J. K. B. 657; *Frost* v. *Aylesbury Dairy Co.*, 1905, 1 K. B. 608; 74 L. J. K. B. 386.

(*l*) *Smith* v. *Hughes*, L. R. 6 Q. B. 607, *per* Lord Blackburn; 40 L. J. Q. B. 221.

(*m*) *Parker* v. *Palmer*, 4 B. & Ald. 387; 23 R. R. 313; Sale of Goods Act, 1893, s. 15.

(*n*) *Heilbuth* v. *Hickson*, L. R. 7 C. P. 438; 11 L. J. C. P. 228.

(*o*) *Mody* v. *Gregson*, L. R. 4 Ex. 52; 38 L. J. Ex. 12; *Drummond* v. *Van Ingen*, 12 A. C. 284; 56 L. J. Q. B. 563.

by the seller, the buyer is apparently without any remedy against him (*p*).

Omission of purchaser to disclose insolvency.

The mere omission of a purchaser of property to disclose his insolvency to the vendor is not a fraud for which the sale may be avoided. If no inquiries are made, and the vendee makes no false statements, nor resorts to any artifice or contrivance for the purpose of misleading the vendor, it is not in general fraudulent in him to remain silent as to his pecuniary condition (*q*). But a partner purchasing the partnership assets must not conceal what he alone knows about the partnership accounts or the sale may be set aside (*r*), so there is fraud if a vendee obtain goods upon credit with a preconceived fraudulent design not to pay for them (*s*); but it is not such a false representation or other fraud as to constitute a misdemeanour under the Debtors Act, 1869 (*t*).

Misrepresentation and concealment by companies.

It is not the law that a company cannot in its corporate character be called on to answer an action of deceit (*u*). The same rules as to false and deceptive statements, which are applicable to contracts between individuals, are also applicable to contracts between an individual and a company. If a director or promoter knowingly makes a false representation to a person as to a matter of fact in order to induce him to act thereon, and he does act thereon, relying on such representation, and thereby sustains damage, such damage may be recovered from the director or promoter in an action of deceit. To support such an action, however, it is necessary, as we have already seen, that the statement should be fraudulent. This was decided by the House of Lords in *Derry* v. *Peek* (*v*). reversing the Court of Appeal, where it had been held that

(*p*) See *Stray* v. *Russell*, 1 El. & El. 888; 29 L. J. Q. B. 115; 117 R. R. 506; *London Founders Ass.* v. *Clarke*, 20 Q. B. D. 576; 57 L. J. Q. B. 291; *Seddon* v. *North Eastern Salt Co.*, 1905, 1 Ch. 326; 74 L. J. Ch. 199.

(*q*) *Ex p. Whittaker*, 10 Ch. 449; 44 L. J. B. 91.

(*r*) *Re Law*, 1905, 1 Ch. 140; 74 L. J. Ch. 169.

(*s*) *Load* v. *Green*, 15 M. & W. 216; 15 L. J. Ex. 113; 71 R. R. 627; *Ex p. Whittaker*, *supra*, *per* Mellish, L. J.; *Attenborough* v. *St. Katharine's Docks Co.*, 3 C. P. D. 450; 47 L. J. C. P. 673; *Re Eastgate*, 1905, 1 K. B. 465; 74 L. J. K. B. 324.

(*t*) *Ex p. Brett*, 1 C. D. 151.

(*u*) *Moncur* v. *Ideal Co.*, 37 O. L. R. 361.

(*v*) 14 App. Ca. 337; 58 L. J. Ch. 864.

the defendants were liable because the statement complained of was untrue, and was made by them without reasonable ground for their believing it to be true. If directors act within their powers with reasonable care and honesty for the benefit of the company they will not be liable for mistakes or errors of judgment (*w*) nor even, it seems, for gross negligence, where there is a clause in the articles exempting them from liability (*x*). Nor will they be liable for non-disclosure of a contract where it is owing to an honest mistake and there is waiver clause (*y*).

The Directors Liability Act, 1890, re-enacted by s. 84 of the Companies Act, 1908, gives legislative sanction to the view of the Court of Appeal in *Derry* v. *Peek* as to directors' liability, but not to their view of the law, since an action of deceit can still only be founded on a fraudulent statement. The object of the Act is to impose upon those who issue a prospectus the duty to take reasonable care not to make untrue statements, and in every case where the plaintiff proves that the prospectus contains an untrue statement it throws upon the person liable under the Act the burden of proving that he believed it was true and had reasonable grounds for such belief (*z*). The Act creates a new statutory duty to abstain from untrue statements, and then in effect gives a new action on the case to those persons who have been injured by the neglect of that statutory duty (*a*). Moreover, a misleading statement in a prospectus is untrue within the meaning of the Act, even though it may be true in the sense in which it is used by those who issue the prospectus (*b*). Further, the statement must be true when the prospectus was issued, so a statement that the company have acquired a valuable property is untrue if it is in fact acquired a few days after the prospectus is issued (*c*). It is not essential that

(*w*) *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate*, 1899, 9 Ch. 392; 68 L. J. Ch. 699.

(*x*) *Re Brazilian Rubber Plantations*, 1911, 1 Ch. 425; 80 L. J. Ch. 221.

(*y*) *Macleay* v. *Tait*, 1906, A. C. 24; 75 L. J. Ch. 90.

(*z*) *Greenwood* v. *Leather Shod Wheel Co.*, *infra*.

(*a*) *Thomson* v. *Lord Clanmorris*, 1900, 1 Ch. 718, 727; 69 L. J. Ch. 337.

(*b*) *Greenwood* v. *Leather Shod Wheel Co.*, 1900, 1 Ch. 421; 69 L. J. Ch. 131.

(*c*) *McConnell* v. *Wright*, 1903, 1 Ch. 546; 72 L. J. Ch. 347.

some specific allegation of fact should be false. The true test is whether taking the whole thing together there is a false representation. If a number of statements give a false impression the prospectus is none the less false because it may be difficult to show that any specific statement is untrue (*d*). It should be noticed that the Act has also made an alteration in the law in this respect, that whereas before the Act a director was not liable for misrepresentations in a prospectus unless he was a party to or ratified its issue, he is now *primâ facie* liable, and cannot escape liability unless he can establish one of the defences under the Act (*e*). The uncorroborated statements of the vendor and promoter of the company afford by themselves no "reasonable ground" for believing the statements to be true, and therefore afford no protection to directors under s. 84 (*f*). It should also be noticed that the Act appears to be wholly cumulative on the existing law, and does not abrogate or affect the old remedy by action of deceit, unless possibly the defendant could in such an action avail himself of some one of the defences in the Act.

The Companies Act, 1908, s. 81, re-enacting the Companies Act, 1900, provides that every prospectus, other than a circular inviting subscriptions for further shares or debentures, is to contain a statement of certain particulars mentioned in the section; but some of the particulars may be omitted if the prospectus is published more than a year after the company is entitled to commence business (sub-sect. 4), and others may be omitted if the prospectus is published as a newspaper advertisement (sub-sect. 5). But no person will incur any liability by reason of non-compliance with the section if he proves that, as regards any matter not disclosed, he was not cognizant thereof, or that the non-compliance arose from an honest mistake of fact; nor will any person incur liability for non-disclosure of a director's interest

(*d*) *Aarons Reefs* v. *Twiss*, 1896, A. C. at p. 281; 65 L. J. P. C. 54; cf. *Greenwood* v. *Leather Shod Wheel Co.*, 1900, 1 Ch. at p. 413; 69 L. J. Ch. 131.

(*e*) See s. 84, and see *Shepheard* v. *Bray*, 1906, 2 Ch. 235; 75 L. J. Ch. 633; as to contribution by co-directors.

(*f*) *Adams* v. *Thrift*, 1915, 2 Ch. 21; 84 L. J. Ch. 729.

in the company or in the property to be acquired unless it be proved against him that he had knowledge of matters not disclosed (sub-sect. 6). Nothing in the section is to limit or diminish any liability which any person may incur under the general law or the Act apart from the section; hence a prospectus, though complying with the section, may still be so framed as to entitle an allottee to rescission of his contract or damages against the directors for deceit or under sect. 84. Where a company is the purchaser of property which belongs absolutely to the vendor the prospectus need not disclose the amount of the purchase-money paid by the vendor upon his acquisition of the property, nor need the prospectus state the amount of any consideration paid or to be paid by any one other than the company. But the whole of the consideration, cash, shares or debentures payable to any one by the company in respect of the purchase must be stated (*g*).

An applicant for shares on the faith of a statement filed in lieu of a prospectus under section 82 has the same right of rescission in case of misrepresentation or omission as he would have had if he had relied on a prospectus (*h*). But the omission to state in a prospectus that a previous offer of shares had been made as required by section 81 does not entitle the allottee to rescission but only to damages (*i*).

Materiality of false representation in prospectus.

A shareholder suing the company for rescission on the ground of misrepresentation must, generally speaking, bring his case under one of the following heads:—(1) Where the misrepresentations are made by the directors or other the general agents of the company entitled to act and acting on its behalf. (2) Where they are made by a special agent of the company while acting within the scope of his authority, including the case of a person constituted agent by subsequent adoption of his acts. (3) Where the company can be held affected, before the contract is complete, with the knowledge that it is induced by misrepresentation. (4) Where the contract is made to the knowledge of the

(*g*) *Brookes* v. *Hansen*, 1906, 2 Ch. 129; 75 L. J. Ch. 450.
(*h*) *Re Blair Open Hearth Co.*, 1914, 1 Ch. 390; 83 L. J. Ch. 313.
(*i*) *Re South of England Natural Gas Co.*, 1911, 1 Ch. 573; 80 L. J. Ch. 358.

company or its agents on the basis of certain representations and it turns out that some of them were material and untrue (*j*).

The following are examples of what are material misrepresentations in a prospectus:—A statement that more than half the proposed capital had been subscribed for, when in fact it had been merely agreed to be subscribed by an agent of the company under an arrangement that it should be allotted to future applicants without any liability on his part (*k*); a statement that the object was to construct a railway under a concession granted by a foreign State, without disclosing the fact that the concession was in fact to be purchased from other parties for a large sum in reduction of the stated capital of the company, and a statement, contrary to the fact, that a contract had been made for the required works "at a price considerably within the available capital" (*l*); a statement that the object of the issue of debentures was to develop the trade of the company, whereas the object was to pay off pressing liabilities (*m*); a statement that a tramway company had the right to use steam power, which right was subject to the consent of the Board of Trade, which had not been given (*n*); a statement that the net profits of a business were over 17 per cent., when they were not more than half that rate (*o*); a statement that full reports on the property had been made for the directors, whereas they had been made for the vendor (*p*); a statement, contrary to fact, that the directors had taken a large number of shares, or that a certain number of shares or a certain amount had been subscribed for (*q*);

(*j*) *Lynde* v. *Anglo-Italian Hemp Co.*, 1896, 1 Ch. 178; 65 L. J. Ch. 96; Buckley, 119; and see *Karberg's Case*, 1892, 3 Ch. 1; 61 L. J. Ch. 741; where the representation was not made by the company.

(*k*) *Ross* v. *Estates Investment Co.*, 3 Ch. 682; 37 L. J. Ch. 873; *Arnison* v. *Smith*, 41 C. D. 348.

(*l*) *Central Railway of Venezuela* v. *Kisch*, L. R. 2 H. L. 99; 36 L. J. Ch. 849; 142 R. R. 39.

(*m*) *Edgington* v. *Fitzmaurice*, 29 C. D. 459.

(*n*) *Peek* v. *Derry*, 37 C. D. 541.

(*o*) *Glasier* v. *Rolls*, 42 C. D. 436; 58 L. J. Ch. 820.

(*p*) *Angus* v. *Clifford*, 1891, 2 Ch. 449; 60 L. J. Ch. 443.

(*q*) *Kent* v. *Freehold Land, &c., Co.*, 4 Eq. 599; 3 Ch. 493; 37 L. J. Ch. 653; *Henderson* v. *Lacon*, 5 Eq. 257.

a statement contrary to fact, that certain persons have agreed to become directors (*r*); a statement, contrary to fact, that a certain person of great experience would be chairman of the company (*s*); or a statement, contrary to fact, that certain dividends were guaranteed (*t*).

Companies Act, 1867, s. 38.

The Companies Act, 1867, s. 38, enacts that every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors of the company, or otherwise; and that any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors and officers of the company knowingly issuing the same, as regards any persons taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract (*u*).

The Companies Act, 1900, repealed sect. 38, and enacted in its place a section which, with additions, now forms sect. 81 of the Act of 1908. But having regard to the Interpretation Act, 1889, it is still necessary to consider the effect of sect. 38 and the construction which has been placed upon it by decided cases.

There has been much difference of opinion among the judges as to the meaning of the section (*v*). But it is now clear that the contract to be disclosed must be a material one—that is, material to an intending investor to know (*w*). Executed as well as executory contracts must be disclosed (*x*), and it is no defence that the director honestly believed that the

(*r*) *Blake's Case*, 34 Beav. 642; *Re Scottish Petroleum Co.*, 23 C. D. 413; *Karberg's Case*, 1892, 3 Ch. 1; 61 L. J. Ch. 741.

(*s*) *Re Kent County Gas Co.*, 95 L. T. 756.

(*t*) *Knox* v. *Hayman*, 67 L. T. 137.

(*u*) See *Arkwright* v. *Newbold*, 17 C. D. 302; 50 L. J. Ch. 372.

(*v*) *Gover's Case*, 1 C. D. 182; 45 L. J. Ch. 83; *Twycross* v. *Grant*, 2 C. P. D. 469; 46 L. J. C. P. 636; *Sullivan* v. *Mitcalfe*, 5 C. P. D. 460; 49 L. J. C. P. 815.

(*w*) *Broome* v. *Speak*, 1903, 1 Ch. 587, 619, 627; 72 L. J. Ch. 251; *Shepheard* v. *Broome*, 1904, A. C. 342; 73 L. J. Ch. 608.

(*x*) 1903, 1 Ch. 600.

contract was not material (*y*). But where the non-disclosure is owing to an honest mistake and there is a waiver clause, the director will not be liable (*z*).

The plaintiff must prove that (1) if he had known of the contract he would not have taken shares, that (2) he has suffered damage from the non-disclosure, and that (3) the defendant knew of the existence of the undisclosed contract (*a*). But the defendant cannot escape liability by pleading ignorance of the contents of the contract or that he left the matter to his legal advisers (*b*).

A prospectus which merely specifies the dates and names of the parties to contracts in compliance with the section does not give notice of circumstances contained in the contracts which are material to be known and the omission of which causes the prospectus to give a false impression (*c*).

Sect. 38 expressly excludes from relief a person who has notice of the contract before the shares were allotted to him. But notice of such contract means express notice, not constructive notice (*d*), and notice of the contents of the contract (*e*). It means such notice as brings home to the mind of a careful reader such knowledge as fairly and in a business sense amounts to notice of a contract (*f*).

The omission in the prospectus of a contract which the promoter of the company had entered into before he became a promoter is not fraudulent within the meaning of sect. 38 (*g*).

The words "knowingly issuing" in sect. 38 mean intentionally issuing a prospectus without inserting the contracts which are required by the section to be specified, although they are omitted under the *bonâ fide* belief that it is unnecessary to specify them (*h*), or in ignorance arising from wilfully

(*y*) *Watts* v. *Bucknall*, 1903, 1 Ch. 766, 773; 72 L. J. Ch. 447; *Shepheard* v. *Broome*, *supra*. (*z*) *Macleay* v. *Tait*, 1906, A. C. 24; 75 L. J. Ch. 90.

(*a*) *Ibid.*

(*b*) *Watts* v. *Bucknall*, *supra*.

(*c*) *Aarons Reefs* v. *Twiss*, 1896, A. C. 273; 65 L. J. P. C. 54.

(*d*) *White* v. *Haymen*, 1 C. & E. 101.

(*e*) *Watts* v. *Bucknall*, 1903, 1 Ch. 766; 72 L. J. Ch. 447.

(*f*) *Greenwood* v. *Leather Shod Wheel Co.*, 1900, 1 Ch. 421; 69 L. J. Ch. 131.

(*g*) *Gover's Case*, 1 C. D. 182; 45 L. J. Ch. 83.

(*h*) *Twycross* v. *Grant*, 2 C. P. D. 469; 46 L. J. C. P. 636; *Broome* v. *Speak*,

abstaining from inquiry (*i*). But a proof copy of a prospectus not authorised for publication is not knowingly issued (*k*). Nor is a prospectus issued without authority though subsequently adopted (*l*).

Sect. 38 is only for the protection of shareholders, and does not, unlike the Directors Liability Act, 1890, and the Companies Act, 1900, give relief to persons who subscribe for debentures or debenture stock on the faith of the prospectus (*m*).

The usual waiver clause in a prospectus or application for shares, to be effective, must show clearly and fairly what is to be waived. The section cannot be evaded by a general waiver clause (*n*). But a waiver clause is now void under sect. 81 (4) of the Companies Act, 1908.

Misrepresentation by parties having a duty to perform.

Those who, having a duty to perform or undertaking a duty represent to those who are interested in the performance of it, that it has been performed, make themselves responsible for all the consequences of the non-performance (*o*). So the bailee of goods who represents to the owner that he has insured the goods is liable to make good the loss occasioned by the non-insurance (*p*).

Misrepresentation by agent binding on the principal.

The false and fraudulent representations of an agent, when acting within the scope of his authority (*q*), and in the course of business (*r*), bind the principal, who is liable for the fraud whether it is committed for the benefit of the principal or for

1903, 1 Ch. 587; 72 L. J. Ch. 251; *Shepheard* v. *Broome*, 1904, A. C. 342; 73 L. J. Ch. 608; *Macleay* v. *Tait*, 1906, A. C. 24, 31; 75 L. J. Ch. 90.

(*i*) *Watts* v. *Bucknall*, 1903, 1 Ch. 766; 72 L. J. Ch. 447.

(*k*) *Baty* v. *Keswick*, 85 L. T. 18.

(*l*) *Hoole* v. *Speak*, 1904, 2 Ch. 732; 73 L. J. Ch. 719.

(*m*) *Cornell* v. *Hay*, L. R. 8 C. P. 328; 42 L. J. C. P. 136.

(*n*) *Greenwood* v. *Leather Shod Wheel Co.*, 1900, 1 Ch. 421; 69 L. J. Ch. 131; *Cackett* v. *Keswick*, 1902, 2 Ch. 456; 71 L. J. Ch. 641; *Watts* v. *Bucknall*, 1903, 1 Ch. 766; 72 L. J. Ch. 447; *Calthorpe* v. *Trechman*, 1906, A. C. 24; 75 L. J. Ch. 90; but see now Companies Act, 1908, s. 81 (4).

(*o*) *Blair* v. *Bromley*, 2 Ph. 360, *per* Lord Cottenham; 16 L. J. Ch. 495.

(*p*) *M'Neill* v. *Millen*, 1907, 2 Ir. R. 328.

(*q*) *Blair* v. *Bromley*, *supra*; *Coleman* v. *Riches*, 16 C. B. 104; 24 L. J. C. P. 125; 100 R. R. 635; *Wheelton* v. *Hardisty*, 8 E. & B. 232, 260; 27 L. J. Q. B. 241; 112 R. R. 535; *Udell* v. *Atherton*, 7 H. & N. 173; 30 L. J. Ex. 337; 126 R. R. 383.

(*r*) *New Brunswick Rly. Co.* v. *Conybeare*, 9 H. L. C. 470; 31 L. J. Ch. 297.

the benefit of the agent. The only difference between the case where the principal receives the benefit and the case where he does not is that in the latter case he is liable for the wrong done, and in the former case he is liable on that ground and also on the ground that by taking the benefit he has adopted the act of his agent (*s*). A man cannot take any benefit under false and fraudulent representation made by his agent, although he may have been no party to the representations, and may not have distinctly authorised them (*t*); but the principal's liability does not seem to be limited to the benefit so taken (*u*).

When an act done by an agent is authorised by the terms of his authority, the act is binding on the principal as to all persons dealing in good faith with the agent, though the act was done by the agent in abuse of his authority, for his own purposes, and not for the benefit of the principal (*x*).

A principal cannot adopt and take the benefit of a contract entered into by his agent, and repudiate the fraud on which it was built. If the agent at the time of the contract makes any representation or declaration touching the subject-matter, it is the representation and declaration of the principal. The statements of the agent which are involved in the contract, as its foundation or inducement, are in law the statements of the principal. The principal cannot separate the contract itself from that by which it was induced. He must adopt the whole contract, including the statements and representations which induced it, or must repudiate the contract altogether (*y*).

(*s*) *Lloyd* v. *Grace Smith & Co.*, 1912, A. C. 716; 81 L. J. K. B. 1140, overruling dicta in *British Mutual Banking Co.* v. *Charnwood Forest Rly.*, 18 Q. B. D. 714; 56 L. J. Q. B. 449; and in *Ruben* v. *Great Fingall*, 1906, A. C. 465; 75 L. J. K. B. 843.

(*t*) *Nicol's Case*, 3 D. & J. 387, 437; 28 L. J. Ch. 257; 121 R. R. 169; *Udell* v. *Atherton*, *supra*, *per* Pollock, C. B., and Wilde, J.; *New Brunswick Rly. Co.* v. *Conybeare*, 9 H. L. C. 714, 726, 739; 31 L. J. Ch. 297; 131 R. R. 415; *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394, 410; 43 L. J. P. C. 31.

(*u*) *Mackay* v. *Commercial Bank*, *&c.*, *supra*; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 317.

(*x*) *Hambro* v. *Burnard*, 1904, 2 K. B. 10; 73 L. J. K. B. 669; cf. *Smith* v. *Prosser*, 1907, 2 K. B. 735; 77 L. J. K. B. 71; *Cuthbert* v. *Robarts*, 1909, 2 Ch. 226; 78 L. J. Ch. 529.

It would be inconsistent with natural justice to permit a man to retain property acquired through the medium of false representations made by his agent, although he was no party to them, or did not authorise them (*z*). If an agent employs another person to make representations, it is the same as if the representations had been made by him (*a*).

It is now settled that a principal cannot enforce a contract induced by the material misrepresentations of the agent who negotiates it, whether such misrepresentations are fraudulent or not (*b*). But whether a principal, in the absence of intentional concealment, is liable in an action for damages for a statement known by him to be false, but made without his knowledge or authority by an agent who believes it to be true, is a question which has given rise to much controversy, and can hardly be considered settled. The case of *Cornfoot* v. *Fowke* (*c*), which first gave rise to the question, and decided it in favour of the principal, is said to have turned on a point of pleading (*d*). The actual point decided was that the jury were misdirected, and apart from the disapproval it has met with, the case can in no way be considered as settling the question; at any rate it is not law if it is supposed to decide that a principal and agent can be so divided in responsibility that the united principal and agent may commit fraud with impunity (*e*). It is thought therefore probable that in such a case an action for damages would lie against the principal, either in the form of an action of deceit or as an analogous but special action on the case (*f*).

(*y*) *Udell* v. *Atherton*, *supra*, *per* Pollock, C. B., and Wilde, B.; *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 265; 36 L. J. Ex. 147; *Weir* v. *Bell*, 3 Ex. D. 244; 47 L. J. Ex. 704; *Mullens* v. *Miller*, 22 C. D. 194; 52 L. J. Ch. 380.

(*z*) *New Brunswick Rly. Co.* v. *Conybeare*, 9 H. L. C. 711; 31 L. J. Ch. 297; 131 R. R. 415; *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 159; *Oakes* v. *Turquand*, L. R. 2 H. L. 325; 36 L. J. Ch. 949.

(*a*) *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 159.

(*b*) *Ibid.*; *Mullens* v. *Miller*, *supra*; Bowstead on Agency, 6th ed., 359 n.; and see Pollock on Torts, 298.

(*c*) 6 M. & W. 358; 55 R. R. 655.

(*d*) L. R. 2 Ex. 262; 36 L. J. Ex. 147.

(*e*) *Pearson* v. *Dublin Corp.*, 1907, A. C. 351, *per* Lord Halsbury; 77 L. J. P. C. 1.

(*f*) Pollock on Torts, 299. The effect of the decision in *Derry* v. *Peek*, 14 App.

Companies and corporations bound by misrepresentation of agents.

A company or corporation is as much bound by the false and fraudulent representations of its authorised agents as an individual (*g*). If the directors or agents of a company or corporation in the course of managing its affairs, or in the course of the business which it is their duty to transact, induce a man by false or fraudulent misrepresentations to enter into a contract for the benefit of the company, the company is bound, and can no more repudiate the fraudulent conduct of its agents than an individual can (*h*), every director being the agent of the company to make the representations contained in the prospectus (*i*). A company or corporation cannot retain any benefit which it may have obtained through the fraudulent representations of its agents, but is responsible to the extent to which it may have profited from such representations (*j*). It was at one time thought to be an open question whether the liability of the corporation is limited to the amount by which it has profited through the agents' fraud (*k*), but it seems to be now settled that a company is liable for the fraudulent act of an agent committed for his own benefit (*l*), and if the act is authorised by the terms of his authority the principal is liable though the act was done by the agent in abuse of his authority, for his own purposes, and not in the interest of the principal (*m*).

A company is not liable under Lord Tenterden's Act for a fraudulent representation as to the credit of another person

Ca. 337; 58 L. J. Ch. 864, on the question, must, however, be carefully considered.

(*g*) *Citizens Life Ass. Co.* v. *Brown*, 1904, A. C. 423; 73 L. J. P. C. 102.

(*h*) *New Brunswick Rly. Co.* v. *Conybeare*, 9 H. L. C. D. 737, *per* Lord Cranworth; 31 L. J. Ch. 297; 131 R. R. 415; *Swire* v. *Francis*, 3 App. Ca. 106; 47 L. J. P. C. 18; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 317.

(*i*) *Mair* v. *Rio Grande Rubber Estates*, *post*, p. 99.

(*j*) *Oakes* v. *Turquand*, L. R. 2 H. L. 325; 36 L. J. Ch. 949; *Henderson* v. *Lacon*, 5 Eq 261; *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301; 43 L. J. Q. B. 56; *Blake* v. *Albion Life Ins. Society*, 4 C. P. D. 99; 48 L. J. C. P. 169; *Weir* v. *Bell*, 3 Ex. D. 240; 47 L. J. Ex. 704; *Kettlewell* v. *Refuge Ass. Co.*, 1908, 1 K. B. 545; 77 L. J. K. B. 421.

(*k*) L. R. 1 H. L. Sc. pp. 166, 167, and see *British Mutual, &c.* v. *Charnwood Forest, &c.*, 18 Q. B. D. 714; 56 L. J. Q. B. 449.

(*l*) *Ante*, p. 94.

(*m*) *Hambro* v. *Burnand*, 1904, 2 K. B. 10; 73 L. J. K. B. 669; cf. *Smith* v. *Prosser*, 1907, 2 K. B. 735; 77 L. J. K. B. 71; *ante*, p. 94.

made by its agent acting within the scope of his authority, although signed by the agent and made in the interest of the company (*n*), unless the agent has special authority from the company to make the representation (*o*).

The rule that a company cannot retain any benefit which it may have obtained through the false and fraudulent representations of its agents, applies to the case of a member of the company, who was induced by such representations to take additional shares (*p*).

Principal not bound by representations of agents, unless they be acting within the scope of their authority.

A principal, however, is not bound by the false and fraudulent representations of his agent, unless the agent be acting within the scope of his authority (*q*), or unless the principal accepts and ratifies the fraud (*r*). A joint stock company, for instance, is not bound by the statements of one of its members, unless he is also the agent of the company, and unless his business be to make statements on its behalf (*s*). Nor is a company bound by the statements of one of the directors, or of its manager, or secretary, or of a clerk, in the absence of evidence of authority given him to make them (*t*). The rule that companies are bound by the misrepresentations of the directors applies only to the case of directors acting as a body (*u*).

The fraud of the agent must be committed not only within the scope of his authority, but in the *course* of his employment. The act complained of may be within the scope of his authority; but the principal is not liable if it is not committed in the course of business (*x*). It is not, however, necessary

(*n*) *Hirst* v. *West Riding, &c.*, 1901, 2 K. B. 560; 70 L. J. K. B. 828; *post*, Ch. vii., s. 2.

(*o*) *Banbury* v. *Bank of Montreal*, 1917, 1 K. B. 409; 86 L. J. K. B. 380.

(*p*) *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 163.

(*q*) *Nicol's Case*, 3 D. & J. 387, 437; 28 L. J. Ch. 257; *New Brunswick Rly. Co.* v. *Conybeare*, 9 H. L. C. 711; 31 L. J. Ch. 297; 131 R. R. 415; *ante*, p. 93.

(*r*) *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301, 312; 43 L. J. Q. B. 56; *Marsh* v. *Joseph*, 1897, 1 Ch. 213; 66 L. J. Ch. 128, *ante*, p. 94.

(*s*) *Burnes* v. *Pennell*, 2 H. L. C. 497; 81 R. R. 244.

(*t*) *Nicol's Case*, *infra*; *Barnett & Co.* v. *South London Tramways*, 18 Q. B. D. 815; 56 L. J. Q. B. 452.

(*u*) *Nicol's Case*, 3 D. & J. 387, 440; 28 L. J. Ch. 257; 121 R. R. 169; but see *Mair* v. *Rio Grande Rubber Estates*, *infra*, p. 99.

(*x*) *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301; 43 L. J. Q. B. 56; *Re Devala Co.*, 22 C. D. 593; 52 L. J. Ch. 434.

to show that the particular act was authorised if the act was done within the scope of the employment authorised by the principal (*y*).

Holding out.

Although a principal is not bound by the statements of an agent when not acting within the scope of his authority, the principal may be liable on the ground of estoppel by "holding out," that is, by apparently authorising the agent to do certain acts (*z*). Where the owner of property so acts as to mislead another person into the belief that the person dealing with it has authority to do so, the person taking the property will acquire a good title as against the owner (*a*). But you do not hold out anything by transferring title deeds or shares to your trustee; you do not hold him out as your agent at all (*b*). Nor can such "holding out" be pushed so far as to bring the forging of a document within the class of acts which the agent is apparently authorised to do (*c*). Nor can holding out be a ground for an action of deceit unless fraud be proved (*d*). The holding out must be to the particular individual who says he relied upon it or under such circumstances of publicity as to justify the inference that he knew of it and acted upon it (*e*). So a principal is liable if he knows that a man is dealing with his agent under the belief that all statements made by the agent are warranted by the principal, and so knowing allows him to expend monies in that belief. The court will not afterwards allow the principal to set up the want of authority of the agent. The knowledge must, however, be brought home to the principal (*f*).

(*y*) *Hamlyn* v. *Houston*, 1903, 1 K. B. 81; 72 L. J. K. B. 72; *Citizens Life Ass. Co.* v. *Brown*, 1904, A. C. 423; 73 L. J. P. C. 102.

(*z*) *Farquharson* v. *King*, 1902, A. C. 325; 71 L. J. K. B. 667; see 1910, A. C. at p. 184.

(*a*) *London Joint Stock Bank* v. *Simmons*, 1892, A. C. 201, 215, *per* Lord Herschell; 61 L. J. Ch 723; *Fuller* v. *Glyn Mills Currie & Co.*, 1914, 2 K. B. 168; 83 L. J. K. B. 764.

(*b*) *Burgis* v. *Constantine*, 1908, 2 K. B. 484; 77 L. J. K. B. 1045, *per* Moulton, L. J.

(*c*) *Ruben* v. *Great Fingall &c.*, 1906, A. C. 439; 75 L. J. K. B. 843.

(*d*) *Ante*, p. 8.

(*e*) *Farquharson* v. *King*, *supra*, *per* Lord Lindley.

(*f*) *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; 149 R. R. 543; see 1910, A. C. at p. 184.

So if a principal entrusts his agent with indicia of title and with authority to deal with them, he is liable if the agent exceeds his authority (*g*).

Misrepresentation by directors of a company.

Where a person has been induced to purchase shares by the fraudulent misrepresentations of directors, and the directors in the name of the company seek to enforce the contract, or the person who has been deceived institutes an action against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents (*h*). So if directors put forward a prospectus which contains a false report by one of the directors, the company can no more retain money subscribed on the faith of it than it could if the whole board of directors had been guilty (*i*). But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against the company if he retains his shares, or if rescission is impossible by reason of the winding-up of the company (*k*), but he may sue the directors personally.

But a director is not liable for misstatements honestly made which he has taken reasonable care to test. The fact that if he had made inquiries he might have discovered that he was being deceived by his subordinates is not in itself sufficient to show that he did not act with reasonable care (*l*).

Misrepresentation by sub-agent.

As a general rule, one agent is not responsible for the acts of another agent unless he does something by which he makes himself a principal in the fraud (*m*). But a sub-agent may stand in a fiduciary position towards the principal and be

(*g*) *Fay* v. *Smillie*, *post*, p. 134.

(*h*) *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. p. 157.

(*i*) *Mair* v. *Rio Grande Rubber Estates*, 1913, A. C. 853; 83 L. J. P. C. 35.

(*k*) *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 317; and see *ante*, p. 96.

(*l*) *Dovey* v. *Cory*, 1901, A. C. 477; 70 L. J. Ch. 753, *ante*, p. 34.

(*m*) *Cargill* v. *Bower*, 10 C. D. 502, 514; 47 L. J. Ch. 649.

accountable for secret commission which he has received (*n*). When an agent employs a sub-agent, and the latter in the course of his employment is guilty of fraud or misrepresentation, and the agent with knowledge of the fraud derives a material benefit from it, the case becomes analogous to that of a principal who profits by the fraud of his agent, the principle being that he who profits by the fraud of one who is acting by his authority, though committed without his authority, adopts the acts of the agent, and becomes responsible to the party who has been imposed upon and has sustained damage by reason of it. The doctrine that the principal is in any event liable for his agent's fraud to the extent to which the principal has profited by the fraud, does not apply to directors employing sub-agents, such as brokers to place debentures, to transact business of the company in the transaction of which the sub-agents are guilty of fraud, for in such a case the company, not the directors, are the principals (*o*). If the director has really acted as principal, and only colourably as the company's agent, no doubt he might be rendered liable as principal (*p*).

Agent selling as if he were principal.

It is not in general fraudulent for an agent to contract as if he were principal without disclosing the fact of his being an agent contracting for another (*q*), but it may be so under the circumstances of the case. Thus, where an apparent vendor of property had represented to the purchaser by means of a fictitious contract made colusively with the real owner that the property had been sold to him at a certain price, when in fact he was acting only as agent under an agreement by which he was to receive a large discount or commission for obtaining a sale at that price, the transaction was held to be fraudulent and the purchaser entitled to rescind the transaction (*r*). On the other hand, for a man to represent that he

(*n*) *Powell* v. *Evan Jones & Co.*, 1905, 1 K. B. 11; 74 L. J. K. B. 115.

(*o*) *Weir* v. *Bell*, 3 Ex. D. 238; 47 L. J. Ex. 704; in which case, however, the Court of Appeal were by no means unanimous in their opinions; *Weir* v. *Barnett*, 3 Ex. D. 32. See now Companies Consolidation Act, 1908, s. 84.

(*p*) 3 Ex. D. p. 41.

(*q*) *Nelthorpe* v. *Holgate*, 1 Coll. 220; 66 R. R. 46.

(*r*) *Lindsey Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221; but see *Leask* v. *Scott*, 2 Q. B. D. 376; 46 L. J. Q. B. 576.

is acting as agent when in fact he is acting on his own behalf is of no consequence if the agent had no principal at all and was in fact contracting for himself (*s*), or if it is immaterial to the purchaser with whom the contract is made (*t*); but if it is material, as where the purchaser has been induced to contract because he has a set-off against the person with whom he intends to contract (*u*), or where the parties stand in a fiduciary relation to each other (*x*), the transaction is fraudulent.

Partnership firm bound by representations of a partner.

A partnership firm is bound by false and fraudulent representations made by any of its members whilst acting within the scope and limits of his authority, and having reference to the proper business of the firm (*y*), but is not bound by statements made by him as to his authority to do that which the nature of the business of the firm does not impliedly warrant (*z*). If A. has a contract with B. and B. takes C. into partnership, and A. elects to abide by his contract with B., C. is not liable for a fraud by B. against A. in respect of the contract though B. was acting within the scope of the partnership business (*a*).

Duty of disclosure in the case of policies of assurance.

The principle which treats non-disclosure as equivalent to fraud, when the circumstances impose a duty that disclosure should be made, obtains specially in respect to policies of assurance. They are contracts *uberrimæ fidei*; that is to say, the parties are not entitled to contract as if they were at arms' length. They must not keep back, as a vendor may, on the principle of *caveat emptor*, a single material fact unknown to those they deal with. And, inasmuch as the risk which the insurer undertakes can only be learnt from the representations

(*s*) *Harper* v. *Vigers*, 1909, 2 K. B. 549; 78 L. J. K. B. 867; *Nash* v. *Dix*, 78 L. T. 445.

(*t*) *Fellowes* v. *Lord Gwydyr*, 1 R. & M. 83; 32 R. R. 148; but see *Bickerton* v. *Burrell*, 5 M. & S. 383; Pollock on Cont. 107.

(*u*) *Boulton* v. *Jones*, 2 H. & N. 564; 27 L. J. Ex. 117; *Archer* v. *Stone*, 78 L. T. 34.

(*x*) *Kimber* v. *Barber*, 8 Ch. 56.

(*y*) Partnership Act, 1890, s. 10; *Moore* v. *Knight*, 1891, 1 Ch. 547; 60 L. J. Ch. 271.

(*z*) Partnership Act, 1890, s. 5.

(*a*) *British Homes Ass. Corp.* v. *Paterson*, 1902, 2 Ch. 404; 71 L. J. Ch. 872; see *Reid* v. *Silberberg*, 1906, V. L. R. 126.

of the party proposing the insurance, courts of justice proceed upon a doctrine strictly analogous to that of the Roman law, and regard non-disclosure as fatal to the validity of the transaction (*b*). This rule extends to all contracts of insurance, and is not confined to life, fire, and marine insurance (*c*).

Policies of marine assurance.

The rule with respect to the duty of disclosure applies with peculiar force in the case of policies of marine insurance. The validity of a contract of marine insurance being conditional upon the completeness, the truth, and the accuracy of the representations of the party proposing the insurance as to the risk, he is bound to make known to the underwriter everything within his knowledge which is of a nature to increase the risk which he is asked to undertake. There are many matters as to which he may be innocently silent. He is not bound to mention facts and circumstances which are within the ordinary professional knowledge of an underwriter: nor is he bound to communicate things which are well known to both parties, or which he is warranted in assuming to be within the knowledge of the party who is asked to undertake the risk; as, for instance, where a fact is one of public notoriety, as of war, or where it is a matter of inference and the materials for forming a judgment are common to both parties. But he is bound to communicate every fact which he is not entitled to assume to be in the knowledge of the underwriter. He may not, however, speculate as to what may or may not be in the mind of the underwriter, or as to what may or may not be brought to his mind by the particulars disclosed to him. It is not enough that the underwriter be furnished with materials from which he may by a course of reasoning and effort of memory see the extent of the risk. The matter must not be left to speculation or peradventure. If the particulars furnished to the underwriter fall short of what the party proposing the insurance is bound to communicate, the contract is vitiated. It is immaterial whether the omission to communicate a material fact has arisen from

(*b*) *Carter* v. *Boehm*, 3 Burr. 1905; *Lindenau* v. *Desborough*, 8 B. & C. 586; 7 L. J. K. B. 42.

(*c*) *Seaton* v. *Heoth*, 1899, 1 Q. B. 782; 68 L. J. Q. B. 631

intention, or indifference, or mistake, or from it not being present to the mind of the party proposing the insurance that the fact was one which ought to have been disclosed (*d*). It lies upon the insurer to prove the misrepresentation (*e*). Non-disclosure by an agent of the assured, without fraudulent intention, has, however, been held to avoid the policy only to the extent of the loss or risk arising from the particular facts so withheld (*f*). The party proposing the insurance is bound to communicate not only every material fact of which he had actual knowledge, but every material fact of which he ought in the ordinary course of business to have knowledge, and must take all necessary measures, by the employment of competent and honest agents, to obtain through the ordinary channels of intelligence in use in the mercantile world all due information as to the subject-matter of the insurance. If by the fraud or negligence of the agent of the party proposing the insurance the underwriter is kept in ignorance of a fact material to the risk, the contract is vitiated (*g*). But this only applies to the agent through whom the insurance was actually effected, and not to an agent not directly connected with the transaction in question (*h*), unless there is a continuous negotiation by more than one agent (*i*). The concealment by the assured at the time of effecting a policy of assurance of a fact which is material to enable a rational underwriter, governing himself by the principles on which underwriters in practice act, to judge whether he shall accept the risk at all or at what rate, will vitiate the policy, although the fact may not be material with regard to the risk assured (*k*).

(*d*) *Carter* v. *Boehm*, 3 Burr. 1905; *Bates* v. *Hewitt*, L. R. 2 Q. B. 595, 605, 606, 610; 36 L. J. Q. B. 282; *Ionides* v. *Pender*, L. R. 9 Q. B. 537; 41 L. J. Q. B. 190; *Anderson* v. *Pacific, &c., Ins. Co.*, L. R. 7 C. P. 68; *Davies* v. *London and Provincial Ins. Co.*, 8 C. D. 474; 47 L. J. Ch. 511; *Mercantile Steamship Co.* v. *Tyser*, 7 Q. B. D. 77.

(*e*) *Davis* v. *National Ins.*, 1891, A. C. 485; 60 L. J. P. C. 73.

(*f*) *Stribley* v. *Imperial, &c., Co.*, 1 Q. B. D. 507; 45 L. J. Q. B. 396; but see 12 App. Ca. p. 540.

(*g*) *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511; 36 L. J. Q. B. 225; *Biggar* v. *Rock Life Ass. Co.*, 1902, 1 K. B. 516; 71 L. J. K. B. 79.

(*h*) *Blackburn* v. *Vigors*, 12 App. Ca. 531; 55 L. J. Q. B. 347.

(*i*) *Blackburn* v. *Haslam*, 21 Q. B. D. 144; 57 L. J. Q. B. 479.

(*k*) *Rivas* v. *Gerussi*, 6 Q. B. D. 222; 50 L. J. Q. B. 176.

He is bound to communicate all facts which would affect the mind of the underwriter (*l*). But an underwriter cannot avoid a policy for non-disclosure of matters of which he has notice (*m*). And he may in any particular case limit the right of full disclosure which he has by law to that of being informed of what is in the knowledge of the party proposing the insurance, not only as to its existence in point of fact, but also to its materiality (*n*). After the contract is complete, the party assured need not communicate to the underwriter facts which afterwards come to his knowledge material to the risk assured against (*o*).

Inasmuch, therefore, as according to the practice of insurance the slip or memorandum of terms made for the purpose of drawing up the policy is considered as the final acceptance of the risk, any information not obtained until after the slip is initialled is immaterial; and if a policy is executed in accordance with the slip, it cannot be avoided on the ground of concealment of information (*p*).

Life assurance policies.

It was formerly considered that policies of assurance on lives, like policies of insurance on ships, were made conditionally upon the truth or completeness of the representations respecting the risk, and that misrepresentation or concealment of a material fact, although not fraudulent, vitiated the policy (*q*). But it is now determined that such is not the case. The assured is always bound, not only to make a true answer to the questions put to him, but to disclose spontaneously any fact exclusively within his knowledge which it is material for the insurer to know. But it is not an implied condition of the validity of the policy that the insured should make a complete and true representation respecting the life

(*l*) *Tate* v. *Hyslop*, 15 Q. B. D. p. 379; 54 L. J. Q. B. 592.

(*m*) *The* "*Bedouin*," 1894, P. 1; 63 L. J. P. 30.

(*n*) *Jones* v. *Provincial Ins. Co.*, 3 C. B. N. S. 16; 26 L. J. C. P. 272; 111 R. R. 541.

(*o*) *Cory* v. *Patton*, L. R. 7 Q. B. 304; 43 L. J. Q. B. 181; *Lishman* v. *Northern Maritime Ass. Co.*, L. R. 10 C. P. 179; 44 L. J. C. P. 185.

(*p*) *Ibid.*; *Cory* v. *Patton*, L. R. 9 Q. B. 577; *Fisher* v. *Liverpool Marine Ins. Co.*, *ibid.* 418; 43 L. J. Q. B. 114.

(*q*) *Lindenau* v. *Desborough*, 8 B. & C. 586; 7 L. J. K. B. 42; *Jones* v. *Provincial Ins. Co.*, 3 C. B. N. S. 86; 26 L. J. C. P. 272; 111 R. R. 541.

proposed for insurance. Such condition, if intended, must be made a matter for express stipulation. If there be no warranty or condition on the part of the party proposing the insurance, the insurer is subject to all risks, unless he can show a fraudulent concealment or misrepresentation, or a non-communication of material facts known to the assured, which it was his duty to communicate (*r*), and which formed part of the basis of the contract (*s*). But knowledge of a material fact if known to the insurance agent, though not communicated, will be imputed to the principal and will not, therefore, invalidate the policy (*t*). If, however, the agent is allowed by the proposer to invent answers to questions which form the basis of the contract, he is not the agent of the insurance company, and the latter is not liable on the policy though the proposer did not know that the agent had answered falsely (*u*). But where the proposal forms were filled in and signed by agents of the company without the authority of the proposers, the company, having received the premiums, was held liable to pay the sums insured (*w*). It is an implied condition that the person whose life is assured is alive at the time of making the policy, and the policy is void if the assured was dead at the date of the policy, though neither party to the policy was aware of his death (*x*). If there is a proviso that the policy shall not be disputed on the ground of merely untrue statements, not fraudulently made, a misrepresentation or concealment undesignedly made does not avoid the policy (*y*). An insurer

(*r*) *Wheelton* v. *Hardisty*, 8 E. & B. 232; 27 L. J. Q. B. 241; 112 R. R. 535; *London Ass.* v. *Mansel*, 11 C. D. 367; 48 L. J. Ch. 331; *Hambrough* v. *Mutual Ins. Co.*, 72 L. T. 140; *Yorke* v. *Yorks. Ins. Co.*, 1918, 1 K. B. 662; 87 L. J. K. B. 881.

(*s*) *Joel* v. *Law Union and Crown Ins. Co.*, 1908, 2 K. B. 863; 77 L. J. K. B. 1108.

(*t*) *Bawden* v. *London, Edinburgh and Glasgow Ass. Co.*, 1892, 2 Q. B. 534; 61 L. J. Q. B. 792; *Ayrey* v. *British Legal, &c.*, 1918, 1 K. B. 136; 87 L. J. K. B. 513.

(*u*) *Biggar* v. *Rock Life Ass. Co.*, 1902, 1 K. B. 516; 71 L. J. K. B. 79.

(*w*) *Pearl Life Ass. Co.* v. *Johnson*, 1909, 2 K. B. 288; 78 L. J. K. B. 777.

(*x*) *Pritchard* v. *Merchant's Life Ass. Society*, 3 C. B. N. S. 622; 27 L. J. C. P. 169; 111 R. R. 777.

(*y*) *Fowkes* v. *Manchester and London Life Ass. Co.*, 3 B. & S. 917; 32 L. J. O. B. 153; 129 R. R. 607; *Hemmings* v. *Sceptre Life Ass. Co.*, 1905, 1 Ch.

may limit his right to that of being informed of what is in the knowledge of the party proposing the insurance, not only as to its existence in point of fact, but also as to its materiality (*z*). The declaration made as to the basis of the contract is taken as continuing up to the time of executing the policy, so that any intermediate change of circumstances rendering it untrue must be communicated; as where the declaration stated as required the name of the latest medical attendant of the insured, and before completing the policy he took the advice of another medical attendant who gave important information respecting his state of health, it was held that the declaration had become untrue and avoided the policy (*a*). The evidence of medical men to show the materiality of facts not disclosed is admissible (*b*).

On the other hand, a policy may be avoided by the false representations of the insurer or his agent and the premiums recovered back by the assured (*c*). But an innocent misrepresentation by an agent that an insurance would be valid in law will not entitle the assured to recover the premiums (*d*). *Secus*, if the statement is made fraudulently (*e*).

Premiums on a life policy the payment of which has been obtained by fraud may be recovered back even though the policy is one which is prohibited by statute (*f*). Accordingly the Assurance Companies Act, 1909, s. 36, does not deprive a person who has effected a policy such as is there described of his right to say that he was induced to enter into the policy by fraud and to claim rescission and repayment of the premiums (*g*).

365; 74 L. J. Ch. 231. Cf. *Macdonald* v. *Law Union*, L. R. 9 Q. B. 328; 43 L. J. Q. B. 131.

(*z*) *Jones* v. *Provincial Ins. Co.*, 3 C. B. N. S. 86; 26 L. J. C. P. 272; 111 R R. 541.

(*a*) *British Equitable Ins. Co.* v. *Great Western Rly. Co.*, 38 L. J. Ch. 314.

(*b*) *Yorke* v. *Yorks. Ins. Co.*, *supra*.

(*c*) *Kettlewell* v. *Refuge Ass. Co.*, 1908, 1 K. B. 545; 77 L. J. K. B. 421; *Merino* v. *Mutual Reserve, &c.*, 21 T. L. R. 165.

(*d*) *Harse* v. *Pearl Life Ass. Co.*, 1904, 1 K. B. 558; 73 L. J. K. B. 373.

(*e*) *British Workman's Ass. Co.* v. *Cunliffe*, 18 T. L. R. 502; *Goldstein* v. *Salvation Army Ass. Soc.*, 1917, 86 L. J. K. B. 793.

(*f*) *Hughes* v. *Liverpool Friendly Soc.*, 1916, 2 K. B. 482; 85 L. J. K. B. 1643.

(*g*) *Tofts* v. *Pearl Life Ass. Co.*, 1915, 1 K. B. 189; 84 L. J. K. B. 286.

Fire assurance policies.

Policies of insurance against fire are made upon the implied condition that the description of the property inserted in the policy is true at the time of making the policy (*h*); and there is an implied condition that the property shall not be altered during the term for which it is insured, so as to increase the risk (*i*). In effecting an insurance against fire, it is the duty of the party proposing the insurance to communicate to the insurer all material facts within his knowledge touching the property (*k*). But the insurer may limit his right to that of being informed of what is in the knowledge of the party proposing the assurance, not only as to its existence in point of fact, but also as to its materiality (*l*).

Where a policy is warranted to be identical in rate, terms and interest with other insurances on the same property, the warranty is a condition precedent of any obligation, and a breach of it avoids the policy (*m*).

Duty of disclosure in the case of contracts of guarantee or suretyship.

The strict rule with respect to non-disclosure, which obtains in the case of policies of insurance, does not extend to contracts of suretyship or guarantee. The contract is not one in which there is a universal obligation on the part of the creditor to make a full disclosure, unless there is a condition that there shall be a full disclosure of all the circumstances (*n*). But very little said which ought not and very little not said which ought to have been said will be sufficient to prevent the contract being valid (*o*). If the creditor be specially communicated with on the subject, he is bound to make a full, fair and honest communication of every circumstance within his knowledge calculated in any way to influence the discretion of the surety on entering into the required

(*h*) *Sillem* v. *Thornton*, 3 E. & B. 868; 23 L. J. Q. B. 362.

(*i*) *Ibid.*; *Stokes* v. *Cox*, 1 H. & N. 533; 26 L. J. Ex. 113; 108 R. R. 607.

(*k*) *Lindenau* v. *Desborough*, 8 B. & C. 592; 7 L. J. K. B. 42; *Bufe* v. *Turner*, 6 Taunt. 338; 16 R. R. 626; *Condogeanis* v. *Guardian Ass. Co.*, 1919, Vict. L. R. 1.

(*l*) *Jones* v. *Provincial Ins. Co.*, 3 C. B. N. S. 86; 26 L. J. C. P. 272.

(*m*) *Barnard* v. *Faber*, 1893, 1 Q. B. 340; 62 L. J. Q. B. 159.

(*n*) *Towle* v. *National Ins.*, 3 Giffe. 42; 30 L. J. Ch. 900; 133 R. R. 20.

(*o*) *North British Ins. Co.* v. *Lloyd*, 10 Ex. 523; 24 L. J. Ex. 14; *Wythes* v. *Labouchere*, 3 D. & J. 609; 121 R. R. 238; *Davies* v. *London and Prov. Ins. Co.*, 8 C. D. 469; 47 L. J. Ch. 511. As to Lord Tenterden's Act, see *post*, Ch vii., s. 2.

obligation (*p*). But he is not under any duty to disclose to the intended surety voluntarily, and without being asked to do so, any circumstances unconnected with the particular transaction in which he is about to engage, which will render his position more hazardous, or to inform him of any matter affecting the general credit of the debtor, or to call his attention to the transaction, unless there be something in it which might not naturally be expected to take place between the parties (*q*). Nor is it necessary in the case of a fidelity guarantee that the non-disclosure should be fraudulent (*r*). If the intended surety desires to know any particular matter of which the creditor may be informed, he must make it the subject of a distinct inquiry (*s*). But if there be anything in the transaction that might not naturally be expected to take place between the parties concerned in it, the knowledge of which it is reasonable to infer would have prevented the surety from entering into the transaction, the creditor is under an obligation to make the disclosure (*t*). If, for instance, there be any private arrangement, or secret understanding between the creditor and the debtor connected with the particular transaction in which he is about to engage, whereby the risk of the surety is increased (*u*), or his position is so materially varied that he is not in the position in which he might reasonably have contemplated to be (*x*); or if a party having reason to suspect the fidelity of his clerk requires security in such a way as to hold him out as one whom he considers a trustworthy person (*y*), or if, when the guarantee

(*p*) *Owen* v. *Homan*, 3 Mac. & G. 378; 20 L. J. Ch. 314; 94 R. R. 516; *Blest* v. *Brown*, 4 D. F. & J. 367; *Greenfield* v. *Edwards*, 2 D. J. & S. 582, 598; 139 R. R. 244.

(*q*) *Hamilton* v. *Watson*, 12 Cl. & Fin. 119; 69 R. R. 58; *Small* v. *Currie*, 2 Drew. 102; 100 R. R. 51; *Wythes* v. *Labouchere*, 3 D. & J. 593, 609; 121 R. R. 238.

(*r*) *London General Omnibus Co.* v. *Holloway*, 1912, 2 K. B. 72; 81 L. J. K. B. 603.

(*s*) *Hamilton* v. *Watson*, *supra*; *Wythes* v. *Labouchere*, 3 D. & J. 609.

(*t*) *Hamilton* v. *Watson*, 12 Cl. & Fin. 109, 119; 69 R. R. 58; *Lee* v. *Jones*, 17 C. B. N. S. 503; 34 L. J. C. P. 131; 142 R. R. 467.

(*u*) *Pidcock* v. *Bishop*, 3 B. & C. 605; 27 R. R. 430.

(*x*) *Spaight* v. *Cowne*, 1 H. & M. 359; 136 R. R. 150; *Ellesmere Brewery Co.* v. *Cooper*, 1896, 1 Q. B. 75; 65 L. J. Q. B. 173.

(*y*) *Smith* v. *Bank of Scotland*, 1 Dow, 272; 14 R. R. 67.

is a continuing one, an employer chooses to continue a clerk in his employment after discovering that he has been guilty of dishonesty in his service (*z*), or if the creditor has notice that the circumstances under which the debtor has obtained the concurrence of the surety lead to the suspicion of fraud (*a*); concealment is fraudulent and will vitiate the transaction. "It must in every case," said Lord Blackburn (*b*), "depend on the nature of the transaction whether the fact not disclosed is such that it is impliedly represented not to exist, and that fact must be generally a question of fact for the jury."

But though the strict rule with respect to non-disclosure which obtains in the case of policies of insurance does not extend to contracts of suretyship, the contract of suretyship is based upon the free and voluntary agency of the individual who enters into it. Anything like pressure used by the intending creditor will have a very serious effect on the validity of the contract, and the case is stronger when pressure is the result of maintaining a false conclusion in the mind of the person pressed (*c*).

Concealment in the case of compromises.

In order that a compromise may be supported in equity, it is essential that the parties should have acted with equal knowledge, or at least equal means of knowledge, in the matter. If one of the parties has knowledge of a material fact, which he withholds from the others, and which they have not reasonable means of knowing, the transaction cannot stand. A compromise cannot be approved of where one party knows only so much of his rights as the opposite party chooses to apprise him of. To constitute a fair compromise of a doubtful right, the facts creating the doubt should be equally known by all the parties. There must be a full and fair communication of all material circumstances

(*z*) *Philipps* v. *Foxhall*, L. R. 7 Q. B. 679; 41 L. J. Q. B. 293; but see *Caxton Union* v. *Dew*, 68 L. J. Q. B. 380.

(*a*) *Owen* v. *Homan*, 4 H. L. C. 997; 20 L. J. Ch. 314; 94 R. R. 516; *Lee* v. *Jones*, 17 C. B. N. S. 503; 34 L. J. C. P. 131; 142 R. R. 467; *Rhodes* v. *Bate*, 1 Ch. 252; 35 L. J. Ch. 267; 148 R. R. 255.

(*b*) 17 C. B. N. S. 506.

(*c*) *Davies* v. *London and Provincial Ins. Co.*, 8 C. D. 474; 47 L. J. Ch. 511.

affecting the question which forms the subject-matter of the agreement, which are within the knowledge of the several parties, and which the others have not reasonable means of knowing, whether such information be asked for by them or not. There must not only be good faith and honest intention, but full disclosure, and without full disclosure honest intention is not sufficient. A party to a compromise who has knowledge of a fact must not take upon himself to decide that the suppressed fact is immaterial, if it could by any possibility have had any influence on the decision of the other party (*d*). To make a compromise of any value the parties must be at arms' length, on equal terms, with equal knowledge, and with sufficient advice and protection (*e*). Mere silence, however, as regards a material fact which the one party is not bound to disclose to the other, is not a ground of defence to specific performance of a compromise (*f*). If it is desired to set aside on the ground of fraud a compromise already approved, a new action must be brought (*g*).

If the compromise is a transaction in the nature of a family arrangement, these principles apply with peculiar force (*h*). The omission to make full communication, even without any wrong motive, is a ground for setting aside the transaction. "Full and complete communication of all material circumstances is what the Court must insist on" (*i*); and without full disclosure honest intention is not sufficient (*k*). The operation of this rule is not affected by the leaning of equity

(*d*) *Walker* v. *Symonds*, 3 Sw. 1; 19 R. R. 155; *Stewart* v. *Stewart*, 6 Cl. & Fin. 911; 49 R. R. 267; *Harvey* v. *Cooke*, 4 Russ. 34; 6 L. J. Ch. 84; *Pickering* v. *Pickering*, 2 Beav. 56; 8 L. J. Ch. 336; *Brooke* v. *Lord Mostyn*, *ibid.* 373; 34 L. J. Ch. 65; *De Cordova* v. *De Cordova*, 4 App. Ca. 702; *Re Roberts*, 1905, 1 Ch. 704; 74 L. J. Ch. 483.

(*e*) *Moxon* v. *Payne*, 8 Ch. 881, *per* James, L.J., 43 L. J. Ch. 340.

(*f*) *Turner* v. *Green*, 1895, 2 Ch. 205; 64 L. J. Ch. 539; *Greenhalgh* v. *Brindley*, 1901, 2 Ch. 324; 70 L. J. Ch. 740.

(*g*) *Emeris* v. *Woodward*, 43 C. D. 185; 59 L. J. Ch. 230.

(*h*) *Gordon* v. *Gordon*, 3 Sw. 400; 19 R. R. 230; *Greenwood* v. *Greenwood*, 2 D. J. & S. 28; 139 R. R. 13; *Fane* v. *Fane*, 20 Eq. 698; but see *Hoblyn* v. *Hoblyn*, 41 C. D. 200; *Re Roberts*, *supra*.

(*i*) *Gordon* v. *Gordon*, 3 Sw. p. 473; 19 R. R. 230.

(*k*) *Ibid.*, p. 477; *De Cordova* v. *De Cordova*, 4 App. Ca. 692; *Re Roberts*, *sup.*

towards supporting family arrangements for the sake of peace and quietness in families (*l*).

The rule with respect to compromises which applies between private individuals is not less applicable to compromises by the Court on behalf of infants; but the Court cannot sanction a compromise on behalf of infants against the opinion of their advisers (*m*). The orders of the Court cannot be set aside on grounds less strong than those which would be required to set aside transactions between competent parties (*n*).

Concealment by persons standing in a position of fiduciary relation.

The most comprehensive class of cases in which equitable relief is sought on the ground of concealment is in the case of transactions between persons standing in a fiduciary relation to each other. In all such cases the party who fills the position of active confidence is under an equitable obligation to disclose to the party towards whom he stands in such relation every material fact which he himself knows calculated to influence his conduct on entering into the transaction. The suppression of any material fact renders the transaction impeachable in equity. This subject will come into review in a subsequent chapter, where the peculiar equities between persons standing in these positions will be considered.

Misrepresentation made by mistake.

If a man makes a representation in the honest belief that it is true, and there be reasonable ground for such relief, a fraudulent intent will not be imputed to him, although it may turn out to be false (*o*), unless there be a duty cast on him to know the truth (*p*). A misrepresentation made through honest mistake is not a ground for rescinding a transaction (*q*), unless the subject-matter be different in substance from what

(*l*) *Fane* v. *Fane*, 20 Eq. 698.

(*m*) *Re Birchall*, 16 C. D. 41.

(*n*) *Brooke* v. *Lord Mostyn*, 2 D. J. & S. 416; 34 L. J. Ch. 65; 139 R. R. 134; *Coaks* v. *Boswell*, 11 App. Ca. 232; 55 L. J. Ch. 761; *Turner* v. *Green*, 1895, 2 Ch. 205; 64 L. J. Ch. 539.

(*o*) *Haycraft* v. *Creasy*, 2 East, 92; 6 R. R. 380; *Collins* v. *Evans*, 5 Q. B. 820; 13 L. J. Q. B. 180; 64 R. R. 656; *Thom* v. *Bigland*, 8 Ex. 726; 22 L. J. Ex. 243; 91 R. R. 730. See *Bank of England* v. *Cutler, Bertram, third party*, 25 T. L. R. 509.

(*p*) *Thom* v. *Bigland*, *supra*.

(*q*) *Ormrod* v. *Huth*, 14 M. & W. 651; 14 L. J. Ex. 366; but see *Re Glub*, *Bamfield* v. *Rogers*, 1900, 1 Ch. 354; 69 L. J. Ch. 278.

it was represented to be. In cases where a contract is sought to be rescinded on the ground of fraud, it is enough to show a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorise a rescission, unless it be such as to show that there is a complete difference between what was represented and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser is induced by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought they were dealing about a sound horse, and were in error, yet the purchaser must pay the whole price, unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the whole of the price, unless there was a condition to that effect in the contract. The principle is well illustrated by the civil law as stated in the Digest (*r*), to the effect that if there be a misapprehension as to the substance of the thing, there is no contract; but if it be only a difference in some quality or accident, even though a misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding. "*Si aes pro auro veneat, non valet, aliter atque si aurum quidem fuerit, deterius autem quam emptor estimaret; tunc enim emptio valet*" (*s*).

The principle of our law is the same as that of the civil law. If the thing sold differs in substance from what the purchaser was led by the vendor to believe he was buying, there is no contract. A man who honestly sold what he thought was a bill without recourse to him, was held nevertheless bound to return the price, on its turning out that the supposed bill was void under the stamp laws in the one case,

(*r*) Lib. 18, *De contrahenda emptione*, Tit. 1, leg. 9, 10, 11.

(*s*) See *Kennedy* v. *Panama, &c., Co.*, L. R. 2 Q. B. p. 587; 36 L. J. Q. B. 260.

and was a forgery in the other (*t*). So also where cotton was sold by sample, and the sample was long stapled cotton, but the cotton delivered was short stapled cotton, the cotton was held to be different in kind from what the purchaser had contracted to buy, and that he was entitled to reject it (*u*). If, on the other hand, the purchaser receives what answers the description of the article sold, and there is no difference in substance between the article delivered and the article sold, but only a difference in some quality or accident, the contract remains binding in the absence of a warranty, even though a misapprehension caused by the incorrect representation of the vendor may have been the actuating motive to the purchaser (*x*). In such a case the rule *caveat emptor* will apply (*y*). In a case, accordingly, where a steam-packet company issued a prospectus stating in effect that they had entered into a contract with a colonial government for the carrying of mails between certain places, and a man induced by the terms of the prospectus applied for and obtained some of the shares, but the contract, not being binding on the colonial government, was repudiated, it was held that the representation did not affect the substance of the matter, the applicant having actually got shares in the very company for shares in which he had applied, and the shares being a property of considerable value in the market, though perhaps not so valuable as they would have been had the statement in the prospectus been strictly accurate (*z*). The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration. There may be misapprehension as to that which is a material part

(*t*) *Gompertz* v. *Bartlett*, 2 E. & B. 849; 23 L. J. Q. B. 65; 95 R. R. 851; *Gurney* v. *Womersley*, 4 E. & B. 133; 24 L. J. Q. B. 46; 99 R. R. 390; cf. *Re Glubb*, 1900, 1 Ch. 354; 69 L. J. Ch. 278.

(*u*) *Azemar* v. *Casella*, L. R. 2 C. P. 677; 36 L. J. C. P. 263.

(*x*) *Kennedy* v. *Panama, &c., Co.*, L. R. 2 Q. B. p. 587; 36 L. J. Q. B. 260.

(*y*) 2 E. & B. p. 850, *per* Lord Campbell.

(*z*) *Kennedy* v. *Panama, &c., Co.*, L. R. 2 Q. B. 580; 36 L. J. Q. B. 260.

of the motive inducing the transaction, but not so as to prevent the subject-matter of the transaction from being in substance what it was represented to be (*a*).

The same principles apply where a claim is made for the restitution of property acquired through incorrect representations made by honest mistake.

In *Rawlins* v. *Wickham* (*b*), Turner, L. J., said that if, upon a treaty for purchase, one of the parties to the contract makes a representation materially affecting the subject-matter of the contract, he cannot be allowed to retain any benefit which he has derived, if the representation proves to be untrue, and that no man can be held to what he has done under circumstances which have been erroneously represented to him by the other party to the transaction, however innocently the representation may have been made; that a contrary doctrine would strike at the root of fair dealing, and would open a door of escape in all cases of representation as to credit, and indeed in all other cases of false representation (*c*). The words of Mr. Justice Story (*d*) are much to the same effect. "Nothing," he said, "is clearer in equity than the doctrine that a bargain founded upon false representations made by the seller, although made by innocent mistake, will be avoided. Mistake as well as fraud in any representation of a fact material to the contract is a sufficient ground to set it aside."

In *Redgrave* v. *Hurd* (*e*) Jessel, M. R., said: "As regards rescission of a contract, there was no doubt a difference between the rules of courts of equity and the rules of courts of common law—a difference which of course has now disappeared by the operation of the Judicature Act, which makes rules of equity prevail. According to the decisions of courts of equity, it was not necessary in order to set aside a contract obtained by *material* false representations to prove that the party who obtained it knew at the time when the representa-

(*a*) *Ibid.*, p. 588.
(*b*) 3 D. & J. 317; 28 L. J. Ch. 188; 121 R. R. 134; explained 34 C. D. p. 595.
(*c*) *Hart* v. *Swaine*, 7 C. D. 46; 47 L. J. Ch. 5.
(*d*) 1 Story (Amer.), 172.
(*e*) 20 C. D. 1; 51 L. J. Ch. 113.

tion was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was: A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it. The other way of putting it was this: Even assuming that a moral fraud must be shown in order to set aside a contract, you have it where a man having obtained a beneficial contract by a statement which he now knows to be false insists upon keeping that contract. To do so is a moral delinquency; no man ought to seek to take advantage of his own false statements . . . the doctrine in equity was settled beyond controversy, and it is enough to refer to the judgment of Lord Cairns in *Reese River Silver Mining Co.* v. *Smith* (*f*), in which he lays it down in the way I have stated." Where, therefore, a man subsequently discovers the falsity of an innocent representation it is his duty to disclose it, otherwise he will be liable in an action of deceit for loss subsequently sustained (*g*).

In *Adam* v. *Newbiggin* (*h*), Bowen, L. J., said: "If the mass of authority there is upon the subject were gone through, I think it would be found there is not so much difference as is generally supposed between the view taken at common law and the view taken in equity as to misrepresentation. At common law it has always been considered that misrepresentations which strike at the root of the contract are sufficient to avoid the contract on the ground explained in *Kennedy* v. *Panama, &c., Co.*" (*i*).

In *Derry* v. *Peek*, Lord Herschell said (*k*): "Where rescission is claimed, it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract having been obtained by misrepresentation cannot

(*f*) L. R. 4 H. L. 64; 39 L. J. Ch. 849.
(*g*) *Robertson* v. *Belson*, 1905, 1 Vict. L. R. 555.
(*h*) 34 C. D. p. 592; affirmed 13 App. Ca. 308; 57 L. J. Ch. 1066.
(*i*) L. R. 2 Q. B. 580; 36 L. J. Q. B. 260.
(*k*) 14 App. Co. p. 359; 58 L. J. Ch. 864.

stand." So, too, Lord Bramwell said (*l*): "A material misrepresentation, though not fraudulent, may give a right to rescind a contract where capable of such rescission."

In *Stewart* v. *Kennedy* (*m*), the House of Lords held that error *in substantialibus* is not sufficient to give a person the right to rescind, unless his belief has been produced by the representations, fraudulent or not, of the other party to the contract.

Where shares in a company are offered to and taken by the public, and a prospectus is issued by the promoters which misrepresents material facts with regard to a contract for purchase entered into by the company with its promoters, the company in its corporate capacity will be entitled to rescission of the contract, although its directors, who are nominees of the promoters, may have been aware of the real facts of the case, and although fraud is not imputed to them (*n*).

From all which cases the principle is obviously deducible that a misrepresentation, however honestly made, is a ground for rescission of contract, provided the misrepresentation is material, or, in other words, so different in substance from what it was represented to be as to amount to a failure of consideration or fundamental error (*o*). Where the misdescription, though not proceeding from fraud, is on a material and substantial point so far affecting the subject-matter of the contract that it may reasonably be supposed that but for such misdescription the purchaser would never have entered into the contract at all, the contract will be rescinded (*p*). But where the latent defect is not so material as to bring the case within the principle of *Flight* v. *Booth*, the purchaser is not entitled to rescission even if the defect is known to and not disclosed by the vendor (*q*).

(*l*) *Ibid.*, p. 347. (*m*) 15 App. Ca. 118, 121.

(*n*) *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate*, 1899, 2 Ch. 392; 68 L. J. Ch. 699.

(*o*) As to the different kinds of fundamental error, see Pollock on Contract, p. 488. (*p*) *Flight* v. *Booth*, 1 Bing. N. C. 370.

(*q*) *Shepherd* v. *Croft*, 1911, 1 Ch. 521; 80 L. J. Ch. 170, distinguishing; *Carlish* v. *Salt*, 1906, 1 Ch. 335; 75 L. J. Ch. 175.

There is a difference in substance amounting to a failure of consideration, if the property is not of the same nature or description as it was represented to be in the particulars of sale, as where leasehold or copyhold property is described as freehold (*r*); or where land sold and conveyed as freehold turns out to be copyhold (*s*); or where an under-lease is sold as an original lease (*t*); or where upon the sale of an estate let at lease on a rack-rent, such rent is described as a ground-rent (*u*); or where there is a misdescription of the quantity of land in regard to acres being statute acres or customary acres (*x*); or where the acreage of an estate is very much less than it was represented to be (*y*); or where a house composed externally partly of brick, and partly of timber, and lath and plaster, is described as a brick-built house (*z*); or where property which was in truth an equity of redemption in a reversionary interest was described as an absolute reversion, or as an immediate reversion expectant on the death of a tenant for life (*a*); or where the rents at which the different parts of a lot of land were underlet were stated, but no mention was made of a ground-rent (*b*).

So, also, there is a difference in substance amounting to a failure of consideration, if there be misrepresentation upon a point material to the due enjoyment of the property; as where a vendor describes land as situated within one mile of a particular town, when it is, in fact, several miles distant therefrom (*c*); or where, upon the sale of a lease of a house

(*r*) *Drewe* v. *Corp*, 9 Ves. 368; *Pulsford* v. *Richards*, 17 Beav. 96, *per* Lord Romilly; 22 L. J. Ch. 559; but see *Blaiberg* v. *Keeves*, 1906, 2 Ch. 175; 75 L. J. Ch. 464.

(*s*) *Hart* v. *Swaine*, 7 C. D. 46; 47 L. J. Ch. 5.

(*t*) *Madeley* v. *Booth*, 2 De G. & S. 718; 79 R. R. 343; *Re Beyfus*, 39 C. D. 110.

(*u*) *Stewart* v. *Alliston*, 1 Mer. 26; 15 R. R. 81.

(*x*) *Price* v. *North*, 2 Y. & C. 620; 7 L. J. Ex. Eq. 9; 47 R. R. 470; *Durham* v. *Legard*, 34 Beav. 612; 34 L. J. Ch. 589; 145 R. R. 698; and see *Connor* v. *Potts*, 1897, 1 Ir. R. 534; *North* v. *Percival*, 1898, 2 Ch. 128; 67 L. J. Ch. 321.

(*y*) *Aberaman Iron Works* v. *Wilkins*, 4 Ch. 101.

(*z*) *Powell* v. *Doubble*, Sug. V. & P. 29, Dart, V. & P. 151.

(*a*) *Torrance* v. *Bolton*, 8 Ch. 124; 42 L. J. Ch. 177.

(*b*) *Jones* v. *Rimmer*, 14 C. D. 591; 49 L. J. Ch. 775.

(*c*) *Duke of Norfolk* v. *Worthy*, 1 Camp. 337; 10 R. R. 749; *Pulsford* v. *Richards*, 17 Beav. 96, *per* Lord Romilly; 22 L. J. Ch. 559; 99 R. R. 48.

or shop, the particulars merely stated that the lease contained a restriction against certain specified trades being carried on upon the premises, whereas, in fact, several other trades were forbidden (*d*); or where, upon the sale of a piece of land described as "a first-rate building plot of ground," no notice was taken of a right of way passing over it (*e*), or an underground culvert running through it (*f*); or of an underground watercourse which third parties had liberty to open, cleanse, and repair, making satisfaction for damage thereby occasioned (*g*); or where a house described to be situated in a fashionable street, was not actually in that street, but merely communicated with it by a passage (*h*).

So, also, there is a difference in substance amounting to a failure of consideration, where the property, as described, is not identical with that intended to be sold (*i*); or where a material part of the property described has no existence, or cannot be found (*k*); or where no title can be shown to a part of the property which, though small in quantity, is important for the enjoyment of the whole (*l*); or where the particulars of sale are misleading as to boundaries and frontage (*m*); or where an annuity was granted to be calculated on a certain footing by the agent of the grantee, and the calculation proved very inaccurate (*n*); or where a man agreed to purchase a share in a partnership business, on the footing of a balance-sheet prepared by an accountant employed by the vendor, which turned out to be very inaccurate in certain particu-

(*d*) *Flight* v. *Booth*, 1 Bing. N. C. 370; 41 R. R. 599.

(*e*) *Dykes* v. *Blake*, 4 Bing. N. C. 463; 44 R. R. 761. See *Gibson* v. *D'Este*, 2 Y. & C. C. C. 542; 6 R. R. 262.

(*f*) *Re Puckett and Smith*, 1902, 2 Ch. 258; 71 L. J. Ch. 666; cf. *Re Brewer and Hankins*, 80 L. T. 127; *Shepherd* v. *Croft*, 1911, 1 Ch. 521; 80 L. J. Ch. 170.

(*g*) *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609; 75 R. R. 216.

(*h*) *Stanton* v. *Tattersall*, 1 Sm. & G. 529; 96 R. R. 471. See Dart, V. & P. 149.

(*i*) *Leach* v. *Mullett*, 3 C. & P. 115; 33 R. R. 657.

(*k*) *Robinson* v. *Musgrove*, 2 Moo. & R. 92.

(*l*) *Arnold* v. *Arnold*, 14 C. D. 270; cf. *Re Jackson and Haden*, 1906, 1 Ch. 412; 75 L. J. Ch. 226.

(*m*) *Brewer* v. *Brown*, 28 C. D. 309; 54 L. J. Ch. 605.

(*n*) *Carpmael* v. *Powis*, 10 Beav. 44; 16 L. J. Ch. 31.

lars (*o*); or where a man was released from an obligation, in which he was bound, on a representation that a certain security deposited with the creditor (which proved to be an imaginary one) was a good security (*p*).

So, also, it may be laid down, as a general rule, that there is a difference in substance amounting to a failure of consideration, if the misrepresentation or misdescription is of such a nature that the amount of compensation cannot be estimated (*q*); as where on the sale of a reversion expectant on the decease of A. in case he should have no children, his age was described as sixty-six, instead of sixty-four (*r*); or as where on the sale of a wood, the particulars erroneously stated that the average size of the timber approached fifty feet, the number of trees not being stated (*s*); or as where the particulars stated the premises to be in the joint occupation of A. and B. as lessees, when in fact A. was only assignee of the lease, and B. was a mere joint occupier (*t*); or as where the right to coal under the estate was shown to be in other parties, and no means existed of determining its value (*u*).

Words "more or less" after statement of quantity of acres, &c.

The presence of the words "more or less" in a contract for the sale or a deed of conveyance of land after a statement of the quantity of acres comprised therein does not import a special engagement that the purchaser takes the risk of the quantity; and of course a vendor cannot rely on such expressions if he fraudulently misstates the quantity (*x*). The words must be taken merely to cover a reasonable excess or deficiency. If it turned out that the quantity falls considerably short of what it was represented to be, the Court will relieve the purchaser from payment for the deficiency; but a slight variation does not afford a ground for relief (*y*).

(*o*) *Charlesworth* v. *Jennings*, 34 Beav. 96.
(*p*) *Scholefield* v. *Templer*, 4 D. & J. 434; 124 R. R. 324.
(*q*) See *Re Beyfus*, 39 C. D. 110.
(*r*) *Sherwood* v. *Robins*, Moo. & M. 194. See 8 Cl. & F. 792.
(*s*) *Brooke* v. *Rounthwaite*, 5 Ha. 298; 15 L. J. Ch. 332; 71 R. R. 115.
(*t*) *Ridgway* v. *Gray*, 1 Mac. & G. 109; 84 R. R. 26.
(*u*) *Smithson* v. *Powell*, 20 L. T. O. S. 105.
(*x*) *Winch* v. *Winchester*, 1 V. & B. 377; 12 R. R. 238.
(*y*) *Portman* v. *Mill*, 2 Russ. 570; 26 R. R. 175; Sug. V. & P. 324; Dart, V. & P. 676.

Nor will the Court interfere, although the deficiency be considerable, if the risk as to the quantity constituted one of the elements of the agreement, or if the sale was a thing in gross and not by admeasurement (*z*); or if there was a special stipulation that the quantities shall be taken as stated (*a*). But if the acreage of an estate is very much less than it was represented to be, a proviso in one of the conditions of sale that the estate as to extent should be taken to be conclusively shown by certain deeds will not estop the purchaser from having the contract rescinded on the ground of the deficiency (*b*). But on a sale of thirty-six acres, a vendor cannot rescind because it turns out that the property contains forty-two acres (*c*). A condition of sale providing that if any error in the particulars should be discovered it should not annul the sale nor should compensation be allowed in respect thereof applies only to small errors, and not to a large deficiency (*d*).

Equitable application of the doctrine of misrepresentation.

Estoppel.

Innocent misrepresentations may give rise to liability, or as it is more correct to say, they may give rise to liability without any need for determining whether they are innocent or otherwise. The principle of law that a man who makes a representation to another in such a way or under such circumstances as to induce him to believe that it is meant to be acted on, is liable as for a fraud in the event of the representation proving to be false and damage thereby accruing to the party to whom it was made, is the ground on which the doctrine of equitable estoppel rests. "The law is clear," said Lord Denman, in *Pickard* v. *Sears* (*e*), "that where one by his words or conduct wilfully causes another to believe in a certain state of things, and induces him to act on that belief

(*z*) *Anon.*, 2 Freem. 107; *Baxendale* v. *Seale*, 19 Beav. 601; 24 L. J. Ch. 385; 105 R. R. 261; cf. *Tancred* v. *Steel Co.*, 15 App. Ca. 125.

(*a*) *Nicoll* v. *Chambers*, 11 C. B. 996; 21 L. J. C. P. 54; 87 R. R. 846. See Sug. V. & P. 324, 327; Dart, V. & P. 155.

(*b*) *Aberaman Iron Works* v. *Wickens*, 4 Ch. 101.

(*c*) *North* v. *Percival*, 1898, 2 Ch. 128; 67 L. J. Ch. 321.

(*d*) *Terry and White*, 32 C. D. 14; 55 L. J. Ch. 345; *Fawcett and Holmes*, 42 C. D. 156; 58 L. J. Ch. 763; *Jacobs* v. *Revell*, 1900, 2 Ch. 858; 69 L. J. Ch. 879; *Lee* v. *Rayson*, 1917, 1 Ch. 613; 86 L. J. Ch. 405.

(*e*) 6 A. & E. 476; 45 R. R. 538.

so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existed at the same time." In *Freeman* v. *Cooke* (*f*), Lord Wensleydale stated that the rule laid down in *Pickard* v. *Sears* "was to be considered as established, but that by the term 'wilfully' in that rule must be understood, if not that the party represents that to be the truth which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true and believed that it was meant that he should act upon it accordingly, and he accordingly does act upon it as true, the party making the representation would be equally precluded from contesting its truth" (*g*). This doctrine is not confined to cases where the original representation was fraudulent. The doctrine goes much further. Even when a representation is made in entire good faith, if it be made in order to induce another to act upon it or under circumstances in which the party may reasonably suppose it will be acted on, then *primâ facie* the party making the representation is bound by it as between himself and those whom he has thus misled (*h*). "The doctrine of equitable estoppel by representation," said Lord Selborne (*i*), "is this, that if a man dealing with another for value makes statements to him as to existing facts which being stated would affect the contract, and without reliance upon which or without the statement of which the party would not enter into the contract, and which being otherwise than as they were stated would leave the situation after the contract different from what it would have been if the representations had not been

(*f*) 2 Exch. 654; 18 L. J. Ex. 114.

(*g*) See *Swan* v. *North Australasian Co.*, 2 H. & C. 182; 31 L. J. Ex. 425; 133 R. R. 639; *Carr* v. *London and North Western Rly. Co.*, L. R. 10 C. P. 307; 44 L. J. C. P. 109; *Bell* v. *Marsh*, 1903, 1 Ch. 528; 72 L. J. Ch. 360; *Longman* v. *Bath Electric Tramways*, 1905, 1 Ch. 646; 74 L. J. Ch. 424.

(*h*) *West* v. *Jones*, 1 Sim. N. S. 207; 20 L. J. Ch. 362; 89 R. R. 67.

(*i*) L. R. 6 H. L. p. 360. See also *Knights* v. *Whiffen*, L. R. 5 Q. B. 664; 40 L. J. Q. B. 51.

made, then the person making the representation shall, so far as the powers of the Court extend, be treated as if the representations were true, and shall be compelled to make them good." Lord Blackburn, in *Burkinshaw* v. *Nicolls* (*k*), said that "When one says to another: 'I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it is of the very essence of justice that between those two parties their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action, and that is what is meant by estoppel." A man, accordingly, who has by express representation or positive acts induced a reasonable man to believe the existence of a particular fact and to believe that the representation was meant to be acted on, will not be permitted to derogate from interests which have been created or rights which have been acquired on the faith of the existence of such fact, by showing that the fact was not such as he had represented it to be, or by determining the actual state of things which he has so held forth as the consideration for the change of his condition by the other (*l*).

Where, for instance, a man holds himself out as a partner, or allows others to do so, he is rightly held liable as a partner by estoppel, even though creditors knew that he was not in fact a partner (*m*).

So a receipt in a mortgage or transfer of mortgage may estop the mortgagor or transferor from claiming as against a person dealing in good faith and for value (*n*). But a fraudulent misstatement in a deed, though it will bind the mortgagor himself, may not estop a party claiming through him who would be aggrieved by the fraud (*o*). Where, however, a mortgagor makes false representations as to existing

(*k*) 3 App. Ca. p. 1026.

(*l*) *Pigott* v. *Stratton*, John. 359; 1 D. F. & J. 49; 29 L. J. Ch. 1; 135 R. R. 336; and see *Spicer* v. *Martin*, 14 App. Ca. p. 23; 58 L. J. Ch. 309.

(*m*) Lindley, 224; L. R. 4 P. C. p. 435.

(*n*) *King* v. *Smith*, 1900, 2 Ch. 425; 69 L. J. Ch. 598; *Rimmer* v. *Webster*, 1902, 2 Ch. 163; 71 L. J. Ch. 561; *Powell* v. *Browne*, 1907, W. N. 228.

(*o*) *Doe* v. *Lloyd*, 5 Bing. N. C. 742.

facts relying on which a mortgagee lends him money, those who claim through the mortgagor for value but with notice of the misrepresentations, are estopped from denying the truth of the representations and must if possible make them good (*p*).

So a share certificate will estop the company from denying that shares are fully paid up (*q*) or that the person named in the certificate is the owner of the shares even though the certificate has been obtained by fraud or under a mistake (*r*). But if a transfer of shares is forged the company is not estopped and the purchaser is liable to indemnify the company against liability (*s*). Nor is the company estopped by a forged certificate (*t*). But if the certificate is issued under the authority of the directors the company may be estopped though it was obtained by the fraud of the secretary (*u*). The certification of a transfer does not create any estoppel (*x*).

A representation will not operate as an estoppel unless it is precise and unambiguous (*y*), nor unless it was in the transaction itself and was the real or proximate cause of the loss (*z*), nor unless there was neglect of some duty owing to the person acting upon it (*a*) and the person acted on it to his detriment (*b*).

An estoppel cannot arise from a representation of intention

(*p*) *Gresham Life Ass.* v. *Crowther*, 1912, 2 Ch. 219; 83 L. J. Ch. 867.

(*q*) *Bloomenthal* v. *Ford*, 1897, A. C. 156; 66 L. J. Ch. 253; see 1899, 1 Ch. 414.

(*r*) *Balkis Consolidated Co.* v. *Tomkinson*, 1893, A. C. 396; 63 L. J. Q. B. 134.

(*s*) *Sheffield Corporation* v. *Barclay*, 1905, A. C. 392; 74 L. J. K. B. 747.

(*t*) *Ruben* v. *Great Fingall Consolidated*, 1906, A. C. 439; 75 L. J. K. B. 843.

(*u*) *Dixon* v. *Kennaway*, 1900, 1 Ch. 833; 69 L. J. Ch. 501.

(*x*) *Whitechurch* v. *Cavanagh*, 1902, A. C. 117; 71 L. J. K. B. 400.

(*y*) *Low* v. *Bouverie*, 1891, 3 Ch. 82; 60 L. J. Ch. 594; *Onward Building Soc.* v. *Smithson*, 1893, 1 Ch. 1; 62 L. J. Ch. 138; *Re Holland*, 1901, 2 Ch. 145; 1902, 2 Ch. 360; 71 L. J. Ch. 518.

(*z*) 2 H. & C., at p. 182; *Bishop* v. *Balkis*, 25 Q. B. D., at p. 219; *Longman* v. *Bath, &c.*, 1905, 1 Ch. 646; 74 L. J. Ch. 424.

(*a*) 2 H. & C., at p. 182; 31 L. J. Ex. 425.

(*b*) *Bell* v. *Marsh*, 1903, 1 Ch. 528; 72 L. J. Ch. 360.

or promise as to future action, for promises *in futuro*, if binding at all, must be binding in contract (*c*).

A person cannot rely by way of estoppel on a statement induced by his own representation or concealment of a material fact the disclosure of which would have been calculated to make his informant hesitate or seek for further information before making the statement, or where the circumstances would have deterred a reasonable man from acting on it (*d*).

Standing by.

The principle is not limited to cases where an express and distinct representation by words has been made, but applies equally to cases where a man by his silence causes another to believe in the existence of a certain state of things, or so conducts himself as to induce a reasonable man to take the representation to be true, and to believe that it was meant that he should act upon it, and he accordingly acts upon it and so alters his previous position. Where there is a duty or obligation to speak, and a man in breach of that duty or obligation holds his tongue, and does not speak and does not say the thing he was bound to say, if that be done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, there is fraud (*e*). "A party," said Lord Wensleydale in *Freeman* v. *Cooke* (*f*), "who, in neglect of a duty cast upon him to speak, stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving" (*g*). "The doctrine," said Lord Campbell in *Cairncross* v. *Lorimer* (*h*), "is to be found in the laws of all civilised nations that if a man either by words or conduct has intimated that he consents to an act which has been done, or

(*c*) *Maddison* v. *Alderson*, 8 App. Ca. p. 473, *per* Selborne, L.C.; 52 L. J. Q. B. 737; *Whitechurch* v. *Cavanagh*, 1902, A. C. 117; 71 L. J. K. B. 400.

(*d*) *Porter* v. *Moore*, 1904, 2 Ch. 367; 73 L. J. Ch. 729.

(*e*) *Brownlie v. Campbell*, 5 App. Ca. 950, *per* Lord Blackburn.

(*f*) 2 Exch. 663; 18 L. J. Ex. 14; 76 R. R. 711.

(*g*) See *Carr* v. *London and North Western Rly. Co.*, L. R. 10 C. P. 307; 44 L. J. C. P. 109.

(*h*) 3 Macq. 829.

that he will offer no opposition to it, although it could not have been done lawfully without his consent, and he thereby induces others to do that from which they might otherwise have abstained, he cannot question the legality of the act he has so sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. . . . If a party has an interest to prevent an act being done, and has full notice of its having been done, and he acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous licence." Nor can parties who stand by without asserting their rights and allow others to incur liabilities which they might not have incurred if those rights had been asserted, set up those rights as against those by whom such liabilities have been incurred (*i*).

A person, for instance, who knows that a bank is relying on his forged signature to a bill, cannot lie by and not divulge the fact until he sees the position of the bank altered for the worse (*k*). So, too, where a man builds or lays out monies upon land, supposing it to be his own, and believing that he has a good title, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error; or where a man, under an expectation created or encouraged by the owner of land that he shall have a certain interest, takes possession of such land, with the consent of the owner, and upon the faith of such promise or expectation, with the knowledge of the former, and without objection by him, lays out monies upon the land; in such cases a court of equity will not afterwards allow the real owner or the landlord, as the case may be, to assert his legal right against the other, without at least making him a proper compensation for

(*i*) *Olliver* v. *King*, 8 D. M. & G. 118, *per* Turner, L.J.; 25 L. J. Ch. 427; 114 R. R. 48; *Lindsay* v. *Gibbs*, 3 D. & J. 697; 28 L. J. Ch. 692; 121 R. R. 295; *London Joint Stock Bank* v. *Simmons*, 1892, A. C. 201; 61 L. J. Ch. 723.

(*k*) *M'Kenzie* v. *British Linen Co.*, 6 App. Ca. 82.

the expenditure which he has incurred (*l*). If the works on which monies have been laid out are of a permanent character, or are works which point to permanence, the Court will not allow them to be interfered with, even upon the payment of a proper compensation. A man who by his conduct has encouraged another to spend monies on his land, in erecting works of a permanent character, cannot be permitted to put an end to the very thing which he has approved. All that he is entitled to is a proper compensation in respect of the land which has been taken (*m*). The case in which the principle has been carried to the farthest extent is *Clavering* v. *Thomas* (*n*). It was there held that a man who has stood by and allowed monies to be spent in opening a mine, which he knew could only be worked by a wayleave over his own land, was bound in equity to give the wayleave.

Another illustration of the principle that a man who remains silent when there is a duty to speak is bound in equity, is where a man claiming a title in himself to property is privy to the fact of another, with colour of title, or pretending to title, dealing with the property, as being his own, or as being unencumbered, and conceals his claim. A man who claims an interest in property need not voluntarily communicate the existence of his claim to a person whom he knows to be about purchasing the property (*o*), but the suppression or concealment of his claim is in equity a fraud; and if a man is privy to the fact that the apparent owner or party in possession is about to deal with the property as his

(*l*) *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52; 9 R. R. 11; *Clare Hall* v. *Harding*, 6 Ha. 273; 17 L. J. Ch. 301; 77 R. R. 115; *Leeds* v. *Amhurst*, 2 Ph. 117; 28 R. R. 47; *White* v. *Wakley*, 26 Beav. 20; 28 L. J. Ch. 77; 122 R. R. 8; *Laird* v. *Birkenhead Rly. Co.*, John. 514; 29 L. J. Ch. 218; 123 R. R. 206; *Archbold* v. *Scully*, 9 H. L. C. 360; 131 R. R. 223; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; 149 R. R. 543; *Nunn* v. *Fabian*, 1 Ch. 35; 35 L. J. Ch. 140; *Plimmer* v. *Wellington*, 9 App. Ca. 699; 53 L. J. P. C. 104.

(*m*) *Beaufort* v. *Patrick*, 17 Beav. 60; 22 L. J. Ch. 489; 39 R. R. 34; *Somersetshire Canal Co.* v. *Harcourt*, 2 D. & J. 596; 27 L. J. Ch. 625; 119 R. R. 251; *Mold* v. *Wheatcroft*, 27 Beav. 516; 29 L. J. Ch. 11; 122 R. R. 511; *Davies* v. *Sear*, 7 Eq. 433; 38 L. J. Ch. 545.

(*n*) Cit. 5 Ves. 689; 6 Ha. 304. But see *Willmott* v. *Barber*, 15 C. D. 104.

(*o*) See *Rooper* v. *Harrison*, 2 K. & J. 103; 110 R. R. 112; *Mangles* v. *Dixon*, 3 H. L. C. 739; 88 R. R. 296.

own and as unencumbered, and he does not give the party with whom he is about to deal notice of his right, he will not be permitted by the Court to set up afterwards his own interest against a title created by the other (*p*). In a case where a mother heard her son before his marriage declare that a certain term was to come to him at her death, and was witness to a deed, whereby the reversion was settled on the issue of the marriage, she was held compellable in equity to make good the settlement (*q*). So, also, in a case where a man having a claim upon property, which was the subject of a reference, knew that the arbitration was going on but did not bring forward his claim, he was held bound by the award (*r*). So, also, where a purchaser agreed with the vendor to buy property, and the vendor's solicitor concealed the fact that he had an encumbrance on the estate, it was held that he must take subject to the interest which he had allowed to be acquired in consequence by the person whom he misled in the transaction (*s*). So, where a married woman fraudulently concealed a settlement in order to induce a mortgagee to advance his money and the mortgage was completed, but before the deed was acknowledged by the married woman, the mortgagee received notice of the settlement, it was held that her estate was bound and that she could not defeat the mortgage (*t*). In one case the principle was applied in the case of a first mortgagee, from the mere circumstance of his being a witness to a second mortgage, but the case goes too far. In order to postpone a prior mortgagee, it is necessary to prove against him fraud or actual notice of the subsequent mortgage (*u*).

(*p*) *Teasdale* v. *Teasdale*, Sel. Ca. Ch. 59; *Savage* v. *Foster*, 9 Mod. 36; *Berrisford* v. *Milward*, 2 Atk. 49; *Beckett* v. *Cordley*, 1 Bro. C. C. 357; *Govett* v. *Richmond*, 7 Sim. 1; 40 R. R. 56; *Nicholson* v. *Hooper*, 4 M. & C. 179; 48 R. R. 59; *Mangles* v. *Dixon*, *supra*; *Olliver* v. *King*, 8 D. M. & G. 110; 25 L. J. Ch. 427; 114 R. R. 48; *Davies* v. *Davies*, 6 Jur. N. S. 1322; *Upton* v. *Vanner*, 1 Dr. & Sm. 594; 127 R. R. 228; *Hooper* v. *Gumm*, 2 Ch. 282; 36 L. J. Ch. 605; *Plimmer* v. *Wellington*, 9 App. Ca. 699; 53 L. J. P. C. 104.

(*q*) *Hunsden* v. *Cheyney*, 2 Vern. 150.

(*r*) *Govett* v. *Richmond*, 7 Sim. 1; 40 R. R. 56.

(*s*) *Sterry* v. *Combs*, 40 L. J. Ch. 595. (*t*) *Sharpe* v. *Foy*, 4 Ch. 35.

(*u*) *Beckett* v. *Cordley*, 1 Bro. C. C. 353; *Stevens* v. *Mid Hants Rly. Co.*, 8 Ch. p. 1069; 42 L. J. Ch. 694.

The equitable rule that a man claiming an interest in property may not stand by and conceal his claim, when he sees another dealing with the property as his own, or as unencumbered, applies with peculiar force, if the person claiming title has in any way actively encouraged the parties to deal with each other (*x*), or has confirmed the party in the error into which he has fallen, or if he derives any benefit from the delusion so caused (*y*).

In order to justify the application of the principle, it is indispensable that the party standing by should be fully apprised of his rights (*z*), and should by his conduct encourage the other party to alter his condition, and that the latter should act on the faith of the encouragement so held out (*a*). The principle does not apply in favour of a stranger who builds on land, knowing it to be the property of another, nor in favour of a lessee who expends monies with the knowledge of his landlord on the improvement of the estate. If a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it. So, also, if a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope and expectation of an extended term or an allowance for it, then if such hope or expectation has not been created or encouraged by the landlord, the tenant has no equity to prevent the landlord from taking possession of the land and buildings when the tenancy is determined (*b*). Nor does the principle apply in favour of a man who is conscious of a defect in his title, and with such

(*x*) *Brown* v. *Thorpe*, 11 L. J. Ch. 73; *Davies* v. *Davies*, 6 Jur. N. S. 1322.

(*y*) *Nicholson* v. *Hooper*, 4 M. & C. 179; 48 R. R. 59.

(*z*) *Per* Jessel, M.R., 1 C. D. p. 528.

(*a*) *Dann* v. *Spurrier*, 7 Ves. 230; 6 R. R. 119; *Barnard* v. *Wallis*, Cr. & Ph. 85; *Marker* v. *Marker*, 9 Ha. 16; 20 L. J. Ch. 246; 89 R. R. 305; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; *Plimmer* v. *Wellington*, 9 App. Ca. 699; 53 L. J. P. C. 104.

(*b*) *Pilling* v. *Armitage*, 12 Ves. 78; 8 R. R. 295; *Clare Hall* v. *Harding*, 6 Ha. 273; 17 L. J. Ch. 301; 77 R. R. 115; *Duke of Beaufort* v. *Patrick*, 17 Beav. 60; 22 L. J. Ch. 489; 39 R. R. 34; *Ramsden* v. *Dyson*, L. R. 1 H. L. p. 129, *per* Lord Kingsdown.

conviction in his mind expends money in improvements on the estate (*c*).

A man who, with full knowledge of the real circumstances of the case permits another, under a mistake, to execute a deed, whereby he incurs a liability, cannot be heard to say that he has contracted liability on the faith of the other being subject to the liability (*d*).

But "acquiescence which will deprive a man of his legal rights must amount to fraud. A man is not to be deprived of his legal rights on the ground of acquiescence unless he has acted in such a way as would make it fraudulent in him to set up those rights" (*e*). "There are several elements or requisites," said Mr. Justice Fry (*f*), "necessary to constitute fraud of that description. In the first place the plaintiff," (the party who alleges acquiescence) "must have made a mistake as to his legal rights. Secondly, he must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right, which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the possessor of the legal right must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls on him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in other acts which he has done either directly or by abstaining from asserting his legal right. When all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but nothing short of this will do."

(*c*) *Kenney* v. *Brown*, 3 Ridg. 518.

(*d*) *Broughton* v. *Hutt*, 3 D. & J. 501; 28 L. J. Ch. 167.

(*e*) *Willmott* v. *Barber*, 15 C. D. 105; *Marriott* v. *Reid*, 82 L. T. 369.

(*f*) *Willmott* v. *Barber*, *supra*; and see *Proctor* v. *Bennis*, 36 C. D. 740; 57 L. J. Ch. 11.

The rule of law as to leave and licence not being countermandable cannot, perhaps, as far as it goes, be distinguished from the equitable doctrine of acquiescence (*g*), but leave and licence executed may be set up at law, as giving a right and title, only in cases where monies have been expended by a man upon his own land (*h*). No right or title can be acquired to an easement, or other right over the land of another, although the licence may have been executed, and monies may have been expended upon the land of the licensee by his express permission. The licence may be at any time countermanded at the will of the owner of the soil (*i*). But in equity the doctrine of acquiescence applies as well where a man has been induced to expend monies on the land of another, as where the expenditure has been on his own land (*k*).

Part performance.

The equitable doctrine with respect to the part performance of parol agreements is founded on the general doctrine of law as to misrepresentation. It is a fraud in the eye of the Court to set up the absence of an agreement, where possession has been given on the faith of an agreement. If a man has been permitted to take possession on the faith of an agreement, it is against equity that he should be treated as a trespasser and turned out of possession, on the ground that there is no agreement; and the Court will, as far as possible, ascertain the terms of the agreement, and give effect to it (*l*). Nothing, however, is part performance that does not put the party into a situation that it is a fraud upon him, if the agreement be not performed (*m*). The acts must render non-performance a

(*g*) *Davies* v. *Marshall*, 10 C. B. N. S. 711, *per* Willes, J.; 31 L. J. C. P. 61; 128 R. R. 881.

(*h*) *Liggins* v. *Inge*, 7 Bing. 682; 33 R. R. 615; *Davies* v. *Marshall*, *supra*; *Blood* v. *Keller*, 11 Ir. C. L. 124.

(*i*) *Wood* v. *Leadbitter*, 13 M. & W. 838; 14 L. J. Ex. 161; 67 R. R. 831; *Davies* v. *Marshall*, *supra*; but see *Blood* v. *Keller*, 11 Ir. C. L. 124.

(*k*) *Duke of Beaufort* v. *Patrick*, 17 Beav. 60; 22 L. J. Ch. 489; 39 R. R. 34; *White* v. *Wakley*, 26 Beav. 20; 28 L. J. Ch. 77; 122 R. R. 8; *Laird* v. *Birkenhead Rly. Co.*, John. 500; 29 L. J. Ch. 218; 123 R. R. 206; *Willmott* v. *Barber*, 15 C. D. 96.

(*l*) *Ungley* v. *Ungley*, 5 C. D. p. 890; 46 L. J. Ch. 854; *Britain* v. *Rossiter*, 11 Q. B. D. p. 131; 48 L. J. Q. B. 362; *Maddison* v. *Alderson*, 8 App. Ca. 467; 52 L. J. Q. B. 737.

(*m*) *McManus* v. *Cooke*, 35 C. D. 681, 697; 56 L. J. Ch. 662.

fraud (*n*). They must be such as to render it a fraud to take advantage of the contract not being in writing (*o*). In order, too, that an act of part performance may have any operation whatsoever, it must be shown plainly what the terms of the agreement are, and it must clearly appear that the act of part performance relied on is unequivocally referable to an agreement such as the one alleged and is not referable to another title (*p*). It must be such as could be done with no other view than to perform the agreement; there must be some *evidentia rei*, which means that the act must speak for itself, so as to connect itself with the agreement. Further, the act must change the relative positions of the parties towards the subject-matter of the agreement (*q*). The expenditure, for instance, by a tenant in possession, on repairs, is referable to the title which he has in the estate, and cannot be deemed an act of part performance (*r*). But the laying out of money by a tenant in possession, in pursuance of a parol agreement for a lease, or upon the faith of a specific engagement that possession should not be disturbed, is an act of part performance (*s*). So, also, and upon the same principle, the possession of a tenant after the expiration of a lease, is not a part performance, for it is referable to the title he has (*t*); but it is otherwise where there is a payment by the tenant in possession of rent at an increased rate (*u*), or if the possession be referable to an agreement for renewal (*x*). There must be a necessary connection between

(*n*) Fry on Spec. Perf. (4th ed.), pp. 259, 260.

(*o*) *Chaproniere* v. *Lambert*, 1917, 2 Ch. 356; 86 L. J. Ch. 726.

(*p*) *Maddison* v. *Alderson*, 8 App. Ca. p. 477; 52 L. J. Q. B. 737; *Dickinson* v. *Barrow*, 1904, 2 Ch. 339; 73 L. J. Ch. 701; Fry on Spec. Perf. (4th ed.), p. 256.

(*q*) 8 App. Ca. p. 478.

(*r*) *Wills* v. *Stradling*, 3 Ves. 378; 4 R. R. 26; *Pilling* v. *Armitage*, 12 Ves. 78; 8 R. R. 295; *Brennan* v. *Bolton*, 2 Dr. & War. 349.

(*s*) *Wills* v. *Stradling*, *supra*; *Laird* v. *Birkenhead Rly. Co.*, John. 530; 29 L. J. Ch. 218; 123 R. R. 206; *Nunn* v. *Fabian*, 1 Ch. 35; 35 L. J. Ch. 140; *Williams* v. *Evans*, 19 Eq. 547; 44 L. J. Ch. 319.

(*t*) *Wills* v. *Stradling*, *supra*; *Lincoln v. Wright*, 4 D. & J. 20; 124 R. R. 133.

(*u*) *Miller* v. *Sharp*, 1899, 1 Ch. 622; 68 L. J. Ch. 322.

(*x*) *Dowell* v. *Dew*, 1 Y. & C. C. C. 345; 12 L. J. Ch. 158; 57 R. R. 363.

the act of part performance and the interest in the land which is the alleged subject-matter of the agreement. It is not sufficient that the acts are consistent with the existence of such an agreement or that they suggest or indicate the existence of some agreement, unless such agreement has reference to the subject-matter. Thus payment of part or even of the whole of the purchase-money is not sufficient to exclude the operation of the Statute of Frauds, unless it is shown that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement (*y*). So payment of rent in advance by a person not in possession is not part performance (*z*). On the other hand, the admission into possession of a stranger is, speaking in general terms, a sufficient part performance, for it is not explicable upon any other supposition than that it has resulted from a contract in respect of the land of which possession has been given. Again, the continuance in possession of a tenant is not in itself a sufficient part performance of a parol agreement for the purchase of the land, for it is equally consistent with a right depending on his tenancy (*a*). Nor is marriage an act of part performance; but if one of the contracting parties agrees, as the consideration for a marriage, to do something more than marry, as to settle an estate, and in consideration of that promise the other party contracts to make a settlement, the settlement made by the one contracting party is a good act of part performance (*b*).

In cases where the aid of the Court is sought on the ground of part performance, the facts must be looked at carefully to see what confirmation there is of the plaintiff's statement, and in looking through the evidence, the Court is particularly

(*y*) *Maddison* v. *Alderson*, 8 App. Ca. p. 479; 52 L. J. Q. B. 737.

(*z*) *Chaproniere* v. *Lambert*, *supra*.

(*a*) *Alderson* v. *Maddison*, 7 Q. B. D. 178, *per* Baggallay, L.J.; *Humphreys* v. *Green*, 10 Q. B. D. 154; 52 L. J. Q. B. 140.

(*b*) *Hammersley* v. *De Biel*, 12 Cl. & Fin. 45; 69 R. R. 18. See *Warden* v. *Jones*, 2 D. & J. 76; 27 L. J. Ch. 190; 119 R. R. 29; *Caton* v. *Caton*, 1 Ch. 137; L. R. 2 H. L. 137; 35 L. J. Ch. 292; *Ungley* v. *U.*, 5 C. D. 887; 46 L. J. Ch. 854; *Re Holland*, 1901, 2 Ch. 145; 1902, 2 Ch. 360; 71 L. J. Ch. 518; *Kettlewell* v. *Refuge Co.*, 1908, 1 K. B. 545; 77 L. J. Ch. 421.

careful to see if there are any documents which confirm it (*c*). Where no written documents exist, the proof in support of the claim must be clear beyond all reasonable doubt (*d*).

Negligence may be tantamount to misrepresentation.

The general doctrine of law with respect to misrepresentation and concealment applies to cases where a man by conduct of culpable negligence misleads another to his prejudice, or puts it in the power of one man to commit a fraud upon another. But the negligence must be in the transaction itself, and must be the proximate cause of the loss (*e*). If a man by neglect of some duty that is owing to another, or to the general public, of whom he is one, leads him to believe in the existence of a certain state of facts, and the belief so induced is the proximate cause of leading him to do a certain act, the former shall not afterwards as against the latter be heard to say that that state of facts did not exist, but must abide by the consequences of his own unjustifiable neglect (*f*). It is immaterial that he may have been acting merely carelessly, and that his conduct may be free from any improper motive. Although a man may be acting in the most entire good faith, if he is guilty of such a degree of neglect as to enable another so to deal with that which is his right as to lead an innocent party to assume that he is dealing with his own, he creates an equity against himself in favour of the innocent party, who has been so misled, and must bear the loss (*g*). If he puts into the hands of another the means of obtaining money from a third person, he never can be able to get a decree to get rid of that transaction arising out of the securities which he has intrusted to another, and of which he,

(*c*) *Nunn* v. *Fabian*, 1 Ch. 35; 35 L. J. Ch. 140; *Miller* v. *Sharp*, 1899, 1 Ch. 622; 68 L. J. Ch. 322.

(*d*) *Howe* v. *Hall*, Ir. R. 4 Eq. 252.

(*e*) *Post*, p. 145.

(*f*) *Swan* v. *North Australasian Co.*, 2 H. & C. 182; 32 L. J. Ex. 425; 133 R. R. 639; *Dixon* v. *Muckleston*, 8 Ch. 160, *per* Lord Selborne; 42 L. J. Ch. 210; *Carr* v. *London and North Western Rly. Co.*, L. R. 10 C. P. 307; 44 L. J. C. P. 109.

(*g*) *Evans* v. *Bicknell*, 6 Ves. 181; 5 R. R. 245; *Waldron* v. *Sloper*, 1 Drew. 193; 94 R. R. 642; *Perry Herrick* v. *Attwood*, 2 D. & J. 21; 27 L. J. Ch. 121; 119 R. R. 10; *Brocklesby* v. *Temperance Building Society*, 1895, A. C. 173; 64 L. J. Ch. 433; cf. *Farquharson* v. *King*, 1903, A. C. 325; 71 L. J. K. B. 667; *Rimmer* v. *Webster*, 1902, 2 Ch. 163; 71 L. J. Ch. 561.

the party complaining, was the author, without first repaying the monies thus obtained (*h*). If he negligently arms another with the symbol of property, he should be the sufferer and not the person who gives credit to the operation and is misled by it (*i*). Where, therefore, the legal mortgagee has left the deeds in the hands of the mortgagor or any other agent with authority to raise money of a definite amount and the limit is exceeded, the legal mortgagee will be postponed, not on the ground of fraud, but on the ground that as the legal mortgagee had left the deeds in the hands of the mortgagor or other agent for the purpose of raising money, he could not insist, as against those who in reliance on the deeds lent their money, that the authority had been exceeded (*k*). So where the holder of shares handed to his agents the documents of title and a blank transfer with authority to borrow a certain amount on the shares and the agent exceeded his authority, the lender was entitled to retain the indicia of title until repayment of the loan (*l*). So, too, where the plaintiff left certificates of shares in the hands of his brokers who pledged them with the defendants, the plaintiff was estopped from setting up his title against the defendants (*m*). It is a well-known principle that where one of two innocent parties must suffer from the fraud of a third, the loss should be borne by him who has enabled the third party to commit the fraud (*n*), if he has neglected some duty owing to the other or has done something which has in fact misled the other (*o*).

(*h*) *Aldborough* v. *Tyre*, 7 Cl. & Fin. 463; 51 R. R. 32.

(*i*) *Vickers* v. *Hertz*, L. R. 2 H. L. Sc. p. 115; cf. *Farquharson* v. *King*, *supra*; *Ruben* v. *Great Fingall*, 1906, A. C. 439; 75 L. J. K. B. 843.

(*k*) *Northern Counties, &c., Co.* v. *Whipp*, 26 C. D. 482; 53 L. J. Ch. 629; *Brocklesby* v. *Temperance Building Society*, 1895, A. C. 173, 184; 64 L. J. Ch. 433; *Lloyd's Bank* v. *Bullock*, 1896, 2 Ch. 192; 65 L. J. Ch. 680; *Lloyd's Bank* v. *Cooke*, 1907, 1 K. J. 794; 76 L. J. K. B. 666; *post*, p. 140.

(*l*) *Fry* v. *Smellie*, 1912, 3 K. B. 282; 81 L. J. K. B. 1003.

(*m*) *Fuller* v. *Glyn, Mills, Currie & Co.*, 1914, 2 K. B. 168; 83 L. J. K. B. 764; but see *post*, p. 137, and cf. *Burgis* v. *Constantine*, *ante*, p. 93.

(*n*) *Vandeleur* v. *Blagrave*, 17 L. J. Ch. 52; 53 R. R. 180; *Arnold* v. *Cheque Bank*, 1 C. P. D. 587; 45 L. J. C. P. 562; *London and South Western Bank* v. *Wentworth*, 5 Ex. D. 105; 49 L. J. Ex. 657; *Babcock* v. *Lawson*, 4 Q. B. D., p. 400; 49 L. J. Q. B. 408; but see *Rimmer* v. *Webster*, *supra*.

(*o*) *Ante*, p. 15.

When accordingly a solicitor fraudulently induced a client to execute a conveyance of an estate to himself, and to sign an indorsed receipt for the purchase-money as having been paid to him, though no money had in fact been paid, and the solicitor took possession of the estate and made an equitable mortgage of the estate, representing it to be his own and unencumbered: it was held that the client who had signed the receipt was guilty of such negligence that he ought to be postponed to the equitable mortgagee who had a good equitable title without notice, and who had advanced his money on the faith of the representation contained in the instrument (*p*). So, also, if a man leave a deed executed by him in the hands of another person, and the deed so left in his hands is made by him a security to a third person who acts honestly and fairly in the transaction, it is not competent for the person who has left the deed in his hands to set up against the third party, who has honestly taken it as a security, the fact, if fact it be, of fraud having been committed upon the person leaving it (*q*). So, also, when a man having dealings with another duly and formally executed a deed in respect of the dealings with a receipt for the money indorsed, and delivered the deed to the agent of the other party without receiving the purchase-money, and the agent received the purchase-money from his principal, and misappropriated it, it was held that the loss must fall on the former, inasmuch as he had by his negligence in delivering the deed to the agent put it into his power to commit the fraud (*r*). So, also, when a man having dealings with another in respect of which the same person acted as agent for both parties, delivered to the agent an instrument, reciting the payment of the purchase-money, but without a receipt for the money being signed, and the agent received the money from the other party but did not pay it over to the former, or inform him that it was in his hands,

(*p*) *Hunter* v. *Walters*, 7 Ch. 75; 41 L. J. Ch. 175. See *Lloyd's Bank* v. *Bullock*, *supra*; *King* v. *Smith*, 1900, 2 Ch. 425; 69 L. J. Ch. 598; *Rimmer* v. *Webster*, 1902, 2 Ch. 163; 71 L. J. Ch. 561.

(*q*) *Greenfield* v. *Edwards*, 2 D. J. & S. 596; 139 R. R. 244. See *Bannfather's Claim*, 16 C. D. 179; 50 L. J. Ch. 218.

(*r*) *West* v. *Jones*, 1 Sim. N. S. 208; 20 L. J. Ch. 362; 89 R. R. 67.

it was held that the latter, who had paid the money into the hands of the agent, must bear the loss (*s*). So, also, where a transfer of certificates in a railway company had been forged, and the company registered the transfer and placed the transferee on the list of shareholders and delivered to him certificates which were in due form though executed under a misapprehension, and he transferred the shares to another person, it was held that the giving of the certificates by the company to the transferee amounted to a statement by the company, intended to be acted on by purchasers in the market, that the transferee was entitled to the shares, and that the purchaser from him having acted upon the statement, the company was estopped from denying its truth (*t*). But where the certificates are not in due form but are forged by the secretary the company is not estopped from denying the title of the transferees (*u*). And if the company has been compelled to make good the loss to the true owner of the stock it can recover the loss from the person at whose request the forged transfer was registered (*x*).

So, also, where the plaintiffs, to whom goods had been pledged and warehoused in their name, were induced by the fraudulent representations of the pledgor that he had sold the goods to the defendants, and would pay them out of the monies received in payment, handed him over a delivery order for the goods, which he gave to the defendants as security for advances, and the defendants, on the advances not being repaid, sold the goods; it was held that as the plaintiffs had allowed the pledgor to appear as the ostensible owner of the goods the loss must fall on them (*y*).

(*s*) *Vandeleur* v. *Blagrave*, 6 Beav. 565, affirmed 17 L. J. Ch. 45; 63 R. R. 180. See *Smith* v. *Evans*, 28 Beav. 63; 29 L. J. Ch. 531; 126 R. R. 22; *Withington* v. *Tate*, 4 Ch. 288.

(*t*) *Bahia and San Francisco Rly. Co.*, L. R. 3 Q. B. 584; 37 L. J. Q. B. 176; *Balkis Consolidated Co.* v. *Tomkinson*, 1893, A. C. 396; 63 L. J. Q. B. 134; *Dixon* v. *Kennaway*, 1900, 1 Ch. 833; 69 L. J. Ch. 501, distinguishing *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. D. 213; 49 L. J. Q. B. 392.

(*u*) *Ruben* v. *Great Fingall Consolidated*, 1904, 2 K. B. 712; 75 L. J. K. B. 843.

(*x*) *Sheffield Corporation* v. *Barclay*, 1905, A. C. 392; 74 L. J. K. B. 747.

(*y*) *Babcock* v. *Lawson*, 4 Q. B. D. 400; 5 Q. B. D. 285; 49 L. J. Q. B.

So if a person signs a piece of paper in blank and gives it to another person with authority to fill it up as a promissory note for a certain amount and the other person fraudulently fills it up for a larger amount, the first named person is liable for the full amount provided the stamp covers such amount (*z*). *Secus* where the note is handed to an agent as custodian only and not with any intention of its being immediately negotiated (*a*).

So, also, a man who gives an acceptance in blank holds out the person to whom it is entrusted as clothed with ostensible authority to fill in the bill as he pleases within the limits of the stamp (*b*). So, also, when a bill is accepted in blank for the purpose of being negotiated, and is afterwards filled up with the name and signature of a person as drawer and indorser, the acceptor cannot as against a *bonâ fide* indorsee for value adduce evidence to show that either the drawing or indorsement is a forgery (*c*). So, also, where an employer signed an order for payment of money which had been drawn up by his clerk in such a negligent way that the amount could be increased, and the clerk afterwards increased the amount, and a bank to which the order was presented cashed it, it was held that the employer was not entitled to complain of the cashing of the order in consequence of the negligent way in which the order had been drawn up (*d*).

The relationship of banker and customer implies a special duty on the part of the customer to use due caution, and if he commits a breach of this duty and thereby misleads the banker into making a payment on a forged cheque and such payment follows in natural and uninterrupted sequence from

408; and see *Nash* v. *De Freville*, 1900, 2 Q. B. 72; 69 L. J. Q. B. 484; *Farquharson* v. *King*, 1902, A. C. 325; 71 L. J. K. B. 667.

(*z*) *Lloyd's Bank* v. *Cooke*, 1907, 1 K. B. 794; 76 L. J. K. B. 666, distinguishing *Herdman* v. *Wheeler*, 1902, 1 K. B. 361; 71 L. J. K. B. 270.

(*a*) *Smith* v. *Prosser*, 1907, 2 K. B. 735; 77 L. J. K. B. 71.

(*b*) *Garrard* v. *Lewis*, 10 Q. B. D. 33.

(*c*) *London and South Western Bank* v. *Wentworth*, 5 Ex. D. 96; 49 L. J. Ex. 657. See *Robarts* v. *Tucker*, 16 Q. B. 580; 20 L. J. Q. B. 270; cf. *Baxendale* v. *Bennett*, 3 Q. B. D. 525; 47 L. J. Q. B. 624.

(*d*) *Halifax Union* v. *Wheelwright*, L. R. 10 Ex. 190; 44 L. J. Ex. 121. See *Arnold* v. *Cheque Bank*, 1 C. P. D. 587; 45 L. J. C. P. 562.

such breach of duty, the loss must fall on the customer, not on the banker (*e*).

But the acceptor of a bill of exchange is not under a duty to take precautions against fraudulent alteration in the bill after acceptance. Accordingly, where a bill for £500 was presented for acceptance with a stamp of much larger amount than was necessary and with spaces left, and the acceptor wrote his acceptance and handed it to the drawer who fraudulently altered it into a bill for £3,500, the acceptor having paid £500 into Court, and being sued by a *bonâ fide* holder for value was held not liable (*f*). And where a person was induced to sign a promissory note by a fraudulent representation that he was witnessing a deed, he was not estopped from relying on the true facts as a defence to an action on the note (*g*).

A cheque signed *per pro* by a person having authority so to sign cheques for specified purposes is not a forgery within section 24 of the Forgery Act, 1861, by reason of its being drawn for purposes outside and in fraud of the authority (*h*).

The mere fact of a purchaser or mortgagee not being in possession of the title deeds will not, in the absence of other circumstances indicative of fraud, or gross and wilful negligence (*i*), affect his legal title as against subsequent purchasers

(*e*) *London Joint Stock Bank* v. *Macmillan*, 1918, A. C. 777; 88 L. J. K. B. 55, approving *Young* v. *Grote*, 4 Bing. 253; 29 R. R. 552, and not following *Colonial Bank of Australasia* v. *Marshall*, 1906, A. C. 559; 75 L. J. P. C. 76.

(*f*) *Scholfield* v. *Londesborough*, 1896, A. C. 514; 65 L. J. Q. B. 593.

(*g*) *Lewis* v. *Clay*, 67 L. J. Q. B. 224.

(*h*) *Morison* v. *London County and Westminster Bank*, 1914, 3 K. B. 356; 83 L. J. K. B. 1202.

(*i*) The distinction between mere negligence and gross negligence was recognised by the Roman lawyers. *Culpa levis*, in the language of the Roman Law, is the want of that diligence which is taken by prudent, careful persons; *culpa lata* is the want of that diligence which might be expected even of a person of less than ordinary prudence. Lindl. on Jur. 131. *Culpa lata* was considered generally equivalent to *dolus*. *Lata culpa dolo comparatur*. Dig. 11, tit. 6, leg. 1, § 1. "Lata culpa est nimis negligentia id est non intelligere quod omnes intelligunt." Dig. Lib. 50, tit. 16, leg. 213. "Si quis non ad eum modum quem nominum natura desiderat diligens est, fraude non caret." Dig. Lib. 16, tit. 3, leg. 32. If the fault is one which any man in his senses would have scrupled to commit, there is *lata culpa*; if the fault consists in falling short of the highest standard of carefulness, the *culpa* was *levis*. Or, again, it might consist in falling short of the care which the person guilty of

or incumbrancers (*k*). But if a man on taking the legal estate makes no inquiry for the title deeds which constitute the sole evidence of the title to the property, or allows them to remain in the hands of the vendor or mortgagor, his conduct affords evidence of an amount of negligence and carelessness sufficient to justify the Court in assuming that he had abstained from making inquiry from a suspicion that his title would be affected if it was made, and in imputing to him the knowledge which by the use of ordinary diligence he might have discovered. So, also, gross negligence will be imputed to a man who, having lent the title deeds to the vendor or mortgagor, or any other agent for a temporary and reasonable purpose, allows them to remain out of his hands for an unreasonable time, and does not reclaim them with proper diligence. If in either of such cases a fraudulent use is made of the title deeds by the vendor or mortgagor, and a new title is created by means of them in favour of a subsequent purchaser for value without notice, the first purchaser or mortgagee will be postponed in equity to the subsequent incumbrancer.

The cases on the subject were fully considered in *Northern Counties Fire Insurance* v. *Whipp* (*l*), where they were said to fall into two categories:—(1) Where possession of the deeds had not been obtained; (2) where possession had been given up or not retained. These two categories were again divided into the following classes:

I. (1) Where the legal mortgagee or purchaser has made no inquiry for the title deeds and has been post-

the *culpa* was accustomed to bestow on his own affairs. *Lata culpa* was treated very much on the same footing as *dolus*, as there always seems something wilful in the *crassa negligentia* which characterised the *lata culpa*. Sandars, Inst. p. 477. When it is said by the Roman lawyers that negligence, heedlessness, or rashness is equivalent in certain cases to *dolus*, the meaning is that, judging from the conduct of the party, it is impossible to determine whether he intended or whether he was negligent, heedless, or rash; and that such being the case, it shall be presumed that he intended, and his liability shall be adjudged accordingly, provided that the question arise in a civil action. Austin Lect. on Jur., vol. 2, p. 107.

(*k*) *Evans* v. *Bicknell*, 6 Ves. 174, 191; 5 R. R. 245; *Martinez* v. *Cooper*, 2 Russ. 198; 26 R. R. 49; *Colyer* v. *Finch*, 5 H. L. C. 905; 21 L. J. Ch. 65; 101 R. R. 442.

(*l*) 26 C. D. 482; 53 L. J. Ch. 629.

poned either to a prior equitable estate (*m*) or to a subsequent equitable owner who used diligence in inquiring for the deeds (*n*).

(2) Where the legal mortgagee has left the deeds in the hands of the mortgagor or any other agent with authority to raise money on them, and he has exceeded the collateral instructions given to him (*o*). In which cases the legal owner is postponed.

(3) Where the legal mortgagee has made inquiry for the deeds and has received a reasonable excuse for their non-delivery, and has accordingly not lost his priority (*p*).

(4) Where the legal mortgagee has received part of the deeds under a reasonable belief that he was receiving all, and has accordingly not lost his priority (*q*).

II. (1) Where the deeds have been lent by the legal mortgagee to the mortgagor upon a reasonable representation as to the object in borrowing them, and has retained his priority over subsequent equities (*r*).

(2) Where the legal mortgagee has returned the deeds to the mortgagor for the express purpose of raising money, though with the expectation that he would

(*m*) *Worthington* v. *Morgan*, 16 Sim. 547; 18 L. J. Ch. 233; 80 R. R. 142; *Oliver* v. *Hinton*, 1899, 2 Ch. 264; 68 L. J. Ch. 583.

(*n*) *Clarke* v. *Palmer*, 21 C. D. 124; 51 L. J. Ch. 634; *Lloyd's Banking Co.* v. *Jones*, 29 C. D. 221; 54 L. J. Ch. 931; *Berwick & Co.* v. *Price*, 1905, 1 Ch. 632; 74 L. J. Ch. 249; *Walker* v. *Linom*, 1907, 2 Ch. 104; 76 L. J. Ch. 500; but see *Re Greer*, 1907, 1 Ir. R. 57.

(*o*) *Perry Herrick* v. *Attwood*, 2 D. & J. 21; 27 L. J. Ch. 121; 119 R. R. 10; *Brocklesby* v. *Temperance Bldg. Soc.*, 1895, A. C. 173, 184; 64 L. J. Ch. 433; *Lloyd's Bank* v. *Bullock*, 1896, 2 Ch. 192; 65 L. J. Ch. 680; *Rimmer* v. *Webster*, 1902, 2 Ch. 163; 71 L. J. Ch. 561; *Lloyd's Bank* v. *Cooke*, 1907, 1 K. B. 794; 76 L. J. K. B. 666; cf. *Cuthbert* v. *Robarts*, 1909, 2 Ch. 226; 78 L. J. Ch. 529.

(*p*) *Hewitt* v. *Loosemore*, 9 Ha. 449; 21 L. J. Ch. 69; 89 R. R. 526; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135; cf. *Manners* v. *Mew*, 29 C. D. 725; 54 L. J. Ch. 909.

(*q*) *Hunt* v. *Elmes*, 2 D. F. & J. 578; 30 L. J. Ch. 255; 129 R. R. 204; *Ratcliffe* v. *Barnard*, 6 Ch. 652; 40 L. J. Ch. 777; *Colyer* v. *Finch*, 5 H. L. C. 905; 21 L. J. Ch. 65; 101 R. R. 442.

(*r*) *Martinez* v. *Cooper*, 2 Russ. 198; 26 R. R. 49.

disclose the prior security to any second mortgagee, in which case the legal estate is postponed (*s*).

The principle of all the above cases, with one exception, seems to be that where one of two innocent persons must suffer by the act of a third person, he who has enabled the third person to occasion the loss must sustain it, provided he has done something which has in fact misled the other (*t*). The only exception seems to be the case first mentioned, where a legal mortgagee or purchaser makes no inquiry for the deeds; and here the principle does not apply because the question does not arise between two innocent persons, since the purchaser or mortgagee is guilty of gross negligence or wilful ignorance amounting to fraud. But it is not necessary that the person postponed should have been guilty of fraud or of that wilful negligence which leads the Court to conclude that he is an accomplice in the fraud (*u*).

Where the relationship between mortgagor and mortgagee is also of a fiduciary nature, such as solicitor and client, the mortgagee will not lose his priority by leaving the title deeds in the possession of the mortgagor, so long at all events as he has no ground to suppose a want of good faith in the latter (*x*).

The rule that a purchaser or mortgagee who neglects to make proper inquiries for the title deeds, or who allows them to remain in the hands of the vendor or mortgagor, will be postponed to a subsequent incumbrancer without notice, who obtains possession of the deeds, operates not only for the benefit of the incumbrancer who has obtained possession of the deeds, but also for the benefit of a subsequent incumbrancer who has advanced his money innocently in the belief that there was not any incumbrance prior to that of the

(*s*) *Briggs* v. *Jones*, 10 Eq. 92; cf. *Re Ingham*, 1893, 1 Ch. 352; 62 L. J. Ch. 100.

(*t*) *See ante*, p. 15.

(*u*) *Oliver* v. *Hinton*, 1899, 2 Ch. 264; 68 L. J. Ch. 583; *Walker* v. *Linom*, 1907, 2 Ch. 104; 76 L. J. Ch. 500; *Aldritt* v. *Maconchy*, 1908, 1 Ir. R. 333.

(*x*) *Taylor* v. *London and County Banking Co.*, 1901, 2 Ch. 231; 70 L. J. Ch. 477.

incumbrancer in possession of the deeds and who has made proper inquiries as to the possession of the deeds (*y*).

Where trustees of a marriage settlement are postponed to a subsequent incumbrancer on the ground of their not inquiring for the deeds, the wife and other beneficiaries are in no better position (*z*).

In cases between parties having merely equitable interests, unaccompanied by the legal estate, it seems somewhat doubtful whether the same amount of negligence is necessary to displace the equity as to displace the legal estate. The weight of authority, however, seems in favour of the view that there is no distinction between the two, and that the negligence necessary to displace one of two equities is the same as is necessary to displace the legal estate, that is, negligence so gross as to make the prior mortgagee responsible for the fraud committed on the subsequent mortgagee (*a*). This view is supported by Turner, L. J. (*b*), Lord Cairns (*c*), Lord Cranworth (*d*), and Lord Selborne (*e*). And Kay, J., said, "nothing short of a decision of the House of Lords can overrule the law so laid down" (*f*). On the other hand, a contrary view seems to have been taken by the Court of Appeal in *National Provincial Bank* v. *Jackson* (*g*), where it was held that the principle that a legal mortgagee will not be postponed on the ground of mere carelessness, does not apply as between equitable claims. And in *Taylor* v. *Russell* (*h*), Lord Macnaghten said he was not convinced of the correctness of the view taken by Kay, J.

(*y*) *Clarke* v. *Palmer*, 21 C. D. 124; 51 L. J. Ch. 634; cf. *Turner* v. *Smith*, 1901, 1 Ch. 213; 70 L. J. Ch. 144.

(*z*) *Walker* v. *Linom*, *supra*, following *Lloyd's Banking Co.* v. *Jones*, 29 C. D. 221; 54 L. J. Ch. 931; but see *Coleman* v. *London County, &c., Bank*, 1916, 2 Ch. 353; 85 L. J. Ch. 652.

(*a*) *Taylor* v. *Russell*, 1891, 1 Ch. 8, *per* Kay, J.; 60 L. J. Ch. 1. See *Walker* v. *Linom*, 1907, 2 Ch. 104; 76 L. J. Ch. 500.

(*b*) *Cory* v. *Eyre*, 1 D. J. & S. p. 167; 137 R. R. 184.

(*c*) *Shropshire Union Canal Co.* v. *Reg.*, L. R. 7 H L. p. 507.

(*d*) *Roberts* v. *Croft*, 2 D. & J. 1; 27 L. J. Ch. 220; 119 R. R. 1.

(*e*) *Dixon* v. *Muckleston*, 8 Ch. p. 161; 42 L. J. Ch. 210.

(*f*) *Taylor* v. *Russell*, 1891, 1 Ch. 8; 60 L. J. Ch. 1.

(*g*) 33 C. D. p. 13.

(*h*) 1892, A. C. p. 262; 61 L. J. Ch. 657.

In examining into conflicting equities the Court must apply the test not of any technical rule or any rule of partial application, but the same broad principles of right and justice which a Court of equity applies universally in deciding upon contested rights (*i*). "A pre-existing equitable title," said Lord Cairns, in *Shropshire Union Canal Co.* v. *Reg.* (*k*), "may be defeated by conduct, by representations, by misstatements of a character which would operate and cause to forfeit and take away the pre-existing equitable title." When, accordingly, a vendor who chose to leave part of the purchase-money unpaid executed and delivered to the purchaser a conveyance in which there was a receipt indorsed acknowledging that the purchase-money had been paid, and the purchaser fraudulently deposited the deed with an equitable mortgagee, it was held that the equitable mortgagee had a better equity than the vendor, inasmuch as the latter had in effect invited and encouraged the mortgagee to rely on the title of the purchaser (*l*). So, also, where an equitable mortgagee returned the deeds to the person from whom he had received them, who promised to return them but did not do so, and after keeping them a considerable time, deposited the deeds by way of equitable mortgage with a *bonâ fide* purchaser without notice, it was held that the first equitable mortgagee had by his laches lost his equity as against the second equitable mortgagee (*m*).

"Persons," said Lord Hatherley, in *Shropshire Union, &c., Canal Co.* v. *Reg.* (*n*), "being real owners of equitable interests may so conduct themselves as to hold out to third persons dealing with their trustee that they are not such equitable owners. Either they have parted with their

(*i*) *Rice* v. *Rice*, 2 Drew. 95, *per* Kindersley, V-C.; 23 L. J. Ch. 289; 100 R. R. 43; *Case* v. *James*, 3 D. F. & J. 263; 30 L. J. Ch. 724.

(*k*) L. R. 7 H. L. 506.

(*l*) *Rice* v. *Rice*, *supra*; cf. *Lloyd's Bank* v. *Bullock*, 1896, 2 Ch. 192; 65 L. J. Ch. 680; and see *Capell* v. *Winter*, 1907, 2 Ch. 376; 76 L. J. Ch. 496.

(*m*) *Waldron* v. *Sloper*, 1 Drew. 193; 94 R. R. 642. See *Adsetts* v. *Hives*, 33 Beav. 52; 140 R. R. 14; *Dowle* v. *Saunders*, 2 H. & M. 251; 34 L. J. Ch. 87; 144 R. R. 140.

(*n*) L. R. 7 H. L. 512; 45 L. J. Q. B. 31.

interest, as in *Waldron* v. *Sloper*, where deeds had been parted with for four years, deeds that constituted in fact Waldron's only title, or it might be, as in the case of *Rice* v. *Rice*, that they may have represented that they had parted with their interest by signing a receipt for the purchase-money when their only interest was a lien on the purchase-money. In one manner or other they may have so represented that they have parted with their equitable rights and interests as to make it impossible for them again to set up that right against a person who has acquired a contradictory right upon the faith of that assertion and that representation."

In the case of mere equitable interests priority cannot be obtained through the medium of a breach of trust or duty. Where it is sought to postpone an equitable title created by declaration of trust a strong case must be made out. A trustee cannot without express authority, or at all events without authority to be implied from circumstances furnishing the most substantial grounds for the implication, either pledge the deeds of the *cestui que trust* or affect his estate or interest under them. A *cestui que trust* will not be postponed on the ground that he did not inquire into the acts or conduct of his trustee (*o*). Nor will negligence be imputed to a man who has taken a security in the name of another, if he does not watch his trustee. The fact that some of the money may have been advanced by a trustee does not vary the rule (*p*). So a mortgagor is not bound to require production of the title deeds on paying off part of the original mortgage debt (*q*).

Nor will negligence be imputed to a man for leaving his title deeds in the hands of his solicitor (*r*), or his certificates

(*o*) *Shropshire Union Canal Co.* v. *Reg.*, L. R. 7 H. L. p. 507; 45 L. J. Q. B. 31; *Powell* v. *London and Prov. Bank*, 1893, 2 Ch. 555; 62 L. J. Ch. 795; *Taylor* v. *London and County Banking Co.*, 1901, 2 Ch. 231; 70 L. J. Ch. 477; but see *ante*, p. 142.

(*p*) *Bradley* v. *Riches*, 9 C. D. 193; 47 L. J. Ch. 811; *Carritt* v. *Real and Personal Advance Co.*, 42 C. D. 263; 58 L. J. Ch. 688. See *Rimmer* v. *Webster*, 1902, 2 Ch. 163; 71 L. J. Ch. 561.

(*q*) *Berwick* v. *Price*, 1905, 1 Ch. 632; 74 L. J. Ch. 249.

(*r*) *Bozon* v. *Williams*, 3 Y. & J. 150; 32 R. R. 771; *Field* v. *Field*, 1894, 1 Ch. 425; 63 L. J. Ch. 233; *Turner* v. *Smith*, 1901, 1 Ch. 213; 70 L. J. Ch. 144; and see *Manners* v. *Mew*, 29 C. D. 725; 54 L. J. Ch. 909.

for shares with his bankers for safe custody (*s*), or for delivering a transfer of shares and certificates to a broker for the purpose of registration (*t*), or to a member of a partnership firm for allowing his partner to get possession of the deeds relating to the partnership property (*u*); nor will negligence be imputed to trustees for leaving documents of title relating to the trust estate in the hands of one of their number (*x*); or to a *cestui que trust* for allowing the trustee to have in his possession documents of title relating to the trust estate (*y*); nor will negligence be imputed to a man for delivering over certificates for shares as a security for monies advanced in a regular and proper course of business (*z*); nor can there be negligence in relying on the honesty of servants in the discharge of their ordinary duty (*a*); nor will negligence be imputed to trustees for leaving a corporation seal in the hands of their secretary (*b*); nor to a company for leaving deeds in the hands of their manager, who was also the mortgagor (*c*); nor to directors for trusting the officers of the company not to conceal what it was their duty to report (*d*).

Negligence, however, to amount to an estoppel or to raise an equity must be negligence in the transaction itself, and must be the proximate cause of leading the party into the mistake. It is not enough that the negligence be collateral to the transaction. It must also be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom that person is one, and not merely neglect of what would be prudent in

(*s*) *Johnston* v. *Renton*, 9 Eq. 181; 39 L. J. Ch. 390.

(*t*) *Donaldson* v. *Gillott*, 3 Eq. 277.

(*u*) *Cavander* v. *Bulteel*, 9 Ch. 79; 43 L. J. Ch. 370.

(*x*) *Cottam* v. *Eastern Counties Rly. Co.*, 1 J. & H. 243; 30 L. J. Ch. 217; 128 R. R. 346; *Mendes* v. *Guedalla*, 2 J. & H. 259; 31 L. J. Ch. 561; 134 R. R. 213.

(*y*) *Shropshire Union Canal Co.* v. *Reg.*, L. R. 7 H. L. 496; 45 L. J. Q. B. 31; *Burgis* v. *Constantine*, 1908, 2 K. B. 484; 77 L. J. K. B. 1045.

(*z*) *Ortigosa* v. *Brown*, 47 L. J. Ch. 168.

(*a*) *Arnold* v. *Cheque Bank*, 1 C. P. D. 587; 45 L. J. C. P. 562.

(*b*) *Bank of Ireland* v. *Evans' Charities*, 5 H. L. C. 409; 101 R. R. 218; *Staple Merchant Co.* v. *Bank of England*, 21 Q. B. D. 160; 57 L. J. Q. B. 418.

(*c*) *Northern Counties, &c.* v. *Whipp*, 26 C. D. 482; 53 L. J. Ch. 629.

(*d*) *Dovey* v. *Cory*, 1901, A. C. 477; 70 L. J. Ch. 753.

respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy (*e*). In a case, accordingly, where a man who owned shares in two companies executed a transfer of shares in blank, and gave his broker authority to fill them up with shares in one company, and the broker filled them up with shares in the other company, which were afterwards transferred to an innocent person, the Court held that the negligence of the owner of the shares in executing the deed in blank was not the real and proximate cause of the loss, and that he was not estopped from insisting that the property in the shares did not pass under the transfers (*f*). So the negligence of the secretary of a company in returning share certificates to a transferor thereby enabling him to fraudulently deal with them is not the proximate cause of the loss so as to raise a case of estoppel against the company (*g*).

So, also, in a case where the bill sued on bore the defendant's signature, and purported to have been drawn and indorsed by one person, and also indorsed by another from whom the plaintiff received it, but before it had been so drawn and indorsed, and whilst it was a mere blank paper with a bill stamp and defendant's signature upon it, it was stolen from defendant's drawer, and therefore never had been given to the drawer or any one from whom he received it to be negotiated in any way as a bill of exchange, it was held that the negligence of the defendant was not the proximate cause of the transaction, and that therefore he was not liable (*h*). So, also, negligence in the custody of a draft, or in its transmission by post, will not disentitle the owner of it to recover the draft or its proceeds from one who has wrong-

(*e*) *Swan* v. *North Australasian Co.*, 2 H. & C. 182, *per* Lord Blackburn; 31 L. J. Ex. 425; 133 R. R. 639; *Carr* v. *London and North Western Rly. Co.*, L. R. 10 C. P. 307, *per* Brett, L.J.; 44 L. J. C. P. 109; *Arnold* v. *Cheque Bank*, *supra*; *Cooper* v. *Vesey*, 20 Ch. D. 634; 51 L. J. Ch. 862; *Bell* v. *Marsh*, 1903, 1 Ch. 528; 72 L. J. Ch. 360.

(*f*) *Swan* v. *North Australasian Co.*, *supra*; and see *Powell* v. *London and Prov. Bank*, 1893, 2 Ch. 555; 62 L. J. Ch. 795; *Carlisle Bank* v. *Bragg*, 1911, 1 K. B. 489; 80 L. J. K. B. 472.

(*g*) *Longman* v. *Bath Electric Tramways*, 1905, 1 Ch. 646; 74 L. J. Ch. 424.

(*h*) *Baxendale* v. *Bennett*, 3 Q. B. D. 525; 47 L. J. Q. B. 624.

fully obtained possession of it (*i*). So, also, in a case where a fraudulent transfer of stock had been effected by means of a power of attorney, improperly sealed with the seal of a corporation by the secretary who had custody of the seal, whereby he was enabled to commit the forgery, it was held that there was not such negligence as to deprive the plaintiff of his right to insist that the transfer was invalid, that to have the effect of depriving him of such right there must be negligence in or immediately connected with the transaction itself, that if there was negligence in the custody of the seal, it was very remotely connected with the act of transfer, and that the transfer was not a necessary or ordinary or likely result of that negligence (*k*).

So a company is not liable for loss sustained by a purchaser of share certificates on which the names of the directors were forged by the secretary. The fact that the certificate is in proper form and delivered by the secretary in the ordinary course of his duty does not operate as a warranty or representation of genuineness or estop the company from denying its validity (*l*).

The law relating to negotiable instruments stands on peculiar grounds. The law relating to these instruments is part of the law merchant, which in order that the negotiability of such instruments, which is of the very essence of their commercial utility, shall not be impaired, establishes that if a man once puts his name to such an instrument, he shall be liable to a *bonâ fide* owner without notice in respect of what may be added to give effect in negotiating the instrument, notwithstanding this may be done in the absence of authority or even for the purpose of fraud (*m*).

(*i*) *Arnold* v. *Cheque Bank*, 1 C. P. D. 587; 45 L. J. C. P. 562. See *Hunter* v. *Walters*, 7 Ch. 87; 41 L. J. Ch. 175.

(*k*) *Bank of Ireland* v. *Evans' Charities*, 5 H. L. C. 410; 101 R. R. 218; *Northern Counties* v. *Whipp*, 26 C. D. 482; 53 L. J. Ch. 629.

(*l*) *Ruben* v. *Great Fingall Consolidated*, 1906, A. C. 439; 75 L. J. K. B. 843.

(*m*) 2 H. & C. 189, *per* Cockburn, C.J.; see *Foster* v. *Mackinnon*, L. R. 4 C. P. 712; 38 L. J. C. P. 310; and *Carlisle Banking Co.* v. *Bragg*, 1911, 1 K. B. 489; 80 L. J. K. B. 472.

A person taking a negotiable instrument in good faith and for value obtains a valid title though he takes from one who has none (*n*).

In the case of equitable interests in personal estate, or choses in action, a purchaser or other incumbrancer, who fails to give notice of his interest to the person having legal control of the fund, will be postponed to an incumbrancer, though subsequent in date, who gives notice (*o*). A reversionary interest in the proceeds of real estate held upon trust for sale but not yet sold is a chose in action within the rule (*p*). But the rule has no application whatever to real estate. As between equitable incumbrancers of real estate, he whose security is prior in date is entitled to priority over a person who takes a subsequent security, notwithstanding that the latter may have been beforehand in giving the party in possession of the estate notice of his security (*q*). An equitable incumbrancer on real estate is not as against another equitable incumbrancer postponed by any neglect to give notice, except where there is some other controlling equity (*r*), such as fraud (*s*).

(*n*) *London Joint Stock Bank* v. *Simmons*, 1892, A. C. 201; 61 L. J. Ch. 723; and see *Fuller* v. *Glyn, Mills, Currie & Co.*, 1914, 2 K. B. 168; 83 L. J. K. B. 764.

(*o*) *Dearle* v. *Hall*, 3 Russ. 1; 2 L. J. Ch. 62; 27 R. R. 1; *Ward* v. *Duncombe*, 1893, A. C. 369; 62 L. J. Ch. 881; *Lloyd's Bank* v. *Pearson*, 1901, 1 Ch. 865; 70 L. J. Ch. 422; *Re Dallas*, 1904, 2 Ch. 385; 73 L. J. Ch. 365.

(*p*) *Lloyd's Bank* v. *Pearson*, *supra*.

(*q*) *Re Richards*, 45 C. D. 589; 59 L. J. Ch. 728.

(*r*) *Ward* v. *Duncombe*, 1893, A. C. 369, 390; 62 L. J. Ch. 881.

(*s*) *Rooper* v. *Harrison*, 2 K. & J. 103; 110 R. R. 112.

CHAPTER III.

PRESUMPTIVE OR CONSTRUCTIVE FRAUD.

Besides that kind of fraud which consists in misrepresentation, express or implied, there is another which will be presumed when parties to a transaction do not stand upon an equal footing (*a*). The general theory of law in regard to acts done and contracts made by parties affecting their rights and interests being that, in order to bind them there must be a free and full consent, and consent being an act of reason accompanied with deliberation, transactions, in which one of the parties is not as free and voluntary an agent as the other, or does not apprehend the meaning and effect of what he is doing, want the very qualities which are essential to the validity of all transactions (*b*). It is upon this principle that when a person, who from his state of mind, age, weakness, or other peculiar circumstances, is incapable of exercising a free discretion, is induced by another to do any act which may tend to the injury of himself or his representatives, that other shall not be allowed to derive any benefit from his improper conduct. The rule is of universal application that where a man is not a free agent, or is not equal to protecting himself, the Court will protect him. The principle is that it is right and expedient, not to save persons from the consequences of their own folly, but to save them from being victimised by other people (*c*).

Lunacy, idiotcy, &c.

It is upon the general ground that there is a want of rational and deliberate consent that the contracts of idiots and persons of unsound mind are generally deemed invalid

(*a*) *Edwards* v. *Meyrick*, 2 Ha. 68.
(*b*) Story, Eq. Jur. s. 222.
(*c*) *Allcard* v. *Skinner*, 36 C. D., p. 182; 56 L. J. Ch. 1052; *post*, p. 193.

by a Court of equity. The mere fact, however, that a man is in a state of lunacy, or is even in confinement, will not *per se* induce the Court to interfere, if it is distinctly shown that the transaction was for his own benefit, that no coercion or imposition was used, and that he knew clearly what he was doing (*d*), and so an executed contract where parties have been dealing fairly and in ignorance of the lunacy, will not be set aside, if injustice would be done to the other side and the parties cannot be placed *in statu quo*, or in the position in which they stood before the transaction (*e*). But this rule is not applicable to the merely voluntary acts of a lunatic, *e.g.*, a voluntary dissentailing deed, which still remain invalid (*f*).

The same rule prevails at law. To prove lunacy is not enough to avoid a contract. A contract entered into *bonâ fide* and in the ordinary course of business is not void by reason of one of the parties being of unsound mind (*g*). To vitiate the contract it must appear that the other party was aware of the fact and took advantage of it (*h*).

A party claiming under a deed is not bound to prove the sanity of the person executing it. The burden of proof lies on the other side (*i*).

The above principles, however, do not apply to a lunatic so found by inquisition. A lunatic so found cannot, even during a lucid interval, execute a valid deed dealing with or disposing of his property, such a deed being entirely null and void. In this respect there is a difference between the execution of a deed and the execution of a will by a lunatic so found (*k*).

Imbecility, mental incapacity &c.,

Independently of that degree of imbecility which will render a man legally *non compos*, a conveyance may be im-

(*d*) *Selby* v. *Jackson*, 6 Beav. 192, 204. See *Baldwyn* v. *Smith*, 1900, 1 Ch. 588; 69 L. J. Ch. 336.

(*e*) *Niell* v. *Morley*, 9 Ves. 478, 482; *Jacobs* v. *Richards*, 18 Beav. 300; 23 L. J. Ch. 557; *Price* v. *Berrington*, 3 Mac. & G. 486; 87 R. R. 157; *Campbell* v. *Hooper*, 3 Sm. & G. 153; 24 L. J. Ch. 644.

(*f*) *Elliott* v. *Ince*, 7 D. M. & G. 475; 26 L. J. Ch. 821.

(*g*) *Molton* v. *Camroux*, 4 Exch. 17; 18 L. J. Ex. 356; 76 R. R. 669.

(*h*) *Beavan* v. *M'Donnell*, 10 Exch. 184; 23 L. J. Ex. 94; 97 R. R. 730; *Imperial Loan Co.* v. *Stone*, 1892, 1 Q. B. 599; 61 L. J. Q. B. 449.

(*i*) *Jacobs* v. *Richards*, 18 Beav. 305; 23 L. J. Ch. 557.

(*k*) *Re Walker* (a lunatic), 1905, 1 Ch. 160; 74 L. J. Ch. 86.

peached for mere weakness of intellect, provided it be coupled with other circumstances to show that the weakness, such as it is, has been taken advantage of by the other party; but the mere fact that a man is of weak understanding or is in intellectual capacity below the average of mankind, if there be no fraud, or no undue advantage be taken, is not of itself an adequate ground to set aside a transaction (*l*). The common law has not drawn any discriminating line by which to determine how great must be the imbecility of mind to render a transaction void and how much intellect is necessary to support it (*m*). The boundaries between actual insanity and great mental weakness are so narrow that the Court must judge in each case upon the facts and circumstances (*n*).

Intoxication.

If a man be so drunk as to be incapable of understanding the terms of a transaction or of forming a rational judgment as to its effect, it is voidable at his option; but this is so only if his state is known to the other party and he has taken advantage of it, and the contract is merely executory and not executed (*o*).

The Court will not specifically enforce a contract against a person who entered into it when intoxicated even in the absence of any unfair advantage (*p*), and a contract obtained by fraud from an intoxicated person may be set aside (*q*).

Infancy.

The rule is the same both at law and in equity with respect to the general incapacity of infants to enter into a binding contract (*r*). A man who enters into a contract during his minority is not bound thereby after his majority on the mere ground that without any false assertion on his part the other

(*l*) *Ball* v. *Mannin*, 3 Bligh, N. S. 1, 1 Dow & Cl. 381; 32 R. R. 1; *Armstrong* v. *Armstrong*, I. R. 8 Eq. 1; *Aldritt* v. *Maconchy*, 1908, 1 Ir. R. 333.

(*m*) *Manby* v. *Bewicke*, 3 K. & J. 342; 112 R. R. 177.

(*n*) *Bennett* v. *Wade*, 9 Mod. 315. See *Harrod* v. *Harrod*, 1 K. & J. 7; 103 R. R. 1; *Longmate* v. *Ledger*, 2 Giff. 163; 128 R. R. 72. See as to want of assent arising from partial insanity or delusion, *Jenkins* v. *Morris*, 14 C. D. 674.

(*o*) *Gore* v. *Gibson*, 13 M. & W. 623, 626; 14 L. J. Ex. 151; 67 R. R. 762; *Molton* v. *Camroux*, 4 Exch. 17, 19; 18 L. J. Ex. 356; 76 R. R. 669; *Matthews* v. *Baxter*, L. R. 8 Ex. 132; 42 L. J. Ex. 73.

(*p*) *Nagle* v. *Baylor*, 3 Dr. & War. 60.

(*q*) 1 Bligh, 137.

(*r*) See Infants' Relief Act, 1874.

party believed him to be of age (*s*). But "infancy never authorises fraud" (*t*). If an infant, by a false and fraudulent representation that he is of full age, induces persons to deal with him, he incurs an obligation in equity, which, however, in the case of a contract is not an obligation to perform the contract, and must be carefully distinguished from it. He is not liable for a wrong arising out of contract such as a fraudulent representation at the time of making the contract that he is of full age, but he is bound by payments made and acts done at his request and on the faith of such representations and is liable to restore any advantage obtained by such representations (*u*). If he has obtained property other than money by fraud he is bound to restore it, but if he has only purported to bind himself to transfer property or to pay money he cannot be compelled to make good his promise or to make satisfaction for its breach. So if an infant obtain a loan of money from a money-lender by fraudulent misrepresentation that he is of full age, he is not liable to refund the money (*x*). It seems that it is not necessary that he should actively encourage fraud. It is enough if he be privy to it. If an infant knowing his rights stands by and seeing another in treaty for the purchase of his estate gives no notice of his title, he will not be permitted afterwards to avoid the purchase (*y*). An infant cannot be allowed by a Court of equity to take advantage of his own fraud (*z*). Nor can he affirm and take the benefit of one part of the transaction and repudiate the remainder (*a*). Where an infant

(*s*) *Stikeman* v. *Dawson*, 1 De G. & Sm. 105; 16 L. J. Ch. 205; 75 R. R. 47; see *Freeman* v. *Bank of Montreal*, 26 Ont. L. R. 451.

(*t*) *Buckinghamshire* v. *Drury*, 2 Eden, 60, 71.

(*u*) *Corry* v. *Gertcken*, 2 Madd. 40; 17 R. R. 180; *Wright* v. *Snowe*, 3 De G. & Sm. 321; 79 R. R. 220; *Ex p. Unity Bank*, 3 D. & J. 63; 27 L. J. B. 33; 121 R. R. 25; *Ex p. Taylor*, 8 D. M. & G. 254; 25 L. J. B. 25; 114 R. R. 113; *Nelson* v. *Stocker*, 4 D. & J. 458; 28 L. J. Ch. 760; *Bartlett* v. *Wells*, 1 B. & S. 836; 31 L. J. Q. B. 57; *Lempriere* v. *Lange*, 12 C. D. 678; *Woolf* v. *Woolf*, 1899, 1 Ch. 343; 68 L. J. Ch. 82.

(*x*) *Leslie* v. *Shiell*, 1914, 3 K. B. 607; 83 L. J. K. B. 1145; explaining *Stocks* v. *Wilson*, 1913, 2 K. B. 235; 82 L. J. K. B. 598.

(*y*) *Savage* v. *Foster*, 9 Mod. 37.

(*z*) *Clarke* v. *Cobley*, 2 Cox, 173; 2 R. R. 25; *Woolf* v. *Woolf*, *supra*.

(*a*) *Thurstan* v. *Nottingham Bldg. Soc.*, 1902, 1 Ch. 1; 1903, A. C. 6; 72 L. J. Ch. 134.

had obtained from a creditor of his wife two promissory notes, in which she was indebted to him before marriage, on giving his bond to the creditor, he was ordered to give back the notes on his pleading infancy when sued on the bond (*b*). Where an infant charged his reversionary interest with payment of a sum lent to him upon his promissory note, and executed a statutory declaration that he was then of full age, and after attaining full age he mortgaged his interest for an amount exceeding what was ultimately available without disclosing the prior charge, the Court held that the charge given by the infant during his infancy was avoided by the subsequent mortgage executed by him when of full age to a mortgagee without notice (*c*). But an infant mortgagor cannot repudiate his mortgage without recognising the right of the mortgagee to the repayment of the sums advanced (*d*).

In the absence of proof of the exercise of undue influence or of the existence of the relation of guardian and ward, a gift of her property within a month before her death by an infant aged twenty years, of business habits, firm will, and fully capable of managing her affairs, to a relation with whom she had been residing since her father's death, for a period of five months until her own death, was held not invalid (*e*).

Coverture.

A married woman may now both sue and be sued in tort in all respects as if she were a *feme sole*, and any damages or costs recovered by her in any such action shall be her separate property, and any damages or costs recovered against her shall be payable out of her separate property (*f*). For torts committed by a woman before her marriage, her husband is now only liable to the extent of the property acquired by him through his wife (*g*). But for the wife's torts committed during coverture, the husband's liability continues to be unlimited as before the Act. He will be exempt from liability

(*b*) *Clarke* v. *Cobley*, *supra*. See *Jones* v. *Kearney*, 1 D. & War. 166; 58 R. R. 249.

(*c*) *Inman* v. *Inman*, 15 Eq. 264.

(*d*) *Thurston* v. *Nottingham Bldg. Soc.*, *supra*.

(*e*) *Taylor* v. *Johnstone*, 19 C. D. 603; 51 L. J. Ch. 879; and see *Hoblyn* v. *Hoblyn*, 41 C. D. 200.

(*f*) 45 & 46 Vict. c. 75, s. 1.

(*g*) *Ibid.* ss. 14, 15.

only in cases where the fraud is directly connected with her contract and parcel of the same transaction and is also the means of effecting, in the sense of obtaining, the contract (*h*). But he is not liable where a decree for judicial separation has been obtained while the action in respect of the tort is pending and before judgment (*i*).

A married woman can bring an action against her husband for recission of a separation deed induced by fraudulent misrepresentation, such a claim not being an action for tort within section 12 of the Married Women's Property Act, 1882 (*k*).

Inequality of footing between parties to a contract.

The principle which vitiates a contract with an incapacitated person has been extended to cases where from the peculiar relation which subsists between the parties, or from the influence which the one party has acquired over the other, the freedom of action which is essential to the validity of all transactions is overcome, and the equal footing on which parties to a transaction should stand is destroyed.

Principle as to dealings between parties standing in a fiduciary relation to each other.

If the relation between the parties is one of a fiduciary nature, transactions between them are watched by the Court with more than ordinary jealousy. The duty of a person who fills a fiduciary position being to protect the interests which are confided to his care, he may not avail himself of the influence which his position gives him for the purposes of his own benefit, and to the prejudice of those interests which he is bound to protect. It is a rule of equity that no man can be permitted to take a benefit where he has a duty to perform which is inconsistent with acceptance of the benefit (*l*). Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by the one and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing

(*h*) *Earle* v. *Kingscote*, 1900, 2 Ch. 585; 69 L. J. Ch. 725.
(*i*) *Cuenod* v. *Leslie*, 1909, 1 K. B. 880; 78 L. J. K. B. 695.
(*k*) *Hulton* v. *Hulton*, 1917, 1 K. B. 813; 86 L. J. K. B. 633.
(*l*) *Robinson* v. *Pett*, 3 P. Wms. 249; *Ex p. Larking*, 4 C. D. 566; 45 L. J. Ch. 235; *Bagnal* v. *Carlton*, 6 C. D. 371; 47 L. J. Ch. 30.

himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had subsisted (*m*). The obtaining property or of any benefit through the medium and unconscientious abuse of influence by a person in whom trust and confidence are placed is a fraud of the gravest character (*n*).

The rule of equity which prohibits a man, who fills a position of a fiduciary character, from taking a benefit from the person towards whom he stands in such a relation, stands upon a motive of general public policy, irrespective of the particular circumstances of the case. The rule is founded on considerations as to the difficulty which must, from the condition of the parties, generally exist of obtaining positive evidence as to the fairness of transactions which are peculiarly open to fraud and undue influence. The policy of the rule is to shut the door against temptation (*o*).

It is an inflexible rule of a Court of equity that a person in a fiduciary position is not entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear that this rule is founded upon principles of morality, but is rather based upon the consideration that, human nature being what it is, there is a danger in such circumstances of the person holding a fiduciary position being swayed by interest rather than by duty and thus prejudicing those whom he was bound to protect (*p*).

The rule does not, however, go the length of avoiding all transactions between parties standing in a fiduciary relation and those towards whom they stand in such relation. All that a Court of equity requires is that the confidence which has been reposed be not betrayed. A transaction between them will be supported, if it can be shown to the satisfaction of the Court that the parties were, notwithstanding the relation,

(*m*) *Tate* v. *Williamson*, 2 Ch. 61; *Bagnal* v. *Carlton*, 6 C. D. 371.

(*n*) *Moxon* v. *Payne*, 8 Ch. 887; 43 L. J. Ch. 240.

(*o*) *Ayliffe* v. *Murray*, 2 Atk. 59; *Robinson* v. *Pett*, 3 P. Wms. 251; *Benson* v. *Heathorn*, 1 Y. & C. C. C. 342; 57 R. R. 351; *Aberdeen Rly. Co.* v. *Blaikie*, 1 Macq. 461; 149 R. R. 32.

(*p*) *Bray* v. *Ford*, 1896, A. C. p. 51, *per* Lord Herschell; 65 L. J. Q. B. 213.

substantially at arms' length and on an equal footing, and that nothing has happened which might not have happened had no such relation existed. The burthen of proof lies in all cases upon the party who fills the position of active confidence to show that the transaction has been fair. If it can be shown to the satisfaction of the Court that the other party had competent and *independent advice*, or that he performed the act or entered into the transaction voluntarily, deliberately and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power of influence to which the relation gave rise, the transaction will be supported (*q*). And this onus extends to a volunteer claiming through the person in a fiduciary position and to any person taking with notice (*r*). A man standing in a fiduciary relation, if dealing with the confiding party, is bound to communicate all the information he has acquired respecting the property, the subject of the transaction, which it was material for him to know in order to enable him to judge of the value of the property (*s*). He must "take upon himself the whole proof that the thing is righteous" (*t*). And the absence of a competent and disinterested legal adviser may of itself be fatal to the transaction (*u*).

A solicitor who acts for both parties is not such an independent adviser as the law requires for the protection of the donor. He must be independent of the donee in fact as well as in name. A solicitor does not discharge his duty by merely satisfying himself that the donor understands and wishes to carry out the particular transaction; he must also satisfy

(*q*) *Edwards* v. *Meyrick*, 2 Ha. 60; *Allfrey* v. *Allfrey*, 1 Mac. & G. 99; 84 R. R. 15; *Smith* v. *Kay*, 7 H. L. C. 750; 30 L. J. Ch. 35; 115 R. R. 367; *Rhodes* v. *Bate*, 1 Ch. 252; 35 L. J. Ch. 267; 148 R. R. 255; *Tate* v. *Williamson*, 2 Ch. 55; *Allcard* v. *Skinner*, 36 C. D. p. 171; 56 L. J. Ch. 1052; *Tucker* v. *Bennett*, 38 C. D. 1, 9, 17; 57 L. J. Ch. 507.

(*r*) *Bainbrigge* v. *Browne*, 18 C. D. 188; 50 L. J. Ch. 522. See *Chaplin* v. *Brammall*, 1908, 1 K. B. at p. 238; 77 L. J. K. B. 366

(*s*) *Ibid.*; *Emma Silver Mining Co.* v. *Grant*, 11 C. D. 922.

(*t*) *Gibson* v. *Jeyes*, 6 Ves. 266, 276; 5 R. R. 295.

(*u*) *Rhodes* v. *Bate*, 1 Ch. 252; 35 L. J. Ch. 267; *Liles* v. *Terry*, 1895, 2 Q. B. 679; 65 L. J. Q. B. 34; *De Witte* v. *Addison*, 80 L. T. 207; *Barron* v. *Willis*, 1902, A. C. 271; 71 L. J. Ch. 609; but see *Hoblyn* v. *H.*, 41 C. D. 200; *Allison* v. *Clayhills*, 97 L. T. 709.

himself that the gift is one that it is right and proper in all the circumstances to make; and if he is not so satisfied his duty is not only to advise his client not to complete the transaction, but also to refuse to act further for him if the client persists (*x*).

The principles which govern the case of dealings of persons standing in a fiduciary relation apply to the case of persons who clothe themselves with a character which brings them within the range of the principle (*y*), or who take instruments, securities, or monies with notice that they have been obtained by a person filling a position of a fiduciary character from a person towards whom he stands in such relation (*z*).

In judging of a validity of transactions between persons standing in a confidential relation to each other, the material point to be considered is whether the person conferring a benefit had competent and independent advice. The age or capacity of the person conferring the benefit and the nature of the benefit are of little importance in such cases. They are important only when no such confidential relation exists (*a*). The general principle, however, as to the incapacity of a person who stands in a fiduciary relation to take a benefit from the party towards whom he stands in such a relation, admits of some limitation. A mere trifling gift to a person standing in a confidential relation, or a mere trifling liability incurred in favour of such person, cannot stand in the same position as a gift of a man's whole property, or a liability involving it, would stand in. In such cases the Court will not interfere to set them aside upon the mere fact of a confidential relation and the absence of proof of competent and independent advice, but will require some

(*x*) *Powell* v. *Powell*, 1900, 1 Ch. 243; 69 L. J. Ch. 164; *Wright* v. *Carter*, 1903, 1 Ch. 27; 72 L. J. Ch. 138.

(*y*) *Tate* v. *Williamson*, 2 Ch. 55; *Emma Silver Mining Co.* v. *Grant*, 11 C. D. 922; 17 C. D. 127; 50 L. J. Ch. 449; *Morley* v. *Loughnan*, 1893, 1 Ch. 736; 62 L. J. Ch. 515; *Barron* v. *Willis*, 1900, 2 Ch. 121; 69 L. J. Ch. 532.

(*z*) *Ardglasse* v. *Pitt*, 1 Vern, 238; *Molony* v. *Kernan*, 2 Dr. & War. 31; 59 R. R. 625; *Espey* v. *Lake*, 10 Ha. 260; 22 L. J. Ch. 336; 90 R. R. 362; *Berdoe* v. *Dawson*, 34 Beav. 603; 145 R. R. 693; *Rolfe* v. *Gregory*, 4 D. J. & S. 576; 34 L. J. Ch. 274; 146 R. R. 463; *De Witte* v. *Addison*, 80 L. T. 207.

(*a*) *Rhodes* v. *Bate*, 1 Ch. 252; 35 L. J. Ch. 267; 148 R. R. 255.

proof not merely of influence derived from the relation, but of *mala fides*, or of undue or unfair exercise of the influence (*b*).

After the termination of the fiduciary relation, it is open to the parties to deal on the same terms as strangers (*c*); but if a relation of confidence be once established, either some positive act or some complete case of abandonment must be shown in order to determine it. The mere fact that the relation is not called into existence is not sufficient of itself to determine it (*d*). If the confidential relation between the parties has not terminated at the commencement of the negotiation, the principles which govern the case of dealings between parties standing in a fiduciary relation continue to operate (*e*). Although indeed the confidential employment may have ceased, the disability will continue so long as the reasons on which it is founded continue to operate (*f*). A man, for instance, who has in the course of a fiduciary employment acquired some peculiar knowledge as to the property of his employer cannot, after the cessation of the relation, use the knowledge so acquired for his own benefit and to the prejudice of the other (*g*). But although a person may have been employed or consulted on one occasion, this will not of itself constitute a confidential relation in respect of a subsequent transaction, occurring at a future and somewhat distant time (*h*).

Dealings between trustee and *cestui que trust.*

A common instance of the application of the rule that a man who fills a position of a fiduciary character cannot derive a benefit from the person towards whom he stands in such relation, is in the case of actual trustees. It is the duty of a trustee to use his best exertions for the advantage of the *cestui*

(*b*) *Ibid.*; *Allcard* v. *Skinner*, 36 C. D. p. 182; 56 L. J. Ch. 1052; *Barron* v. *Willis*, 1900, 2 Ch. p. 132; 69 L. J. Ch. 532.

(*c*) *Tate* v. *Williamson*, 2 Ch. 65; *Mitchell* v. *Homfray*, 8 Q. B. D. 587; 50 L. J. Q. B. 460; *Allcard* v. *Skinner*, *supra*; *post*, p. 162.

(*d*) *Rhodes* v. *Bate*, *supra*.

(*e*) *Tate* v. *Williamson*, 2 Ch. 65.

(*f*) *Carter* v. *Palmer*, 8 Cl. & Fin. 657; 54 R. R. 145.

(*g*) *Ibid.*; *Holman* v. *Loynes*, 4 D. M. & G. 270; 23 L. J. Ch. 529; 102 R. R 127; app. 1903, 1 Ch. 27.

(*h*) *Rhodes* v. *Bate*, *supra*; cf. *Barron* v. *Willis*, *supra*.

que trust. He may not place himself in a situation in which his interests will come into conflict with that which his duty requires him to do. Any personal benefit which he may gain by availing himself of his fiduciary character must be acquired by a dereliction of duty and will enure for the benefit of the trust estate (*i*). There is no more sacred rule of equity than that a trustee cannot so execute a trust as to have the least benefit from it himself (*k*). It is an inflexible rule that a trustee will not be allowed to put himself in a position where his interest and duty conflict (*l*). No trustee who buys up an incumbrance on the estate of which he is trustee can ever as against the trust estate make a profit out of it (*m*). The restraint on any personal benefit to the trustee is not confined to his dealings with the estate, but extends to remuneration for services and prevents him from receiving anything beyond the payment of his expenses, unless there be an express stipulation to the contrary (*n*). There may be cases in which the Court will establish an agreement made with a trustee for a certain allowance beyond the term of his trust, but the Court will be extremely cautious and wary in doing so (*o*).

The leading case on the subject is *Keech* v. *Sandford* (*p*), where it was decided that a trustee or tenant for life of renewable leaseholds who takes a renewal in his own name is a trustee of the renewed lease for the persons interested in the old lease even though the lessor refused to grant a renewal to the beneficiaries. The principle has been extended by *Phillips*

(*i*) *Ex p. Lacey*, 6 Ves. 625; 6 R. R. 9; *Ex p. James*, 8 Ves. 337, 344; 7 R. R. 56; *D'Albiac* v. *D'Albiac*, 16 Ves. 123; *Hamilton* v. *Wright*, 9 Cl. & Fin. 111; 69 R. R. 58; *Broughton* v. *Broughton*, 5 D. M. & G. 164; 25 L. J. Ch. 250; 104 R. R. 71. A lease obtained by a trustee or executor in his own name, even in the absence of fraud, and upon the refusal of the lessor to grant a new lease to the *cestui que trust*, shall be held upon trust for the person entitled to the old lease. *Keech* v. *Sandford*, Sel. Ca. Ch. 61.

(*k*) *Forbes* v. *Ross*, 2 Cox, 116.

(*l*) *Bray* v. *Ford*, 1896, A. C. p. 51, *per* Lord Herschell; 65 L. J. Q. B. 213.

(*m*) *Ex p. Larking*, 4 C. D. 566; 45 L. J. Ch. 235.

(*n*) *Robinson* v. *Pett*, 3 P. Wms. 249; *Broughton* v. *Broughton*, *supra*; *Crosskill* v. *Bower*, 32 Beav. 86; 138 R. R. 646; *Barrett* v. *Hartley*, 2 Eq. 789; *Re Bignell*, 1892, 1 Ch. 59; 61 L. J. Ch. 334; *Re White*, 1898, 1 Ch. 297; 67 L. J. Ch. 139.

(*o*) *Ayliffe* v. *Murray*, 2 Atk. 59.

(*p*) 2 Wh. & Tu. L. C. (7th ed.), 693.

v. *Phillips* (*q*) to the case of a trustee or tenant for life purchasing the reversion so that the reversion so purchased is subject to the trust. But the principle only applies in the case of leases renewable by contract, or where there is a reasonable expectation that the lease will be renewed (*r*). It does not apply to one of the next of kin taking a new lease in his own right, and in the absence of unfair dealing he is entitled to hold the new lease for his own benefit (*s*). The principle, however, applies to a tenant for life in possession of mortgaged houses purchasing the property from the mortgagee, and he holds the property as trustee for the remaindermen (*t*). In the case of trustees, executors, agents, and perhaps tenants for life, the presumption of personal incapacity to retain the benefit is one of law and cannot be rebutted; in the case of mortgagees and partners there is a rebuttable presumption of fact; and in the case of co-owners and other persons not in a fiduciary position they will not be deemed trustees unless they have acted fraudulently (*u*).

But there is no rule which incapacitates a trustee from dealing with the *cestui que trust* in respect of the trust estate. A trustee for sale may purchase the trust estate, if the *cestui que trust* fully and clearly understands with whom he is dealing and makes no objection to the transaction, and the trustee fairly and honestly discloses all that he knows respecting the property and gives a just and fair price, and does not seek to secure surreptitiously any advantage for himself (*x*). The onus, however, rests upon the trustee, and he is bound to produce clear affirmative proof that the parties were at arms' length, that the *cestui que trust* had the fullest

(*q*) 29 C. D. 673; 54 L. J. Ch. 943.

(*r*) *Bevan* v. *Webb*, 1905, 1 Ch. 620; 74 L. J. Ch. 300.

(*s*) *Re Biss*, 1903, 2 Ch. 40; 72 L. J. Ch. 473.

(*t*) *Griffith* v. *Owen*, 1907, 1 Ch. 195; 76 L. J. Ch. 92.

(*u*) *Re Biss*, *sup.*, *per* Collins, M.R. and Romer, L.J.

(*x*) *Ayliffe* v. *Murray*, 2 Atk. 59; *Ex p. Lacey*, 6 Ves. 626; 6 R. R. 9; *Ex p. James*, 8 Ves. 348; 7 R. R. 56; *Coles* v. *Trecothick*, 9 Ves. 246; 7 R. R. 167; *Ex p. Bennett*, 10 Ves. 381; 8 R. R. 1; *Randall* v. *Errington*, *ibid.* 422; 8 R. R. 18; *Morse* v. *Royal*, 12 Ves. 355; 8 R. R. 338; *Downes* v. *Grazebrook*, 3 Mer. 208; 17 R. R. 62; *Knight* v. *Marjoribanks*, 2 Mac. & G. 10; 83 R. R. 136; *Thomson* v. *Eastwood*, 2 A. C. 215, 236.

information upon all material facts, and that having this information he agreed to and adopted what was done (*y*). It is not for the *cestui que trust* to prove negatively that he had not full information; it is for the trustee to prove affirmatively that the information was given (*z*). The transaction becomes impeachable, if there is any secret or underhand dealing on the part of the trustee. However fair it may be in other respects, the transaction cannot be supported if the *cestui que trust* does not clearly and distinctly understand that he is dealing with the trustee. A trustee cannot under any circumstances be allowed to deal with himself on behalf of the *cestui que trust* surreptitiously and without his knowledge and assent. It is immaterial that he may take no advantage from the bargain. It may be that the terms on which he attempts to deal with the trust estate are as good as could have been obtained from any other quarter. They may even be better, but so inflexible is the rule, that no inquiry can be made as to the fairness or unfairness of the transaction. It is enough that the act has a tendency to interfere with the duty of protecting the trust estate which the trustee has taken upon himself to perform. The policy of the rule is to shut the door against temptation. It makes no matter whether the transaction relates to real estate, or personalty, or mercantile matters, for the disability arises not from the subject-matter, but from the obligation under which a trustee lies to do his utmost for the *cestui que trust* (*a*). It makes no difference in the obligation of the principle that the sale was by public auction (*b*), or that the purchase was

(*y*) *Williams* v. *Scott*, 1900, A. C. 499; 69 L. J. P. C. 77.

(*z*) *Dougan* v. *Macpherson*, 1902, A. C. 197; 71 L. J. P. C. 62.

(*a*) *Fox* v. *Macreth*, 2 Bro. C. C. 400; 2 Cox, 320; 4 Bro. P. C. 258; 2 R. R. 55; *Ex p. Lacey*, *supra*; *Ex p. James* 8 Ves. 348, *supra*; *Ex p. Bennett*, *supra*; *Randall* v. *Errington*, *supra*; *Baker* v. *Carter*, 1 Y. & C. 250; 4 L. J. Ex. Eq. 12, 41 R. R. 267; *Lewis* v. *Hillman*, 3 H. L. C. 607; 88 R. R. 233; *Knight* v. *Marjoribanks*, 2 Mac. & G. 12; 83 R. R. 136; *Hamilton* v. *Wright*, 9 Cl. & Fin. 111; 69 R. R. 58; *Aberdeen Rly. Co.* v. *Blaikie*, 1 Macq. 461; *Parkinson* v. *Hanbury*, 2 D. J. & S. 450; 36 L. J. Ch. 292.

(*b*) *Ex p. James*, 8 Ves. 348; 7 R. R. 56; *Ex p. Bennett*, 10 Ves. 393; 8 R. R. 1; *Sanderson* v. *Walker*, 13 Ves. 602; *Downes* v. *Grazebrook*, 3 Mer. 207; 17 R. R. 62; *Grover* v. *Hugell*, 3 Russ. 428; 27 R. R. 103; *Adams* v. *Sworder*, 2 D. J. & S. 44; 139 R. R. 23.

made through another person (*c*), as for instance through a purchaser on an understanding that he should resell to the trustee (*d*), or that the purchase was made from a co-trustee (*e*), or that the trustee may have purchased as agent for another person (*f*).

The application of the principle is limited to dealings with the trust estate. In all matters unconnected with the subject of the trust the parties are fully competent to deal with each other as strangers (*g*).

Nor will the principle operate after the relation of trustee and *cestui que trust* is clearly dissolved. Apart from any circumstances of doubt or suspicion there is no rule that a person who has ceased to be a trustee of an instrument containing a trust for sale cannot become a purchaser of the trust property (*h*). But a man who has been a trustee cannot, after the termination of the relation, be allowed to avail himself for his own benefit, and to the prejudice of the party for whom he has been trustee, of any information which he may have acquired during the existence of the relation (*i*). Subject to this limitation a man who has acted in a fiduciary character may, on divesting or discharging himself of the trust, purchase the property in respect of which he has filled a fiduciary position (*k*). If a man cannot by an act of his own

(*c*) *Sanderson* v. *Walker*, 13 Ves. 602; *Adams* v. *Sworder*, *supra*; *Bagnal* v. *Carlton*, 6 C. D. 371; 47 L. J. Ch. 30.

(*d*) *Re Postlethwaite*, 37 W. R. 200.

(*e*) *Whichcote* v. *Laurence*, 3 Ves. 740.

(*f*) *Ex p. Bennett*, 10 Ves. 381, 400; 8 R. R. 1; *Gregory* v. *Gregory*, Coop. 201; 14 R. R. 244; *Ex p. Grylls*, 2 Dea. & Ch. 290.

(*g*) *Knight* v. *Marjoribanks*, 2 Mac. & G. 12; 2 H. & Tw. 308; 83 R. R. 166.

(*h*) *Re Boles and British Land Co.*, 1902, 1 Ch. 244; 71 L. J. Ch. 130.

(*i*) *Ex p. Lacey*, 6 Ves. 627; 6 R. R. 9; *Coles* v. *Trecothick*, 9 Ves. 246; 7 R. R. 167; *Ex p. Bennett*, 10 Ves. 394; 8 R. R. 1; *Morse* v. *Royal*, 12 Ves. 373; 8 R. R. 338; *Ex p. Larking*, 4 C. D. 566; 45 L. J. Ch. 235; *Luddy's Trustee* v. *Peard*, 33 C. D. 500; 55 L. J. Ch. 884.

(*k*) *Ex p. James*, *supra*; *Sanderson* v. *Walker*, 13 Ves. 601; *Downes* v. *Grazebrook*, 3 Mer. 200; 17 R. R. 62. The expression "shaking off" the character of trustee, or "dissolving the relation" of trustee, used in some of the cases, does not seem to amount to more than that the transaction takes place with the consent of the parties beneficially interested. *Morse* v. *Royal*, *supra*; *Downes* v. *Grazebrook*, *supra*; *Chalmer* v. *Bradley*, 1 J. & W. 68; 20 R. R. 216. In *Austin* v. *Chambers*, 6 Cl. & Fin. 1; 49 R. R. 1; where it was said that a man might, on shaking off the character of a trustee, purchase the

discharge himself of the trust so as to enable him to purchase, the Court will, under particular circumstances, divest him of the character and enable him to purchase (*l*). If the trust property is taken entirely out of a man's hands, and all his authority over it put an end to by the interposition and act of law, as in the case of a sale by execution, there is no reason why he should not be able to purchase. The principle upon which a trustee is debarred from purchasing does not apply to such a case (*m*). The assignee of an insolvent debtor, for instance, may purchase the debtor's estate when sold by the sheriff (*n*). But on a sale by the Court, the Court will not as a rule give the trustee leave to bid, for that is a question for the *cestuis que trust* to decide for themselves (*o*). But where leave was given to the solicitor of an executor to bid at the sale, it was held that the effect of the leave was to put an end to the fiduciary relation and to place him in the position of a mere stranger (*p*).

Charities.

The trustees or governors of a charity cannot grant a lease to one of themselves (*q*). But a tenant who has got a lease of charity lands at too low a rent is not to be turned out unless there is collusion, as, for instance, if he is a relative of one of the trustees. In such a case inadequacy of price is less a badge of fraud than in almost any other case (*r*).

Directors of companies.

The principle which affects dealings between trustee and *cestui que trust* is not confined to the case of trustees properly so called, but extends to other persons invested with a like fiduciary character, such as the directors or promoters of a company (*s*).

trust estate, the solicitor was not employed in the sale by his client, and was himself a judgment creditor. A trustee cannot be allowed to purchase the trust estate by his retirement from the trust with that object in view. *Spring* v. *Pride*, 4 D. J. & S. 395; cf. *Re Boles*, 1902, 1 Ch. 244; 71 L. J. Ch. 130.

(*l*) *Campbell* v. *Walker*, 5 Ves. 681. See *Ex p. Morland*, Mont. & M. 76.

(*m*) See *Austin* v. *Chambers*, *supra*; *Beaden* v. *King*, 9 Ha. 499; 22 L. J. Ch. 111.

(*n*) See *Ex p. Morland*, Mont. & M. 76.

(*o*) *Tennant* v. *Trenchard*, 4 Ch. 545; 38 L. J. Ch. 169.

(*p*) *Boswell* v. *Coaks*, 23 C. D. 302; 11 App. Ca. 232; 55 L. J. Ch. 761.

(*q*) *Att.-Gen.* v. *Clarendon*, 17 Ves. 500.

(*r*) *Ex p. Skinner*, *Re Lawford Charity*, 2 Mer. 457.

(*s*) *Benson* v. *Heathorn*, 1 Y. & C. C. C. 326; 57 R. R. 351; *Great Luxem-*

The director of a company is in a fiduciary position towards the company of which he is a director. There is, however, an essential difference between a director and a trustee. A trustee is the owner of the property and deals with it as principal, subject only to an equitable obligation to account to his *cestui que trust*. The office of a director is that of a paid servant of the company. He never enters into a contract for himself, but only for his principal, that is, the company. He cannot sue on such contracts, nor be sued on them, unless he exceeds his authority. That is the broad distinction between trustees and directors (*t*). A director, however, as we have said, stands in a fiduciary position, and is bound to use his best endeavours for the advantage of the company. He may not place himself in a position in which his interests will come into conflict with that which his duty requires him to do. Any personal benefit which he may gain by availing himself of his fiduciary character must be acquired by a dereliction of duty, and will enure for the benefit of the company (*u*). If he makes any profit on account of transactions of business when he is acting for the company, he must account for it to the company (*x*). So, also, if acting for himself, he proposes to the company a contract from the execution of which he will derive a profit, that profit belongs to the company (*y*). It makes no difference that the profit is one which the company itself could not have obtained. The question is not whether the company could have acquired it, but whether the director acquired it while acting for the company (*z*). So a company is entitled to money received by a director from a promoter under an agreement to

burg Rly. Co. v. *Magnay*, 25 Beav. 586; 119 R. R. 555; *Aberdeen Rly. Co.* v. *Blaikie*, 1 Macq. 461; 149 R. R. 32.

(*t*) *Smith* v. *Anderson*, 15 C. D. 247, 275; 50 L. J. Ch. 39.

(*u*) *Hay's Case*, 10 Ch. 600; 44 L. J. Ch. 721; *Ex p. Larking*, 4 C. D. 568; 45 L. J. Ch. 235.

(*x*) *Imperial Mercantile Credit Ass.* v. *Coleman*, L. R. 6 H. L. 189; 40 L. J. Ch. 262; *Weston's Case*, 10 C. D. 579; 48 L. J. Ch. 425; *Eden* v. *Ridsdale Lamp Co.*, 23 Q. B. D. 368; 58 L. J. Q. B. 579; *Theatre Amusement Co.* v. *Stone*, 50 Can. S. C. R. 32.

(*y*) *Imperial Mercantile Credit Ass.* v. *Coleman*, *supra*.

(*z*) *Boston Co.* v. *Ansell*, 39 C. D. 339.

indemnify him against any loss on his qualification shares (*a*). And if each of several directors has received something with the knowledge and approval of the others, they are all jointly and severally liable for the whole (*b*). But when a director not purporting to act on behalf of the company buys a property which he sells again at an enhanced price to the company, he is under no obligation to account to the company for the profit so made (*c*).

Where the articles of a joint stock association declared that if a director had any interest in a contract proposed for acceptance by the association, he should declare his interest, it was held that he must declare the nature of his interest, and that the words were not satisfied by a mere declaration that he had an interest in the matter (*d*). Directors, who are also vendors to the company, do not discharge their duty of disclosing what profits they have made by inserting words in a prospectus which, read with caution, might give a clue to their meaning. The disclosure must be explicit. Nor can they escape liability by a clause in the articles that they will not be accountable for any profit made (*e*).

A director cannot retain a consideration received by him from the promoters as an inducement to become a director. If the consideration has been a gift of fully paid-up shares, though he is not liable as a contributory, he may be compelled to restore the shares, or to account to the company for the highest value to be attributed to them since they have been in his possession (*f*), but he ought not to be charged with more than the real value (*g*).

Nor can a director, after a company has ended in disaster,

(*a*) *Archer's Case*, 1892, 1 Ch. 322; 61 L. J. Ch. 129.

(*b*) *Carriage Co-op. Ass.*, 27 C. D. 322; 53 L. J. Ch. 1154.

(*c*) *Burland* v. *Earle*, 1902, A. C. 83; 71 L. J. P. C. 1.

(*d*) *Imperial Mercantile Credit Ass.* v. *Coleman*, *supra*; and see *Costa Rica Rly.* v. *Forwood*, 1901, 1 Ch. 746; 70 L. J. Ch. 385.

(*e*) *Gluckstein* v. *Barnes*, 1900, A. C. 240; 69 L. J. Ch. 385.

(*f*) *Carling's Case*, 1 C. D. 115, 126; 45 L. J. Ch. 5; *M'Kay's Case*, 2 C. D. 1; 45 L. J. Ch. 148; *Pearson's Case*, 5 C. D. 336; 46 L. J. Ch. 339; *Nanty-glo, &c., Ironworks Co.* v. *Grave*, 12 C. D. 738; *Metcalfe's Case*, 13 C. D. 169; 49 L. J. Ch. 236; *Eden* v. *Ridsdale Lamp Co.*, 23 Q. B. D. 368; 58 L. J. Q. B. 579; *Innes & Co.*, 1903, 2 Ch. 254; 72 L. J. Ch. 643.

(*g*) *Shaw* v. *Holland*, 1900, 2 Ch. 305; 69 L. J. Ch. 621.

turn his office into profit at the expense of those whose interests he was bound to protect. Where, accordingly, after a company has gone into liquidation a director purchased debentures of the company at a discount, he was not allowed to prove for more against the company than he had actually paid (*h*).

If, moreover, directors of a company having to exercise a fiduciary power choose to place themselves in such a position that their interests pull one way while their duty is plainly to do something quite different, and for that reason they abstain from exercising that power, they will be held to all the same consequences as though that power had been exercised (*i*).

Directors who so use their powers as to obtain benefits for themselves at the expense of the shareholders without disclosure must account for those benefits to the company (*k*). But directors are not trustees for individual shareholders and may purchase their shares without disclosure (*l*).

There is no difference in principle between a profit made by a director after he has become a director and profit through a bargain made by him at the time when he becomes a director, with a person who is proposing to enter into a contract with the company of which he is a director (*m*).

The fact that a contract for purchase cannot be rescinded does not preclude the company from obtaining from the vendor, if he is a director, a secret profit made by him at its expense (*n*).

Promoters of companies.

The case of a promoter seems an exceptionally strong case of fiduciary relationship, inasmuch as the trustee or agent, so far from his being selected by his *cestui que trust* or principal, here actually creates the principal in whose affairs he acts (*o*). Promoters have "almost an unlimited power to make the

(*h*) *Ex p. Larking*, 4 C. D. 566; 45 L. J. Ch. 235.

(*i*) *Gilbert's Case*, 5 Ch. 565; 39 L. J. Ch. 837; *Englefield Colliery Co.*, 8 C. D. 388.

(*k*) *Alexander* v. *Automatic Telephone Co.*, 1900, 2 Ch. 56; 69 L. J. Ch. 428.

(*l*) *Percival* v. *Wright*, 1902, 2 Ch. 421; 71 L. J. Ch. 846.

(*m*) *Hay's Case*, 10 Ch. 600; 44 L. J. Ch. 721.

(*n*) *Gluckstein* v. *Barnes*, 1900, A. C. 240; 69 L. J. Ch. 385. See *Lady Forrest Gold Mines*, 1901, 1 Ch. 582; 70 L. J. Ch. 275.

(*o*) Buckley, p. 188.

corporation subject to such regulations as they please, and for such purposes as they please, and to create it with a managing body whom they select, having powers such as they choose to give to their managers, so that the promoters can create such a corporation that the corporation, as soon as it comes into being, may be bound by anything, not in itself illegal, which the promoters have chosen " (*p*). The word " promoter," however, has no very definite meaning (*q*), and it is often very difficult to determine the date at which a person becomes a promoter. Intention to promote is not enough, nor is an agreement to promote (*r*); you must show promotion in fact (*s*). And unless a promoter is in a fiduciary position towards the company, not only at the time of the sale but also at the time of his original acquisition of the property, he cannot, in the absence of fraud, be compelled to hand over secret profits (*t*). The relationship of vendor to the company when coupled with promotion involves certain fiduciary duties but such fiduciary relationship is not identical with ordinary out and out trusteeship (*u*).

A man may purchase property with the object of selling it at a profit to a company, but if he was a promoter the transaction will in the absence of proper disclosure (*x*) be set aside (*y*), or if he was a promoter at the date at which he bought, the profit will be ordered to be paid over (*z*) unless the company bought with the knowledge of the profit (*a*). But the vendor is not bound to disclose the amount of the profit made by him on the sale to the company. The mere suppression of the amount of profit made by him does not

(*p*) *Erlanger* v. *New Sombrero Co.*, 3 App. Ca. p. 1268; 48 L. J. Ch. 73.

(*q*) *Per* Lindley, L. J., 27 W. R. 836.

(*r*) *Gover's Case*, 1 C. D. 182; 45 L. J. Ch. 83.

(*s*) 35 C. D. pp. 410, 411; 33 C. D. 85; *Lady Forrest Gold Mine*, 1901, 1 Ch. 582; 70 L. J. Ch. 275.

(*t*) *Ladywell Co.* v. *Brookes*, 35 C. D. 406; 56 L. J. Ch. 684; *Lady Forrest Gold Mine*, *supra*; and see *post*, Ch. vii., s. 1.

(*u*) *Omnium Electric Palaces* v. *Baines*, *infra*.

(*x*) *Lagunas Nitrate Co.* v. *Lagunas Syn.*, 1899, 2 Ch. 292; 68 L. J. Ch. 699

(*y*) *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221.

(*z*) *Leeds and Hanley Theatres*, 1902, 2 Ch. 809; 72 L. J. Ch. 1.

(*a*) *Whaley Bridge* v. *Green*, 5 Q. B. D. 109; 49 L. J. Q. B. 326.

by itself amount to fraud so as to make him liable to account (*b*).

It is incumbent on promoters to take care that, in forming the company, they provide it with a board of directors who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. There is no rule that the owner of property may not promote and form a company and then sell his property to it; but, if he does so, he is bound to take care that he sells it to the company through the medium of a board of directors, who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs not to the promoters but to some other person (*c*).

There is, however, no duty imposed on promoters of a company to provide it with an independent board of directors, if the real truth is disclosed to those who are induced by the promoters to join the company; and where the promoters are vendors to the company the contract for sale cannot be set aside under such circumstances merely because the board of directors were not independent (*d*).

An assignment of a business to a private company by insolvent traders is not void under 13 Eliz. c. 5, if made for valuable consideration and free from fraud, but if the effect of it is to make the assets unavailable for creditors generally it is an act of bankruptcy (*e*).

Though a one-man company is legal, yet a sale to such a company may turn out to be fraudulent under 13 Eliz. or void as an act of bankruptcy on the part of the vendor (*f*).

(*b*) *Lady Forrest Gold Mine*, 1901, 1 Ch. 582, 70 L. J. Ch. 275.

(*c*) *Erlanger* v. *New Sombrero Co.*, 3 App. Ca. p. 1236; 48 L. J. Ch. 73; *Leeds and Hanley Theatres*, 1902, 2 Ch. 809; 72 L. J. Ch. 1. See *Omnium Electric Palaces* v. *Baines*, 1914, 1 Ch. 332; 83 L. J. Ch. 372.

(*d*) *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, 1899, 2 Ch. 392; 68 L. J. Ch. 699.

(*e*) *Re David and Adlard*, 1914, 2 K. B. 694; 83 L. J. K. B. 1173; *post*, Ch. iv., s. 1.

(*f*) *Re Hirth*, 1899, 1 Q. B. 612; 68 L. J. Q. B. 287; *Wheatley* v. *W.*, 85 L. T. 491; *Re Slobodinsky*, 1903, 2 K. B. 517; 72 L. J. K. B. 883.

It is not fraudulent for a trader to sell his business to a limited company consisting only of himself and six members of his own family, the business being then solvent, and all the terms of sale being known to and approved by the shareholders; and neither the company nor liquidator is in such a case entitled to rescission of the contract of purchase (*g*).

A person not a director may be a promoter of a company which is already incorporated, the capital of which, however, has not been taken up, and which is not yet in a position to perform the obligations imposed on it by its creators (*h*).

The 38th section of the Companies Act, 1867, does contain the word "promoters," but it imposes no fresh duty on them with regard to the company. It imposes a fresh duty towards, and gives a new cause of action to, persons who take shares in the company as individuals; it does not affect the obligation of the promoters towards the corporation. The extent of the fiduciary relation which the promoters bear to the company is a very important consideration in construing the section (*i*).

If the promoters of a company are the owners of the property which they are selling to the company, they are bound, like other persons in a fiduciary position, to state in their prospectus that they are the owners, and to make a full and fair disclosure of their interest and position with respect to that property. It is not necessary in all cases that the price given by them for the property should be stated; but it is not fair in them to omit to state that they have just purchased the property at a very much smaller amount than they propose to sell it for to the company which they are promoting or causing to come into existence (*k*).

Full disclosure of all material facts by promoters who sell

(*g*) *Salomon* v. *Salomon & Co.*, 1897, A. C. 22; 65 L. J. Ch. 35.

(*h*) *Emma Silver Mining Co.* v. *Lewis*, 4 C. P. D. 407; 48 L. J. C. P. 257.

(*i*) *Erlanger* v. *New Sombrero Co.*, 3 App. Ca. 1269, *per* Lord Blackburn; 48 L. J. Ch. 73; and see *ante*, p. 91.

(*k*) *New Sombrero Co.* v. *Erlanger*, 5 C. D. 73; *Erlanger* v. *New Sombrero Co.*, *supra*; *Bagnal* v. *Carlton*, 6 C. D. 371; 47 L. J. Ch. 30; *Lady Forrest Gold Mine*, 1901, 1 Ch. 582; 70 L. J. Ch. 275; *Leeds and Hanley Theatres*, 1902, 2 Ch. 809; 72 L. J. Ch. 1.

property to and become directors of the company is necessary. Disclosure means disclosure to intended shareholders; and therefore disclosure to directors who are themselves promoters or their nominees is not disclosure at all (*l*). If there has been concealment, honesty of purpose on their part with an intention to act for the benefit of the company will not avail them as a defence to an action for rescission. The mere fact of the disclosure of the fiduciary relation and of the double character in which they have acted will not discharge them from the obligation of making a complete and candid disclosure (*m*). Further, the disclosure must be explicit; it is not enough to insert in the prospectus words which read with caution and sifted to the bottom might have given to the reader a clue to their meaning (*n*). Nor can they escape liability by a clause in the articles that they will not be accountable to the company for any profit (*o*).

If a promoter forms a company by fraudulent means and the company is ordered to be wound up, the promoter cannot prove in the winding-up for his services in forming the company or for his services as officer of the company after the company has been registered (*p*).

There is no difference in principle between money taken from the funds of a company by a secret bargain between the vendor and the promoters, and money so taken by secret bargain between the vendor, the promoters, and the contractors (*q*).

Other fiduciary relations.

The principle which affects dealings between trustee and *cestui que trust* extends also to other persons invested with a like fiduciary character; such as executors and adminis-

(*l*) *Gluckstein* v. *Barnes*, 1900, A. C. 249, 259; 69 L. J. Ch. 385; and see *Re Darby*, 1911, 1 K. B. 95; 80 L. J. K. B. 180.

(*m*) *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, 1899, 2 Ch. 392; *per* Rigby, L. J.; 68 L. J. Ch. 699.

(*n*) *Gluckstein* v. *Barnes*, 1900, A. C. 240; 69 L. J. Ch. 385.

(*o*) *Ibid.*

(*p*) *Re Hereford Waggon Co.*, 2 C. D. 621, 626; 45 L. J. Ch. 461.

(*q*) *Twycross* v. *Grant*, 2 C. P. D. 535, *per* Cockburn, C. J.; 46 L. J. C. P. 636.

trators (*r*); assignees of a bankrupt (*s*); committees of inspection in bankruptcy (*t*); commissioners of bankrupts and other judicial officers (*u*); committees of lunatics (*x*); governors of charities (*y*); receivers (*z*); arbitrators (*a*); auditors (*b*); brokers (*c*); to a member of a corporation taking a lease of the corporate property (*d*), and many other cases (*e*). The disability extends in general to all persons who being employed or concerned in the affairs of another acquire a knowledge of his property (*f*). Partners in business of an assignee in bankruptcy are equally disqualified from purchasing with the assignee himself (*g*).

Mortgagees.

The principle does not, however, apply to the case of a mortgagee dealing with the mortgagor (*h*), nor to the case of a puisne mortgagee buying the mortgaged property from a prior mortgagee under the exercise of his power of sale (*i*), but a mortgagee of leaseholds cannot *primâ facie* renew the

(*r*) *Pickering* v. *Pickering*, 2 Beav. 31; 8 L. J. Ch. 336; 48 R. R. 104; *Wedderburn* v. *Wedderburn*, 4 M. & C. 41; 8 L. J. Ch. 177; 44 R. R. 331; *Allfrey* v. *Allfrey*, 1 Mac. & G. 87; 84 R. R. 15; *Prideaux* v. *Lonsdale*, 1 D. J. & S. 433; 137 R. R. 260; *De Cordova* v. *De Cordova*, 4 App. Ca. 702.

(*s*) *Ex p. Bennett*, 10 Ves. 381; *Ex p. Forder*, 1881, W. N. 117; *Ex p. Wainwright*, 19 C. D. 140; 51 L. J. Ch. 67.

(*t*) *Re Gallard*, 1897, 2 Q. B. 8; 66 L. J. Q. B. 484.

(*u*) *Ex p. James*, 8 Ves. 338; 7 R. R. 56; *Ex p. Bennett*, *supra*.

(*x*) *Wright* v. *Proud*, 13 Ves. 136.

(*y*) *Att-Gen.* v. *Clarendon*, 17 Ves. 500; *ante*, p. 163.

(*z*) *Alven* v. *Bond*, 1 Fl. & Kel. 196; *Seagram* v. *Tuck*, 18 C. D. 296; 50 L. J. Ch. 572.

(*a*) *Blennerhassett* v. *Day*, 2 Ba. & Be. 116; 53 R. R. 79.

(*b*) *Leeds Estate Co.* v. *Shepherd*, 36 C. D. 787; 57 L. J. Ch. 46; *Newton* v. *Birmingham Small Arms Co.*, 1906, 2 Ch. 378; 75 L. J. Ch. 627.

(*c*) *Erskine & Co.* v. *Sachs*, 1901, 2 K. B. 504; 70 L. J. K. B. 978.

(*d*) *Att.-Gen.* v. *Corporation of Cashel*, 3 Dr. & War. 294.

(*e*) See *Ex p. Morgan*, 12 Ves. 6; 8 R. R. 276; *Grover* v. *Hugell*, 3 Russ. 428; 27 R. R. 103; *Greenlaw* v. *King*, 3 Beav. 49; 10 L. J. Ch. 129; 52 R. R. 21; *Beaden* v. *King*, 9 Ha. 499; 22 L. J. Ch. 111; *Denton* v. *Donner*, 23 Beav. 285; 113 R. R. 143.

(*f*) Sug. V. & P. 287, 14th ed., *ante*, p. 158.

(*g*) *Ex p. Moore*, 51 L. J. Ch. 72.

(*h*) *Knight* v. *Marjoribanks*, 2 Mac. & G. 10; 2 H. & Tw. 308; 83 R. R. 136; *Melbourne Banking Co.* v. *Brougham*, 7 App. Ca. 307; but cf. *Martinson* v. *Clowes*, 21 C. D. 860, *inf.*

(*i*) *Shaw* v. *Bunny*, 2 D. J. & S. 468; 34 L. J. Ch. 257; 139 R. R. 190; *Kirkwood* v. *Thompson*, *ibid.*, 613; 139 R. R. 264.

lease for himself (*k*); nor does the principle apply to the case of a tenant for life purchasing from trustees for sale under a power to be exercised with his consent (*l*); nor to the case of a tenant for life or mortgagor with power to sell or lease selling or leasing to a trustee for himself (*m*); nor does it operate to preclude a tenant for life from effecting a sale which will be advantageous to his own interest, if his conduct has been without blame and blemish (*n*); nor does the principle apply to the case of a merely nominal trustees, such as trustees who has disclaimed (*o*). Nor when property is sold in a foreclosure suit is the solicitor to some creditors of the mortgagee, one of whom has obtained a decree for the administration of the mortgagee's estate, precluded from purchasing, though his name appeared on the particulars of sale as one of several solicitors from whom particulars of sale could be obtained (*p*).

If a mortgagee exercises his power of sale *bonâ fide*, the Court will not interfere even though the sale be very disadvantageous, unless the price is so low as of itself to be evidence of fraud (*q*). But a mortgagee exercising his power of sale cannot purchase on his own account, nor can the solicitor of the mortgagee acting for him in the matter of the sale purchase on his own account (*r*). A mortgagee may, however, in good faith sell to his solicitor who has acted for him in the mortgage, though such a sale might, under certain circumstances, be impeached by the mortgagee but not by the mortgagor (*s*). In a case where property was sold under their

(*k*) *Nesbitt* v. *Tredennick*, 1 B. & B. 46; 12 R. R. 1; *Re Biss*, 1903, 2 Ch. at p. 56; 72 L. J. Ch. 473.

(*l*) *Dicconson* v. *Talbot*, 6 Ch. 37. The Settled Land Act, 1890, s. 12, makes provision for purchase by the tenant for life. A purchase by tenant for life in the name of a third person would be no better than if it were made in his own name, indeed it would be rather indicative of fraud. *M'Pherson* v. *Watt*, 3 App. Ca. 254, 263.

(*m*) *Bevan* v. *Habgood*, 1 J. & H. 222; 128 R. R. 335.

(*n*) *Hickley* v. *Hickley*, 2 C. D. 190; 45 L. J. Ch. 401; *Hahesy* v. *Guiry*, 1918, 1 Ir. R. 135.

(*o*) *Stacey* v. *Elph*, 1 M. & K. 195; 2 L. J. Ch. 50; 36 R. R. 304; *Clark* v. *C.*, 9 App. Ca. 733; 52 L. J. P. C. 99.

(*p*) *Guest* v. *Smythe*, 5 Ch. 551; 39 L. J. Ch. 536.

(*q*) *Warner* v. *Jacob*, 20 C. D. 220, 224; *post*, Ch. v., s. 2; 51 L. J. Ch. 642.

(*r*) *Martinson* v. *Clowes*, *inf.*

(*s*) *Nutt* v. *Easton*, 1900, 1 Ch. 29; 69 L. J. Ch. 46.

power of sale by mortgagees of a building society, it was held that the secretary of the society could not bid at the auction, though he stated he was buying on his own account (*t*).

Dealings between solicitor and client.

Considerations of a similar character apply to the case of transactions between persons standing to each other in the relation of solicitor and client. It is the duty of a solicitor to protect the interests of his client. The client is entitled to the full benefit of the best exertions of the solicitor. A solicitor may not bring his own personal interest in any way into conflict with that which his duty requires him to do (*u*), or make a gain for himself in any manner whatever at the expense of his client in respect of the subject of any transactions connected with or arising out of the relation of solicitor and client, beyond the amount of just and fair professional remuneration to which he is entitled (*x*). He must account therefore for any secret profit or commission so made (*y*). A solicitor may not even enter into an agreement, as regards contentious business, upon the terms of getting a greater benefit than he would obtain by the costs which he is entitled to charge according to law (*z*). If indeed a solicitor be a trustee, he is not entitled to charge for professional services in respect of the trust estate (*a*).

A solicitor is not under any incapacity to purchase from or sell to a client. A solicitor may deal with a client or purchase a client's property even during the continuance of the relation, but the burthen of proof lies on him to show that the transaction has been perfectly fair (*b*). A solicitor selling to or buying from a client is bound to disclose every thing that is or may be material to the judgment of the client before the transaction is completed, and this liability does not depend

(*t*) *Martinson* v. *Clowes*, 21 C. D. 860; and see *Prees* v. *Coke*, 6 Ch. 645.

(*u*) *Lawless* v. *Mansfield*, 1 Dr. & War. 557, 631; *Baron* v. *Willis*, 1900, 2 Ch. 121; 1902, A. C. 271; 69 L. J. Ch. 532; *Nocton* v. *Ashburton*, 1914, A. C.

(*x*) *Proctor* v. *Robinson*, 35 Beav. 335; 147 R. R. 191; *Tyrrell* v. *Bank of London*, 10 H. L. C. 26, 44; 31 L. J. Ch. 369; 138 R. R. 14.

(*y*) *Copp* v. *Lynch*, 72 L. T. 137.

(*z*) *Pince* v. *Beattie*, 31 L. J. Ch. 734; Cordery, 273; 139 R. R. 376.

(*a*) Cordery, 207.

(*b*) *Sup.*, p. 156.

upon undue influence (*c*). A prudent man would not deal with his client without the intervention of another solicitor, though there is no invariable rule that a solicitor may not take such a course (*d*), but such employment goes for nothing unless it be shown that the new solicitor had sufficient information and took sufficient steps to make his intervention of value (*e*). A transaction might be so manifestly fair that independent advice would not be considered necessary (*f*). But generally speaking on a sale by a client to his solicitor the latter must prove (1) that the client was fully informed; (2) that he had competent independent advice, and (3) that the price given was a fair one (*g*). He must satisfy the Court that he has taken no advantage of his professional position, and has brought to the knowledge of the independent solicitor everything which he himself knew necessary to enable him to form a judgment in the matter, and he must in particular be able to show that a just and fair price has been given (*h*). He should, indeed, be prepared to show how the contract was entered into, who made the first offer, and what were the circumstances attending the transaction (*i*). The possibility of a speculative or contingent advantage does not fall within those communications which a solicitor is bound to disclose to his client, if the transaction has been in other respects fair,

(*c*) *Moody* v. *Cox*, 1917, 2 Ch. 71; 86 L. J. Ch. 424.

(*d*) *Cutts* v. *Salmon*, 21 L. J. Ch. 750, *per* Lord St. Leonards; *Jones* v. *Price*, 20 L. T. 49; *Allison* v. *Clayhills*, 97 L. T. 709. See *Luddy's Trustee* v. *Peard*, 33 C. D. 500; 55 L. J. Ch. 884.

(*e*) *Slator* v. *Nolan*, Ir. Rep. 11 Eq. 367, 407; *Luddy's Trustee* v. *Peard*, *supra*.

(*f*) *Wright* v. *Carter*, 1903, 1 Ch. 27, *per* Vaughan Williams, L. J.; 72 L. J. Ch. 138.

(*g*) *Ibid.*, *per* Cozens-Hardy, L. J.; *Allison* v. *Clayhills*, *sup.*

(*h*) *Gibson* v. *Jeyes*, 6 Ves. 266, 277; 5 R. R. 295; *Uppington* v. *Bullen*, 2 Dr. & War. 185; *Savery* v. *King*, 5 H. L. C. 627, 655; 25 L. J. Ch. 482; 101 R. R. 299; *Spencer* v. *Topham*, 22 Beav. 573; 111 R. R. 488; *Gresley* v. *Mousley*, 4 D. & J. 78, 3 D. F. & J. 433; 28 L. J. Ch. 620; 124 R. R. 164; *Pisani* v. *Att.-Gen.*, L. R. 5 P. C. 516, 536; *McPherson* v. *Watt*, 3 App. Ca. 254, 272; *Widgery* v. *Tepper*, 5 C. D. 516; 7 C. D. 423; *Wright* v. *Carter*, 1903, 1 Ch. 27; 72 L. J. Ch. 138.

(*i*) *Jones* v. *Price*, 20 L. T. 49. See *Rhodes* v. *Bate*, 1 Ch. 252; 35 L. J. Ch. 267; 148 R. R. 255; see also *Moore* v. *Prance*, 9 Ha. 299; 20 L. J. Ch. 468; where a deed was set aside, though the solicitor derived no benefit from it.

and the point was as much open to the observation of the one party as the other (*k*). If a solicitor be employed as an agent for sale or purchase, he may not purchase from or sell to himself surreptitiously without the knowledge or consent of his client (*l*). Though the transaction is one which might have been supported had the client known that the solicitor was the purchaser, it cannot be supported if that fact has not been disclosed (*m*). A solicitor may sell for one client and buy for another client, though the transaction requires the greatest openness of dealing (*n*).

A solicitor or his partner having under a judgment the conduct of a sale, cannot buy without leave of the Court; and as a rule leave will not be given against the wish of the parties interested (*o*).

Where the solicitor obtains leave to bid he is at arms' length with the vendors and is not bound to disclose facts within his knowledge affecting value; but if he professes to give information on any particular subject, with a view to guide the Court and obtain its approval, he must give all the material information in his possession on that particular subject (*p*).

The rule that a solicitor who deals with a client is bound to prove the fairness of the transaction applies with peculiar force where the client is placed at a disadvantage from his being indebted to the solicitor, and gives him a security for the debt (*q*). If, however, the Court is satisfied that the transaction has been on the whole fair and reasonable, and

(*k*) *Edwards* v. *Meyrick*, 2 Ha. 60. See *Tonkin* v. *Hughes*, 79 L. T. 47; 1 T. L. R. 469; *Coaks* v. *Boswell*, *inf.*

(*l*) *Bloye's Trust*, 1 Mac. & G. 488; 19 L. J. Ch. 89; *Lewis* v. *Hillman*, 3 H. L. C. 607; 88 R. R. 233; *Tyrrell* v. *Bank of London*, 10 H. L. C. 26, 44; 31 L. J. C. 369; 138 R. R. 14; *Adams* v. *Sworder*, 2 D. J. & S. 44; 139 R. R. 23.

(*m*) *McPherson* v. *Watt*, 3 App. Ca. 256

(*n*) *Hesse* v. *Briant*, 6 D. M. & G. 623; 106 R. R. 225; and see *Farrar* v. *Farrars, Lim.*, 40 C. D. 395; 58 L. J. Ch. 185.

(*o*) Cordery, 191.

(*p*) *Coaks* v. *Boswell*, 11 App. Ca. 232, 240, 244; 55 L. J. Ch. 761.

(*q*) *Eyre* v. *Hughes*, 2 C. D. 148; 45 L. J. Ch. 395; *Watson* v. *Rodwell*, 11 C. D. 150; 48 L. J. Ch. 209; *Cockburn* v. *Edwards*, 18 C. D. 449; 51 L. J. Ch. 46.

that no undue advantage has been taken, it will be supported, although there may have been some irregularities attending it (*r*). A solicitor who advances money to or has dealings with a client must be able to prove the advance of the money by some other evidence than the instrument creating the security (*s*), or the receipt clause (*t*); but a purchaser without notice from the solicitor could rely on the receipt clause (*u*). A security given by a client to his solicitor for past or future costs or for monies due will be supported if *bonâ fide* (*x*).

In dealing with a case where a solicitor has purchased from a client, the circumstances of his employment may be considered and the amount of influence estimated. In a case accordingly where no high degree of confidence existed, and not much influence had been acquired, the Court, being satisfied that the conduct of the solicitor had been *bonâ fide*, and that the bargain was a fair one, the transaction was upheld (*y*).

The statement of an untrue consideration in a deed of purchase of sale between solicitor and client is fatal to the deed. The Court will never support a deed where a solicitor is purchaser and the consideration is unduly stated (*z*). But a client may be estopped as against a subsequent purchaser from denying the consideration (*a*).

The rule which throws upon a solicitor dealing with his client the burthen of proving the fairness of the transaction is not confined to cases where the solicitor is actually employed at the time, but may extend to cases where a solicitor has in the course of his employment on a previous occasion acquired or had the means of acquiring any peculiar knowledge as to

(*r*) *Jones* v. *Roberts*, 9 Beav. 419; *Blagrave* v. *Routh*, 8 D. M. & G. 621; 26 L. J. Ch. 86; 110 R. R. 346.

(*s*) *Lawless* v. *Mansfield*, 1 Dr. & War. 557, 605.

(*t*) *Jones* v. *Thomas*, 3 Y. & C. 498, 522.

(*u*) Conv. Act, 1881, s. 55; *Lloyd's Bank* v. *Bullock*, 1896, 2 Ch. 192, 197; 65 L. J. Ch. 680; *Capell* v. *Winter*, 1907, 2 Ch. 376; 76 L. J. Ch. 496; *ante*, p. 122.

(*x*) *Cheslyn* v. *Dalby*, 2 Y. & C. 170; 47 R. R. 384; *Edwards* v. *Meyrick*, 2 Ha. 60; Sol. Rem. Act, 1881, Ord. VII.

(*y*) *Pisani* v. *Att.-Gen. of Gibraltar*, L. R. 5 P. C. 536.

(*z*) *Uppington* v. *Bullen*, 2 Dr. & War. 184. See *Holman* v. *Loynes*, *infra*.

(*a*) *Powell* v. *Browne*, 1907, W. N. 228; *ante*, p. 122.

the property (*b*). The solicitor of a bankrupt who has acquired information in that character before the bankruptcy, cannot afterwards buy from the trustee without full disclosure, even though the trustee is independently advised (*c*). As a general rule, however, it no longer applies after there has been an entire cessation of the relation (*d*). The continuance, however, will be presumed in the absence of some positive act or complete case of abandonment (*e*). Nor will it apply with the same force where the relation though not terminated has been loosened and the influence consequent on the relation which formerly existed between the parties is not subsisting in its full and perfect force (*f*).

The rule which throws upon a solicitor dealing with his client the burthen of proving the fairness of the transaction applies to the case of voluntary agreements, and not to a case where the solicitor is in the hostile attitude of an urgent and pressing creditor (*g*). Nor does the rule apply, where the transaction is totally disconnected with the relation and concerns objects and things not embraced in or affected by or dependent upon that relation (*h*). But the fact that the relationship exists in matters other than the transaction in question suggests the inference that the influence has not ceased as regards the matter in question (*i*). The fact that the purchaser may be a solicitor, and that the vendor has no legal adviser, there having been no previous relation of solicitor and client between them, does not bring the case within the ordinary rule of the Court in such cases (*k*).

(*b*) *Holman* v. *Loynes*, 4 D. M. & G. 270, 281; 23 L. J. Ch. 529; 102 R. R. 127; approved in 3 App. Ca. 271; and 1903, 1 Ch. 27. See *Carter* v. *Palmer* 8 Cl. & Fin. 657, 707; 54 R. R. 145.

(*c*) *Luddy's Trustee* v. *Peard*, 33 C. D. 500; 55 L. J. Ch. 884.

(*d*) *Gibson* v. *Jeyes*, 6 Ves. 277; 5 R. R. 295; *Wood* v. *Downes*, 18 Ves. 120; 11 R. R. 160; *Montesquieu* v. *Sandys*, *ibid.* 313; 11 R. R. 197; *Cane* v. *Allen*, 2 Dow 289.

(*e*) *Rhodes* v. *Bate*, 1 Ch. 252, 260; 35 L. J. Ch. 267; 148 R. R. 255.

(*f*) *Moss* v. *Bainbrigge*, 6 D. M. & G. 292; 106 R. R. 96.

(*g*) *Johnson* v. *Fesemeyer*, 3 D. & J. 13; 121 R. R. 7; *Pearson* v. *Benson*, 28 Beav. 599; 126 R. R. 259.

(*h*) *Montesquieu* v. *Sandys*, 18 Ves. 313; 11 R. R. 197; *Edwards* v. *Meyrick*, 2 Ha. 60, 68; but see 3 App. Ca. p. 271.

(*i*) *Wright* v. *Carter*, 1903, 1 Ch. 27; 72 L. J. Ch. 138.

(*k*) *Edwards* v. *Williams*, 32 L. J. Ch. 763.

The rule with regard to gifts by a client to his solicitor is much stricter than the rule with regard to other dealings between them (*l*). The Court starts with a presumption of undue influence continuing so long as the relation or the influence exists. The presumption is not irrebuttable, but the onus is on the solicitor to show that the gift was uninfluenced by his position. The fact that the donor had competent advice may show that the influence had ceased; but the new solicitor must satisfy himself not only that the donor knew what he was doing and did it of his own free will, but that the gift was a proper one to be made under all the circumstances of the case, otherwise he will not be in a position to give competent advice (*m*). There is no difference in principle between a gift to a man's wife and a gift immediately to himself, if the gift to the wife be effected by undue means on the part of the husband (*n*); and this is so even where the wife was also the client's niece (*o*). The rule also extends to any other member of the solicitor's family (*p*).

The rule in respect to benefits conferred by will is different. A solicitor may take a benefit under the will of a client, although he may himself have prepared it, if no undue influence was exerted by him over the testator (*q*), and the will was not executed under any mistake or misapprehension caused by himself (*r*). But a solicitor cannot be allowed to take any benefit from his own professional ignorance. A solicitor is bound to have full professional knowledge and to give the information to his client. If a solicitor is employed to prepare a deed or to make a will, the law imputes to him a knowledge of all the legal consequences to result therefrom,

(*l*) *Wright* v. *Proud*, 13 Ves. 127; *per* Lord Eldon; *Thomson* v. *Judge*, 3 Drew. 306; 24 L. J. Ch. 785; 106 R. R. 362; *Holman* v. *Loynes*, 4 D. M. & G. 270, 283; 25 L. J. Ch. 529; 102 R. R. 127; *Re Holmes's Estate*, 3 Giff. 337; 133 R. R. 119; *O'Brien* v. *Lewis*, 4 Giff. 221; 32 L. J. Ch. 569; 141 R. R. 178; *Morgan* v. *Minett*, 6 C. D. 638.

(*m*) *Powell* v. *Powell*, 1900, 1 Ch. 247; 69 L. J. Ch. 164; *Wright* v. *Carter*, 1903, 1 Ch. 27; 72 L. J. Ch. 138.

(*n*) *Goddard* v. *Carlisle*, 9 Pri. 169; 23 R. R. 654.

(*o*) *Liles* v. *Terry*, 1895, 2 Q. B. 679; 65 L. J. Q. B. 34.

(*p*) *Barron* v. *Willis*, 1900, 2 Ch. 121; 1902, A. C. 271; 71 L. J. Ch. 609.

(*q*) *Walker* v. *Smith*, 29 Beav. 394; 131 R. R. 637.

(*r*) *Betts* v. *Doughty*, 5 P. D. 26; 48 L. J. P. 71.

and requires that he should distinctly and clearly point out to his client all those consequences from which a benefit may arise to himself from the instrument so prepared. If he fail to do so, he cannot as against his client, or any one claiming under him, derive any benefit under the instrument (*s*).

Accounts between solicitor and client will be opened if sufficient cause is shown in the shape of undue influence, though no error be proved (*t*); but in the absence of unfairness or undue influence (which will not be presumed from the mere relationship), specific items of mistake must be alleged and proved (*u*). In case of undue influence, as the account ought never to have been settled at all, it will be reopened generally (*x*); but mere error, as distinguished from excessive charges, is not a ground for reopening, nor is the omission to inform the client that he has a right to tax the bill (*y*).

The principles which apply in the case of dealings between solicitor and client are also applicable to the case of a counsel employed by a man as his confidential adviser (*z*); to the case of a man who has constituted himself the legal adviser of another (*a*), or has offered him legal advice in the matter (*b*); and to the case of the clerk of a solicitor who has acquired the confidence of a client of his master (*c*).

Dealings between principal and agent.

Considerations of a like nature apply to the case of persons standing in the relation of principal and agent. A person who is an agent for another undertakes a duty in which there is a confidence reposed and which he is bound to execute to

(*s*) *Segrave* v. *Kirwan*, Beat. 157; *Greenfield* v. *Bates*, 5 Ir. Ch. 219; *Boyes* v. *Carritt*, 26 C. D. 531; 53 L. J. Ch. 654.

(*t*) *Watson* v. *Rodwell*, 11 C. D. 150; 48 L. J. Ch. 209.

(*u*) *Hiles* v. *Moore*, 17 L. J. Ch. 385.

(*x*) *Coleman* v. *Mellersh*, 2 Mac. & G. 309; 86 R. R. 123; *Ward* v. *Sharp*, 50 L. T. 557.

(*y*) *Re Webb, Lambert* v. *Still*, 1894, 1 Ch. 73; 63 L. J. Ch. 145. See *Cheese* v. *Keen*, 1908, 1 Ch. 245; 77 L. J. Ch. 163.

(*z*) *Carter* v. *Palmer*, 8 Cl. & Fin. 657, 707; 54 R. R. 145; *Broun* v. *Kennedy*, 33 Beav. 133; 4 D. J. & S. 217, 33 L. J. Ch. 342; 140 R. R. 47; *Corley* v. *Stafford*, 1 D. & J. 238; 26 L. J. Ch. 865.

(*a*) *Tate* v. *Williamson*, 1 Eq. 528; 2 Ch. 65.

(*b*) *Davis* v. *Abraham*, 5 W. R. 465; *Barron* v. *Willis*, 1900, 2 Ch. 121; 1902, A. C. 271; 71 L. J. Ch. 609.

(*c*) *Hobday* v. *Peters*, 28 Beav. 349; 29 L. J. Ch. 780; 126 R. R. 162; *Nesbitt* v. *Berridge*, 32 Beav. 284; 138 R. R. 745.

the utmost advantage of the person who employs him. The principal is entitled to the full benefit of the best exertions of the agent. An agent cannot be allowed to place himself in a position which under ordinary circumstances might tempt him not to do that which is the best for his principal, or in which his interest and his duty will be in conflict. No agent in the course and execution of his agency can, without the knowledge and consent of his principal, be allowed to make any profit or advantage out of the matter of his agency and the business in which he is employed beyond the proper remuneration to which he is entitled for his services as agent (*d*). Where a person in the employment of another is bribed with a view to inducing him to act otherwise than faithfully to his employer, the agreement is a corrupt one and unenforceable whatever the effect produced on the mind of the person bribed may be (*e*).

There is no difference in principle between a profit made by an agent after he has become an agent and profit through a bargain made by him at the time when he becomes an agent with a person who is proposing to enter into a contract with his principal (*f*). An agent cannot bargain for any benefit derived from the subject on which he is employed without disclosing the fact to his principal. Commission received by an agent without the knowledge of his principal is looked on as a bribe. It is a profit which the principal has a right to extract from the agent whenever it comes to his knowledge (*g*). The rule is the same whether the remuneration received by the agent formed part of the original bargain, or was a present for services rendered (*h*); or whatever the form which the secret profit may take (*i*).

(*d*) *Tyrrell* v. *Bank of London*, 10 H. L. C. 26, 39; 31 L. J. Ch. 369; 138 R. R. 14; *Parker* v. *M'Kenna*, 10 Ch. 118; 44 L. J. Ch. 425; *Morrison* v. *Thompson*, L. R. 9 Q. B. 480, 485; 43 L. J. Q. B. 215; *Stubbs* v. *Slater*, 1910, 1 Ch. 195; 79 L. J. Ch. 420.

(*e*) *Stoney Point Co.* v. *Barry*, 36 O. L. R. 522.

(*f*) *Hay's Case*, 10 Ch. 600; 44 L. J. Ch. 721.

(*g*) *Grant* v. *Gold Exploration, &c.*, 1900, 1 Q. B. 233; 69 L. J. Ch. 150; *Hitchcock* v. *Sykes*, 49 Can. S. C. R. 403; *post*, p. 184.

(*h*) *M'Kay's Case*, 2 C. D. 1; 45 L. J. Ch. 148.

(*i*) *Keogh* v. *Dalgety*, 1917, V. L. R. 11.

There is no rule to prevent an agent from dealing with his principal in respect of the matter in which he is employed as agent. But an agent who seeks to uphold a transaction between himself and his principal must be able to show to the satisfaction of the Court that he gave his principal the same advice in the matter as an independent and disinterested adviser would have done, and that he made a full disclosure of all he knew respecting the property, and that the principal knew with whom he was dealing and made no objection to the transaction, and finally that the consideration was just and fair (*k*). However fair the transaction may be in other respects, any underhand dealing on the part of the agent will render it impeachable at the election of the principal. It is immaterial that the agent may have taken no advantage by the bargain. It is sufficient that he has not acted with that good faith which the Court requires, and has placed himself in a situation which might tempt an agent to allow his own interest to come into conflict with that which his duty requires him to do (*l*).

An agent who is employed to sell cannot become the purchaser surreptitiously and without the knowledge or assent of his employer (*m*); nor can an agent who is employed to purchase, purchase secretly from himself or from his own trustee (*n*), or for his own benefit (*o*). The rule applies whether the agent employed to purchase was actually in the position of a vendor, or intended to place himself in that

(*k*) *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714, 732; 65 R. R. 305; *Lewis* v. *Hillman*, 3 H. L. C. 607; 88 R. R. 233; *Rhodes* v. *Bate*, 1 Ch. 252; 35 L. J. Ch. 267; 148 R. R. 255.

(*l*) *Gillett* v. *Peppercorne*, 3 Beav. 78; 52 R. R. 38; *Charter* v. *Trevelyan*, *supra*; *Tyrrell* v. *Bank of London*, 10 H. L. C. 26; 31 L. J. Ch. 369; 138 R. R. 14; *Parker* v. *M'Kenna*, 10 Ch. 118; 44 L. J. Ch. 425; *De Bussche* v. *Alt*, 8 C. D. 316; 47 L. J. Ch. 386; *Birt* v. *Burt*, 22 C. D. 604; 52 L. J. Ch. 397.

(*m*) *Charter* v. *Trevelyan*, *supra*; *Lewis* v. *Hillman*, *supra*; *Parker* v. *M'Kenna*, *supra*; *McPherson* v. *Watt*, 3 App. Ca. 256; *Kelly* v. *Enderton*, *ante*, p. 69.

(*n*) *Gillett* v. *Peppercorne*, *supra*; *Barker* v. *Harrison*, 2 Coll. 546; *Bentley* v. *Craven*, 18 Beav. 75; 104 R. R. 373; *Tyrrell* v. *Bank of London*, *supra*; *Kimber* v. *Barber*, 8 Ch. 57.

(*o*) *Lees* v. *Nuttall*, 2 M. & K. 819; 31 R. R. 99; *Taylor* v. *Salmon*, 4 M. & C. 134; 48 R. R. 34; cf *James* v. *Smith*, 1891, 1 Ch. 384.

position (*p*). An agent for sale, if he intends to purchase himself, or to take an interest in the purchase, is bound to tell his principal what share in the purchase he intends to take. He is bound to disclose to his principal the exact nature of his interest. It is not enough for him to say that he has an interest, or to make statements such as would put the principal on inquiry (*q*). So also an agent who is employed to settle a debt or to make an arrangement cannot purchase the debt or any charge upon the property which is the subject of the arrangement for his own benefit (*r*). So also an agent employed to effect an insurance is bound, in the absence of an agreement to the contrary, to account to his principal for any discount which may be allowed by the insurance office on the premiums paid (*s*). The disability extends to the case of a sub-agent or substitute employed by the agent (*t*). A sub-agent stands in a fiduciary relation to the principal and is accountable to him (*u*).

The rule applies with peculiar stringency to the directors of companies who are agents for the sales and purchases made by the company (*x*).

The rule that an agent dealing with his principal must impart knowledge acquired in his office does not apply where the relation has ceased and there is another agent with equal means of knowledge to guard the interest of the principal in the transaction (*y*). After the relation of principal and agent has wholly ceased, or the agent has divested himself of that character, the parties are restored to their competency to deal with each other (*z*). But an agent who has in the course of

(*p*) *Beck* v. *Kantorowicz*, 3 K. & J. 242; 112 R. R. 123.

(*q*) *Dunne* v. *English*, 18 Eq. 524; *Stubbs* v. *Slater*, 1910, 1 Ch. 195; 79 L. J. Ch. 420.

(*r*) *Cane* v. *Allen*, 2 Dow, 294; *Reed* v. *Norris*, 2 M. & C. 361; 6 L. J. Ch. 197; 45 R. R. 88; *Carter* v. *Palmer*, 8 Cl. & Fin. 657; 11 Bli. N. S. 397; 54 R. R. 145; *Hobday* v. *Peters*, 28 Beav. 349; 29 L. J. Ch. 780; 126 R. R. 162.

(*s*) *Queen of Spain* v. *Parr*, 39 L. J. Ch. 73.

(*t*) *De Bussche* v. *Alt*, 8 Ch. D. 287; 47 L. J. Ch. 386; *ante*, p. 99.

(*u*) *Powell* v. *Jones*, 1905, 1 K. B. 11; 74 L. J. K. B. 115.

(*x*) *Hay's Case*, 10 Ch. 600; 44 L. J. Ch. 721.

(*y*) *Scott* v. *Dunbar*, 1 Moll. 442.

(*z*) *Charter* v. *Trevelyan*, 4 L. J. Ch. 209. See *Parker* v. *M'Kenna*, 10 Ch. 118; 44 L. J. Ch. 425.

his employment acquired some peculiar knowledge as to the property cannot after the cessation of the relation use the knowledge so acquired for his own benefit and to the prejudice of his former client (*a*). Nor can a man who is employed as a confidential agent escape from liability under the pretence that the business has been entrusted to an agent and not to him, unless it can be shown that the agent was intended to act and in fact acted independently of him (*b*).

So long as a contract remains executory, and the trustee or agent has power either to enforce it or to rescind or alter it, a trustee or agent cannot repurchase the property from his own purchaser except for the benefit of his principal. There may be cases of agents for sale who when they have once made the contract have concluded their agency, such as the case of an auctioneer, who when he has knocked down the estate and made the written contract may be said to have terminated his agency. But even in that case the Court would look with considerable suspicion on a repurchase by such an agent, because it would always be extremely difficult to find out whether there had not been some previous concert and understanding between them (*c*).

There is no rule preventing the same agent from acting for the opposing parties, but he must be able to satisfy the Court that the parties were substantially at arms' length in the transaction, and that there had been the utmost fairness throughout (*d*). Unless he can do this the taking commissions from both sides is fraudulent. Accordingly a bargain in which the agent of a money-lender receives commissions from both sides and is a co-adventurer with the money-lender, is fraudulent apart from the Money-lenders Act, 1900 (*e*).

(*a*) *Carter* v. *Palmer*, *supra*; *Holman* v. *Loynes*, 4 D. M. & G. 270; 23 L. J. Ch. 529; 102 R. R. 127.

(*b*) *Rhodes* v. *Bate*, 1 Ch. 252; 35 L. J. Ch. 267; 148 R. R. 255.

(*c*) *Parker* v. *M'Kenna*, *supra*; *per* Mellish, L.J.; *Re Postlethwaite*, 60 L. T. 514; *Williams* v. *Scott*, 1900, A. C. 499; 69 L. J. P. C. 77.

(*d*) *Hesse* v. *Briant*, 6 D. M. & G. 623; 106 R. R. 225; and see *Farrar* v. *Farrars*, *Lim.*, 40 C. D. 395; 58 L. J. Ch. 185.

(*e*) *Samuel* v. *Newbold*, 1906, A. C. 461; 75 L. J. Ch. 705.

When a bribe or secret commission is given by a vendor to a purchaser's agent it may be recovered by the purchaser, even though there is a custom, unknown to the purchaser, to give such commission (*f*). The principle also extends to a sub-agent (*g*). The Court will not inquire into the motive of the vendor in giving the bribe, and there is an irrebuttable presumption that the agent was influenced by the bribe (*h*). Any surreptitious dealing between one principal and the agent of the other principal is a fraud. The defrauded principal is entitled at his option to have the contract rescinded, or if he elects not to rescind, to have such other relief as he is entitled to (*i*). In the latter case he has two distinct and cumulative remedies—he may recover from the agent the amount of the bribe, and he may also recover from the agent and the briber, jointly and severally, damages for any loss he has sustained by entering into the contract, and it is immaterial which of the two he sues first (*k*).

Further, where an agent to sell property receives a secret profit from the purchaser, he must not only account for that profit to his principal but is not entitled to any commission from his principal (*l*). A sub-agent is likewise accountable to the principal (*m*). But the principal must reprobate the contract as soon as he learns of the payment of the commission, otherwise he will still be bound by it (*n*), and the purchaser though guilty of fraud may claim rescission on the ground of non-disclosure by the vendor (*o*).

A gift to an agent is valid unless some advantage was

(*f*) *Bartram & Sons* v. *Lloyd*, 88 L. T. 286.

(*g*) *Powell* v. *Jones*, 1905, 1 K. B. 11; 74 L. J. K. B. 115.

(*h*) *Hovenden* v. *Millhoff*, 83 L. T. 41; C. A.

(*i*) *Panama, &c., Telegraph Co.* v. *India Rubber, &c., Telegraph Works Co.*, 10 Ch. 526; 45 L. J. Ch. 121.

(*k*) *Salford* v. *Lever*, 1891, 1 Q. B. 168; 60 L. J. Q. B. 39; *Grant* v. *Gold Exploration, &c.*, 1900, 1 Q. B. 233; 69 L. J. Q. B. 150.

(*l*) *Andrews* v. *Ramsay*, 1903, 2 K. B. 635; 72 L. J. K. B. 865; *Stubbs* v. *Slater*, 1910, 1 Ch. 195; 79 L. J. Ch. 420; but see *Hippisley* v. *Knee*, 1905, 1 K. B. 1; 74 L. J. K. B. 68; *Nitedals, &c.* v. *Bruster*, 1906, 2 Ch. 671; 75 L. J. Ch. 798.

(*m*) *Powell* v. *Evan Jones & Co.*, 1905, 1 K. B. 11; 74 L. J. K. B. 115.

(*n*) *Bartram & Sons* v. *Lloyd*, 88 L. T. 286.

(*o*) *Moody* v. *Cox*, 1917, 2 Ch. 71; 86 L. J. Ch. 424.

taken by the agent of the relation in which he stood to the donor. If the conduct of the agent has been fair, honest, and *bonâ fide*, it is immaterial that the deed of gift may have been drawn up by his solicitor without the intervention of a disinterested third party (*p*). The rule with respect to the capacity of an agent to accept a gift from his principal is not so strict as it is in the case of solicitor and client, trustee and *cestui que trust*, and guardian and ward. The relation being of a sort less known and definite than in those other cases, the jealousy is diminished (*q*).

The ordinary doctrines of agency are as applicable to corporations as to private persons, whether they arise in questions of contracts or torts and frauds (*r*).

Partners.

The principles which govern the case of dealings between principal and agent apply as between partners. It is the duty of partners towards each other to refrain from all concealment in the transaction of the partnership business. If a partner be guilty of any such concealment and derive a benefit therefrom, he will be treated in equity as a trustee for the firm, and compelled to account to his co-partners (*s*).

This principle extends to persons who have agreed to become partners, and if one of them in negotiating for the acquisition of property for the intended firm receives a bonus or commission he must account for it (*t*).

If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business (*u*). In other words, he is not at liberty to deal on his own private

(*p*) *Hunter* v. *Atkins*, 3 M. & K. 113; 41 R. R. 30; *Nicol* v. *Vaughan*, 1 Cl. & Fin. 495; 35 R. R. 60.

(*q*) *Hunter* v. *Atkins*, *supra;* but see *Hobday* v. *Peters*, 28 Beav. 349; 29 L. J. Ch. 780; 126 R. R. 162.

(*r*) *Citizens Life Ass. Co.* v. *Brown*, 1904, A. C. 423; 73 L. J. P. C. 102.

(*s*) *Rusell* v. *Austwick*, 1 Sim. 52; 27 R. R. 157; Partnership Act, 1890, s. 29; cf. *Cassels* v. *Stewart*, 6 App. Ca. 64.

(*t*) *Fawcett* v. *Whitehouse*, 1 R. & M. 132, 148; 8 L. J. Ch. 50; 32 R. R. 163; *Hichens* v. *Congreve*, 4 Russ. 562; 6 L. J. Ch. 167; 32 R. R. 173.

(*u*) Partnership Act, 1890, s. 30; *Williamson* v. *Hine*, 1891, 1 Ch. 390; 60 L. J. Ch. 123; cf. *Trimble* v. *Goldberg*, *post*, p. 187.

account in any matter or business which is obviously at variance with his primary duty to the partnership. The object of this prohibitory rule is to withdraw from each partner the temptation to bestow more attention and to exercise a sharper sagacity in respect to his own purchases and sales and negotiations than he does in respect to the concerns of the partnership in the same, or in a conflicting line of business (*x*). So if one partner should purchase articles on his own private account in some special trade in which the partnership was engaged, the purchase being to the injury of the partnership, he would be liable to account for profits (*y*). But where a partner carries on a business not connected with or competing with that of the firm, his partners have no right to the profits he thereby makes, even though he has agreed not to carry on any separate business (*z*).

A partner must account for any profit derived from the use of the partnership property, name, or business connection (*a*); and if he make use of information obtained in the course of the partnership, or by reason of his connection with the firm for his own exclusive use in any transaction within the scope of the partnership business, he must account for any profit so derived (*b*); but he need not account for any profit derived from the use of such information for purposes which are wholly outside the scope of the partnership business (*c*).

A partner cannot make a secret profit out of dealings with the firm. He cannot, for example, supply the firm with goods which he has himself bought for his own use at a lower price without informing his partners of the facts (*d*). Nor can a partner treat privately and behind the backs of his co-partners for a lease of the premises where the joint trade is

(*x*) *Glassington* v. *Thwaites*, 1 Sim. and St. 124, 133; 1 L. J. Ch. 118; 24 R. R. 153; *Burton* v. *Wookey*, 6 Madd. 367; 23 R. R. 349; *England* v. *Curling*, 8 Beav. 129; 68 R. R. 39.

(*y*) *Burton* v. *Wookey*, *supra*.

(*z*) *Aas* v. *Benham*, 1891, 2 Ch. 244.

(*a*) Partnership Act, 1890, s. 29.

(*b*) *Dean* v. *Macdowell*, 8 C. D. 345; 47 L. J. Ch. 537; cf. *Lamb* v. *Evans*, 1893, 1 Ch. 218; 62 L. J. Ch. 404.

(*c*) *Aas* v. *Benham*, 1891, 2 Ch. 244.

(*d*) *Bentley* v. *Craven*, 18 Beav. 75; 104 R. R. 373.

carried on. A lease obtained in his own name will be held in trust for the partnership (*e*).

One partner may, however, acquire for himself the share of a co-partner without informing the other partners of the purchase (*f*); but he must, if he has had the management of the business or the keeping of the accounts, made a full disclosure of the state of the business, otherwise the purchase will be liable to impeachment by the co-partner (*g*). There is, however, no rule that the purchasing partner cannot rely on any election or confirmation binding on the selling partner unless and until full disclosure has been made (*h*).

A firm will be liable for the tortious act of one of the partners if done within the general scope of the authority given to him as a partner to conduct the business of the firm (*i*).

A partner who on his own account buys a property or business which is not within the scope of the partnership and is neither in rivalry nor in any way connected with the partnership, and who acts on information not acquired as a partner, is not liable to account to his co-partners (*k*).

There is nothing fiduciary between the surviving partner and the dead man's representative, except that they may sue each other in equity. There are certain legal rights and duties which attach to them, but it is a mistake to apply the word "trust" to the legal relation which is thereby created (*l*). Nevertheless, there is a mutual liability to account for any secret profit so long as the affairs of the partnership have not been completely wound up (*m*).

Dealings between guardian and ward.

The rule of equity with respect to dealings between guar-

(*e*) *Clegg* v. *Edmondson*, 8 D. M. & G. 787; 114 R. R. 336. See *Re Biss*, 1903, 2 Ch. 40; 72 L. J. Ch. 473.

(*f*) *Cassels* v. *Stewart*, 6 App. Ca. 64.

(*g*) *Maddeford* v. *Austwick*, 1 Sim. 89; 27 R. R. 165; *Law* v. *Law*, 1905, 1 Ch. 140; 74 L. J. Ch. 168.

(*h*) *Ibid.*

(*i*) *Hamlyn* v. *Houston*, 1903, 1 K. B. 81; 72 L. J. K. B. 72.

(*k*) *Trimble* v. *Goldberg*, 1906, A. C. 494; 75 L. J. P. C. 92.

(*l*) *Knox* v. *Gye*, L. R. 5 H. L. 656; 42 L. J. Ch. 234.

(*m*) Part. Act, 1890, s. 29 (2).

dian and ward is extremely strict (*n*), and imposes a general inability on the parties to deal with each other. Where the relation of guardian and ward is subsisting between two parties, if a gift or anything in the nature of a gift proceeds from the ward towards the guardian, when the ward has just come of full age, such transactions are subject to be viewed with the utmost jealousy by Courts of equity. It is almost impossible that transactions of such a nature can be sustained, unless the party claiming the benefit of the gift can show to the satisfaction of the Court that his influence has not been misapplied in the particular transaction. Unless it appears to be a spontaneous act on the part of the ward, or unless he was informed, in all the particulars, of the nature, character, and probable consequence of his proceeding, such a transaction cannot stand (*o*). Transactions between guardian and ward cannot be allowed to stand, even although they may have taken place after the guardianship has come to a close, unless the influence which is presumed to arise from the relation has ceased to exist (*p*). The influence may continue to exist for a considerable time after the actual relation has ceased to exist (*q*). As long as the accounts between the parties have not been fully settled or the estate still remains in some sort under the control of the guardian, the influence will be presumed to exist (*r*). The influence will indeed be presumed to exist, unless there is distinct evidence of its determination (*s*). After the relation has entirely ceased,

(*n*) *Hatch* v. *Hatch*, 9 Ves. 292; 7 R. R. 195; *Powell* v. *P.*, 1900, 1 Ch. 243; 69 L. J. Ch. 164.

(*o*) *Archer* v. *Hudson*, 15 L. J. Ch. 211; *Mulhallen* v. *Marum*, 3 Dr. & War. 317.

(*p*) *Hylton* v. *Hylton*, 2 Ves. 548, 549; *Carey* v. *Carey*, 2 Sch. & Lef. 173; *Dawson* v. *Massey*, 1 B. & B. 219; *Maitland* v. *Irving*, 15 Sim. 437; 74 R. R. 115; *Archer* v. *Hudson*, 15 L. J. Ch. 211; 64 R. R. 132; *Maitland* v. *Backhouse*, 17 L. J. Ch. 121; *Espey* v. *Lake*, 10 Ha. 260; 22 L. J. Ch. 336; 90 R. R. 362. See *Rhodes* v. *Bates*, *inf.*

(*q*) *Hatch* v. *Hatch*, *supra*; approved 1903, 1 Ch. 27; *Aylward* v. *Kearney*, 2 B. & B. 463; *Revett* v. *Harvey*, 1 Sim. & St. 502; 24 R. R. 219; *Maitland* v. *Irving*, 15 Sim. 437; 74 R. R. 115; *Archer* v. *Hudson*, 15 L. J. Ch. 211; *Maitland* v. *Backhouse*, 17 L. J. Ch. 121; *Davies* v. *Davies*, 9 Jur. N. S. 1002.

(*r*) *Hylton* v. *Hylton*, 2 Ves. 547; *Dawson* v. *Massey*, 1 B. & B. 229. See *Matthew* v. *Brise*, 14 Beav. 345; 92 R. R. 130; *Espey* v. *Lake*, *supra*.

(*s*) *Rhodes* v. *Bate*, 1 Ch. 252; 35 L. J. Ch. 267; 148 R. R. 255.

not merely in name but in fact, and a full and fair settlement of all transactions arising out of the relation has been made, and sufficient time has elapsed to put the parties in a position of complete independence to each other, there is no objection to any bounty or grant conferred by the ward on his former guardian (*t*).

It is not necessary for the application of the principle that the relation of guardian and ward should exist in perfect strictness of terms, or that the guardian should be a guardian appointed by the Court or nominated by the father. If the young person lives with and is brought up or under the care, influence, and control of a near relative of mature age—if the relation of guardian and ward thus subsist between them—the principle is equally applicable (*u*).

The principle applies to the case of a third party who makes himself a party with the guardian who obtains a security from his ward (*x*).

Parent and child.

The case of parent and child comes within the same principle. The influence which a parent has naturally over a child makes it the duty of the Court to watch over and protect the interests of the child. A child may deal with or make a gift to a parent, and such dealing or gift is good, if it be not tainted with parental influence operating on the hopes or fears or necessities of the child. A child is presumed to be under parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts, it lies on the parent upholding the transaction or maintaining the gift to disprove the exercise of parental influence by showing that the child was really a free agent and had competent independent advice, or had at least competent means of forming an independent judgment and fully understood what he was

(*t*) *Hylton* v. *Hylton*, 2 Ves. 547, 549.

(*u*) *Revett* v. *Harvey*, *supra*; *Allfrey* v. *Allfrey*, 1 Mac. & G. 98; 84 R. R. 15; *Espey* v. *Lake*, *sup.*; *Prideaux* v. *Lonsdale*, 1 D. J. & S. 433; 137 R. R. 260; *Everitt* v. *Everitt*, 10 Eq. 410; 39 L. J. Ch. 777; *Kempson* v. *Ashbee*, *infra*.

(*x*) *Kempson* v. *Ashbee*, 10 Ch. 15; 44 L. J. Ch. 195; *De Witte* v. *Addison*, 80 L. T. 207.

doing and was desirous of doing it (*y*), and further that the transaction or gift was a right and proper one under the circumstances (*z*). The principle applies for at least a year after the coming of age of the child, and will extend beyond the year, if the dominion lasts (*a*), that is, until the relationship has entirely ceased, not only in name but in fact, and the parties are at arms' length, for the principle continues to apply for so long after the relation has ceased as the reasons on which it is founded continue to operate (*b*). The Court will indeed presume the continuance of the influence, unless there is a distinct evidence of its determination (*c*). The *onus probandi* which lies on the father to show that the child had independent advice, and that he executed a deed with full knowledge of its contents, and with the free intention of giving the father the benefit conferred by it, extends to a volunteer claiming through the father, and to any person taking with notice of the circumstances which raise the equity, and no farther. If a solicitor purports to act in the transaction on behalf of the child, a purchaser for value is entitled to assume that he has given the child proper advice, even although he be acting as the father's solicitor. There is no absolute rule in such a transaction that the father and child must be advised by different solicitors (*d*). Where the parental influence is disproved or that influence has ceased, a dealing between parent and child or a gift from a child to a parent stands on the same footing as any other dealing or gift (*e*). The entreaty of a sick father to a child does not

(*y*) *Baker* v. *Bradley*, 7 D. M. & G. 597; 25 L. J. Ch. 7; 109 R. R. 245; *Wright* v. *Vanderplank*, 8 D. M. & G. 135, 146; 25 L. J. Ch. 753; 114 R. R. 60; *Savery* v. *King*, 5 H. L. C. 627, 655; 25 L. J. Ch. 482; *Jenner* v. *Jenner*, 2 D. F. & J. 359; 30 L. J. Ch. 201; 129 R. R. 110; *Berdoe* v. *Dawson*, 34 Beav. 603; 145 R. R. 693; *Potts* v. *Surr*, *ibid.* 543; 145 R. R. 663; *Turney* v. *Collins* 7 Ch. 329; 41 L. J. Ch. 558.

(*z*) *Powell* v. *P.*, 1900, 1 Ch. 243; 69 L. J. Ch. 164.

(*a*) 7 H. L. C. 772, *per* Lord Cranworth.

(*b*) *Carter* v. *Palmer*, 8 Cl. & Fin. 657; 54 R. R. 145.

(*c*) *Rhodes* v. *Bates*, 1 Ch. 252; 35 L. J. Ch. 267; 148 R. R. 255.

(*d*) *Bainbrigge* v. *Browne*, 18 C. D. 188; 50 L. J. Ch. 522; but see *Powell* v. *P.*, 1900, 1 Ch. 243; 69 L. J. Ch. 164.

(*e*) *Wright* v. *Vanderplank*, 8 D. M. & G. 135, 146; 25 L. J. Ch. 753; 114 R. R. 60.

amount to undue influence (*f*). Nor is the mere fact of a daughter soon after coming of age voluntarily giving securities to a creditor of her father in payment of his debts of itself ground for imputing undue influence to the father (*g*). But where a daughter, then about twenty-two years old, in order to save her father from bankruptcy was induced to mortgage her property to pay his debts, and the daughter had no independent advice, the transaction was set aside (*h*).

Transactions between parent and child which proceed upon arrangements between them for the settlement of the family property, or which tend to the peace and security of the family and the avoidance of litigation, do not come within the ordinary rules of the Court with respect to parental influence. If the settlement is one by which the parent acquires no benefit, not already possessed by him, and be a reasonable arrangement and for the benefit of the family and be not obtained through misrepresentation or suppression of the truth, it will be supported even although it may appear that the parent did exert parental influence and authority over the son to procure his execution of it. If the child is fully aware of the nature and effect of the transaction, it is of no consequence that he may not have had the advice of a separate solicitor; nor can he be heard to say that he executed the settlement with precipitancy. If the settlement be for the benefit of the family, a Court of equity will not inquire into the degree of influence which may have been exerted (*i*). Arrangements between members of a family to assist their several objects or relieve their several necessities are affected by so many peculiar considerations and are influenced by so many different motives that they are withdrawn from the

(*f*) *Farrant* v. *Blanchford*, 1 D. J. & S. 107; 32 L. J. Ch. 237; 137 R. R. 164.

(*g*) *Thornber* v. *Sheard*, 12 Beav. 589; 85 R. R. 169. See as to undue influence, *post*, p. 193.

(*h*) *De Witte* v. *Addison*, 80 L. T. 207.

(*i*) *Hoghton* v. *Hoghton*, 15 Beav. 278, 305; 21 L. J. Ch. 482; 92 R. R. 421; *Baker* v. *Bradley*, 7 D. M. & G. 597; 25 L. J. Ch. 7; 109 R. R. 245; *Dimsdale* v. *Dimsdale*, 3 Drew. 556; 25 L. J. Ch. 806; 106 R. R. 428; *Jenner* v. *Jenner*, 2 D. F. & J. 354; 30 L. J. Ch. 201; 129 R. R. 110; *Potts* v. *Surr*, 34 Beav. 543; 145 R. R. 663; *Williams* v. *Williams*, 2 Ch. 295; 36 L. J. Ch. 200; *Fane* v. *Fane*, 20 Eq. 698; *Hoblyn* v. *Hoblyn*, 41 C. D. 200.

ordinary rules by which the Court is guided in adjudicating between other parties (*k*). The Court does not minutely weigh the considerations on one side or the other. Even ignorance of rights may not avail to impeach the transaction. But transactions in the nature of a bounty from a child to a parent soon after coming of age are viewed by the Court with jealousy (*l*). If the parent gains some unusual advantage by the transaction, the general principles with respect to parental influence apply, and the transaction cannot be supported, unless it can be shown that the child knew what he was doing and was desirous of doing it and was not unduly influenced by his father (*m*). But even if the father obtains a benefit it is not necessarily unfair, and even if unfair the whole settlement will not be avoided (*n*).

If the person who takes the benefit is a member of the family and the parent himself takes no benefit, the transaction will not be set aside, even though considerable pressure may have been used by the parent to induce the son to execute it. So where a father with some warmth of temper insisted upon a deed being executed by a son for the benefit of his two sisters, the Court would not set it aside (*o*).

Dealings in other cases of a fiduciary character.

The principles which govern the case of dealings of persons standing in a fiduciary relation apply generally to the case of persons who clothe themselves with a character which brings them within the range of the principle (*p*). A man who possesses the confidence of another will not be allowed by a Court of equity to take advantage of that situation, although the relation of solicitor and client or principal and agent be

(*k*) *Bellamy* v. *Sabine*, 2 Ph. 425; 17 L. J. Ch. 105; 78 R. R. 132; *Head* v. *Godlee*, John. 536; 29 L. J. Ch. 633; 123 R. R. 227; *Hoblyn* v. *Hoblyn*, 41 C. D. 200.

(*l*) *Baker* v. *Bradley*, *supra*.

(*m*) *Hoghton* v. *Hoghton*, *supra*; *Baker* v. *Bradley*, *supra*; *Savery* v. *King*, 5 H. L. C. 627; 25 L. J. Ch. 482; 101 R. R. 299; *Fane* v. *Fane*, 20 Eq. 698; *Tabor* v. *Cunningham*, 24 W. R. 156; *Jenner* v. *Jenner*, *supra*; *Potts* v. *Surr*, *supra*.

(*n*) *Hoblyn* v. *Hoblyn*, 41 C. D. 200.

(*o*) *Wycherley* v. *W.*, 2 Eden, 175; and see *Bentley* v. *Mackay*, 31 Beav. 151; 135 R. R. 381.

(*p*) *Tate* v. *Williamson*, 2 Ch. 55.

not strictly constituted between them. It is enough that a man be merely consulted as a confidential friend (*q*). It is immaterial that no definite relation may exist between the parties (*r*).

Undue influence.

The principle on which the Court acts in relieving against transactions on the ground of inequality of footing between the parties is not confined to cases where a fiduciary relation can be shown to exist, but extends to all the varieties of relations in which dominion may be exercised by one man over another, and applies to every case where influence is acquired and abused, or where confidence is reposed and betrayed (*s*). Indeed, there is no fixed limit to this equity to set aside transactions on this ground (*t*). In cases where a fiduciary relation does not subsist between the parties, the Court will not, as it does where a fiduciary relation subsists, presume confidence put and influence exerted: the confidence and the influence must in such cases be proved extrinsically, but when they are proved extrinsically the rules of equity are just as applicable in the one case as in the other (*u*).

"The principle must be examined. What, then, is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly, or is it right and expedient to save them from being victimised by other people? In my opinion, the doctrine of undue influence is founded on the second of these two principles. Courts of equity have never set aside gifts on the ground of folly, imprudence, or want of foresight on the part of the donors. The Courts have always repudiated any such jurisdiction. *Huguenin* v. *Baseley* is itself a clear authority to this effect. It would

(*q*) *Taylor* v. *Obee*, 3 Pri. 83; 17 R. R. 548; *Barron* v. *Willis*, 1900, 2 Ch. 121; 1902, A. C. 271; 71 L. J. Ch. 609.

(*r*) *Ibid.*; *Morley* v. *Loughnan*, 1893, 1 Ch. 736; 62 L. J. Ch. 515.

(*s*) *Huguein* v. *Baseley*, 14 Ves. 273, 286; 9 R. R. 276; *Williams* v. *Bayley*, L. R. 1 H. L. 200; 35 L. J. Ch. 717; *Smith* v. *Kay*, 7 H. L. C. 750, 779; 30 L. J. Ch. 35; 115 R. R. 367; *Rhodes* v. *Bate*, 1 Ch. 252; 35 L. J. Ch. 267; 148 R. R. 255; *Morley* v. *Loughnan*, *supra*.

(*t*) *Fry* v. *Lane*, 40 C. D. 312; *per* Kay, J.; 58 L. J. Ch. 113.

(*u*) 7 H. L. C. 779; *per* Lord Kingsdown. See *Harrison* v. *Guest*, 6 D. M. & G. 424; 25 L. J. Ch. 544; 106 R. R. 129; *Rhodes* v. *Bate*, 1 Ch. 252; 35 L. J. Ch. 267; 148 R. R. 255; *Lyon* v. *Home*, 6 Eq. 655; 37 L. J. Ch. 674; *Morley* v. *Loughnan*, 1893, 1 Ch. 736; 62 L. J. Ch. 515.

obviously be to encourage folly, recklessness, extravagance, and vice if persons could get back their property which they foolishly made away with. . . . On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws" (*x*).

No general rule can be laid down as to what shall constitute undue influence. As no Court has ever attempted to define fraud, so no Court has ever attempted to define undue influence, which includes one of its many varieties (*y*). The question is one which must in each case depend on its own particular circumstances. There is no head of equity more difficult of application than the avoidance of a transaction on the ground of advantage taken of distress (*z*). The case presents no difficulty where direct restraint, duress, or oppression can be shown. The difficulty arises when the Court has to determine whether the advantage taken of distress amounts to oppression (*a*), or the influence exerted has been so pressing as to be undue within the rule of equity (*b*). In a case where the holders of forged bills working on the fears of a father for the safety of his son, who had forged them, but without any distinct threat, and without any distinct promise not to prosecute, obtained from him a security for the amount of the bills, the transaction was set aside (*c*). But, *semble*, it does not follow that, where there is

(*x*) *Allcard* v. *Skinner*, 36 C. D. 182; *per* Lindley, L.J.; 56 L. J. Ch. 1052.

(*y*) *Ibid.*, at p. 183.

(*z*) *Ramsbottom* v. *Parker*, 6 Madd. 6.

(*a*) *Ramsbottom* v. *Parker*, 6 Madd. 6.

(*b*) *Middleton* v. *Sherburne*, 4 Y. & C. 389; 54 R. R. 485; *Boyse* v. *Rossborough*, 6 H. L. C. 48; 26 L. J. Ch. 256; 108 R. R. 1; *Rhodes* v. *Bate*, *supra*; *Armstrong* v. *Armstrong*, I. R. 8 Eq. 1; cf. *Richards* v. *French*, 18 W. R. 636. The civil law always sets aside a contract procured by force, or from want of liberty in the contracting party. It was said in the Pandects that the party must be intimidated by the apprehension of some serious evil of a present or pressing nature, and such as is capable of making an impression upon a person of courage. Pothier, however, thinks this rule too strict, and that regard should be had to the age, sex, and condition of the party, and that a fear which would not be deemed sufficient to have influence on a man in the prime of life might be sufficient in respect of a woman, or a man in the decline of life. Obl. p. 1, c 1, art. 3, s. 2, p. 25.

(*c*) *Williams* v. *Bayley*, L. R. 1 H. L. 200; 35 L. J. Ch. 717. See *Davies* v. *London and Provincial Ins. Co.*, 8 C. D. 474; 47 L. J. Ch. 511.

an agreement not to prosecute, there is a necessary inference of fact that there is such pressure or undue influence on the party to whom the consideration moves as to entitle him to equitable relief (*d*). The *onus* in such a case is on the plaintiff to prove pressure or undue influence (*e*).

Inadequacy of consideration.

Mere inadequacy of consideration or inequality in a bargain is not a ground to set aside a transaction, if the parties were on equal terms and in a situation to judge for themselves, and performed the act wittingly and willingly (*f*). Mere inadequacy of consideration is not a ground for refusing specific performance of an unexecuted contract (*g*), and still less can it be ground for rescinding an executed contract (*h*). But inadequacy of consideration, if it be of so gross a nature as to amount in itself to evidence of fraud, is a ground for cancelling a transaction. In such cases the relief is granted, not on the ground of the inadequacy of consideration, but on the ground of fraud as evidenced thereby (*i*). In determining whether the consideration is or is not adequate, it must always be remembered that there are fancy prices not regulated by instrinsic value (*k*).

The fact that a transaction may have been improvident or precipitate, or may have been entered into without independent professional advice, is as immaterial as mere inadequacy of consideration, if the parties were on equal terms and in a situation to act and judge for themselves, and fully understood the nature of the transaction, and no evidence can be

(*d*) *Jones* v. *Merionethshire Bldg. Soc.*, 1892, 1 Ch. 173; 61 L. J. Ch. 138.

(*e*) *McClatchie* v. *Haslam*, 65 L. T. 691.

(*f*) *Harrison* v. *Guest*, 6 D. M. & G. 434; 8 H. L. C. 481; 25 L. J. Ch. 544; 105 R. R. 129.

(*g*) But see Pollock on Contracts, 662.

(*h*) *Coles* v. *Trecothick*, 9 Ves. 246; 7 R. R. 167; *Abbott* v. *Sworder*, 4 De G. & Sm. 456; 22 L. J. Ch. 235; 87 R. R. 439; *Haywood* v. *Cope*, 25 Beav. 140; 27 L. J. Ch. 468; 119 R. R. 360; comp. *Falcke* v. *Gray*, 4 Drew. 651; 29 L. J. Ch. 28; 113 R. R. 493.

(*i*) *Wood* v. *Abrey*, 3 Madd. 417; 18 R. R. 264; *Cockell* v. *Taylor*, 15 Beav. 103, 115; 21 L. J. Ch. 545; 92 R. R. 328; *Falcke* v. *Gray*, 4 Drew. 651; *supra*; *Butler* v. *Miller*, L. R. 1 Ir. Eq. 210; *Prees* v. *Coke*, 6 Ch. 648; *Haygarth* v. *Wearing*, 12 Eq. 326; 40 L. J. Ch. 577; *Brenchley* v. *Higgins*, 83 L. T. 751.

(*k*) *Abbott* v. *Sworder*, *supra*.

adduced of the exercise of undue influence or oppression (*l*). But inadequacy of consideration or the absence of independent professional advice becomes a most material circumstance when one of the parties to a transaction is from age, ignorance, distress, incapacity, recklessness, weakness of mind, body, or disposition, or from humble position or other circumstances, unable to protect himself. In all such cases, whatever be the nature of the transaction, the *onus* of proof rests on the party who seeks to uphold it to show that the other performed the act or entered into the transaction voluntarily, and deliberately, knowing its nature and effect, and that this consent to perform the act or become a party to the transaction was not obtained by reason of any undue advantage taken of his position or of any undue influence exerted over him (*m*).

In *Clark* v. *Malpas* (*n*), the seller was a man in humble life, imperfectly educated, and unable of himself to judge of the precautions to be taken in selling or of the mode of sale, or of the mode of securing the price which was not at once paid down. He was helpless in the matter, without advice, without protection. Only one solicitor was employed, and he was more the solicitor of the purchaser than of the seller. The bargain was not an ordinary one; and not only was there completion at an undervalue, which alone might be nothing, but there was completion under circumstances of gross imprudence, on terms on which the seller ought not to have been allowed to complete.

So also in *Baker* v. *Monk* (*o*), certain real estates had been sold by an elderly, uneducated woman in humble life to a person far above her in station. The agreement was made without the intervention of anyone acting on her behalf, and it appearing that the consideration paid was inadequate, the sale was set aside, though there was no evidence of fraud on

(*l*) *Harrison* v. *Guest*, *supra*; *Denton* v. *Donner*, 23 Beav. 291; 113 R. R. 143; *Toker* v. *Toker*, 3 D. J. & S. 487; 32 L. J. Ch. 322; 142 R. R. 135; *Taylor* v. *Johnstone*, 19 C. D. 603; 51 L. J. Ch. 879; *Hoblyn* v. *Hoblyn*, 41 C. D. 200.

(*m*) *Rhodes* v. *Bate*, 1 Ch. 252; 35 L. J. Ch. 267; 148 R. R. 255; *Tate* v. *Williamson*, 2 Ch. 65; *Prees* v. *Coke*, 6 Ch. 648; *Fry* v. *Lane*, 40 C. D. 312; 58 L. J. Ch. 113; *Brenchley* v. *Higgins*, 83 L. T. 751.

(*n*) 4 D. F. & J. 403; 135 R. R. 212; see *O'Connor* v. *Foley*, 1905, 1 I. R. 1.

(*o*) 4 D. J. & S. 388; 146 R. R. 361.

the part of the purchaser. "I think," said Turner, L. J., "there was that distinction between the parties which rendered it incumbent on the appellant to throw further protection around this lady before he made the bargain with her."

So also in *Fry* v. *Lane* (*p*), the poverty and ignorance of the vendor were held enough to throw the burden of proof on the purchaser. The result, said Kay, J., "is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of equity will set aside the transaction. This will be done even in the case of property in possession, and *à fortiori* if the interest be reversionary. The circumstances of poverty and ignorance of the vendor and absence of independent advice throw upon the purchaser the *onus* of proving, in Lord Selborne's words, that the purchase was fair, just, and reasonable."

The mere fact, however, that one of the parties may be an illiterate person or a man of advanced age, or may be in bad health, or in distress, or pecuniary embarrassment, will not vitiate a transaction, even although it may have been founded on an inadequate consideration and no independent advice may have been had, if it appear on the face of the evidence that he was fully competent to form an independent judgment in the matter and became a party to the transaction deliberately and advisedly, knowing its nature and effect. The *onus* rests on the party impeaching the transaction to show that coercion was used or undue influence was exercised (*q*). There can be no title to relief on the ground of advantage taken of distress where the advantage or disadvantage of the transaction is to be the result of future contingencies and is not within the view of the parties at the time (*r*).

A mere false statement of the consideration does not of

False statement of consideration.

(*p*) 40 C. D. 312; 58 L. J. Ch. 113; and see *James* v. *Kerr*, 40 C. D. 449; 58 L. J. Ch. 355.

(*q*) *M'Neill* v. *Cahill*, 2 Bligh, 228; *Curson* v. *Belworthy*, 3 H. L. C. 742; 88 R. R. 319; *Harrison* v. *Guest*, 6 D. M. & G. 434; 8 H. L. C. 481; 25 L. J. Ch. 544; 106 R. R. 129; but see *Cooke* v. *Lamotte*, 15 Bev. 234; 21 L. J. Ch. 371; 92 R. R. 397; *Fry* v. *Lane*, *supra*; *Brenchley* v. *Higgins*, 83 L. T. 751

(*r*) *Ramsbottom* v. *Parker*, 6 Madd. 6.

itself necessarily vitiate a deed (*s*), but there may be cases where a false statement of the consideration may of itself destroy the whole transaction (*t*). The general rule is that, where no consideration is expressed in a deed a party may aver and prove consideration in support of it, and where a consideration is expressed, a man may still aver other considerations not inconsistent therewith (*u*). Where, however, the consideration expressed in a deed is impeached on the ground of fraud, the party claiming under the deed cannot aver in its support considerations different from that expressed (*x*). If the transaction on which a deed purports to be founded and the consideration for which it was executed appear to be untruly stated, the instrument may, if the untruth would operate fraudulently, lose all its binding quality in equity even though it might have been conclusive at law (*y*). If a deed states on its face a pecuniary consideration, a party cannot, if it be impeached, set up considerations of blood or natural love and affection (*z*). Where, however, the recitals stated a pecuniary consideration as the foundation of a deed, and in the operative part love and affection were introduced as being partly the consideration on which the deed was founded, the Court would not from this circumstance alone presume fraud (*a*).

In dealings between parties one of whom is subject to the influence of the other, there must be upon the face of the deed itself a fair and correct statement of the transaction. If the statement as to the consideration is not true, the transaction cannot be supported. A consideration partly of the consideration stated in the deed and partly of something else

(*s*) *Bowen* v. *Kirwan*, Ll. & G. 47.

(*t*) *Ibid.*; *Uppington* v. *Bullen*, 2 Dr. & War. 184; *Gibson* v. *Russell*, 2 Y. & C. C. C. 104; 60 R. R. 60; *Slator* v. *Nolan*, Ir. R. 11 Eq. 395.

(*u*) *Clifford* v. *Turrell*, 1 Y. & C. 138; Affd. 14 L. J. Ch. 390; 14 L. J. Ch. 390; 57 R. R. 275; and cases cit. 2 P. Wms. 204; and see L. R. 8 Ch. 942; *Leifchild's Case*, L. R. 1 Eq. 231.

(*x*) *Clarkson* v. *Hanway*, 2 P. Wms. 203; *Bridgman* v. *Green*, 2 Ves. 627; *Willan* v. *Willan*, 2 Dow 274.

(*y*) *Watt* v. *Grove*, 2 Sch. & Lef. 501.

(*z*) *Clarkson* v. *Hanway*, 2 P. Wms. 203; *Willan* v. *Willan*, 2 Dow 282.

(*a*) *Filmer* v. *Gott*, 4 Bro. P. C. 230; *Whalley* v. *Whalley*, 3 Bligh, 13.

is not consistent with the consideration stated on the face of the deed. It is not open to the party who seeks to uphold it to give such evidence to sustain the deed (*b*).

The statement of consideration where there was in fact none, or the untrue statement of the consideration or other circumstances of a suspicious nature, may be sufficient to shift the burden of proof from the party impeaching a deed upon the party upholding it (*c*).

Cases in which transactions have been set aside for undue influence.

The jurisdiction of the Court in relieving against transactions on the ground of undue influence has been exercised as between a medical man and a patient (*d*); as between the keeper of a lunatic asylum and a patient under his care (*e*); as between a minister of religion and a person under his spiritual influence (*f*); as between a sister and a sisterhood (*g*); as between a man and a woman over whom he has obtained spiritual ascendency by working upon her superstitious fancies and delusions (*h*); as between an old lady and a spiritualist medium (*i*); as between an invalid and a religious quack (*k*); as between a young man in the army just come of age and his superior officer (*l*); as between a man and a lady to whom he was about to be married (*m*); as between a man and a

(*b*) *Aherne* v. *Hogan*, Dru. 310; *Uppington* v. *Bullen*, 2 Dr. & War. 184; *Clifford* v. *Turrell*, *supra*; *Gibson* v. *Russell*, 2 Y. & C. C. C. 104; 60 R. R. 60; *Slator* v. *Nolan*, I. R. 11 Eq. 395; cf. *Pattle* v. *Hornibrook*, 1897, 1 Ch. 255; 66 L. J. Ch. 144.

(*c*) *Watt* v. *Grove*, 2 Sch. & Lef. 482, 502; *Griffiths* v. *Robins*, 3 Madd. 191; 53 R. R. 34; *Gibson* v. *Russell*, *supra*; *Aherne* v. *Hogan*, Dru. 310. See *Harrison* v. *Guest*, *supra*.

(*d*) *Dent* v. *Bennett*, 4 M. & C. 269; 20 L. J. Ch. 44; *Aherne* v. *Hogan*, Dru. 310; *Gibson* v. *Russell*, *supra*; *Allen* v. *Davis*, 4 De G. & S. 133; 21 L. J. Ch. 472; 89 R. R. 564; *Billage* v. *Southee*, 9 Ha. 540; *Mitchell* v. *Homfray*, 8 Q. B. D. 587; 50 L. J. Q. B. 460; cf. *Holmes* v. *Howes*, 20 W. R. 310.

(*e*) *Wright* v. *Proud*, 13 Ves. 136; 53 R. R. 22.

(*f*) *Huguenin* v. *Baseley*, 14 Ves. 273; 9 R. R. 276; *Middleton* v. *Sherburne*, 4 Y. & C. 358; 54 R. R. 485; *Allcard* v. *Skinner*, 36 C. D. 145; 56 L. J. Ch. 1052; cf. *Kirwan* v. *Cullen*, 4 Ir. Ch. 322; *Re Metcalfe*, 2 D. J. & S. 122; 33 L. J. Ch. 308; 139 R. R. 58.

(*g*) *Allcard* v. *Skinner*, *supra*.

(*h*) *Nottidge* v. *Prince*, 2 Giff. 246; 29 L. J. Ch. 857; 128 R. R. 111.

(*i*) *Lyon* v. *Home*, 6 Eq. 655; 37 L. J. Ch. 674.

(*k*) *Morley* v. *Loughnan*, 1893, 1 Ch. 736; 62 L. J. Ch. 515.

(*l*) *Lloyd* v. *Clark*, 6 Beav. 309; 63 R. R. 85.

(*m*) *Page* v. *Horne*, 11 Beav. 227, 235; 17 L. J. Ch. 200; 83 R. R. 146; *Cobbett* v. *Brock*, 20 Beav. 525; 109 R. R. 523.

woman with whom he was living (*n*); as between brother and sister (*o*); as between two brothers (*p*); as between an elder and a younger brother just come of age (*q*); as between two sisters (*r*); as between an uncle and his nephew (*s*), who was deaf and dumb (*t*); as between an uncle, who was in such a state of bodily and mental imbecility as rendered him incapable of transacting business requiring deliberation and reflection, and a nephew (*u*); as between nephew and aunt (*x*), or aunt and niece (*y*); as between a young man just come of age and a man who had acquired an influence over him during his minority (*z*); as between a young man of intemperate habits and a person with whom he was living (*a*); as between an unmarried woman and her brother-in-law (*b*); as between an old lady and a woman living with her in the capacity of a companion or domestic (*c*); as between a child and an imbecile parent (*d*); and in other cases (*e*).

(*n*) *Coulson* v. *Allison*, 2 D. F. & J. 521; 129 R. R. 176. See *Farmer* v. *Farmer*, 1 H. L. C. 724; *Garvey* v. *M'Minn*, 9 Ir. Eq. 526; but see 1908, S. C. 93.

(*o*) *Sharp* v. *Leach*, 31 Beav. 491; 135 R. R. 526.

(*p*) *Sturge* v. *Sturge*, 12 Beav. 229; 19 L. J. Ch. 17; 85 R. R. 77.

(*q*) *Sercombe* v. *Saunders*, 34 Beav. 382; 145 R. R. 566; *M'Mackin* v. *Hibernian Bank*, 1905, 1 I. R. 296.

(*r*) *Harvey* v. *Mount*, 8 Beav. 439; 14 L. J. Ch. 233; 68 R. R. 146.

(*s*) *Tate* v. *Williamson*, 2 Ch. 55.

(*t*) *Ferres* v. *Ferres*, 2 Eq. Ca. Ab. 695. Cf. *Farmer* v. *Farmer*, 1 H. L. 724; *Vickers* v. *Bell*, 9 L. T. 600.

(*u*) *Willan* v. *Willan*, 2 Dow. 274.

(*x*) *Griffiths* v. *Robins*, 3 Madd. 191; 53 R. R. 54; *Cooke* v. *Lamotte*, 15 Beav. 241; 21 L. J. Ch. 371; 92 R. R. 397. See *Toker* v. *Toker*, 3 D. J. & S. 487; 32 L. J. Ch. 322; 142 R. R. 135.

(*y*) *Anderson* v. *Elsworth*, 3 Giff. 154; 30 L. J. Ch. 922; 133 R. R. 60.

(*z*) *Grosvenor* v. *Sherratt*, 28 Beav. 661; 126 R. R. 284; *Smith* v. *Kay*, 7 H. L. C. 750; 30 L. J. Ch. 35; 115 R. R. 367; *Slator* v. *Nolan*, Ir. R. 11 Eq. 386.

(*a*) *Terry* v. *Wacher*, 15 Sim. 447.

(*b*) *Rhodes* v. *Bate*, 1 Ch. 252; 35 L. J. Ch. 267; *Coutts* v. *Acworth*, 8 Eq. 558; 39 L. J. Ch. 649; *Wollaston* v. *Tribe*, 9 Eq. 44. Cf. *Richards* v. *French*, 18 W. R. 636.

(*c*) *Cole* v. *Gibson*, 1 Ves. 503; *Bate* v. *Bank of England*, 9 Jur. 545; 72 R. R. 777.

(*d*) *Whelan* v. *Whelan*, 3 Cow. (Amer.) 538. Cf. *Beanland* v. *Bradley*, 2 Sm. & G. 339; 97 R. R. 228.

(*e*) *Brooke* v. *Gally*, 2 Atk. 34; *Bell* v. *Howard*, 9 Mod. 302; *Osmond* v. *Fitzroy*, 3 P. W. 129; *How* v. *Weldon*, 2 Ves. 516; *Evans* v. *Llewellin*, 1 Cox, 333; 1 R. R. 49; *Wood* v. *Abrey*, 3 Madd. 417; 18 R. R. 264; *Hudson* v.

Husband and wife.

The rule in *Huguenin* v. *Baseley* does not apply to the relationship of husband and wife, and consequently there is no presumption that a voluntary deed executed by a wife in favour of her husband is invalid. The *onus* lies on the party who impugns the transaction and not on the party who supports it (*f*). A mortgage therefore by a wife to secure her husband's debts is not void merely because she had no independent advice (*g*). But "the Court will have more jealousy over such a transaction" (*h*), and will set it aside if there is pressure, want of knowledge, concealment or misrepresentation (*i*).

In a Canadian case it was held upon the evidence that a transfer of property was executed by a husband under the undue influence and coercion of his wife, and was rightly set aside (*k*).

The doctrine of undue influence and the scope of the principle were very fully discussed by the Court of Appeal in *Allcard* v. *Skinner* (*l*). There a lady entered a sisterhood, and while a member of it gave large sums to the lady superior. Some years afterwards, in 1879, she left the sisterhood, but made no demand for the return of her property until 1885, when she commenced an action for the return of her property. It was held that, although she had voluntarily and while she had independent advice entered the sisterhood

Beauchamp, cit. 3 Bligh, 18; *Collins* v. *Hare*, 2 Bligh, N. S. 106; *M'Diarmid* v. *M'Diarmid*, 3 Bligh, N. S. 374; *Aylward* v. *Kearney*, 2 B. & B. 477; *Longmate* v. *Ledger*, 2 Giff. 157; 128 R. R. 72; *Custance* v. *Cunningham*, 13 Beav. 363; *Douglas* v. *Culverwell*, 4 D. F. & J. 20; 31 L. J. Ch. 543; 135 R. R. 11; *Prideaux* v. *Lonsdale*, 1 D. J. & S. 439; 137 R. R. 260; *Williams* v. *Bayley*, L. R. 1 H. L. 200; 35 L. J. Ch. 717; *Davies* v. *London and Provincial Ins. Co.*, 8 C. D. 474; 47 L. J. Ch. 511.

(*f*) *Nedby* v. *Nedby*, 5 De G. & S. 377; 21 L. J. Ch. 446; 90 R. R. 105; *Barron* v. *Willis*, 1899, 2 Ch. 578; 1902, A. C. 271; 71 L. J. Ch. 609; *Howes* v. *Bishop*, 1909, 2 K. B. 390; 78 L. J. K. B. 796.

(*g*) *Bank of Africa* v. *Cohen*, 1909, 2 Ch., at p. 135; 78 L. J. Ch. 767.

(*h*) *Grigby* v. *Cox*, 1 Ves. Sen. 517.

(*i*) *Price* v. *Price*, 1 D. M. & G. 308; 21 L. J. Ch. 53; 91 R. R. 101; *Proctor* v. *Robinson*, 35 Beav. 335; 147 R. R. 191; *Turnbull* v. *Duval*, 1902, A. C. 429; 71 L. J. P. C. 84; *Chaplin* v. *Brammall*, 1908, 1 K. B. 233; 77 L. J. K. B. 366.

(*k*) *Hopkins* v. *Hopkins*, 21 C. L. T. 14; 27 A. R. 658.

(*l*) 36 C. D. 145; 56 L. J. Ch. 1052.

with the intention of devoting her fortune to it, yet as at the time when she made the gifts she was subject to the influence of the lady superior and the spiritual director and to the rules of the sisterhood, she would have been entitled on leaving the sisterhood to claim restitution of such part of her property as was still in the hands of the lady superior, but not of such part as had been expended for the purposes of the sisterhood while she remained in it. But held also, that under the circumstances the plaintiff's claim was barred by her laches and acquiescence since she left the sisterhood.

The principle on which the Court sets aside transactions on the ground of undue influence only applies to cases where some lawful relation has been constituted between the parties (*m*). Where, accordingly, a woman while living in adultery with a married man assigned certain property to secure a debt which he owed, the Court would not, from the mere existence of the relation, presume undue influence, the woman being of mature intelligence, and the transaction having been entered into deliberately (*n*).

Transactions even between mortgagor and mortgagee are looked on with jealousy where a mortgagor, in embarrassed circumstances, and under pressure, sells the equity of redemption to the mortgagee for less than others would have given, and there is evidence to show misconduct on the part of the mortgagee in obtaining the purchase (*o*). If the mortgagee of leasehold premises obtain a renewal either by being in possession or by clandestine conduct towards the mortgagor, the renewal lease will be treated as a graft upon the old one; and the mortgagee will not be allowed to retain it for his own benefit, but will hold it in trust (*p*).

Third parties.

In the application of the principles of the Court, there is no

(*m*) *Hargreave* v. *Everard*, 6 Ir. Ch. 278; but see *Coulson* v. *Allison*, 2 D. F. & J. 521; 129 R. R. 176.

(*n*) *Ibid.*

(*o*) *Gubbins* v. *Creed*, 2 Sch. & Lef. 221; 9 R. R. 71; *Ford* v. *Olden*, 3 Eq. 461; 36 L. J. Ch. 651; *Prees* v. *Coke*, 6 Ch. 645.

(*p*) *Nesbitt* v. *Tredennick*, 1 Ba. & Be. 46; 12 R. R. 1; *Re Biss*, 1903, 2 Ch., at p. 56; 72 L. J. Ch. 473.

distinction between the case of one who himself exercises a direct influence, and one who makes himself a party with the person who exercises the undue influence (*q*).

Whether a transaction can be set aside on the ground of undue influence, where the influence has been exercised, not by the party obtaining the benefit, but by a third person, appears to be doubtful (*r*). But there is no doubt that third persons cannot retain any benefit which they have derived from the fraud or undue influence of others. "Let the hand receiving it be ever so chaste, yet if it comes through a polluted channel the obligation of restitution will follow it" (*s*). This, however, only applies to a fund which may be treated as a trust fund to which no statute of limitation has any application. In other cases the fraud must be fraud of the defendant himself or of some one for whom he is directly responsible (*t*).

Expectant heirs.

The Court of Chancery assumed jurisdiction at a very early period to set aside transactions in which expectant heirs had dealt with their expectations, when the Court was satisfied that they had not been adequately protected against the pressure put on them by their poverty. The doctrine was long ago established, that mere inadequacy of price would entitle an expectant heir to set aside on terms the sale of a reversion, and the purchaser was bound to establish the fact that the transaction was fair and the consideration given was sufficient. This doctrine at first was applied to all cases of expectancy on the death of parents, and was afterwards extended to the sale of any reversion.

But the arbitrary rule of the Court of Chancery, according to which the sale of a reversion was liable to be set aside simply on the ground that the sum paid was not, in the opinion of the Judge, an adequate value, being found to be an impediment to fair and reasonable as well as to uncon-

(*q*) *Ardglasse* v. *Pitt*, 1 Vern. 238; *Espey* v. *Lake*, 10 Ha. 260; 22 L. J. Ch. 336; 90 R. R. 362; *O'Connor* v. *Foley*, 1905, 1 Ir. R. 1; *sup.*, pp. 148, 182.

(*r*) *Bentley* v. *Mackay*, 31 Beav. 143; 135 R. R. 381. See *Wycherley* v. *Wycherley*, 2 Eden, 175.

(*s*) *Morley* v. *Loughman*, 1893, 1 Ch., p. 757; 62 L. J. Ch. 515.

(*t*) *John* v. *Dodwell*, 1918, A. C. 563; 87 L. J. P. C. 92.

scionable bargains, the Sales of Reversions Act, 31 & 32 Vict. c 4, was passed, which enacts that "no purchase made *bonâ fide* and without fraud or unfair dealing of any reversionary interest in real or personal estate shall be hereafter opened or set aside merely on the ground of undervalue."

The Act is carefully limited to purchases made *bonâ fide* and without fraud or unfair dealing, and leaves undervalue still a material element in cases in which it is not the sole equitable ground of relief. In a case accordingly where the party entitled to a reversionary interest was very poor, and there was a false recital in the deed that more money had been advanced than was actually paid, the deed was only allowed to stand for the money actually advanced (*u*).

But the protection which the Court throws round expectant heirs and unwary young men in the hands of unscrupulous persons has not been affected by the repeal of the usury laws or by the change of the law as to the sale of reversionary interests (*x*).

These changes in the law have in no degree altered the *onus probandi* where the relative position of the parties is such as to raise from the circumstances the presumption of fraud; for fraud in these cases need be nothing more than an unconscientious use of the power arising out of the circumstances (*y*). Mere inadequacy of price will entitle an expectant heir to apply to the Court to set aside on terms the sale of a reversionary interest, and the *onus* of proving the transaction fair and the price sufficient is on the purchaser (*z*). Where accordingly a money-lender advanced monies to a young man entitled to a large reversionary interest in the event of his surviving his father, taking by way of security his acceptances at three months for the sums advanced with interest and discount together exceeding 60 per cent., and the young man

(*u*) *Re Slater's Trust*, 11 Ch. D. 238; 48 L. J. Ch. 473.

(*x*) *Tyler* v. *Yates*, 6 Ch. 665; 40 L. J. Ch. 768; *Aylesford* v. *Morris*, 8 Ch. 484; 42 L. J. Ch. 546; *Beynon* v. *Cooke*, 10 Ch. 389.

(*y*) *Chesterfield* v. *Janssen*, 2 Ves. 124; *Aylesford* v. *Morris*, 8 Ch. 490; 42 L. J. Ch. 546.

(*z*) *Aylesford* v. *Morris*, *supra*; *O'Rorke* v. *Bolingbroke*, 2 App. Ca. 814; *Brenchley* v. *Higgins*, *inf.*

had no professional assistance, and no application was made to his father or to the solicitor of his father, an order was made for the delivery up of the bills on payment of the sums actually advanced and interest at five per cent. (*a*).

Where the plaintiff sold a share in the reversionary interest to which he was entitled for such a sum that the interest on the expectation was about 10 per cent., although the plaintiff was of full age and full intelligence and had written a letter prior to the sale showing that he understood the exact nature of the bargain, it was held that the *onus* was on the defendant to show that there had been no unconscionable bargain, and the transaction was set aside (*b*).

"The result of the decisions," said Kay, J., in *Fry* v. *Lane* (*c*), "is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of equity will set aside the transaction. This will be done even in the case of property in possession and *à fortiori* if the interest be reversionary."

In each case it must depend on the circumstances whether the presumption of fraud is raised; but if raised the presumption may be repelled by proving that the transaction was in point of fact fair, just, and reasonable. In a case where a man purchased the reversionary interest from a lad only a few days above twenty-one years, in furtherance of an arrangement made whilst he was an infant, the transaction was held good, as upon the evidence it appeared to be not only *bonâ fide* and without fraud or unfair dealing, but a fair one and to be for the advantage of the lad, and was sanctioned by his father, who was his natural guardian. The fact that the price given for the reversion was inadequate, as the facts turned out in the end, was considered immaterial, there being evidence to show that the purchaser was not aware that the life of the father was not a good one, and that he was not ignorant of the fact because he had neglected to make proper

(*a*) *Aylesford* v. *Morris*, 8 Ch. 484; 42 L. J. Ch. 546.

(*b*) *Brenchley* v. *Higgins*, 83 L. T. 751.

(*c*) 40 C. D. 312; 58 L. J. Ch. 113; cf. *Rees* v. *De Bernardy*, 1896, 2 Ch. 437; 65 L. J. Ch. 656; and see *James* v. *Kerr*, 40 C. D. 449; 58 L. J. Ch. 355.

inquiries or to take steps which he ought to have taken. Nor was the fact that the lad had no professional adviser considered under the circumstances material, as it appeared that he had no friend whom he could consult but his father, and that neither he nor his father had the means of paying a professional adviser. The Court was, however, of opinion that had the matter been practicable, and the lad not been penniless, the purchaser should have required him to have had an independent adviser (*d*).

A sale of a reversionary interest by a young man of full age for a substantial purpose stands on the same footing as other contracts (*e*).

Unconscionable bargains.

The principle on which a Court of equity relieves from an unconscionable bargain entered into with an expectant heir or reversioner for the loan of money applies also to the case of money being lent on unconscionable terms (not fully understood by the borrower and known not to be fully understood by the lender) to a young man, being a minor at the time of the first transaction, the son of a father possessing large property, who has no property of his own and no expectation of any, except such general expectations as are founded on his father's position in life, the money being lent without any thought of repayment by the borrower but on the credit of such general expectations, and in the hope of extorting payment from the father to avoid the exposure attendant on his son being made a bankrupt (*f*).

The obolition of the usury laws does not affect the power of the Court to set aside usurious transactions when they are founded on fraud. Accordingly a series of deeds charging sums advanced by a money-lender with exorbitant interest on the borrower's estates, which were ample security, were set aside save to the extent of securing the actual advances with moderate interest, the deeds containing unprecedented clauses, introduced by the money-lender without the knowledge of the borrower, who was unprotected by proper professional

(*d*) *O'Rorke* v. *Bolingbroke*, 2 App. Ca. 814.
(*e*) *Judd* v. *Green*, 45 L. J. Ch. 108; but see *Brenchley* v. *Higgins*, *supra*.
(*f*) *Nevill* v. *Snelling*, 15 C. D. 679; 47 L. J. Ch. 777.

advice (*g*). And in another case a similar transaction was set aside although the plaintiff fully understood the exact nature of the bargain into which he was about to enter (*h*). Although the circumstances may not entitle a party to relief on the ground of a catching bargain with an expectant heir, the transaction may be opened up under the Money-lenders Act (*i*).

Money-lenders Act, 1900.

Under the Money-lenders Act, 1900, a transaction can be reopened if the Court is satisfied that the transaction is harsh and unconscionable even though it is not such as a Court of equity would have given relief against before the Act (*k*). The policy of the Act is to enable the Court to prevent oppression, leaving it in the discretion of the Court to weigh each case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to abuse of power (*l*). Excessive interest may of itself show that a transaction is harsh and unconscionable within the meaning of the Act (*m*). But where that is not so it must be shown that the interest is excessive and the transaction harsh and unconscionable under the circumstances (*n*), and in arriving at that conclusion it seems that the Court will take into consideration the following matters: (1) what risk the lender ran, or in other words, whether the loan was secured or not; (2) whether the borrower was an intelligent man on equal terms with the lender and understood the bargain; and (3) whether the lender was guilty of fraud, misrepresentation, or duress (*o*).

An agreement with respect to a loan by an unregistered money-lender is illegal and void, and the borrower may recover back any securities given to the money-lender though

(*g*) *Howley* v. *Cook*, Ir. R. 8 Eq. 571; and see *Rae* v. *Joyce*, 1892, 29 L. R. Ir. 500, where the cases are reviewed.

(*h*) *Brenchley* v. *Higgins*, 83 L. T. 751.

(*i*) *Wolfe* v. *Lowther*, 31 T. L. R. 354.

(*k*) *Re a Debtor*, 1903, 1 K. B. 705; 72 L. J. K. B. 382. As to what is a money-lender, see *Litchfield* v. *Dreyfus*, 1906, 1 K. B. 584.

(*l*) *Samuel* v. *Newbold*, 1906, A. C. 461; 75 L. J. Ch. 705.

(*m*) *Ibid.*

(*n*) *Midland Discount Co.* v. *Macdonald*, 1909, S. C. 477.

(*o*) *Ibid.* *Part* v. *Bond*, 93 L. T. 49; *Poncione* v. *Higgins*, 21 T. L. R. 12; *Carringtons* v. *Smith*, 1906, 1 K. B. 79; *Bonnard* v. *Dott*, 1906, 1 Ch. 740; *Levine* v. *Greenwood*, 20 T. L. R. 389; *Wells* v. *Joyce*, 1905, 2 Ir. R. 134.

the latter cannot counterclaim for the money advanced (*p*). But in an equitable action by a borrower to recover securities the money-lender will not be ordered to give up the securities except upon the terms that the borrower repay the money advanced (*q*). *Secus*, where the action is for a mere declaration that the transaction is void (*r*).

A money-lender can only carry on business at his registered address; a transaction carried out elsewhere is void (*s*), even though the transaction is an isolated one (*t*).

Where the money-lender proceeds under Order XIV. and the borrower sets up a defence under the Act but admits that the money advanced is due, the proper order is to order summary judgment for the amount admitted to be due and to give leave to defend for the rest of the claim (*u*). The question whether a transaction is unconscionable is for the judge and not for the jury (*x*).

Voluntary settlements and deeds of gift.

Considerations of a similar character apply to the case of deeds of gift and voluntary settlements. A man may make a voluntary settlement if he pleases, either by way of gift or in the shape of a trust to be executed by persons to whom he conveys property. Whether it be a gift or a conveyance upon trust, it must satisfactorily appear that he understood and approved of the contents of the deed, and knew what he was doing, or at all events was protected by independent advice, and that no undue influence was exercised over him by the person in whose favour he made the instrument (*y*). No general rule can be laid down as to the proper and usual provisions in such a settlement, but a power of revocation is

(*p*) *Bonnard* v. *Dott*, 1906, 1 Ch. 740.

(*q*) *Lodye* v. *National Union Investment Co.*, 1907, 1 Ch. 300.

(*r*) *Chapman* v. *Michaelson*, 1909, 1 Ch. 238.

(*s*) *Gadd* v. *Provincial Union Bank*, 1909, 2 K. B. 353; *Jackson* v. *Price*, 1910, 1 K. B. 143.

(*t*) *Cornelius* v. *Phillips*, 1918, A. C. 199; 87 L. J. K. B. 246.

(*u*) *Lazarus* v. *Smith*, 1908, 2 K. B. 266, explaining *Wells* v. *Allott*, 1904, 2 K. B. 842.

(*x*) *Abrahams* v. *Dimmock*, 1915, 1 K. B. 662; 84 L. J. K. B. 802.

(*y*) *Lister* v. *Hodgson*, 4 Eq. 32; *Phillips* v. *Mullings*, 7 Ch. 246; 41 L. J. Ch. 211; *Turner* v. *Collins*, *ibid.* 329; 41 L. J. Ch. 558.

not essential. Whether there should be such a power or not must depend on the circumstances of the case (*z*).

The absence of a power of revocation in a voluntary settlement, and the fact that the intention of the settlor was not called to that absence, do not make a voluntary settlement invalid. They are merely circumstances to be considered in deciding on the validity of the settlement. The true rule is that the absence of a power of revocation is a circumstance to be taken into account, and is of more or less weight according to the other circumstances of each case (*a*). The absence of a power of revocation in a voluntary deed not impeached on the ground of undue influence is material when it appears that the settlor did not intend to make an irrevocable settlement, or when the settlement is of such a nature or was made under such circumstances as to be unreasonable and improvident, unless guarded by a power of revocation (*b*). If there are substantial questions of incapacity and undue influence *bonâ fide* raised, and the Judge is unable to arrive at a favourable conclusion upon them, he cannot thereupon proceed to treat the absence of a power of revocation upon its own merits, as if those other questions had not been raised at all. Without it the grounds of special impeachment might be insufficient. Without these it might itself be insufficient. Yet the two in combination might be fatal to the deed (*c*).

In *Phillips* v. *Mullings* (*d*), where it was the object of the settlor to preserve his property from being wasted by himself, and in *Proctor* v. *Gregg* (*e*), where it was the object of the settlor to protect himself against the importunity of his relations, it was held that the absence of a power of revocation was sufficiently accounted for and the deed was upheld (*f*). So where the object of a post-nuptial settlement was to

(*z*) *Phillips* v. *Mullings*, *supra*; *James* v. *Couchman*, 29 C. D. 212; 54 L. J. Ch. 838.

(*a*) *Hall* v. *Hall*, 8 Ch. 430; 42 L. J. Ch. 444; *Henry* v. *Armstrong*, 18 C. D. 668.

(*b*) *Hall* v. *Hall*, 8 Ch. 440, *per* Lord Selborne.

(*c*) *Armstrong* v. *Armstrong*, Ir. R. 8 Eq. 45.

(*d*) 7 Ch. 244; 41 L. J. Ch. 211.

(*e*) 21 W. R. 240 n.

(*f*) *Long* v. *Donegan*, 21 W. R. 830.

provide for the plaintiff's wife and children in case of bankruptcy, and a life interest to the plaintiff was intentionally omitted, the Court refused to interfere (*g*).

In *Henshall* v. *Fereday* (*h*), however, where a lady on the suggestion of her brother executed a deed which had been prepared by a solicitor on his instructions, and the solicitor never saw the settlor or performed any duty at all towards her, the deed was set aside on the ground that it contained no power of revocation. But where a lady understood what she was doing, and that it was an irrevocable settlement, and the settlement was reasonable and just, it was upheld, though the deed did not exactly correspond with the instructions, but was read over to and executed by her. The fact that she afterwards burned the deed is of no weight. This fact may prove change of mind but does not prove that at the time of the execution of the deed her mind was other than therein expressed (*i*).

"The law is that anybody of full age and sound mind who has executed a voluntary deed by which he has denuded himself of his own property is bound by his own act, and if he himself comes to have the deed set aside, especially if he comes a long time afterwards, he must prove some substantial reason why the deed should be set aside" (*k*).

Voluntary limitations in a settlement come under the general rule as to undue influence in obtaining the gift (*l*). But if there is no ground for impeaching the settlement, either on the ground of undue influence or on the ground of the absence of a power of revocation, the provisions of a marriage settlement in favour of volunteers cannot be revoked (*m*).

Voluntary gifts and subscriptions to charities fall within

(*g*) *Rake* v. *Hooper*, 83 L. T. 669.

(*h*) 21 W. R. 570.

(*i*) *Hall* v. *Hall*, 8 Ch. 437; 42 L. J. Ch. 444.

(*k*) *Henry* v. *Armstrong*, 18 C. D. 668; and see *James* v. *Couchman*, 29 C. D. 212; 54 L. J. Ch. 838; *Bonhote* v. *Henderson*, 1895, 2 Ch. 202.

(*l*) *Wollaston* v. *Tribe*, 9 Eq. 44; but see *Tucker* v. *Bennett*, 38 C. D. 1; 57 L. J. Ch. 507.

(*m*) *Paul* v. *Paul*, 20 C. D. 742; 51 L. J. Ch. 839.

the same principle, and cannot be set aside or recovered except on the ground of fraud or mistake induced by the donee (*n*).

(*n*) *Ogilvie* v. *Littleboy*, 1897, W. N. 53; *Re Glubb*, 1900, 1 Ch. 354; 69 L. J. Ch. 278.

CHAPTER IV.

FRAUDS UPON THIRD PARTIES.

ANOTHER class of frauds is where a contract or other act is substantially a fraud upon the rights, interests, or intentions of third parties. The general rule is that particular persons in contracts and other acts shall not only transact *bonâ fide* between themselves, but shall not transact *malâ fide* in respect to other persons who stand in such a relation to either as to be affected by the contract or the consequences of it (*a*). Collusion between two persons to the prejudice or loss of a third is in the eye of the Court the same as a fraud (*b*).

SECTION I.—FRAUD UPON CREDITORS.

A class of frauds coming under the head of fraud upon third parties embraces all those agreements or other acts of parties which tend to delay, deceive, or defraud creditors.

Transactions in fraud of creditors are voidable at common law (*c*), but the Legislature, with the view of affirming the rule and carrying the principles of the common law more fully into effect, declared by statutes 50 Edw. III. c. 6, and 3 Hen. VII. c. 4, all fraudulent gifts of goods and chattels in trust for the donor and to defraud creditors to be void.

The statute 13 Eliz. c. 5, perpetuated by 29 Eliz. c. 5, after reciting that feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, have been contrived of malice, fraud, covin, collusion, &c., to delay, hinder or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, &c., proceeds to

(*a*) 2 Ves. 156, 157, *per* Lord Hardwicke; 3 Ves. 502.

(*b*) *Garth* v. *Cotton*, 1 Dick. 217.

(*c*) *Cadogan* v. *Kennett*, Cowp. 432; *Copis* v. *Middleton*, 2 Madd. 428; 17 R. R. 226; *Richards* v. *Att.-Gen.*, 12 Cl. & Fin. 44; *Barton* v. *Vanheythuysen*, 11 Ha. 132.

declare and enact that every feoffment, &c., of lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution made for any intent and purpose, before declared and expressed, shall be, as against that person or persons, his or their heirs, successors, executors, &c., whose actions, suits, &c., are or might be in any wise disturbed, hindered, delayed, or defrauded, utterly void (*d*). Estates, however, or interests in lands or chattels, &c., conveyed or assured *bonâ fide* and on good consideration without notice to the person who is dealing with the person who afterwards becomes insolvent of any fraud or collusion, are excepted from the operation of the statute (*e*).

The scheme of the statute is this: By it all conveyances and assignments made with intent to hinder and delay creditors are rendered void against all creditors hindered or delayed by their operation. There is, however, a proviso for the protection of a purchaser for good consideration without notice of the illegal intention. In the authorities which deal with the statute it is not always clear whether the judges are dealing with the operative part of the Act or with the proviso. The illegal intent under the operative part is a question of fact. The want of consideration is a material fact in considering whether there was any illegal intent, but it is not conclusive that there existed any such intent. In the same way consideration is by no means conclusive that there was no illegal intent. When, however, one comes to deal with the proviso it is quite clear that any person relying on the proviso must prove both good consideration and that he had no notice of the illegal intent (*f*).

As between the parties themselves and all persons claiming under them in privity of estate, voluntary conveyances are binding (*g*); but in so far as they have the effect of delaying,

(*d*) *Tarleton* v. *Liddell*, 17 Q. B. 391; 20 L. J. Q. B. 507.

(*e*) 13 Eliz. c. 5, s. 6; *Halifax Banking Co.* v. *Gledhill*, 1891, 1 Ch. 31; 60 L. J. Ch. 181.

(*f*) *Glegg* v. *Bromley*, 1912, 3 K. B. 474; 81 L. J. K. B. 1081, *per* Parker, J.

(*g*) *Petre* v. *Espinasse*, 2 M. & K. 496; 39 R. R. 254; *Robinson* v. *M'Donnell*, 2 B. & Ald. 134; *French* v. *French*, 6 D. M. & G. 95; 28 L. J. Ch. 612; *Olliver*

defrauding, or deceiving creditors, voluntary conveyances are not *bonâ fide*, and are void as against creditors to the extent to which it may be necessary to deal with the property to their satisfaction. To this extent, and to this extent only, they will be treated as if they had not been made. For every other purpose they are good (*h*), unless the transaction is so tainted with fraud as to necessitate its avoidance *in toto* so as to work justice between the parties (*i*).

The mere fact of a deed being voluntary is not enough to render it void as against subsequent creditors (*j*). But if at the time a man executes a voluntary settlement he is actually insolvent, the settlement is void as against creditors (*k*). It is not, however, necessary, in order to invalidate a voluntary settlement, that the settlor should be in a state of insolvency (*l*). The language of the Act being that any conveyance of property is void against creditors, if it is made to hinder, delay or defeat creditors, the Court has to decide in each particular case whether, under all the circumstances, the object of the settlor was to hinder, delay, or defeat creditors (*m*), and if that is so, a valuable consideration will not necessarily make it valid (*n*). The main question is the *bonâ fides*, and that is only to be settled by reference to the facts of each case. "I abstain," said Lord Campbell (*o*), "from saying what are the particular proofs that are

v. *King*, 8 D. M. & G. 110; 25 L. J. Ch. 427; 114 R. R. 48. A sham transfer for the purpose of defrauding creditors will not pass the property in goods even as between the debtor and his confederate. *Bowes* v. *Foster*, 2 H. & N. 779; 27 L. J. Ex. 262.

(*h*) *Croker* v. *Martin*, 1 Bligh, N. S. 573; 30 R. R. 93; *French* v. *French*, *supra*; *Neale* v. *Day*, 28 L. J. Ch. 45; see *Re Sims*, 3 Manson, 340; *Re Carter and Kenderdine*, 1897, 1 Ch. 776; 66 L. J. Ch. 408.

(*i*) *Tarleton* v. *Liddell*, 17 Q. B. 418, 419; 20 L. J. Q. B. 507.

(*j*) *Holmes* v. *Penney*, 3 K. & J. 99; 26 L. J. Ch. 179; 112 R. R. 49; *Re Lane-Fox*, 1900, 2 Q. B. 508; 69 L. J. Q. B. 722. See *post*, p. 218.

(*k*) *French* v. *French*, *supra*; *Freeman* v. *Pope*, 5 Ch. 544; 39 L. J. Ch. 689; *Taylor* v. *Coenen*, 1 C. D. 640.

(*l*) *Townsend* v. *Westacott*, 2 Beav. 344; 9 L. J. Ch. 241; 50 R. R. 193; *Thompson* v. *Webster*, 4 Drew. 632; 4 L. T. 750, in Dom. Proc.; 28 L. J. Ch. 703; 113 R. R. 488.

(*m*) *Godfrey* v. *Poole*, 13 App. Ca., at p. 503; 57 L. J. C. P. 78.

(*n*) *Bott* v. *Smith*, 21 Beav. 511; 111 R. R. 187.

(*o*) *Thompson* v. *Webster*, 4 L. T. 750.

necessary, or from laying down any particular rule as to what amount of evidence, or what proof of consideration or want of consideration, or what evidence of notice or want of notice may be necessary. Those are facts to be inquired into in each particular case." If there is no evidence to show that the settlor, when he executed the instrument, had any intention to defraud, it is immaterial that he may have been embarrassed at the time, and wanted money to meet claims upon him, if there is no reason for saying that he had the slightest notion of doing more than borrowing money to tide over the difficulty. Though there may be circumstances in the case which might lead to the presumption that the settlement was made to defeat creditors, yet when the circumstances come to be explained and established, it may be clear that no such intent existed in the minds of either of the parties to the transaction (*p*). The Court must look at the whole of the circumstances and see whether the deed was in fact executed with the intent to defeat and delay creditors (*q*).

Although there be no intention to defraud, the question then is whether there is any evidence to show that the settlor knew at the time when the settlement was executed that it was a necessary consequence of the settlement that his creditors would be defrauded (*r*), for in order to defeat a voluntary settlement it is not necessary that there should be proof of an actual and express intent to defeat creditors. It is enough if the facts are such as to show that the settlement would *necessarily* have that effect. If at the date of the settlement the person making the settlement was not in a position actually to pay creditors, the law will infer that he intended by making the voluntary settlement to defeat and delay them. Again, the same inference will be made by the law, if after deducting the property which is the subject of the settlement, sufficient assets are not left for the payment

(*p*) *Thompson* v. *Webster*, 4 L. T. 750, *per* Lord Chelmsford; *Re Lane-Fox*, 1900, 2 Q. B. 508; 69 L. J. Q. B. 722.

(*q*) *Re Holland*, 1902, 2 Ch. 360; 71 L. J. Ch. 518.

(*r*) *Ibid.*

of the settlor's debts (*s*). But a *bonâ fide* settlement by a person having ample means outside the settlement to pay present debts is not void because afterwards the effect proves to be to defeat future creditors (*t*). And the mere fact that a debt exists which existed at the date of the settlement, will not make a deed fraudulent (*u*). But where the intention to defraud is manifest, and no other purpose appears, this is sufficient to bring the case within the statute and to override all circumstances whatever (*x*).

A man may by executing a settlement defeat, defraud, or delay his creditors, although at the time he makes the settlement, he may have more property than would be sufficient to satisfy his creditors, after the settlement had been made, because the property may be so inaccessible as to make it almost impossible for the creditors to get possession of it—it may be at the antipodes—it may be an accumulation of bad debts very difficult to get. There might be fifty reasons to bring it within the scope of the statute, so that a solvent man in making a settlement may nevertheless be liable to have that settlement avoided, although not only he was not insolvent but might have had more than enough property left in some form or other to satisfy his creditors (*y*).

But a voluntary settlement made *bonâ fide* by a person having ample means outside the settlement for payment of present debts is not void because some years afterwards the effect proves to be to defeat or delay future creditors, and such a settlement cannot be set aside by the settlor's trustee in bankruptcy (*z*). The existence of debts at the time of the execution of the deed is not sufficient to debar a man from

(*s*) *Freeman* v. *Pope*, 5 Ch. 538; 39 L. J. Ch. 689; *Taylor* v. *Coenen*, 1 C.D. 641; *Ridler* v. *Ridler*, 22 C. D. 74; 52 L. J. Ch. 343; *Ex parte Chaplin*, 26 C. D., p. 335; 53 L. J. Ch. 732; *Edmunds* v. *Edmunds*, 1904, P. 362; 73 L. J. P. 97; but see *dictum* of Esher, M.R., in *Ex parte Mercer*, 17 Q. B. D., p. 298; 55 L. J. Q. B. 558.

(*t*) *Re Lane-Fox*, *infra*.

(*u*) *Skarf* v. *Soulby*, 1 Mac. & G. 364; 19 L. J. Ch. 30; 84 R. R. 103. See *post*, p. 219.

(*x*) *Acraman* v. *Corbett*, 1 J. & H. 423; 30 L. J. Ch. 642; 128 R. R. 449.

(*y*) *Thompson* v. *Webster*, 7 Jur. N. S. 532, *per* Lord Cranworth.

(*z*) *Re Lane-Fox*, 1900, 2 Q. B. 508; 69 L. J. Q. B. 722.

executing a voluntary deed. A man may intend to pay every debt as soon as it is contracted, and constantly use his best endeavours and have ample means to do so, and yet be frequently, if not always, indebted in small sums (*a*). In the absence of an intent to delay, defraud or defeat creditors a voluntary settlement made by a settlor in embarrassed circumstances but having property not included in the settlement, ample for payment of debts, due by him at the time of making it, may be supported against creditors, although debts due at the date of the settlement may to a considerable amount remain unpaid (*b*).

It makes no difference whether the voluntary conveyance is to trustees or directly to volunteers: if the conveyance is made to trustees and all the *cestuis que trust* are volunteers, the conveyance to the trustees is void under the statute no less than the interests of the *cestuis que trust* (*c*).

A surety is no more justified in placing his property out of the reach of liability for the debt than if he were the principal debtor (*d*). Nor is a man who has entered into a guarantee for the liability of another justified in making a voluntary settlement, if under the peculiar circumstances of the case the possible liability under the guarantee is likely at no distant date to become an actual debt. There may be a state of things in which the liability of a guarantor might be so remote that it need not be regarded, but if he conveys away all his property by a voluntary settlement, it is doubtful whether the settlement can in any case be supported in the event of his ultimately being called on under his guarantee (*e*). In a case, accordingly, where in 1872 a father gave a bank a guarantee to secure the balance due from his son on his banking account to the extent of £1,000; and in May, 1877, the son's account was overdrawn by £1,500, and the father in May, 1877, made a voluntary settlement of a leasehold property worth £200 a year, his only other property being furniture worth less than

(*a*) *Townsend* v. *Westacott*, 2 Beav. 344; 9 L. J. Ch. 241; 50 R. R. 193.
(*b*) *Kent.* v. *Riley*, 14 Eq. 190; 41 L. J. Ch. 569.
(*c*) *Townend* v. *Toker*, 1 Ch. 458; 35 L. J. Ch. 608.
(*d*) *Goodricke* v. *Taylor*, 2 H. & M. 380; 2 D. J. & S. 135; 139 R. R. 66.
(*e*) *Ridler* v. *Ridler*, 22 C. D. 74; 52 L. J. Ch. 343.

£200 and a debt of £1,500 due to him from his son, and in 1880 the son went into liquidation; it was held that the settlement was void as against creditors, for that under the circumstances the liability under the guarantee ought to have been regarded as a substantial one; that the father had no right to treat the sum of £1,500 due to him from the son as a good debt, and that after the settlement the father had nothing left to meet his liability under the guarantee (*f*).

It has been said that to bring a transaction within the provisions of the statute 13 Eliz. c. 5, it should include the whole or substantially the whole of the debtor's property (*g*); but this statement of the law is directly opposed to that laid down in an earlier case (*h*).

If the effect, not necessarily the object of the deed, is to defeat, hinder, or delay one particular creditor only, the deed will be void under the statute (*i*). But a deed of assignment made for good consideration by a debtor in favour of a creditor is not rendered invalid by reason of its being made with the intention of defeating some other particular creditor or creditors (*j*).

Subsequent creditors.

The provisions of the statute 13 Eliz. c. 5, are not confined to existing creditors, but extend to subsequent creditors whose debts had not been contracted at the date of the settlement (*k*), but the principle will not operate in favour of subsequent creditors, unless it can be shown either that the settlor made the settlement with the express intent to "delay, hinder, or defraud" persons who might become creditors (*l*), or that after the settlement the settlor had not sufficient means or reasonable expectation of being able to pay his then existing

(*f*) *Ibid.*

(*g*) *Re Hirth*, 1899, 1 Q. B., at p. 620; 68 L. J. Q. B. 287.

(*h*) *Alton* v. *Harrison*, 4 Ch., at p. 626; 38 L. J. Ch. 669.

(*i*) *Edmunds* v. *Edmunds*, 1904, P. 362; 73 L. J. P. 97; but see *Golden* v. *Gilham*, 20 C. D. 396; 51 L. J. Ch. 503; *ante*, p. 215.

(*j*) *Glegg* v. *Bromley*, *ante*, p. 213.

(*k*) *Tarback* v. *Marbury*, 2 Vern. 509.

(*l*) *Stileman* v. *Ashdown*, 2 Atk. 481; *Stephens* v. *Olive*, 2 Bro. C. C. 91; *Holloway* v. *Millard*, 1 Madd. 414; *Holmes* v. *Penney*, 3 K. & J. 99; 26 L. J. Ch. 179; 112 R. R. 49; *Murphy* v. *Abraham*, 15 Ir. Ch. 371.

debts (*m*), or at least that there are debts unsatisfied which were due at the date of the settlement (*n*). If at the time of bringing the action no debt due at the execution of the settlement remains unpaid, and there is no evidence to show that the settlement had for its object the delaying, hindering, or defrauding of subsequent creditors, the settlement prevails against them (*o*), but if any debt due at the date of the settlement remains unsatisfied at the time of bringing the action (*p*), or if there be evidence to show that the settlement was made in contemplation of future debts or in furtherance of a meditated design of future fraud, although the settlor may not have been indebted at the time (*q*), or if it be a necessary inference to be drawn from the facts and dates that the deed was executed with a view to defeat persons who might become creditors, the deed will be set aside (*r*). If a settlement is set aside as fraudulent against creditors whose debts accrued before its execution, subsequent creditors are entitled to participate (*s*): but if antecedent creditors cannot make out a case for setting it aside, subsequent creditors cannot impeach the settlement as fraudulent by reason of the prior indebtment (*t*).

The true test, to be derived from the above cited cases, appears to be, not whether there is any debt in existence which was due prior to the settlement and which in the result has remained unpaid, though the settlor continued solvent after making the settlement, but whether from all the circum-

(*m*) *Spirett* v. *Willows*, 3 D. J. & S. 302; 34 L. J. Ch. 365; 142 R. R. 65; *Freeman* v. *Pope*, *infra*; *Re Lane-Fox*, 1900, 2 Q. B. 508; 69 L. J. Q. B. 722.

(*n*) *Jenkyn* v. *Vaughan*, 3 Drew. 419; 25 L. J. Ch. 338; 106 R. R. 385; *Barton* v. *Vanheythuysen*, 11 Ha. 132; 90 R. R. 607; *Freeman* v. *Pope*, *infra*.

(*o*) *Jenkyn* v. *Vaughan*, *supra*; *Thompson* v. *Webster*, 7 Jur. N. S. 531; *Re Lane-Fox*, *supra*.

(*p*) *Freeman* v. *Pope*, 5 Ch. 544; 39 L. J. Ch. 689.

(*q*) *Stileman* v. *Ashdown*, 2 Atk. 481; *Richardson* v. *Smallwood*, Jac. 552; *Holloway* v. *Millard*, 1 Madd. 414; *Spirett* v. *Willows*, *supra*; *Ware* v. *Gardner*, 7 Eq. 321; 38 L. J. Ch. 348; *Freeman* v. *Pope*, *supra*.

(*r*) *Barling* v. *Bishopp*, 29 Beav. 417; 131 R. R. 648; *Reese River Co.* v. *Atwell*, 7 Eq. 351.

(*s*) *Richardson* v. *Smallwood*, Jac. 552; *Ede* v. *Knowles*, 2 Y. & C. C. C. 172; *Barton* v. *Vanheythuysen*, 11 Ha. 132; 90 R. R. 607.

(*t*) *See Holloway* v. *Millard*, 1 Madd. 419; *Walker* v. *Burrows*, 1 Atk. 94; *Ede* v. *Knowles*, 2 Y. & C. C. C. 172, 178; 60 R. R. 106.

stances the Court can infer that the settlement was made with the intent, actual or constructive, of delaying or defeating existing or subsequent creditors (*u*).

The fact that the settlor at the date of the settlement was largely engaged in speculative transactions (*x*), or was about to engage in a hazardous business (*y*), is, of course, strong evidence that, notwithstanding his apparent solvency, the real intention of the settlor was to place the property beyond the reach of his creditors, and the fact that he has already made provision for the objects of the settlement may not be immaterial in estimating the *bonâ fides* of the transaction (*z*). It is immaterial in such cases that there are no creditors whose debts arose before the date of the settlement (*a*).

Power of revocation in settlement evidence of fraud.

A power of revocation inserted in a deed has always been looked on as strong evidence of fraud as against creditors, and will in general make it void under the statute (*b*). It is the same where there is a *de facto* power of revocation, though not in express terms (*c*), or where there is an equivalent to what is a power of revocation (*d*). Where a revocable settlement was revoked, the trustees consenting on condition that another settlement should be made and the settlor died within two years of his executing the second settlement, it was held that the second settlement was void as against the trustee in bankruptcy (*e*).

What property is within the statute.

In order to make a voluntary settlement or conveyance void as against creditors, whether existing or subsequent, it is indispensable that it should transfer property which would be liable to be taken in execution for the payment of debts (*f*).

(*u*) Sm. L. C., p. 22; *Re Lane-Fox*, 1900, 2 Q. B. 508; 69 L. J. Q. B. 722.

(*x*) *Crossley* v. *Elworthy*, 12 Eq. 158; 40 L. J. Ch. 480.

(*y*) *Mackay* v. *Douglas*, 14 Eq. 106; 41 L. J. Ch. 539; *Re Pearson*, 3 C. D. 808; *Ex parte Russell*, 19 C. D. 588; 51 L. J. Ch. 521; see *Re Holland*, 1902, 2 Ch. 360; 71 L. J. Ch. 518; *Alexandra Oil Co.* v. *Cork*, 140 W. R. 604.

(*z*) *Crossley* v. *Elworthy*, *supra*.

(*a*) *Mackay* v. *Douglas*, *supra*.

(*b*) *Jenkyn* v. *Vaughan*, *supra*; *Smith* v. *Hurst*, 10 Ha. 30; 22 L. J. Ch. 289; 90 R. R. 263.

(*c*) *Tarback* v. *Marbury*, 2 Vern. 509.

(*d*) *Acraman* v. *Corbett*, 1 J. & H. 410; 30 L. J. Ch. 642; 128 R. R. 449.

(*e*) *Re Parry*, 1904, 1 K. B. 129; 73 L. J. K. B. 83.

(*f*) See *Guy* v. *Pearkes*, 18 Ves. 196; 11 R. R. 186; *Ex parte Hawker*, 7 Ch. 214; 41 L. J. B. 34.

Under the old law a voluntary settlement of stock or choses in action, or of copyholds, or of any other property not liable to execution, was not within the statute (*g*); but copyholds, bonds, money, stock, &c., being under statute 1 Vict. c. 110, seizable in execution are now within the statute (*h*); and choses in action, being now attachable under the Common Law Procedure Act, 1854, are also within the statute (*i*).

A settlement of equitable reversionary personalty may be within the Act since a creditor may reach it by a charging order or the appointment of a receiver by way of equitable execution (*k*).

Retention of deed by settlor will not prevent its operation.

If a deed of voluntary settlement be duly executed, effect will be given to it, though it has been retained by the grantor, and without notice of it having been given to any person (*l*). Where a man having received money belonging to B. without any communication with him, executed a deed of mortgage to B. for the amount, and retained possession of it in his custody for twelve years and then died insolvent, it was held good against creditors, there being no fraud connected with it, the settlor having been solvent at the time of its execution, and there being no evidence to show that the deed was meant to be an escrow (*m*).

Claimants under voluntary instrument within statute.

A creditor under a voluntary covenant, or bond, although *post obit*, is as much entitled to the benefit of the statute 13 Eliz. c. 5, even in equity, as any other creditor (*n*).

13 Eliz. c. 5, s. 5, exception where deed is for valuable consideration and *bonâ fide*.

Estates or interests in lands or chattels, &c., conveyed or assured *bonâ fide* and for good consideration without notice to the party who is dealing with the person who afterwards

(*g*) *Ibid; Norcutt* v. *Dodd*, Cr. & Ph. 100; 54 R. R. 224.

(*h*) *Norcutt* v. *Dodd*, *ibid.*; *Barrack* v. *M'Culloch*, 3 K. & J. 110; 26 L. J. Ch. 105; 112 R. R. 60; *French* v. *French*, 6 D. M. & G. 95; 28 L. J. Ch. 612; 106 R. R. 46; *Warden* v. *Jones*, 2 D. & J. 76; 27 L. J. Ch. 190; 119 R. R. 29; *Stokoe* v. *Cowan*, 29 Beav. 637; 131 R. R. 742.

(*i*) *Edmunds* v. *Edmunds*, 1904, P. 362; 73 L. J. P. 97.

(*k*) *Ideal Bedding Co.* v. *Holland*, 1907, 2 Ch. 157; 76 L. J. Ch. 441.

(*l*) *Way's Trust*, 2 D. J. & S. 365; 34 L. J. Ch. 49; 139 R. R. 130.

(*m*) *Exton* v. *Scott*, 6 Sim. 31; 38 R. R. 72; cf. *Lloyd* v. *Attwood*, 3 D. & J. 655; 29 L. J. Ch. 97; 121 R. R. 252; *Cracknall* v. *Janson*, 11 C. D. 22; 48 L. J. Ch. 168.

(*n*) *Adames* v. *Hallett*, 6 Eq. 468; and see *Re Whittaker*, 1901, 1 Ch. 9; 70 L. J. Ch. 6.

becomes unable to pay his debts of any fraud or collusion, are by the 5th section (*o*) excepted from the operation of the statute 13 Eliz. c. 5 (*p*). The section includes the purchaser of any interest under the deed impeached, whether legal or equitable, and prevents the deed being impeached against him (*q*).

In order to come within the exception, and escape from the operation of the statute, it is not sufficient that a conveyance be upon good consideration or *bonâ fide*. It must be both for good consideration and *bonâ fide*. Although a deed be made upon good consideration within the meaning of the statute, it is void against creditors, unless it be *bonâ fide* (*r*). But it is not a ground for invalidating a *bonâ fide* sale that it was made with intent to defeat creditors, if the purchaser is free from fraud (*s*); and fraud will not be imputed to a purchaser merely because his solicitor was privy to it (*t*). The expression "good consideration" in the statute means valuable consideration. Meritorious consideration, such as love, affection, &c., though good as between the parties themselves, is not in the eye of the law *bonâ fide*, if it is inconsistent with that good faith which is due to creditors (*u*).

Marriage a sufficient consideration.

Marriage is in itself a sufficient consideration for an antenuptial settlement upon the husband, wife, or issue; and in the absence of fraud the settlement made by one of the contracting parties is not invalidated by reason of the settlement made by the other proving ineffective, as by reason of his or her infancy, nor does any case of election arise as against the

(*o*) Commonly printed as sect. 6.

(*p*) *Supra*, p. 213.

(*q*) *Halifax Banking Co.* v. *Gledhill*, 1891, 1 Ch. 31; 60 L. J. Ch. 181.

(*r*) *Twyne's Case*, 3 Rep. 81; *Worsley* v. *De Mattos*, 1 Burr. 474, 475; *Cadogan* v. *Kennett*, Cowp. 434; *Bott* v. *Smith*, 21 Beav. 516; 111 R. R. 187; *Harman* v. *Richards*, 10 Ha. 81; 22 L. J. Ch. 1066; 90 R. R. 297; *Thompson* v. *Webster*, 4 Drew. 628; 28 L. J. Ch. 703; 113 R. R. 488; *Lloyd* v. *Attwood*, *supra*; *Fraser* v. *Thompson*, 4 D. & J. 600; 124 R. R. 443; *Corlett* v. *Radcliffe*, 14 Moo. P. C. 121, 135; 134 R. R. 13; *Middleton* v. *Pollock*, 2 C. D. 108; 45 L. J. Ch. 293; *Ex parte Ellis*, 2 C. D. 797; 45 L. J. B. 159; *Ex parte Chaplin*, 26 C. D. 319; 53 L. J. Ch. 732.

(*s*) *Glegg* v. *Bromley*, *ante*, 213.

(*t*) *Re Tetley*, 3 Manson, 321; 66 L. J. Q. B. 111.

(*u*) *Copis* v. *Middleton*, 2 Madd. 430; 17 R. R. 226; *Taylor* v. *Jones*, 2 Atk. 600; *Strong* v. *Strong*, 18 Beav. 408; 104 R. R. 490; *Thompson* v. *Webster*, 7 Jur. N. S. 531; *Golden* v. *Gillam*, 20 C. D. 392; affirmed 51 L. J. Ch. 503.

other party or his or her representatives (*w*). Nor will the fraudulent intent of the husband invalidate the settlement as against the wife if she is free from fraud (*x*).

When the marriage is not a valid one.

But a settlement made in pursuance of an agreement entered into in contemplation of a marriage not recognised as valid by the laws of this country, as formerly between a man and his deceased wife's sister, cannot (at any rate as far as it is executory) (*y*) be supported (*z*), even as respects a provision made thereby for children of a former legal marriage (*a*); and the same rule, it is conceived, will equally apply where the marriage, though a *bonâ fide* one, is invalid by reason of one of the parties having contracted a previous marriage which, although not known to be so, is still subsisting. In the case of a settlement executed as part of the arrangements of a marriage within the prohibited degrees, there is not merely the absence of a good consideration, but the presence of that which the Courts necessarily treat as an immoral consideration, namely, an agreement for concubinage instead of coverture (*b*). But a voluntary settlement upon the woman herself, if not founded upon an agreement for, although it in fact precedes, a concubinage of this description, and which purports on the face of it to be voluntary, cannot be set aside by the settlor or his representatives, if it has been perfected by an actual transfer of the property to the trustees (*c*).

How far the consideration of marriage extends.

A question is frequently raised as to how far the consideration of marriage extends. As against the settlor and his heirs, limitations in favour of collaterals contained in an ante-nuptial settlement are binding (*d*), but whether they

(*w*) *Campbell* v. *Ingilby*, 21 Beav. 567; 1 D. & J. 393; 118 R. R. 145. See, however, *Codrington* v. *Lindsay*, 8 Ch. 593; 45 L. J. Ch. 526.

(*x*) *Parnell* v. *Stedman*, Cab. & El. 153.

(*y*) *Ayerst* v. *Jenkins*, 16 Eq. 275; 42 L. J. Ch. 690. See 13 C. D., p. 206, and *Phillips* v. *Probyn*, *infra*.

(*z*) *Coulson* v. *Allison*, 2 D. F. & J. 521; 129 R. R. 176.

(*a*) *Chapman* v. *Bradley*, 33 Beav. 61; 33 L. J. Ch. 139.

(*b*) *Phillips* v. *Probyn*, 1899, 1 Ch. 811; 68 L. J. Ch. 401.

(*c*) Dart, V. & P. 920.

(*d*) *Davenport* v. *Bishop*, 1 Ph. 698; 65 R. R. 283; but see *Wollaston* v. *Tribe*, 9 Eq. 44.

will be supported as against creditors or subsequent *bonâ fide* purchasers for value has been the subject of frequent discussion (*e*). Limitations in favour of collaterals in a marriage settlement are as a general rule voluntary (*f*), but they will be upheld if there be any party to the settlement who purchases on their behalf (*g*). There are two exceptions to the rule that the valuable consideration of marriage extends only to the husband, wife, and issue of the marriage, and not to collaterals. The first is in favour of a settlement made by a widow before a second marriage on the children of a former marriage (*h*), but this does not extend to a like settlement made by a widower (*i*). The second is in favour of a settlement made on the children of either of the marrying parties by a future marriage (*j*).

In *Clarke* v. *Wright* (*k*), Lord Blackburn was of opinion that if the limitations in an ante-nuptial settlement in favour of collaterals so far interfere with those which would naturally be made in favour of the husband, wife, and issue, that they must be presumed to have been agreed upon by all parties as part of the marriage contract, they are not voluntary, and will be upheld. And recent decisions have laid down the principle that where such limitations are supported, it is not upon the ground of consideration, but because they could not be defeated without defeating the interests of persons who are within the marriage consideration (*l*).

Post-nuptial settlements when valid against creditors.

A post-nuptial settlement made in pursuance of articles or of a binding written agreement drawn up before marriage is valid against creditors, and a parol ante-nuptial agreement

(*e*) Dart. V. & P. 922; May on Fraud. Conv. 264-286.

(*f*) *Johnson* v. *Legard*, T. & R. 295; 18 R. R. 301; *Wollaston* v. *Tribe*, 9 Eq. 44.

(*g*) *Heap* v. *Tonge*, 9 Ha. 104; 20 L. J. Ch. 661; 89 R. R. 339; *Mullins* v. *Guilfoyle*, 2 L. R. Ir. 109.

(*h*) *Clarke* v. *Wright*, 6 H. & N. 849; 30 L. J. Ex. 113; *Gale* v. *Gale*, 6 C. D. 144; 46 L. J. Ch. 809.

(*i*) *Re Cameron and Wells*, 37 C. D. 32; 57 L. J. Ch. 69.

(*j*) *Clayton* v. *Winton*, 3 Madd. 302, n.; 18 R. R. 234; but see *Wollaston* v. *Tribe*, 9 Eq. 44; *De Mestre* v. *West*, *infra*.

(*k*) 6 H. & N. 869.

(*l*) *Mackie* v. *Herbertson*, 9 App. Ca. 303; *De Mestre* v. *West*, 1891, A. C. 264; 60 L. J. P. C. 66.

may prevent a post-nuptial settlement from being voluntary, if recited in the settlement, or there is a note or memorandum of it in writing (*m*), but though such a recital is a memorandum in writing sufficient to satisfy the Statute of Frauds, it does not dispense with the necessity of proving that the ante-nuptial agreement was actually made (*n*), and a written recognition after marriage of a verbal promise made upon marriage will not support a post-nuptial settlement against creditors (*o*). Nor can a post-nuptial settlement be supported against creditors if made in pursuance of articles entered into during infancy, and not ratified or referred to in the settlement (*p*). Post-nuptial settlements are as a general rule voluntary deeds, and therefore void as against creditors; the fact that a post-nuptial settlement may be founded on a moral duty will not deprive it of its voluntary character (*q*). But a post-nuptial settlement becomes a settlement for valuable consideration if made in consideration of the receipt of a further portion (*r*), or of an agreement to pay a further portion which is afterwards paid (*s*), or (on a settlement of the husband's estate) of the wife relinquishing her interest under an existing settlement (*t*); or her jointure (*u*), or dower (if married before the late Act came into operation) (*x*); or mortgaging her separate estate (*y*), or property over which she had a power of appointment (*z*), to pay his debts. So if the settlor's father brings property into settlement, the settlement, though post-nuptial, is for value (*a*).

(*m*) *Re Holland*, 1902, 2 Ch. 360; 71 L. J. Ch. 518.
(*n*) *Re Gillespie*, 20 Mans. 311.
(*o*) *Warden* v. *Jones*, 2 D. & J. 76; 27 L. J. Ch. 190; 119 R. R. 29.
(*p*) *Trowell* v. *Shenton*, 8 C. D. 318; 47 L. J. Ch. 738.
(*q*) *Jefferys* v. *Jefferys*, Cr. & Ph. 138, 141; 54 R. R. 249.
(*r*) *Stileman* v. *Ashdown*, 2 Atk. 479; *Ramsden* v. *Hylton*, 2 Ves. 308.
(*s*) *Brown* v. *Jones*, 1 Atk. 190.
(*t*) *Harman* v. *Richards*, 10 Ha. 81; 22 L. J. Ch. 1066; 90 R. R. 297.
(*u*) *Cottle* v. *Fripp*, 2 Vern. 220.
(*x*) Sug. 718.
(*y*) *Carter* v. *Hind*, 22 L. T. 116, *coram* Lord Hatherley.
(*z*) See *Whitbread* v. *Smith*, 3 D. M. & G. 740; 98 R. R. 285.
(*a*) *Hance* v. *Harding*, 20 Q. B. D. 732; 57 L. J. Q. B. 403. See *Re Parry*, 1904, 1 K. B. 129; 73 L. J. K. B. 83.

So, also, when in a post-nuptial settlement there is a bargain between husband and wife, altering their relative positions as to the estate, and their relative rights and interests in the estate, there is a valuable consideration for the settlement (*b*). Where, accordingly, by a post-nuptial settlement, certain freeholds belonging to the wife were settled by the husband and wife to the use of the wife for life, and after her decease to such uses as she should by will appoint, and in default of appointment, to the use of children, with a power during her life for the wife to lease at rack-rent, and with a power of sale and exchange in the trustees with her consent, it was held that, inasmuch as the husband by the settlement lost his estate by the curtesy and also his power of preventing the wife from alienating the estate during his life, while on the other hand the wife was reduced by the same instrument from being an owner in fee to a life estate with a testamentary power of appointment, the estate going in default to her children, both of them had given value, and that the settlement therefore was one for valuable consideration (*c*).

So, also, where the wife was entitled in reversion to a moiety in freehold estates, and by a post-nuptial settlement husband and wife by a deed duly acknowledged conveyed their moiety of the estate, subject to the prior life estate, to trustees and their heirs upon trust to pay the rents to the wife for life for her separate use, and without power of anticipation, with remainder to the husband for life, and after the decease of husband and wife to such persons as the wife should by will appoint, and in default of appointment to the use of her children as tenants in common in fee, with cross remainders between them, with an ultimate limitation to the wife or heirs, it was held that, inasmuch as the husband had given up his chance of an estate during the coverture and of an estate by the curtesy, and had also given his wife the first interest in the estate, and the wife on the other hand had given up her fee simple, there was a bargain for value between them, and that the settlement was therefore one for valuable

(*b*) *Re Foster and Lister*, 6 C. D. 87: 46 L. J. Ch. 480.
(*c*) *Ibid.*

consideration, and ought to be sustained against a subsequent purchaser for value (*d*). So, also, in *Teasdale* v. *Braithwaite* (*e*), where a woman having freehold estates married without a settlement and afterwards husband and wife conveyed by deed duly acknowledged the land to trustees during the life of the wife upon trust for her separate use without power of anticipation, and after her death to the use of the husband for life, with remainder to their children as therein mentioned, it was held that there was sufficient consideration moving from the husband to make the settlement one for valuable consideration, and that it was not void as against a subsequent mortgagee without notice of the settlement. "It is settled," said Bacon, V.-C. (*f*), "that if husband and wife, each of them having interests, no matter how much or of what degree, or of what quality, come to an agreement which is afterwards embodied in a settlement, that is a bargain between husband and wife which is not a transaction without valuable consideration" (*g*). But a settlement concurred in by husband and wife is voluntary, if they merely take back under the settlement such interests as they were respectively entitled to independently of the settlement (*h*).

So, also, money laid out by the husband on land devised to his wife for life, with remainder to her children, or in default, &c., to her in fee, was held good consideration for a conveyance of it to the use of the wife for life, remainder to her children in fee, and if no children to the husband absolutely (*i*). So, also, where a wife was entitled to certain property for her life for her separate use, remainder to the

(*d*) *Hewison* v. *Negus*, 16 Beav. 594; 22 L. J. Ch. 655; 96 R. R. 274.

(*e*) 4 C. D. 85; 5 C. D. 630; 46 L. J. Ch. 725.

(*f*) *Ibid.*, 4 C. D. 90.

(*g*) See *Welman* v. *Welman*, 15 C. D. 570; 49 L. J. Ch. 736. Inasmuch as under the Married Women's Property Act, 1882, the husband takes no interest in the property of the wife, where the marriage has taken place since the passing of the Act, post-nuptial settlements, which under the old law were deemed to have been made for a valuable consideration, where there was a modification of the interests of husband and wife in the property of the wife, must now be regarded as voluntary.

(*h*) *Butterfield* v. *Heath*, 15 Beav. 408; 22 L. J. Ch. 270; 92 R. R. 484; *Acraman* v. *Corbett*, 1 J. & H. 422; 30 L. J. Ch. 642; 128 R. R. 449.

(*i*) *Crofts* v. *Middleton*, 2 K. & J. 208; 25 L. J. Ch. 513; 114 R. R. 100.

husband for life, with remainder to their children as they should appoint, and she conveyed her life estate to trustees for the benefit of her children, and the husband covenanted to assign his life interest, if he should survive his wife, it was held that the settlement was for valuable consideration (*k*).

In certain cases a settlement made upon a wife after marriage is not to be treated as wholly voluntary, where it is done in performance of a duty which a Court of equity would enforce. Thus, if a man should contract a marriage by stealth with a woman having a considerable fortune in the hands of trustees, and he should afterwards make a suitable provision on her in respect of her fortune, the settlement would not be set aside in favour of the creditors of the husband, since a Court of equity would not suffer him to take possession of her fortune without making a suitable settlement on her (*l*).

Settlement of leaseholds.

In *Price* v. *Jenkins* (*m*), it was held by the Court of Appeal that a settlement of leasehold property is not a voluntary conveyance under 27 Eliz. c. 4, on the ground that the assignment of leasehold property is of itself a conveyance for valuable consideration on account of the implied obligation to perform the covenants in the lease. But in *Lee* v. *Matthews* (*n*), the Court of Appeal in Ireland dissented from the judgment in that case, and declined to follow it. "The question," said Chief Justice May, "in each case is, was the dealing a bargain or a gift? The existence of onerous liabilities, from which the covenantee covenants to indemnify the assignor, may give the transaction the character of a bargain for good and valuable consideration, while, on the other hand, the gift of a valuable interest in lands is not less a gift because the property so given carries with it certain obligations. The gift is thereby diminished, but it does not necessarily lose its essential character of gift because it must

(*k*) *Joyce* v. *Hutton*, 12 Ir. Ch. 77.

(*l*) *Moore* v. *Rycault*, Prec. Ch. 22; *Ward* v. *Shallet*, 2 Ves. 16; *Ramsden* v. *Hylton*, *ibid.*, 304; *Arundell* v. *Phipps*, 10 Ves. 139.

(*m*) 5 C. D. 621; 46 L. J. Ch. 805; followed in *Harris* v. *Tubb*, 42 C. D. 79; 58 L. J. Ch. 434.

(*n*) 6 L. R. I. 530.

be taken *cum onere*." Where, however, leaseholds are settled by way of sub-demise, the doctrine of *Price* v. *Jenkins* has no application (*o*); and the doctrine has no application as against creditors to cases coming under 13 Eliz. c. 5, and therefore a settlement of leaseholds, though carrying liabilities and covenants, is void under that statute as being calculated to defeat and delay creditors (*p*). Nor does the doctrine apply to cases coming within s. 47 of the Bankruptcy Act, 1883 (*q*). In *Harris* v. *Tubb* (*r*), Kekewich, J., treated the principle as laid down in *Price* v. *Jenkins* as the rule, and the principles laid down in *Ridler* v. *Ridler* and *Ex p. Hillman* as exceptions to the rule.

Concurrence of third party in settlement may make it for value.

If a person whose concurrence the parties think essential joins in a settlement, his concurrence will be deemed a valuable consideration, even although he did not substantially part with anything (*s*). The concurrence in such cases depends not so much on whether the concurrence passed any interest as on whether it enabled a settlement to be made which could not otherwise have been effected (*t*). The joinder of a necessary party is not, however, always a sufficient consideration. It has been held not to be so where a limitation was made not for his benefit, or at his desire, or in pursuance of any contract of his (*u*). In separation deeds the covenant usually entered into by the trustees to indemnify the husband against the wife's debts will, as against creditors and also, it is conceived, as against subsequent purchasers, support any further settlement he may make on her (*x*).

Consideration not expressed may be proved.

A deed which appears on its face to be voluntary, may be shown by any evidence (consistent with its terms) to have been made for valuable consideration, but the evidence must be clear, and it must be proved beyond the shadow of a doubt

(*o*) *Shurmur* v. *Sedgwick*, 24 C. D. 597; 53 L. J. Ch. 87.
(*p*) *Ridler* v. *Ridler*, 22 C. D. 74; 52 L. J. Ch. 343; see *Re Marsh and Lord Granville*, 24 C. D. 11, *per* Bowen, L.J.; 53 L. J. Ch. 640.
(*q*) *Ex parte Hillman*, 10 C. D. 622; 48 L. J. B. 77.
(*r*) 42 C. D. 79; 58 L. J. Ch. 434.
(*s*) Sng. 719; Dart, 918.
(*t*) *Harman* v. *Richards*, 10 Ha. 87; 22 L. J. Ch. 1066; 90 R. R. 297.
(*u*) *Doe* v. *Rolfe*, 8 A. & E. 650; 46 R. R. 687.
(*x*) Dart, V. & P. 916; May on Fraud. Conv. 241, 242.

that there was that additional consideration which the parties did not choose to put on the face of the instrument (*y*).

If the execution of a voluntary deed be not communicated to the party benefited, there cannot be a question of consideration. There can be no consideration without either contract in the first instance, or such notice on the part of the party benefited by the voluntary instrument, as after knowledge of it changes his position. If, after the voluntary settlement has been executed, its contents are communicated to the person taking the benefit of it, and, acting on the faith of it, he does substantially alter his position—that is, communicates to the donor his acceptance of the further security —then, by so doing, he gives value to the donor being the value which the donor expected him to give. He has, in fact, accepted the voluntary instrument as a consideration for the action he takes on the faith of it. In that way it comes back again really to contract, and upon that ground it is that the Courts have refused to disturb voluntary deeds where consideration has been given to them, so to say, *ex post facto*. But where he has no knowledge, it is impossible that he can give consideration in that way (*z*).

Voluntary deed may become for value by consideration given since its execution.

A deed, though voluntary at the time of its execution, may afterwards become valuable by a consideration given since its execution (*a*), or by subsequent acts. If an assignment or appointment has been made to a volunteer, the subject of which is afterwards assigned for value by the assignee or appointee, the purchaser from him has a better equity than the creditors (*b*). A man who has made a voluntary grant is not entitled to have it set aside except on paying all that the transferee has paid for it (*c*).

Purchase of a settlement for third parties is within sect. 6.

The benefit of 13 Eliz. c. 5, s. 6, has been extended to cases

(*y*) *Kelson* v. *Kelson*, 10 Ha. 385; 22 L. J. Ch. 745; *Townend* v. *Toker*, 1 Ch. 446; 35 L. J. Ch. 608; *Levy* v. *Creighton*, 22 W. R. 605.

(*z*) *Jones* v. *Bygott*, 44 L. J. Ch. 487, *per* Jessel, M.R.; see *Cracknall* v. *Janson*, 11 C. D. 1; 48 L. J. Ch. 168.

(*a*) *Parr* v. *Eliason*, 1 East, 95.

(*b*) *Morewood* v. *South Yorkshire, &c., Rly. Co.*, 3 H. & N. 798; 28 L. J. Ex. 114; 117 R. R. 981.

(*c*) *Aldbrough* v. *Trye*, 7 Cl. & Fin. 463; 51 R. R. 32; see *Judd* v. *Green*, 45 L. J. Ch. 111.

in which the purchaser, innocent of any fraud on the part of the owner of the property, has, by making a loan or payment, become a purchaser, not for his own benefit, but for the purpose of inducing the settlor to settle the property on his family (*d*). In *Bayspoole* v. *Collins* (*e*), where the owner of an equity of redemption settled it upon his wife and children at the request of a near relative, and, in consequence of a small advance by way of loan upon the security of his promissory note, the settlement was upheld as being for valuable consideration. So where the consideration for the settlement was covenants by the mother and brother of the settlor to pay him annuities of £50 and £25 (*f*). So, also, where a man being in embarrassed circumstances, his mother agreed to advance the money necessary to relieve him from his embarrassment, on condition of his settling his estate on his family, the transaction was upheld as being one for valuable consideration (*g*). So, also, where a man entitled to a life interest in the dividends of Consols, being largely indebted, his brother agreed to pay all debts, not charged on his life interest in the Consols, upon condition that such life interest should be settled so as to be applicable for the maintenance of the man, his wife and children, or any of them, at the absolute discretion of the trustees, the settlement was held valid as one made for valuable consideration (*h*). So, also, where A. and B. were indebted and, being under threat of eviction, executed a deed, afterwards registered as a bill of sale, whereby, in consideration of the payment of the debt by the father-in-law of one of them, they conveyed to him the farm and all its chattels, the deed was held to be for valuable consideration (*i*).

In considering whether or not a deed is voluntary, the Court will take into consideration all the circumstances under

Rules for determining whether a deed is voluntary.

(*d*) *Thompson* v. *Webster*, 4 D. & J. 605; 7 Jur. N. S. 531.

(*e*) 6 Ch. 228; 40 L. J. Ch. 289.

(*f*) *Re Tetley, Ex parte Jeffrey*, 66 L. J. Q. B. 111; affirmed 3 Manson, 321.

(*g*) *Thompson* v. *Webster*, 7 Jur. N. S. 531; 124 R. R. 409.

(*h*) *Holmes* v. *Penney*, 3 K. & J. 98; 26 L. J. Ch. 179; 112 R. R. 49; see *Ex parte Eyre*, 44 L. T. 922.

(*i*) *Smith* v. *Tatton*, 6 L. R. I. 41.

which it was executed, and the relative positions of the parties, and will look at other deeds executed at the same time, if they appear to be part of the same transaction, although not mentioned in the impeached deed, and will take into consideration any evidence which tends to throw light on the reasons and considerations for the settlement, and, though there is no proof either by intrinsic evidence or by anything appearing on the face of the deeds of any stipulation or agreement which there was sufficient consideration to support, yet several transactions may be viewed together, and the parties to them must be considered to have stipulated according to the rights which they had, and any consideration which is found to exist will either support the whole transaction or none at all (*k*).

Deed must be *bonâ fide*.

It is not enough, in order to support a settlement against creditors, that it be made for valuable consideration. It must also be *bonâ fide*. If it be made with intent to delay, hinder, or defraud creditors, it is void against them, although there may be, in the strictest sense of the term, a valuable or even an adequate consideration (*l*). Cases have frequently occurred in which persons have given a full and fair price for goods, and where the possession has been actually changed, yet being done for the purpose of delaying or defeating creditors, the transaction has been held fraudulent, and has therefore been set aside as against them (*m*). "The fact that there is a valuable consideration," said Mr. Justice Fry, in *Golden* v. *Gillam* (*n*), "shows at once that there may be a purpose in the transaction other than the delaying or defeating of creditors, and renders the case of those who contest the deed more difficult."

Where the instrument sought to be set aside as fraudulent against creditors is founded on a valuable consideration,

(*k*) *Harman* v. *Richards*, 10 Ha. 88; 22 L. J. Ch. 1066; 90 R. R. 297; see *Re Reis*, 1904, 2 K. B. 769; 73 L. J. K. B. 929.

(*l*) *Twyne's Case*, 3 Rep. 81; *Holmes* v. *Penney*, *supra*.

(*m*) *Ibid.*, *Worsley* v. *De Mattos*, 1 Burr. 474, 475; *Cadogan* v. *Kennett*, Cowp. 434; *Bott* v. *Smith*, 21 Beav. 511; 111 R. R. 187; *Harman* v. *Richards*, *supra*.

(*n*) 20 C. D. 396; 51 L. J. Ch. 503.

an actual and express intent to defeat creditors must be proved (*o*).

The mere fact of a *bonâ fide* creditor being defeated is not enough of itself to set aside a deed founded on valuable consideration (*p*). In *Holmes* v. *Penney* (*q*), the creditor was excluded from all remedy in respect of his debt, and the existence of the debt must have been present to the mind of the settlor at the time of the settlement, but Lord Hatherley, then a Vice-Chancellor, being of opinion that the person who advanced the money as the consideration of the settlement, had no knowledge at the time of the settlement that there were any unpaid debts of the settlor in existence, and that his only object was to make an honest family arrangement, upheld the deed (*r*). So, also, in *Golden* v. *Gillam* (*s*), where it appeared to be the object of a mother and daughter to make an honest family settlement, under which the mother conveyed a farm to the daughter, and the daughter, in consideration of the conveyance, undertook to maintain the mother and to pay creditors whose debts had been contracted in connection with the carrying on of the farm, the settlement was upheld, though there was outstanding a debt of another description to which the covenant did not apply, the Court being of opinion that the settlement was a *bonâ fide* one, and that the debt in question was not present to the mind of the settlor or her daughter at the time of the settlement.

The inquiry in every case is whether the deed was executed with the intent to defeat or delay creditors. The mere fact that, as a collateral result, it may have that effect will not make the deed void within the statute, if it was otherwise made for good consideration and *bonâ fide* (*t*).

But since a person must be taken to intend the consequence

(*o*) *Freeman* v. *Pope*, 5 Ch. 538, *per* Giffard, L.J.; 39 L. J. Ch. 689.

(*p*) *Smith* v. *Tatton*, 6 L. R. I. 41; cf. *Edmunds* v. *Edmunds*, 1904, P. 362; 73 L. J. P. 97; *ante*, p. 218.

(*q*) 3 K. & J. 98; 26 L. J. Ch. 179; 112 R. R. 49.

(*r*) See *Ex parte Eyre*, 44 L. T. 922.

(*s*) 20 C. D. 396; affirmed 51 L. J. Ch. 503.

(*t*) *Ibid.*, see *ante*, p. 218.

of his own acts, the intent to defeat creditors will be inferred where that is necessarily the effect of the deed (*u*).

If the deed be for valuable consideration, it is immaterial that the settlor may retain a life interest under it (*x*). But if there is any secret trust or any proviso to pay the settlor the dividends until the execution issue, the settlement would be fraudulent though made for value (*y*). In the case of a merely voluntary settlement, the fact that the settlor may derive any benefit under it would probably be fatal to the deed (*z*). But a deed of arrangement is not necessarily void because it reserves certain benefits to the debtor (*a*).

It is not a ground for invalidating a *bonâ fide* sale that it was made with a view to defeat an intended execution. The sale of property for good consideration made *bonâ fide* and with a *bonâ fide* intention to pass the property, is sufficient to defeat the execution of a creditor (*b*). Nor is it a fraud to mortgage personal property for money actually lent to the mortgagor, even though the mortgagor's intention may be thus to defeat the expected execution of a judgment creditor (*c*); or to confess a judgment in favour of one creditor for the purpose of giving him preference over another who is on the eve of issuing execution on a judgment previously obtained (*d*).

The consideration of marriage, although the most valuable of all considerations, if there be *bonâ fides*, will not support a settlement by a man in insolvent or embarrassed circumstances, if there be evidence to show that the intended wife was implicated in any design to delay or defraud the creditors of the intended husband, or that the marriage was part of a

(*u*) *Edmunds* v. *Edmunds*, *supra*; *ante*, p. 233 n. (*o*).

(*x*) *Holmes* v. *Penney*, 3 K. & J. 98; 26 L. J. Ch. 179; 112 R. R. 49; *Thompson* v. *Webster*, 7 W. R. 648.

(*y*) *Holmes* v. *Penney*, *supra*.

(*z*) *Ibid.*, at p. 101.

(*a*) *Post*, p. 242.

(*b*) *Wood* v. *Dixie*, 7 Q. B. 892; 68 R. R. 590; *Hale* v. *Saloon Omnibus Co.*, 4 Drew. 496; 28 L. J. Ch. 777; 113 R. R. 430; *Maskelyne* v. *Smith*, 1902, 2 K. B. 158; 71 L. J. K. B. 476; *Glegg* v. *Bromley*, *ante*, p. 213.

(*c*) *Darvill* v. *Terry*, 6 H. & N. 807; 30 L. J. Ch. 355; 123 R. R. 845.

(*d*) *Holbird* v. *Anderson*, 5 T. R. 235.

scheme or contrivance between them to protect his property against the claims of his creditors (*e*). But an ante-nuptial settlement made by a man when insolvent is valid against creditors, so far as concerns the interests of the wife and children, though it may contain a false recital, if the wife had no knowledge of the insolvency of the husband or of the false recital (*f*). So a covenant by a husband in his marriage settlement to settle all his after-acquired property, except business assets, is not fraudulent and void as against creditors under 13 Eliz. c. 5 (*g*). The case of *Ex p. Bolland, Re Clint* (*h*) is no longer to be treated as an authority on this point (*g*).

Inadequacy of consideration, when evidence of *mala fides*.

Mere inadequacy of consideration is not in general a circumstance which will of itself make an assignment void as against creditors (*i*), but the inadequacy must not be so great as to induce the belief that the transaction was a mere fraudulent contrivance between the parties to defraud creditors (*k*), so that when a man in a hopeless condition assigned to his mother policies of assurance on his life amounting to £800 in consideration of a debt of £180 owing to her, it was set aside as a fraud against creditors (*l*). Where it appeared that the consideration stated to have been paid was not really *bonâ fide* paid, or was afterwards returned, the sale was not allowed to override a prior conveyance, although voluntary (*m*); and when the estate is conveyed as security for money to be thereafter advanced, it must be proved that

(*e*) *Colombine* v. *Penhall*, 1 Sm. & G. 228; 96 R. R. 391; *Fraser* v. *Thompson*, 4 D. & J. 660; 124 R. R. 443; *Bulmer* v. *Hunter*, 8 Eq. 49; 38 L. J. Ch. 534; *Re Pennington*, 5 Morrell, 268.

(*f*) *Kevan* v. *Crawford*, 6 C. D. 30; 45 L. J. Ch. 658; *Parnell* v. *Stedman*, Cah. & El. 153. See Bankruptcy Act, 1914, s. 27.

(*g*) *Re Reis, Ex p. Clough*, 1904, 2 K. B. 769; 1905, A. C. 442; 74 L. J. K. B. 918. See *post*, p. 240.

(*h*) 17 Eq. 120; 43 L. J. B. 16.

(*i*) *Copis* v. *Middleton*, 2 Madd. 423; 17 R. R. 226.

(*k*) *Twyne's Case*, 3 Rep. 83 *b*; *Doe* v. *James*, 16 East, 213; *Strong* v. *Strong*, 18 Beav. 408; 104 R. R. 490; *Hale* v. *Allnutt*, 18 C. B. 527; 107 R. R. 390.

(*l*) *Stokoe* v. *Cowan*, 29 Beav. 637; 131 R. R. 742.

(*m*) *Roberts* v. *Williams*, 4 Ha. 130; 11 L. J. Ch. 65; 67 R. R. 25; *Mullins* v. *Guilfoyle*, 2 L. R. I. 113.

money has actually been advanced on the mortgage (*n*). But a vendor's giving back part of the purchase-money to the purchaser's family does not invalidate the sale (*o*). A conveyance, though made for valuable consideration, may under certain circumstances be fraudulent against subsequent purchasers (*p*).

When the transaction is on the whole fair and honourable and not induced by the fraudulent intention of defeating creditors or purchasers, the Court is not very particular as to the amount of the consideration (*q*). It is enough if it is valuable and not so entirely inadequate as from its insufficiency to induce the presumption of fraud. The smallness of the consideration is not a matter the Court will go into, except so far as it is evidence that the transaction was a sham (*r*). The case is all the stronger when the instrument is between relatives. In such cases, less than in others, will the Court weigh in very nice scales the amount of the consideration (*s*), or hold that the difference between the real value of the estate and the consideration given is a badge of fraud, or evidence of an intention to defraud creditors (*t*). In a case accordingly where husband and wife jointly seised in fee mortgaged the estate limiting the equity of redemption to such uses as they or the survivor should appoint, and the property was reconveyed by their appointment to the use of the wife for life, with remainder to the use of the husband for life, with remainder to uses in favour of their issue, it was held that her concurrence in the settlement made by the reconveyance was a sufficient consideration to support it against a subsequent pur-

(*n*) *Doe* v. *Webber*, 1 A. & E. 740; 3 L. J. K. B. 208; 40 R. R. 268.

(*o*) *Doe* v. *James*, 16 East, 214; *per* Lord Ellenborough.

(*p*) *Perry-Herrick* v. *Atwood*, 2 D. & J. 21; 27 L. J. Ch. 121; 119 R. R. 10. See *Rimmer* v. *Webster*, 1902, 2 Ch. 163; 71 L. J. Ch. 561.

(*q*) *Holmes* v. *Penney*, 3 K. & J. 90; 26 L. J. Ch. 179; 112 R. R. 49; *Atkinson* v. *Smith*, 3 D. & J. 186; 28 L. J. Ch. 2; 121 R. R. 65; *Thompson* v. *Webster*, 4 D. & J. 605; 28 L. J. Ch. 703; 124 R. R. 409; *Townend* v. *Toker*, 1 Ch. 446; 35 L. J. Ch. 608; *Price* v. *Jenkins*, 5 C. D. 621; 46 L. J. Ch. 805; *Rosher* v *Williams*, 20 Eq. 217; 44 L. J. Ch. 419.

(*r*) *Bayspoole* v. *Collins*, 6 Ch. 228; 40 L. J. Ch. 289.

(*s*) *Thompson* v. *Webster*, 7 Jur. N. S. 532; 124 R. R. 409.

(*t*) *Townend* v. *Toker*, *supra*; *Bayspoole* v. *Collins*, *supra*; *Golden* v. *Gillam*, 20 C. D. 396; aff. 51 L. J. Ch. 503.

chaser from the husband (*u*). So if a post-nuptial settlement be made with the aid of another person whose concurrence is essential to its full validity, as is the case of a settlement by tenant for life and tenant in tail in remainder, this may take from the instrument its voluntary character (*x*). So a family compromise founded on doubtful intestacy is valid (*y*). But of course the fact of the grantees having had estates in the property which, as in the case of estates in remainder on an estate tail, have been destroyed by the settlor will not support the settlement (*z*).

Nominal consideration insufficient.

A nominal consideration is insufficient to support a deed. When accordingly a deed conveying the whole real estate of the grantor and otherwise voluntary contained a covenant by the grantor that under certain specified circumstances and within a limited period he would build a house on part of the estate conveyed, but there was no shifting clause or proviso for defeasance in case of non-performance of the covenant, it was held that the covenant raised no consideration affecting the voluntary nature of the contract (*a*).

Purchaser must have notice of fraud.

When there has been a sale for value, not only must fraud be shown, but, in order to avoid the transaction as against a purchaser, it must be shown that he was privy to the fraud against creditors. A conveyance cannot be invalidated where there is a *bonâ fide* purchaser (*b*). The fraudulent intent of the vendor or settlor will not invalidate the deed if the purchaser was free from fraud (*c*). Even though there may be some suspicion in the circumstances of the case, the purchase will be held good unless it is shown that it was a contrivance to defeat creditors and that the purchaser was privy to it (*d*).

(*u*) *Atkinson* v. *Smith*, *supra*.

(*x*) 8 A. & E. at p. 659. Dart, V. & P. 918.

(*y*) *Heap* v. *Tonge*, 9 Ha. 90; 20 L. J. Ch. 661; 89 R. R. 339.

(*z*) *Cormick* v. *Trapaud*, 6 Dow, 60.

(*a*) *Rosher* v. *Williams*, 20 Eq. 210; 44 L. J. Ch. 419.

(*b*) *Copis* v. *Middleton*, 2 Madd. 426; 17 R. R. 226.

(*c*) *French* v. *French*, 6 D. M. & G. 101; 28 L. J. Ch. 612; 106 R. R. 46; *Golden* v. *Gillam*, 20 C. D. 394; aff. 51 L. J. Ch. 503; *Parnell* v. *Stedman*, Cab. & El. 153.

(*d*) *Hale* v. *Saloon Omnibus Co.*, 4 Drew. 496; 28 L. J. Ch. 777; 113 R. R. 430.

And fraud will not be imputed to a purchaser merely because his solicitor was privy to it (*e*).

When a recovery was suffered by A., tenant for life, and B. his son, tenant in tail in remainder, and by the deed leading the uses of the recovery, A.'s life estate was limited to B. in order to defraud A.'s creditors, and subject thereto the property was settled on B. for life, with remainder to his first and other sons in tail, but B. was not privy to the fraud, it was held that the recovery was good, and that the deed leading to uses was bad, so that A.'s life estate passed to his assignees in a subsequent bankruptcy, and subject thereto B. became entitled in fee simple (*f*). A conveyance pending an action or judgment is not necessarily void if supported by a valuable consideration (*g*).

Purchase-money may not be taken so as to defeat creditors.

The benefit of the section which excepts from the operation of the statute conveyances made *bonâ fide* and for valuable consideration is strictly confined to the purchaser and the interest created in his favour, so that even when there is a *bonâ fide purchaser*, the consideration received for property sold by a debtor is liable to the same rules as the property would have been if unsold (*h*).

Mala fides supersedes consideration.

A fraudulent intention to which the purchaser is a party will override all inquiry into the consideration (*i*). "If," said Lord Mansfield in *Cadogan* v. *Kennett* (*j*), "the transaction be not *bonâ fide*, the circumstances of its being done for a valuable consideration will not alone take it out of the statute." If moreover the purchaser must have been aware that the debtor was in a state of insolvency, or that the effect of the deed will be to leave the debtor without the means of

(*e*) *Re Tetley*, 3 Manson, 321.

(*f*) *Tarleton* v. *Liddell*, 17 Q. B. 390; 4 De G. & Sm. 538; 20 L. J. Q. B. 507; 85 R. R. 505; *Wakefield* v. *Gibbon*, 1 Giff. 401; 26 L. J. Ch. 505; 114 R. R. 486.

(*g*) See *Marlow* v. *Orgill*, 8 Jur. N. S. 789, 829; *Darvill* v. *Terry*, 6 H. & N. 807; 30 L. J. Ex. 355; 123 R. R. 845.

(*h*) *French v. French, supra; Neale* v. *Day*, 28 L. J. Ch. 45.

(*i*) *Acraman* v. *Corbett*, 1 J. & H. 423; 30 L. J. Ch. 642; 128 R. R. 449.

(*j*) Cowp. 434.

paying his debts, the transaction, though for value, cannot be upheld (*k*).

Though there be a judgment against the vendor, and the purchaser has notice of it, that fact will not of itself affect the validity of the sale of personal property. But if the purchaser, knowing of the judgment, purchases with the view and purpose to defeat the creditor's execution, it is iniquitous and fraudulent, notwithstanding he may have given a full price, for it is assisting the debtor to injure the creditor. The question of fraud depends on the motive (*l*).

So where a debtor transfers his business to a company with the object of defeating his creditors and the company takes with notice, the transaction will be set aside as fraudulent under the statute of 13 Eliz. (*m*).

In *Barling* v. *Bishopp* (*n*) a voluntary conveyance with the intention of depriving the plaintiff in an action of the fruits of his verdict was held bad. So, also, when the object of the deed was to defeat proceedings under a winding up, it was held bad (*o*). But where the liability of a solvent settlor in respect of a pending action is highly speculative, the settlement will not be bad (*p*).

The absence of any fraudulent intention on the part of the debtor is not sufficient to uphold the settlement, if the settlement has been procured by the fraud of the donees. The distribution accordingly by a debtor, when in a weak state of mind and body, of the whole of his property among his children, partly in consideration of annuities for his life, partly by voluntary settlement, and partly by pecuniary gifts, was held void under 13 Eliz. c. 5, the Court being satisfied that the children were aware at the time that the creditor's

(*k*) *Corlett* v. *Radcliffe*, 14 Moo. P. C. 135; 134 R. R. 13; *French* v. *French*, *supra*, 103; *Re Slobodinsky*, 1903, 2 K. B. 517; 72 L. J. K. B. 883.

(*l*) 1 Burr. 474, Cowp. 434, *per* Lord Mansfield; 8 Taunt. 678, *per* Dallas, C. J.

(*m*) *Gonville* v. *Patent Caramel Co.*, 1912, 1 K. B. 599; 81 L. J. K. B. 291; *ante*, p. 168.

(*n*) 29 Beav. 417; 131 R. R. 648.

(*o*) *Reese River, &c., Co.* v. *Attwell*, 7 Eq. 347.

(*p*) *Ex p. Mercer*, 17 Q. B. D. 290; 55 L. J. Q. B. 558; cf. *Reg.* v. *Hopkins*, 1896, 1 Q. B. 652; 65 L. J. M. C. 125.

claim would be defeated, though it did not appear that the debtor had any such intention (*q*).

Bankruptcy Act, 1914, s. 42. Voluntary settlements.

Under the Bankruptcy Act, 1914, s. 42 replacing s. 47 of the Act of 1883, any settlement of property (not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after his marriage in right of his wife) shall, if the settlor becomes bankrupt within two years after the date of such settlement, be void as against the trustee in bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of such settlement, be void against the trustee in bankruptcy, unless the parties claiming under such settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof. The section also provides that any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or husband or children of any property wherein the settlor had not at the date of the marriage any interest, and not being property in right of the settlor's wife or husband shall, if the settlor is adjudged bankrupt and the covenant or contract has not been executed, be void against the trustee in bankruptcy (*r*).

"Settlement" for the purposes of the section does not include a gift of money to a son in order to start him in business (*s*), but it has been held to include gifts of jewellery and other chattels made within two years of the bankruptcy (*t*).

(*q*) *Cornish* v. *Clark*, 14 Eq. 184; 42 L. J. Ch. 14; cf. *Golden* v. *Gillam*, 20 C. D. 389.

(*r*) *Re Reis*, 1904, 2 K. B. 769; 74 L. J. K. B. 918.

(*s*) *Re Player*, 15 Q. B. D. 682; 54 L. J. Q. B. 554; *Re Plummer*, 1900, 2 Q. B. 790; 69 L. J. Q. B. 936.

(*t*) *Re Tankard*, 1899, 2 Q. B. 57; 68 L. J. Q. B. 670.

On the other hand a slight consideration will suffice to prevent the settlement being voluntary within the section (*u*).

In order to constitute a "purchaser in good faith" within the section it is sufficient if there be good faith on the part of the purchaser; it is not necessary that both parties to the transaction should act in good faith (*x*).

It seems that a voluntary settlement avoided under the section is not avoided absolutely, but only so far as may be necessary to satisfy the debts of the bankrupt and the costs of the bankruptcy (*y*). Nor does the settlement become void *ab initio*, but only as from the date of the act of bankruptcy (*z*).

The rule that a trustee in bankruptcy stands in the bankrupt's shoes does not apply to cases under settlements which come within sect. 47 of the Bankruptcy Act, 1883, or the statute 13 Eliz. c. 5, or to cases of fraud (*a*).

Bills of sale.

The law relating to the prevention of frauds upon creditors by secret bills of sale is to be found in the Bills of Sale Acts, 1878 and 1882, with minor amending Acts of 1890 and 1891, but the subject is too special to be dealt with at length in the present treatise.

Assignment giving preference to creditors.

Transactions which have for their object the defeating or defrauding of creditors must be carefully distinguished from cases where a sale or assignment or other conveyance merely amounts to giving a preference to one creditor or to one set of creditors over another. The law tolerates assignments giving one creditor a preference over another. The fact that a man may have assigned the whole or the bulk of his property to a creditor or set of creditors and that the assignment may have been expressly made with the intent to benefit some creditors (*b*), or to defeat the claim of a particular creditor, is of no consequence under the common law or under

(*u*) *Re Tetley*, 3 Manson, 321; 66 L. J. Q. B. 111; but see *Re Parry*, 1904, 1 K. B. 129; 73 L. J. K. B. 83.

(*x*) *Mackintosh* v. *Pogose*, 1895, 1 Ch. 505; 64 L. J. Ch. 274.

(*y*) *Re Sims*, 3 Manson, 340; see *Ideal Bedding Co.* v. *Holland*, 1907, 2 Ch. 157; 76 L. J. Ch. 441; *Re Parry*, 1904, 1 K. B. 129; 73 L. J. K. B. 83.

(*z*) *Carter and Kenderdine's Contract*, 1897, 1 Ch. 776; 66 L. J. Ch. 408.

(*a*) *Re Holland*, 1902, 2 Ch. 360; 71 L. J. Ch. 518.

(*b*) *Alton* v. *Harrison*, 4 Ch. 625; 38 L. J. Ch. 669.

the statute of Elizabeth, if the consideration be adequate (*c*), and the bill of sale or assignment be not a contrivance resorted to by the debtor as a mere cloak for retaining a personal benefit in his own favour (*d*). A transfer of property is not made with intent to defeat or delay creditors because its effect or object is to prefer one creditor to another. What the Act invalidates is a transfer which removes the whole or part of the debtor's property from the creditors as a body for the benefit of the debtor (*e*). The test is, was the deed *bonâ fide*, or was it a mere cloak for retaining a benefit to the grantor? (*f*) A payment is *bonâ fide* within the meaning of the statute of Elizabeth if it is intended to be a payment, and a security is *bonâ fide* if it was intended to be a security, even though the debtor knew he was insolvent, and even although the creditor who accepted the money knew it. The statute has no regard whatever to the question of preference or priority among the creditors of the debtor. The creditor of an insolvent debtor who dies without having been adjudicated a bankrupt is entitled to the benefit of any payment or security made or given by the debtor (*g*).

Benefit reserved to debtor.

A deed of arraugement is not necessarily void under 13 Eliz. c. 5, because it contains provisions in favour of the debtor or reserves certain benefits to him, or because a particular creditor is intentionally excluded from its operation (*h*).

Fraud upon creditors under the bankrupt law.

Assignments, conveyances, or gifts, though not fraudulent within the statute 13 Eliz. c. 5, may be fraudulent as against creditors within the provisions of the bankrupt laws. Any transfer which is fraudulent within the meaning of the statute of Elizabeth is also fraudulent and an act of bankruptcy under the bankrupt law, and void as against the

(*c*) *Middleton* v. *Pollock*, 2 C. D. 106; 45 L. J. Ch. 293; *Ex p. Games*, 12 C. D. 321; *Maskelyne* v. *Smith*, 1902, 2 K. B. 158; 71 L. J. K. B. 476.

(*d*) *Alton* v. *Harrison*, *supra*.

(*e*) *Musahar Sahu* v. *Hakim Lal*, L. R. 43, Ind. App. 104.

(*f*) *Ex p. Games*, *supra*.

(*g*) *Middleton* v. *Pollock*, *supra*.

(*h*) *Maskelyne* v. *Smith*, *supra*.

trustee in bankruptcy (*i*). But a conveyance to a creditor of his whole property, or of the whole of his property with an exception merely nominal, in consideration of a past or pre-existing debt, though not fraudulent within the statute of Elizabeth (*j*), is fraudulent under the Bankruptcy Act, and an act of bankruptcy (*k*). So the assignment of a business to a private company, though not fraudulent within the statute of Elizabeth, may be an act of bankruptcy (*l*). The principle of the bankrupt laws being the equal distribution of the property and effects of a bankrupt among his creditors, acts which are done with the object of preventing an equal distribution of the property and effects of a bankrupt among his creditors are fraudulent within the meaning of those laws (*m*). The assignment accordingly by a man of the whole of his estate and effects, or of the whole with a colourable exception of part only under such circumstances as necessarily to defeat and delay his creditors, is a fraud within the meaning of those laws, although there be no actual moral fraud (*n*). Where therefore the debtor's property consisted chiefly in the implements of his trade, the assignment of these, which consequently rendered him incapable of carrying on his trade, was in substance an assignment of all his property, and void against his trustee in bankruptcy (*o*). So a creditor who takes a transfer of substantially the whole of the debtor's property in payment of a past debt with notice that there are other creditors is not acting with good faith, and such a transaction is an act of bankruptcy and *primâ facie* a fraudulent preference (*p*). But where there is a substantial exception out of the debtor's property, such an exception as might

(*i*) *Doe* v. *Ball*, 11 M. & W. 531; *Ex p. Games*, 12 C. D. 321; *Re Hirth*, 1899, 1 Q. B. 612, 620; 68 L. J. Q. B. 287.

(*j*) See *ante*, p. 222.

(*k*) *Allen* v. *Bonnett*, 5 Ch. 580; *Re Wood*, 7 Ch. 302; *Ex p. Games*, *supra*; *Re Jukes*, 1902, 2 K. B. 58; 71 L. J. K. B. 710.

(*l*) *Re David and Adlard*, 1914, 2 K. B. 694; 83 L. J. K. B. 1173.

(*m*) *Young* v. *Waud*, 8 Exch. 234; 22 L. J. Ex. 27.

(*n*) *Allen* v. *Bonnett*, 5 Ch. 577; *Re Wood*, 7 Ch. 305; *Ex p. King*, 2 C. D. 263; 45 L. J. B. 109; *Ex p. Payne*, 11 C. D. 539.

(*o*) *Re Rayment*, 80 L. T. 807.

(*p*) *Re Jukes*, *supra*; distinguishing *Shears* v. *Goddard*, 1896, 1 Q. B. 406; 65 L. J. Q. B. 344.

possibly enable him to carry on his trade with advantage, an assignment of the whole of the rest of his property cannot be necessarily and by force of law, without reference to extrinsic circumstances showing fraud, an act of bankruptcy (*q*). In such a case it would be necessary to prove some other circumstances besides the mere execution of the deed to satisfy the Court that it was intended to be a fraud upon creditors (*r*). Whether an exception is substantial enough depends on the circumstances of the case (*s*). If the property excepted out of the assignment is property which cannot be taken in execution by a creditor, it does not constitute a substantial exception (*t*). Nor is there a substantial exception when a trader assigns everything except his household furniture and book debts of small value (*u*). So also a deed is invalid although a substantial part of the property be not comprised in it, if the necessary consequence of it be to cause insolvency or to defeat and delay creditors (*w*). The rule applies with peculiar force, if the fact of his embarrassed circumstances be known or must be necessarily taken to be known to the assignee (*x*). In determining whether a bill of sale comprises the whole of the debtor's property, the value of his book debts is to be taken into consideration (*y*).

Assignment for an advance of money is not fraudulent.

The assignment by a trader of his property and effects for a present advance of money is not necessarily a fraud upon the bankrupt laws, though the whole of his stock, present and future, is included in the conveyance. A present substantial advance puts the transaction upon the same footing as an assignment with a substantial exception of part of the property. The advance may be the means of enabling him

(*q*) *Lomax* v. *Buxton*, L. R. 6, C. P. 112, *per* Willes, J.; 40 L. J. C. P. 150.

(*r*) *Ibid.*

(*s*) *Ex p. King*, *supra*, *per* Mellish, L.J.; *Ex p. Hughes*, 1893, 1 Q. B. 595; 62 L. J. Q. B. 358.

(*t*) *Ex p. Hawker*, 7 Ch. 214; 41 L. J. B. 34.

(*u*) *Ex p. Bland*, 6 D. M. & G. 761; 106 R. R. 257.

(*w*) *Young* v. *Waud*, 8 Exch. 221; 22 L. J. Ex. 27; *Ex p. Wensley*, 1 D. J. & S. 281; 32 L. J. B. 23; 137 R. R. 219; *Re Wood*, 7 Ch. 305.

(*x*) *Young* v. *Fletcher*, 3 H. & C. 732; 34 L. J. Ex. 154; 140 R. R. 705; *Re Slobodinsky*, 1903, 2 K. B. 517; 72 L. J. K. B. 883.

(*y*) *Ex p. Burton*, 13 C. D. 102.

to go on with his trade, and so the transaction may be beneficial to creditors. If the conveyance be made *bonâ fide* for the purpose of enabling him to carry on his business, it cannot be called a fraudulent act as tending to defeat or delay creditors, although the property or effects have been sold or pledged for a sum less than their value. A *bonâ fide* sale of goods in a season of pressure by a trader for whatever ready money can be obtained is valid, though the price be small. The proportion which the sum raised bears to the value of the property sold or pledged is a circumstance to be considered in determining whether the transaction is *bonâ fide* or not, but it is not conclusive that it is fraudulent (*z*). It is for the Court to say whether, under all the circumstances of the case, the effect of the assignment is to defeat or delay creditors (*a*). If, however, there was in the minds of the parties the sinister object of defeating or delaying creditors, the advance of even a substantial part of the value of the property at the time of the assignment will not make the transaction valid. But the Court will not hold a deed conveying property in consideration of a present advance which bears a substantial proportion to the value of the property to be invalid unless it is satisfied that there exists an intention to defeat and delay and consequently to defraud creditors; and that object must be the object not only of the bankrupt but also of the party who is dealing with him. A person dealing *bonâ fide* with the bankrupt would be safe. Unless he knows, or from the very nature of the transaction must be taken necessarily to have known, that the object was to defeat or delay creditors, the deed cannot be impeached (*b*). A conveyance by a trader of all his property was held fraudulent upon creditors within the meaning of the bankrupt laws, even though made in consideration of marriage, it being shown that the wife

(*z*) *Bittlestone* v. *Cooke*, 6 E. & B. 307; *Bell* v. *Simpson*, 2 H. & N. 410; 26 L. J. Ex. 363; 115 R. R. 613; *Pennell* v. *Reynolds*, 11 C. B. N. S. 709; 132 R. R. 725; see *Ex p. Wensley*, *supra*.

(*a*) *Pennell* v. *Reynolds*, *supra*; *Ex p. Cohen*, 7 Ch. 22; 40 L. J. B. 16; *Ex p. Cooper*, 10 C. D. 325; 48 L. J. B. 54.

(*b*) *Fraser* v. *Levy*, 6 H. & N. 16; 123 R. R. 352; *Re Slobodinsky*, 1903, 2 K. B. 517; 72 L. J. K. B. 883; see *Re Colemere*, 1 Ch. 128; 35 L. J. B. 8

was cognizant of the embarrassed state of the husband's affairs (*c*).

An assignment of all a trader's effects to secure a present advance or present and future advances *bonâ fide* agreed to be made for the purpose of enabling him to carry on his business, is not an act of bankruptcy (*d*). So, also, an assignment by a trader of all his effects to secure an advance to enable him to satisfy a pressing demand and thus to continue his business, is not of itself an act of bankruptcy (*e*); and, if the advance be to pay off a subsisting charge on the property, the transaction will be protected, although the security is not transferred, but a new mortgage is executed, even although the person advancing the money had notice of an act of bankruptcy committed by the debtor (*f*).

A security comprising all the debtor's property for an existing debt arising from a loan previously made will not be an act of bankruptcy if it is made in performance of an agreement, whether written or parol (*g*), *bonâ fide* entered into at the time of the loan (*h*). But an agreement of this sort will not protect the transaction, if it is not absolute but conditional to give a security on the request of the creditor, and such request is purposely postponed until the debtor is in a state of insolvency in order to prevent the destruction of his credit which would result from registering the deed (*i*). Such a transaction will be regarded as evidence of a design to commit a fraud on the general creditors (*k*); and the *onus* is on the creditor to prove that he did not postpone taking the security in order to enable the debtor to obtain credit from other

(*c*) *Colombine* v. *Penhall*, 1 Sm. & G. 228; 96 R. R. 391; *Bulmer* v. *Hunter*, 8 Eq. 49; 38 L. J. Ch. 534; *Re Pennington*, 5 Morrell, 268.

(*d*) *Hutton* v. *Cruttwell*, 1 E. & B. 15; 22 L. J. Q. B. 78; 93 R. R. 4; *Harris* v. *Rickett*, 4 H. & N. 1; 28 L. J. Ex. 197; 118 R. R. 294; *Ex p. Dann*, 17 C. D. 26; 51 L. J. Ch. 290.

(*e*) *Hutton* v. *Cruttwell*, *supra*; *Harris* v. *Rickett*, *supra*; *Re Colemere*, *supra*; *Lomax* v. *Buxton*, L. R. 6 C. P. 112; 40 L. J. C. P. 150.

(*f*) *Ex p. Harris*, 19 Eq. 253; 44 L. J. B. 31.

(*g*) *Harris* v. *Rickett*, *supra*; *Ex p. Foxley*, 3 Ch. 515.

(*h*) *Jones* v. *Harber*, L. R. 6 Q. B. 77; 40 L. J. Q. B. 59; *Ex p. Izard*, 9 Ch. 271; 43 L. J. B. 31.

(*i*) *Ex p. Fisher*, 7 Ch. 636; 41 L. J. B. 62; *Ex p. Burton*, 13 C. D. 102.

(*k*) *Ex p. Fisher*, *supra*.

people (*l*). Nor can a man under a secret unregistered agreement borrow money with which to carry on business, enjoy credit, contract debts, and acquire property subject to an undertaking that at any moment he may be called on to pay the money or else to give up not merely the property he had at the time of the bill of sale, but all the property he might have acquired (*m*).

Assignment by debtor partly in consideration of a past debt and a fresh advance of money.

An assignment by a debtor of all his property and effects partly as a security for a past debt and partly as a security for a substantial fresh advance, is not necessarily an act of bankruptcy. If the assignment is made not merely for an antecedent debt but also for a present further advance, of which the debtor really has the advantage and which he can apply to the purchase of stock or otherwise for his use, the transaction is considered on the same footing as if there was a substantial exception out of the debtor's property, and is therefore not necessarily *per se* an act of bankruptcy (*n*). It is not necessary to the validity of the transaction that a security should be given at the time of the advance. The rule applies where a sum of money is advanced upon the faith of a contract that a bill of sale shall be given. If a bill of sale is subsequently given in performance of an agreement entered into at the time of the further advance, it stands upon the same footing, and will have the same effect with respect to creditors as if it had been given at the time of the further advance (*o*).

But if the giving of the bill of sale is purposely postponed till the circumstances of the debtor become hopeless and he is on the verge of bankruptcy, the antecedent agreement will not support it (*p*). Nor will the agreement to give a bill of sale be upheld, if it appear to have been concocted between

(*l*) *Re Jackson and Bassford*, 1906, 2 Ch. 467; 75 L. J. Ch. 697.

(*m*) *Ex p. Hauxwell*, 23 C. D. 626; 52 L. J. Ch. 737.

(*n*) *Lomax* v. *Buxton*, L. R. 6 C. P. 112; 40 L. J. C. P. 150; *Allen* v. *Bonnett*, 5 Ch. 577; *Ex p. Fisher*, 7 Ch. 642; 41 L. J. B 62; *Ex p. Games*, 12 C. D. 321.

(*o*) *Hutton* v. *Cruttwell*, *supra*; *Ex p. King*, 2 C. D. 263; 45 L. J. B. 109; *Ex p. Fisher*, *supra*.

(*p*) *Ex p. Fisher*, *ibid.*; *Ex p. Burton*, 13 C. D. 102; *Ex p. Kilner*, *ibid.* 249; *Re Jackson and Bassford*, 1906, 2 Ch. 467; 75 L. J. Ch. 697.

the creditor and the debtor for the purpose of evading the remedy which the Act as to bills of sale intended to provide for the benefit of creditors (*q*).

In order that the execution of a bill of sale of substantially the whole of a debtor's property and effects as a security for a pre-existing debt, and further advances may not be an act of bankruptcy, it is necessary that there should be an agreement binding the grantee to make further advances. It is not sufficient that further advances should have been in contemplation of the parties, the deed being so stamped as to cover them and further advances having been actually made after the execution of the deed (*r*). But it is enough if there is a contemporaneous parol agreement on the part of the creditor to make further advances to a sufficient amount, and such advances are afterwards in fact made, even though the deed contains no covenant or obligation on the part of the creditor to make further advances (*s*). Where there was a parol agreement on the part of the creditor to make fresh advances, but no covenant or written agreement binding him to do so, the transaction was upheld (*t*).

Where a bill of sale comprising the whole of the grantor's property is given on the eve of bankruptcy to secure a pre-existing debt, and it is attempted to support it by an agreement alleged to have been made at the time the money was advanced, it is for the Court to judge from all the surrounding circumstances whether the agreement was a *bonâ fide* one, or whether the bill of sale was purposely postponed in order to protect the grantor's credit. The *onus probandi* is upon the person who sets up the prior agreement to prove not only that the agreement did exist, but that it was in all respects a *bonâ fide* agreement (*u*).

(*q*) *Ex p. Cohen*, 7 Ch. 20; 40 L. J. B. 16; *Ex p. Hauxwell*, 23 C. D. 626; 52 L. J. Ch. 737.

(*r*) *Ex p. Dann*, 17 C. D. 26; 51 L. J. Ch. 290.

(*s*) *Re Winstanley*, 1 C. D. 290, 560; 45 L. J. B. 89.

(*t*) *Ex p. Wilkinson*, 22 C. D. 788; 52 L. J. Ch. 657; *Jamaica* v. *Lascelles*, 1894, A. C. 135; 63 L. J. P. C. 70.

(*u*) *Ex p. Kilner*, 13 C. D. 246; *Ex p. Hauxwell, supra; Re Jackson and Bassford, supra.*

It is not essential for the validity of transactions of this sort by way of security that the advance should be of equal value with the existing debt or the property charged, if it be *bonâ fide* to enable the debtor to carry on his business (*x*). Neither is it essential that the equivalent should be a sum of money paid down. If the debtor has something done for him that will enable him to carry on his business, that will be a sufficient equivalent, as where the drawer of bills of exchange took them up at maturity at the request of the acceptor (*y*). So, also, where the agreement was to supply goods on credit and they were supplied (*z*).

To constitute a substantial advance, it is not necessary that there should be money actually paid down. It is enough if a trader carrying on his business has something done for him which will enable him to continue carrying it on (*a*). The payment accordingly of bills by the drawee at the request of the acceptor is a substantial advance, and prevents the assignment by a man of all his property and effects from being an act of bankruptcy (*b*). An honest giving of time to a trader may be as fair and valuable an equivalent as an advancement of money (*c*). But the forbearance of the grantee of a bill of sale to enforce a judgment is not a sufficient consideration for an assignment of the whole of the debtor's property to secure a past debt (*d*).

Whether or not a further advance is a substantial one or only intended to give colour to a security which is in reality made only for the purpose of securing a pre-existing debt, is a question to be determined on the circumstances of each particular case (*e*). It is not a question whether the further advance is great or small, but whether there was a *bonâ fide*

(*x*) *Ex p. Fisher*, 7 Ch. 642; 41 L. J. B. 62; *Ex p. Izard*, 9 Ch. 271; 43 L. J. B. 31.
(*y*) *Ex p. Reed*, 14 Eq. 593.
(*z*) *Ex p. Sheen*, 1 C. D. 560.
(*a*) *Ex p. Reed*, 14 Eq. 593.
(*b*) *Ibid.*
(*c*) *Philps* v. *Hornstedt*, 1 Ex. D. 62; 42 L. J. Ex. 12.
(*d*) *Ex p. Cooper*, 10 C. D. 325; 48 L. J. B. 54; *Ex p. Payne*, 11 C. D. 539.
(*e*) *Ex p. King*, 2 C. D. 262; 45 L. J. B. 109.

intention of carrying on the business (*f*). Though, however, the smallness of the fresh advance does not necessarily make the conveyance an act of bankruptcy, it affords evidence that the principal object of the parties in the whole transaction was not to enable the debtor to continue his business or meet his engagements, but to secure the past debt (*g*). Though there may be an advance in point of form, yet if from the mode in which the advance is made, it comes into the hands of the debtor under such circumstances that he does not get the real enjoyment of the money so advanced, the advance will not prevent the transaction from being an act of bankruptcy (*h*).

The lapse of twelve months from the date of a deed by a trader assigning all his estate and effects before any *fiat* issues will prevent the deed from being invalidated as an act of bankruptcy (*i*). "If," said Lord Justice Giffard in *Allen* v. *Bonnett* (*k*), "the deed be without consideration or the consideration has been in substance fictitious, or if the deed was not intended to operate according to its tenor and effect, or was a fraudulent preference, or was void as being obnoxious to the provisions of the 13 Eliz. c. 5, the lapse of more than twelve months from its execution would be of no importance, but where these circumstances do not arise, the lapse of twelve months before any *fiat* issues validates that which would be otherwise impeachable" (*l*).

Fraudulent transfer.

Bankruptcy Act, 1914, s. 1, sub-sec. 1.

It is enacted by the Bankruptcy Act, 1914, s. 1, sub-s. 1, that it shall be an act of bankruptcy (a) if a debtor makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally, (b) if he makes a fraudulent conveyance, gift, delivery or transfer of his property, or of any part thereof. In the first case (a) there must be a conveyance or assignment; other modes of

(*f*) 2 C. D. 798, *per* Mellish, L. J.; *Ex p. Johnson*, 26 C. D. 338; *Jamaica* v. *Lascelles*, 1894, A. C. 135; 63 L. J. P. C. 70.

(*g*) *Ex p. Fisher*, *supra*; *Philps* v. *Hornstedt*, *supra*; *Ex p. King*, *supra*.

(*h*) *Grohom* v. *Chapman*, 12 C. B. 85; 21 L. J. C. P. 173; see *Lomax* v. *Buxton*, L. R. 6 C. P. 112, *per* Willes, J.; 40 L. J. C. P. 150.

(*i*) *Allen* v. *Bonnett*, 5 Ch. 577; *Lomax* v. *Buxton*, *supra*.

(*k*) 5 Ch. 581.

(*l*) *Ex p. Games*, 12 C. D. 321.

disposition, such as a declaration of trust, will not suffice (*m*). In the second case (b) there must be a conveyance, gift, delivery or transfer with a fraudulent intent (*n*), and a conveyance will be deemed fraudulent in the latter case as necessarily defeating and delaying creditors if (1) it is of substantially the whole of the debtor's property, (2) in consideration of a past debt, and (3) there is no fair present equivalent (*o*). A bill of sale accordingly of his whole property to secure a past debt was held to be an act of bankruptcy (*p*). But where a creditor has in his possession goods belonging to his debtor and subject to a lien for the debt, and the debtor requests him to sell the goods for their joint benefit and to pay himself out of the proceeds the amount due and to hand over to him the balance, the transaction is not a fraudulent transfer, even though it should afterwards turn out that the goods in question were the whole property of the debtor (*q*).

A sale is not a fraudulent transfer because there is an intention in the mind of the vendor to use the purchase-money for the purpose of making a voluntary preference, though the purchaser may know the motive of the sale and the intention of the vendor with respect to the proceeds (*r*). But where a sheriff has seized goods under an execution and before sale the debtor agrees with the execution creditor to sell him the goods seized for the amount of his debt and the sheriff's charges, there is a fraudulent transfer, if the debtor was in a state of insolvency (*s*).

Fraudulent preference.

It is enacted by sect. 44 of the Bankruptcy Act, 1914, that "every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own

(*m*) *Ex p. Foley*, 24 Q. B. D. 728; 59 L. J. Q. B. 106.
(*n*) *Ibid.*
(*o*) *Re Hirth*, 1899, 1 Q. B. 612; 68 L. J. Q. B. 287; *Re Jukes*, 1902, 2 K. B. 58; 71 L. J. K. B. 710.
(*p*) *Re Wood*, 7 Ch. 302.
(*q*) *Philps* v. *Hornstedt*, L. R. 8 Ex. 30; 1 Ex. D. 62; 42 L. J. Ex. 12.
(*r*) *Ex p. Stubbins*, 17 C. D. 68; 50 L. J. Ch. 547.
(*s*) *Ex p. Pearson*, 8 Ch. 667; 42 L. J. B. 44.

money (*t*), in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors (*u*), shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy"; but that "this section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt" (*x*). To constitute a fraudulent preference within the meaning of the clause, the payment or assignment must be the spontaneous act of the debtor, and it must appear either by necessary inference from the circumstances of by direct evidence that the payment or assignment was made with the view of preferring the creditor. The question is whether the payment or assignment was made with the substantial, effectual or dominant view of giving the creditor who is paid a preference; and if the view to prefer be the substantial view, the fact that the debtor was in some degree influenced by a request for payment is immaterial (*y*). But if the act done can be properly referred to some other motive or reason than that of giving the creditor paid a preference over the other creditors, the payment will not be held to be fraudulent and void, though made without pressure (*z*). It is not enough to show that the debtor has paid one creditor with a view to benefit another, still less that he has done it with the intention of benefiting himself (*a*), or of benefiting someone who was not a creditor, as where the payment was made to a creditor by the maker of a promissory note in order to prevent a surety from being

(*t*) See *Ex p. Blackburn*, 12 Eq. 363; 40 L. J. B. 79; *Butcher* v. *Stead*, L. R. 7 H. L. 846, *per* Lord Cairns; 44 L. J. B. 129.

(*u*) See *Ex p. Bolland*, 7 Ch. 27, *per* Mellish, L. J.; *Ex p. Topham*, 8 Ch. 619, *per* Mellish, L. J.; 42 L. J. B. 57.

(*x*) See *Re Cherry*, 19 W. R. 1005. In determining whether a transaction amounts to fraudulent preference, the Court will have regard to the language of the section. *Ex p. Griffith*, 23 C. D. 69; 52 L. J. Ch. 717.

(*y*) *Ex p. Griffith, supra*; *Ex p. Hill*, 23 C. D. 695; 52 L. J. Ch. 903.

(*z*) *Ex p. Taylor*, 18 Q. B. D. 295; 56 L. J. Q. B. 195.

(*a*) See *Sharp* v. *Jackson*, 1899, A. C. 419; 68 L. J. Q. B. 866.

compelled to pay it in his default (*b*). The Court is bound to look at the motive and not at the result (*c*), and evidence of other acts of preference is admissible to prove the debtor's intent (*d*). If there is no ground for imputing such a motive, as if the payment be made on the application of the creditor, or under circumstances tending to interfere with the free will of a debtor, as if there was a *bonâ fide* application or pressure on the part of the creditor or some person having a right to apply, and the act in any degree proceeded from such application or pressure, there is no fraudulent preference. Where, accordingly, a payment has been made under pressure (*e*), or goods have been returned either in the hope on the part of the debtor that he would obtain further credit or only from the pressure (*f*), there is no fraudulent preference. "If," said Lord Cairns, in *Tomkins* v. *Saffery* (*g*), "the payment or assignment has been made under pressure, the pressure must be taken to be the *causa causans* of the payment or assignment, and not any intention of giving preference to a particular creditor." Where, however, it is alleged that property has been transferred under a sense of obligation, the obligation in order to negative preference must be one that appears to the debtor to be legally binding on him; it is not sufficient to show that the debtor acted under a sense of duty and of what he thought was right (*h*).

If a debtor makes a payment believing in good faith and on reasonable grounds that he is legally bound to make it, though he is not in fact so bound, it is not a fraudulent preference (*i*).

But pressure is not necessary to prevent a payment or assignment from being a fraudulent preference. It is sufficient that the payment or assignment be not the spontaneous act of the debtor. If the creditor demands payment,

(*b*) *Re Warren*, 1900, 2 Q. B. 138; 69 L. J. Q. B. 425.
(*c*) *Re The Stenotyper*, 1901, 1 Ch. 250; 70 L. J. Ch. 74.
(*d*) *Re Ramsay*, 1913, 2 K. B. 80; L. J. K. B. 526.
(*e*) *Ex p. Kevan*, 9 Ch. 758; see *Ex p. Halliday*, 8 Ch. 287.
(*f*) *Ex p. Topham*, 8 Ch. 620; 42 L. J. B. 57; *Smith* v. *Pilgrim*, 2 C. D. 127.
(*g*) 3 App. Ca. 225.
(*h*) *Re Blackburn & Co.*, 1899, 2 Ch. 725; 68 L. J. Ch. 764; cf. *Re Lake*, *infra*.
(*i*) *Re Vautin, Ex p. Saffery* (No. 2), 1900, 2 Q. B. 325; 69 L. J. Q. B. 703.

pressure is not necessary on his part to take it out of the class of voluntary acts. A mere *bonâ fide* demand by a creditor for payment or for a security without any pressure, is sufficient to support a payment or the giving of a security made in consequence (*j*). It is enough that there be such a demand as partly to influence the debtor in making the payment or giving the security so that he did not make or give it voluntarily. There is in such a case no fraudulent preference, though there may have been a mixed motive, and the creditor may have been a friend whom the debtor wished to prefer (*k*). Nor is it a fraudulent preference if there be a demand upon a debtor and a yielding to that demand by making a payment which might not otherwise have been made so soon (*l*).

Other circumstances besides a demand for payment on the part of the creditor may rebut the presumption of fraudulent preference on the part of the debtor. Although the transaction is apparently voluntary, if the effect of the evidence is to show that the desire to give a fraudulent preference was not the motive operating on the debtor in handing over his assets to the particular creditor, the transaction is valid (*m*). If the debtor, though he was aware that bankruptcy was unavoidable, and though no application was made for payment, has paid the debt simply in discharge of an obligation he had entered into to pay it on a given day, or in pursuance of a previous agreement, or if he makes payment to a creditor in the ordinary course of business without any view of giving a preference to the particular creditor at the expense of the general creditors, there is no fraudulent preference within the meaning of the bankrupt law (*n*). But where a bill of exchange is not presented at maturity but is held over at the debtor's request, its subsequent payment is not a payment in

(*j*) *Strachan* v. *Barton*, 11 Exch. 650; 25 L. J. Ex. 182; *Johnson* v. *Fesemeyer*, 3 D. & J. 24; 121 R. R. 7; *Ex p. Tempest*, 6 Ch. 74; 40 L. J. B. 22.

(*k*) *Ex p. Tempest*, *supra*; *Ex p. Bolland*, 7 Ch. 26; *Ex p. Topham*, *supra*; *Re Lake*, 1901, 1 Q. B. 710; 70 L. J. Q. B. 390.

(*l*) *Tomkins* v. *Saffery*, 3 App. Ca. 235, *per* Lord Blackburn; see *Strachan* v. *Barton*, *supra*.

(*m*) *Bills* v. *Smith*, 6 B. & S. 321; 34 L. J. Q. B. 68; 141 R. R. 421.

(*n*) *Ibid.*; *Ex p. Blackburn*, 12 Eq. 358; 40 L. J. B. 79; *Ex p. Kevan*, 9 Ch. 758.

the ordinary course of business, and may be a fraudulent preference (*o*). "If," said Lord Blackburn, in *Tomkins* v. *Saffery* (*p*), "a man pays his debts and sends money to meet his bills on the days on which they become due, and does other things so as to keep himself alive and in good credit for the time, there would not be undue preference, because those payments were not made in favour of certain creditors as against others, but were made in the hope that if he were to keep himself alive something might turn up in his favour." So, also, if the security is given in pursuance of a former promise which has been acted on by the creditor, and which the debtor was ready to fulfil (*q*), or in reference to an actual undertaking which the debtor has given, and which he is peremptorily called on to fulfil (*r*), there is no fraudulent preference. Nor is there fraudulent preference if the case made out is merely the ordinary transactions between a banker and his customer, when the banker advances money to his customer for the purpose of carrying on his business (*s*).

Though the case may not be within the Act if the payment is made with a view to prefer the particular creditor and with some additional motive, the additional motive must not be so trifling that it ought not to be taken into account (*t*). A mere request for payment, though often repeated and refused but ultimately complied with, will not alone prevent a preference on the eve of bankruptcy from being fraudulent (*u*).

The knowledge of the creditor preferred or his privity to the circumstances is not to be taken into consideration in estimating whether a transaction is or is not a fraudulent preference. If it appear that a demand was made by the creditor, it is immaterial that he may have been aware of the insolvency of the debtor. However desperate the circumstances of the debtor may be, and although the

(*o*) *Ex p. Viney*, 1897, 2 Q. B. 16; 66 L. J. Q. B. 491.
(*p*) 3 App. Ca. 235.
(*q*) *Ex p. Hodgkin*, 20 Eq. 755; 44 L. J. B. 107.
(*r*) *Bills* v. *Smith*, *supra*.
(*s*) *Ex p. Hodgkin*, *supra*.
(*t*) *Ex p. Griffith*, 23 C. D. 69, *per* Jessel, M. R.; 52 L. J. Ch. 717.
(*u*) *Ibid.*

creditor knew them to be desperate, the creditor is not debarred from pressing his debtor for payment or to give him a security, and if he did so press and payment was made or a security given, such payment or the giving of such security, though on the very eve of insolvency, is not a fraudulent preference (*x*). But to prevent the payment from being a fraudulent preference, there must be a real pressure (*y*). If what has taken place merely amounts to a request on the part of the creditor for preference, it is not enough (*z*).

A creditor who receives notice of his debtor's intention to commit an act of bankruptcy is not bound to inquire whether the act has been committed, but is entitled to avail himself of his remedies just as if he had received no such notice (*a*). If the Court is satisfied that everything has been done *bonâ fide*, the transaction cannot be impeached; the case, however, would be different if the matter had originated with the debtor, and was voluntary on his part (*b*).

The proviso in the section of the Act in favour of a purchaser, payee, or incumbrancer in good faith and for valuable consideration, extends to cases where the consideration is the payment of a pre-existing debt (*c*). A voluntary payment *bonâ fide* made to a creditor in the usual course of business a few days before the debtor stopped payment, but without notice by the creditor of the debtor's insolvency, has been held to be a payment within the proviso (*d*). So, also, a *bonâ fide* purchase by a creditor of part of his debtor's property in satisfaction of his debt was held to be protected by the proviso (*e*); and it has been laid down generally that a payment in the ordinary course of trade, the procuring of bills of exchange presented at maturity on the payment of

(*x*) *Ex p. Topham*, 8 Ch. 619; 42 L. J. B. 57; *Smith* v. *Pilgrim*, 2 C. D. 127.
(*y*) *Ex p. Hall*, 19 C. D. 580; 51 L. J. Ch. 556.
(*z*) *Ex p. Griffith*, 23 C. D. 69; 52 L. J. Ch. 717.
(*a*) *Re Wright*, 3 C. D. 70; 45 L. J. B. 30.
(*b*) *Ibid.*
(*c*) *Ex p. Norton*, 16 Eq. 408.
(*d*) *Ex p. Blackburn*, 12 Eq. 358; 40 L. J. B. 79; *Butcher* v. *Stead*, L. R. 7 H. L. Ca. 839; 44 L. J. B. 129; *Ex p. Kevan*, 9 Ch. 758.
(*e*) *Ex p. Tempest*, 6 Ch. 74; 40 L. J. B. 22.

debts which have become payable in the customary manner, or payments made in fulfilment of a contract of engagement to pay in a particular manner or at a particular time, are not open to any objection on the ground of their being voluntary, even although they were made without any express demand by the creditor, unless the creditor had at the time notice of an act of bankruptcy committed by the debtor (*f*).

But if the creditor who receives the payment was clearly aware that he who made the payment was unable to pay his debts from his own money as they became due, and that the money was given to him for the very purpose of preferring him to the general body of creditors, he is not a payee in good faith (*g*). So, also, if the transaction is fraudulent in its inception, and the creditor has been privy to the fraud, it is immaterial that the payment to the creditor has been made under pressure, for he is not a payee in good faith (*h*). So, also, a security given by an insolvent company for payment of a debt due to a director cognizant of the state of the company's affairs, was set aside though the director had pressed for the payment of his debt (*i*). So, also, was a bill of sale given under pressure in pursuance of a prior verbal promise made at the time of an advance, but with the understanding that the security should not be called for unless the debtor was in difficulties (*k*).

Sect. 44 is made applicable to companies by the Companies Act, 1908, sect. 210 re-enacting Companies Act, 1862, s. 164, but that section, although it uses the words "fraudulent preference," does not extend the operation of sect. 44 (*l*).

The provisions of sect. 44 only apply to transactions between a debtor and persons who are in the strict sense of the word

(*f*) *Ex p. Blackburn, supra.*

(*g*) *Tomkins* v. *Saffery*, 3 App. Ca. 235; *Ex p. Griffith*, 23 C. D. 69; 52 L. J. Ch. 717.

(*h*) *Ex p. Reader*, 20 Eq. 765; 44 L. J. B. 139. See *Ex p. Kevan*, 9 Ch. 758.

(*i*) *Gaslight Improvement Co.* v. *Terrell*, 10 Eq. 168; 39 L. J. Ch. 725. But see *Wilmot* v. *London Co.*, 34 C. D. 149.

(*k*) *Ex p. Bolland*, 8 C. D. 230; *Re Jackson and Bassford*, 1906, 2 Ch. 467; 75 L. J. Ch. 697.

(*l*) *Re The Stenotyper, Ltd.*, 1901, 1 Ch. 250; 70 L. J. Ch. 74; and see 1902, 2 K. B. 477.

his creditors (*m*). The word "creditor" in sect. 44 means any person who at the date when the charge or payment is made is entitled, if bankruptcy supervenes, to prove in the bankruptcy and share in the distribution of the bankrupt's estate. A charge therefore given to a surety before he has been called upon to pay as surety may be a fraudulent preference (*n*). The clause does not apply to trust property (*o*), or to property appropriated to a particular purpose (*p*), or to property restored to someone to whom it rightfully belongs, and from whom it was wrongfully taken, as, for instance, to make good a breach of trust (*q*).

In order to protect a transaction from being a fraudulent preference, it is not necessary that the debt should be actually due (*r*). But the person demanding payment on a security must be someone having a right to make the demand (*s*). A demand by a surety is sufficient (*t*).

The *onus* is on the trustee in bankruptcy not merely to show insolvency, but also to prove that the payment was made with a view to prefer the particular creditor (*u*).

If the time has passed within which the deed can be set aside as a fraudulent preference, it cannot be treated as void under the bankrupt law (*x*).

Assignment for benefit of creditors.

An assignment by a man of his property for the benefit of his creditors is valid at common law, and under the Statute 13 Eliz. c. 5, and will be supported, provided the deed be *bonâ fide* for the benefit of all the creditors, and there be an unconditional surrender by the debtor of all his property and

(*m*) *Ex p. Kelly & Co.*, 11 C. D. 306; 48 L. J. B. 65; *Re Warren*, 1900, 2 Q. B. 138; 69 L. J. Q. B. 425; *Dovey* v. *Morgan*, 1901, 2 K. B. 477; 70 L. J. K. B. 614.

(*n*) *Re Blackpool Motor Car Co.*, 1901, 1 Ch. 77; 70 L. J. Ch. 61.

(*o*) *Murray* v. *Pinkett*, 12 Cl. & Fin. 764.

(*p*) 1 D. & J. 152. See *Ex p. Kelly & Co.*, *supra*.

(*q*) *Ex p. Stubbins*, 17 C. D. 58; 50 L. J. Ch. 547; *Sharp* v. *Jackson*, 1899, A. C. 419; 68 L. J. Q. B. 866; *Re Lake*, 1901, 1 Q. B. 710; 70 L. J. Q. B. 390.

(*r*) *Strachan* v. *Barton*, 11 Exch. 647; 25 L. J. Ex. 182.

(*s*) *Ibid.*

(*t*) *Edwards* v. *Glyn*, 2 El. & El. 29; 28 L. J. Q. B. 350; 119 R. R. 608.

(*u*) *Ex p. Green*, 5 Manson, 48; 67 L. J. Q. B. 431.

(*x*) *Ex p. Games*, 12 C. D. 321.

effects (*y*). Assignments for the benefit of creditors are now regulated by the Deeds of Arrangement Act, 1914 (*z*).

A creditors' trust deed is valid, although it may have the effect of hindering and delaying a particular creditor of his execution, because it does not deprive any of the creditors of his fair share of the debtor's property, if he chooses to become a party to the deed (*a*). But if the deed is not such a deed as it was reasonable to expect a creditor to become a party to, it cannot be supported (*b*). So, also, a deed which the debtor has a power to revoke and attempts to use as a shield against his creditors is fraudulent and void against creditors who are affected by the deed, notwithstanding the deed upon the face of it purports to be for the benefit of all the creditors (*c*). So, also, is an instrument void as against creditors, if there is a secret bargain between the debtor and the trustees that part of the estate shall be kept back (*d*). So, also, a deed was held void as against creditors, which contained a proviso that a dividend should only be paid to a creditor on his assenting to or executing the deed, and that if within a certain time any creditor did not execute or assent, his dividend should be paid by the trustees to the debtor, and which also provided that the executing and assenting creditors should indemnify the trustees against any personal risk or loss they might sustain by reason of their proceedings under the deed (*e*). But this case cannot be regarded as laying down any general principle apart from its particular facts (*f*).

Nor can a debtor vest his property in one of his creditors for the mere purpose of protecting himself against the claims of his other creditors. A deed executed for such a purpose cannot be otherwise than fraudulent and void against the

(*y*) *Smith* v. *Hurst*, 10 Ha. 30; 22 L. J. Ch. 289; 90 R. R. 263; *Riches* v. *Evans*, 9 Car. & P. 641; *Godfrey* v. *Poole*, 13 App. Ca. 497; 57 L. J. P. C. 78; but see *Maskelyne* v. *Smith*, 1903, 1 K. B. 671; 72 L. J. K. B. 237.

(*z*) 4 & 5 Geo. 5, c. 47.

(*a*) *Pickstock* v. *Lyster*, 3 M. & S. 371; 16 R. R. 300.

(*b*) *Owen* v. *Body*, 5 A. & E. 28.

(*c*) *Smith* v. *Hurst*, *supra*.

(*d*) *Blacklock* v. *Dobie*, 1 C. P. D. 265; 45 L. J. C. P. 498.

(*e*) *Spencer* v. *Slater*, 4 Q. B. D. 13; 48 L. J. Q. B. 204.

(*f*) *Maskelyne* v. *Smith*, 1902, 2 K. B. 158; 71 L. J. K. B. 476.

creditors, whose interests are affected by it. Such a deed, although upon the face of it for the benefit of the creditors, is in truth a deed for the benefit of the debtor, and the creditor who accepts it takes, not for his own benefit, but for the purpose of carrying out the views and objects of the debtor in fraud of his other creditors. He becomes a party to the fraud of the debtor, and being a party to the fraud, he cannot be in any better position than the debtor who perpetrated it (*g*).

An assignment by a trader of all his effects to a trustee for the general benefit of all his creditors is valid, though it contains a clause empowering the trustee to employ the grantor or any other person or persons in winding up the affairs of the grantor, and in collecting and getting in his estate and effects thereby assigned, and in carrying on his trade, if thought expedient by him, if it appear from the whole scope of the deed that the carrying on the trade was merely subsidiary to the general purpose of sale and distribution (*h*).

Where a debtor in insolvent circumstances executed a deed by which he conveyed all his estate to trustees in trust to sell in such a manner as they might think proper, and to divide the residue of the proceeds, after paying expenses rateably, among the creditors, parties to the deed, and if the trustees thought fit, creditors who refused or neglected to execute, and if the trustees thought proper but not otherwise, to pay the dividends or debts due to non-assenting creditors to the debtor; and the deed also provided for the payment of maintenance to the debtor, if the trustees thought fit, and the executing creditors respectively indemnified the debtor and the trustees in respect of the bills of exchange and promissory notes made or indorsed to them respectively by the debtor, in respect of the scheduled debts, the deed was held good under the statute (*i*).

(*g*) *Smith* v. *Hurst*, *supra*.

(*h*) *Janes* v. *Whitbread*, 11 C. B. 406; 20 L. J. C. P. 217.

(*i*) *Boldero* v. *London & Westminster Discount Co.*, 5 Ex. D. 50; *Maskelyne* v. *Smith*, 1902, 2 K. B. 158; 71 L. J. K. B. 476

The distinction between deeds vesting property in trustees upon trust for the benefit of particular persons, which deeds cannot be revoked, altered, or modified by the party who has created the trust, and deeds purporting to be executed for the benefit of creditors, when the question whether the trusts can be revoked, altered, or modified, depends on the circumstances of each particular case, has been laid down as follows, viz.: In cases of deeds vesting property in trustees upon trust for the benefit of particular persons, the deed cannot be revoked, altered, or modified by the party who has created the trust; but in cases of deeds purporting to be executed for the benefit of creditors, the question whether the trusts can be revoked, altered, or modified depends on the circumstances of each particular case. It is difficult at first sight to see the distinction between the two classes of cases, for in each of the classes a trust is created, and the property is vested in the trustees. The distinction lies in this: In cases of trust for the benefit of particular persons, the party making the trust can have no other object than to benefit the persons in whose favour the trust is created, and the trust being well created, the property belongs in equity to the *cestui que trust* as much as it would belong to them at law, if the legal interest had been transferred to them; but in cases of deeds purporting to be executed for the benefit of creditors, and to which no creditor is a party, the motive of the party executing the deed may have been either to benefit his creditors or to promote his own convenience, and the Court has to examine the circumstances for the purpose of ascertaining what was the true purpose of the deed, and this examination does not stop with the deed, but must be carried on to what has subsequently occurred, because the party who has created the trust may, by his own conduct or by the obligations which he has permitted his trustees to contract, have created an equity against himself. Each case of the latter description is governed by its own circumstances (*k*).

(*k*) *Smith* v. *Hurst*, *supra*; *Johns* v. *James*, 8 C. D. 744; 47 L. J. Ch. 853; *Smith* v. *Cooke*, 1891, A. C. 297; 60 L. J. Ch. 607; *New's Trustee* v. *Hunting*, 1897, 2 Q. B. 19; 66 L. J. Q. B. 554.

Fraud in drawing and accepting bills in contemplation of bankruptcy.

Another case of fraud upon creditors is where at the time bills of exchange were drawn and accepted, the drawer and acceptor were both intending to become bankrupts, and the drawer sold the bills at a great undervalue to a third party. The Court being satisfied that the holder of the bills knew that the bills were issued in contemplation of bankruptcy, and that there was something wrong about the bills, held that he could not prove in the bankruptcy for more than he had paid for the bills (*l*).

Fraudulent composition deeds.

Another case of fraud upon creditors is where upon a composition by a debtor with his creditors, particular creditors, by means of secret bargains, secure to themselves undue advantages over the rest of the creditors. The principle of all composition deeds being that the debtor shall make a true representation of his assets, and that the creditors shall stand upon an equal footing, any secret arrangement between the debtor and a particular creditor whereby he is placed in a more favoured position than the rest of the creditors, is a fraud upon the others, which will entitle them to set aside the composition and resort to their original debts (*m*), and the debtor may recover back any sum so paid (*n*). The principle applies though the bargain was made after the creditor had executed the deed, and though the additional payment was made at the expense of a third person, if with the debtor's knowledge. It also applies to composition arrangements made under the provisions of any statute (*o*). The validity of the composition, however, will not be affected by a compulsory payment to a creditor under legal proceedings known to be pending at the time of the arrangement for composition (*p*).

A creditor who has bargained for a secret advantage of this sort will be bound by a release contained in the deed, although it be void as against the other creditors (*q*). Indeed, it would

(*l*) *Jones* v. *Gordon*, 2 App. Ca. 632; 47 L. J. B. 1; *Re Aylmer*, 70 L. T. 244.

(*m*) *Dauglish* v. *Tennant*, L. R. 2 Q. B. 49; 36 L. J. Q. B. 10; *Ex p. Milner*, *infra.*; *McDermott* v. *Boyd*, 1894, 3 Ch. 365; 64 L. J. Ch. 13.

(*n*) *Re Lenzberg's Policy*, 7 C. D. 650; 47 L. J. Ch. 178.

(*o*) *Ex p. Milner*, 15 Q. B. D. 605; 54 L. J. Q. B. 425.

(*p*) *Carey* v. *Barrett*, 4 C. P. D. 379.

(*q*) *Ex p. Oliver*, 4 De G. & Sm. 354; *Ex p. Phillips*, 36 W. R. 567.

seem that a creditor who has practised a fraud of this sort on the other creditors will not, if the composition is not paid and the debtor becomes bankrupt, be allowed to prove under the bankruptcy for either his original debt or the composition (*r*).

Bankruptcy Act, 1914, s. 35.

The Bankruptcy Act, 1914, s. 35, preserves to a landlord, in the event of the tenant's bankruptcy, the right of distress for six months' rent of the demised premises (*s*). The clause applies to attornment clauses in a mortgage deed when there is nothing unreasonable in the deed itself, or in the rent reserved (*t*). But if from the terms of the particular deed, or from the amount of the rent fixed by the attornment clause, it can be concluded by the Court that the rent is not a real rent, but a mere sham, that the tenancy is not a real tenancy, but a mere sham, and that the attornment clause is a mere device to give the mortgagee a hold in the event of bankruptcy over the goods and chattels of the mortgagor, which would otherwise have been distributed among his general creditors, the attornment clause is invalid (*u*).

Debt incurred by fraud.

An order of discharge will not release a bankrupt from any debt or liability incurred by means of fraud or fraudulent breach of trust to which he was a party, nor from any debt or liability whereof he obtained forbearance by any fraud of which he was a party (*x*).

Grant defeasible on bankruptcy.

If property be granted to a man defeasible on his bankruptcy the grant is good, if made by a person other than the bankrupt, and if the condition is express (*y*). But the law is clearly settled that no man possessed of property can reserve that property to himself, until he shall become bankrupt, and then provide that in the event of bankruptcy it shall pass to

(*r*) *Re Cross*, 4 De G. & Sm. 364.

(*s*) Bankruptcy Act, 1914, s. 35.

(*t*) *Re Stockton Iron Furnace Co.*, 10 C. D. 335; 48 L. J. Ch. 417; *Ex p. Voisey*, 21 C. D. 452; 52 L. J. Ch. 121. See *Ex p. Isherwood*, 22 C. D. 385; 52 L. J. Ch. 370.

(*u*) *Ex p. Jackson*, 14 C. D. 745.

(*x*) Bankruptcy Act, 1914, s. 28.

(*y*) *Seymour* v. *Lucas*, 29 L. J. Ch. 841; 127 R. R. 66; *Ex p. Eyre*, 44 L. T. 922.

another, and not to his creditors (*z*). A covenant or bond by a man to pay monies upon the contingency of his bankruptcy, even though given in consideration of marriage, is a fraud upon the bankrupt laws and cannot be upheld (*a*), except as far as the value of the wife's fortune may extend (*b*). If the Court can find a definite sum which can be appropriated as the wife's property, the covenant will to that extent be supported (*c*). The fortune of a wife may be settled on her husband till he shall become bankrupt or make a composition with his creditors, and then to her separate use (*d*), and a post-nuptial settlement by a husband of property coming to him in right of his wife, even though reversionary, is not made fraudulent by a clause making his life interest determinable on bankruptcy (*e*).

Fraudulent devises.

The same policy of affording protection to the rights of creditors pervades the provisions of the statute 11 Geo. IV. and 1 Will. IV. c. 47, respecting fraudulent devises in fraud of creditors, which, in effect, enacted that an heir or devisee alienating the lands made the testator's debts his own debts to the extent of the value of the land so alienated.

The creditors may by taking proceedings obtain payment out of the descended or devised real estates in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee, whether upon a common purchase or on a settlement, even with notice that there are debts unpaid, the land is not liable although the heir remains personally liable to the extent of the value of the land alienated (*f*). An equitable

(*z*) *Ex p. Jay*, 14 C. D. 19; *Mackintosh* v. *Pogose*, 1895, 1 Ch. 505; 64 L. J. Ch. 274; *Merry* v. *Pownall*, 1898, 1 Ch. 306; 67 L. J. Ch. 162.

(*a*) *Higinbotham* v. *Holme*, 19 Ves. 88; 12 R. R. 16; *Higginson* v. *Kelly*, 1 Ba. & Be. 255; 12 R. R. 28.

(*b*) *Higginson* v. *Kelly*, *supra*; *Lester* v. *Garland*, 5 Sim. 205; 1 L. J. Ch. 185; 35 R. R. 146; *Whitmore* v. *Mason*, 2 J. & H. 204; 31 L. J. Ch. 433; 134 R. R. 190.

(*c*) *Ibid.*

(*d*) *Lester* v. *Garland*, *supra*; *Sharp* v. *Gosserat*, 20 Beav. 470; 109 R. R. 502.

(*e*) *Re Holland*, 1902, 2 Ch. 360; 71 L. J. Ch. 518; overruling *Re Pearson*, 3 C. D. 808.

(*f*) *Small* v. *Hedgely*, 34 C. D. 379; 56 L. J. Ch. 360; *Worthington* v. *Abbott*, 101 L. T. 895.

tenant for life is a "devisee" within the meaning of the Act, and therefore a *bonâ fide* alienation by him before action brought will be protected (*g*).

It may be well to mention here another class of frauds on third parties which were formerly of some importance, though they are no longer so. Under the 27 Eliz. c. 4, a mere voluntary settlement or conveyance was deemed to be fraudulent against subsequent purchasers. This statute has now been displaced by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), which enacts that no voluntary conveyance of land if made *bonâ fide* and without any fraudulent intent shall be deemed fraudulent within 27 Eliz. c. 4 by reason of any subsequent purchase for value or be defeated under that Act by a conveyance made upon any such purchase. There is therefore no longer any presumption of fraud in such cases and the onus is now on the person alleging fraud to prove it (*h*). 27 Eliz. c. 4.

SECTION II.—CONSTRUCTIVE NOTICE.

Another class of frauds upon third parties consists of cases where a man takes or purchases property with notice of the legal or equitable title of other persons to the same property, and seeks to defeat their just rights by appropriating the property to his own use. In equity notice affects the conscience. A man who takes or purchases property cannot protect himself against claims of which he has notice, to the same property. If a man acquiring property has at the time of the acquisition notice of an equity binding the person from whom he takes, in respect of the property, he is bound to the same extent and in the same manner by the same equity (*i*). In accordance with this principle the purchaser of property from a trustee, with notice of the trust, is himself a trustee for the same property (*k*); the purchaser of property

(*g*) *Re Atkinson*, 1908, 2 Ch. 307; 77 L. J. Ch. 766.
(*h*) *Moore* v. *Kelly*, 1918, 1 Ir. R. 169.
(*i*) *Taylor* v. *Stibbert*, 2 Ves. Jr. 437; 2 R. R. 278.
(*k*) *Saunders* v. *Dehew*, 2 Vern. 271; *Allen* v. *Knight*, 5 Ha. 272; 11 Jur. 527; 16 L. J. Ch. 370; 71 R. R. 100; *Cory* v. *Eyre*, 1 D. J. & S. 149; 137 R. R. 184; *Mumford* v. *Stohwasser*, 18 Eq. 556; 43 L. J. Ch. 694; *Taylor* v. *London and County Bank*, 1901, 2 Ch. 231; 70 L. J. Ch. 477.

which the vendor has contracted to sell is, if he has notice of the contract, bound by the same equity by which the vendor whom he represents was bound (*l*); the purchaser of property with notice of an equitable lien for unpaid purchase-money (*m*), or of an equitable mortgage by deposit of deeds (*n*), is bound by the equity to which his vendor was liable; and the purchaser of land which the vendor has covenanted to use in a specified manner is, if he has notice of the covenant, bound by its terms (*o*); but of course the covenant must be binding in order to affect him, and he has the benefit of whatever would prevent the person entitled to the benefit of the covenant from insisting on it, *e.g.*, material alterations in the property or acquiescence in breaches of the covenant (*p*).

Actual notice.

Notice is either actual or constructive; but there is no difference between them in its consequences (*q*). Actual notice consists in express information of a fact, and brings home knowledge directly to a party (*r*). Actual notice must, in order to be binding, at least when it depends on oral communication only, proceed from someone interested in the property (*s*), and should be in the same transaction. Actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest evidence from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion (*t*). If there be knowledge the case of constructive

(*l*) *Taylor* v. *Stibbert, supra; Scott* v. *Dunbar*, 1 Moll. 442; *Manchester Ship Canal* v. *Manchester Racecourse Co.*, 1901, 2 Ch. 37; 70 L. J. Ch. 468.

(*m*) *Rice* v. *Rice*, 2 Drew. 73; 23 L. J. Ch. 289; 100 R. R. 43; see *Capell* v. *Winter*, 1907, 2 Ch. 376; 76 L. J. Ch. 496.

(*n*) *Dryden* v. *Frost*, 3 M. & C. 670; 45 R. R. 344; *Leigh* v. *Lloyd*, 2 D. J. & S. 330; 34 L. J. Ch. 646; 139 R. R. 118.

(*o*) *Tulk* v. *Moxhay*, 2 Ph. 774; 78 R. R. 289; *Hall* v. *Ewin*, 37 C. D. 74; 57 L. J. Ch. 95.

(*p*) *Sayers* v. *Collyer*, 28 C. D. 103; 54 L. J. Ch. 1; *Knight* v. *Simmonds*, 1896, 2 Ch. 294; 65 L. J. Ch. 583; and see *Mackenzie* v. *Childers*, 43 C. D. 265; 59 L. J. Ch. 188.

(*q*) *Prosser* v. *Rice*, 28 Beav. 68; 126 R. R. 27.

(*r*) 45 & 46 Vict. c. 39, s. 3.

(*s*) *Barnhart* v. *Greenshields*, 9 Moo. P. C. C. 18; 105 R. R. 1.

(*t*) See *Boursot* v. *Savage*, 2 Eq. 134; 35 L. J. Ch. 627.

notice cannot arise: it would be absorbed in the proof of knowledge (*u*). There is, however, no conclusive rule of law that, because a man has the means of knowledge, he has the knowledge itself. The mere means of knowledge is not the same thing as knowledge. The possession of the means of knowledge is only evidence that the party who has it may have knowledge (*x*).

Constructive notice.

Whatever is notice enough to excite the attention of a man of ordinary prudence and call for further inquiry is, in equity, notice of all facts to the knowledge of which an inquiry suggested by such notice, and prosecuted with due and reasonable diligence, would have led. Notice of this sort is called constructive notice, or, as Lord Chelmsford called it, imputed notice, that is, evidence of notice the presumption of which is so strong that the Court will not allow of its being controverted (*y*). Constructive notice, as distinguished from actual notice, is a legal inference from established facts, and like other legal presumptions, does not admit of dispute. If a man has actual notice of circumstances sufficient to put a man of ordinary prudence on inquiry as to a particular point, the knowledge which he might, by the exercise of reasonable diligence, have obtained will be imputed to him by the Court. The presumption of the existence of knowledge is so strong that it cannot be allowed to be rebutted (*z*), either from his having something which ought to have put him to further inquiry, or from his wilfully abstaining from inquiry to avoid notice (*a*). But a purchaser is not bound to be suspicious (*b*).

The Conveyancing Act, 1882, s. 3, provides that a purchaser or other person "shall not be prejudicially affected by notice

(*u*) *Wilde* v. *Gibson*, 1 H. L. C. 624, *per* Lord Cottenham; 73 R. R. 191.

(*x*) *Brownlie* v. *Campbell*, 5 App. Ca. 952, *per* Lord Blackburn; see *Redgrave* v. *Hurd*, 20 C. D. 1; 51 L. J. Ch. 113.

(*y*) 3 De G. & J. 547.

(*z*) *Hewitt* v. *Loosemore*, 9 Ha. 455; 21 L. J. Ch. 69; 89 R. R. 526; *per* Turner, L. J.; *Espin* v. *Pemberton*, 3 D. & J. 554, *per* Lord Chelmsford; 28 L. J. Ch. 311; 121 R. R. 224; *Jones* v. *Gordon*, 2 App. Ca. 632; 47 L. J. B. 1.

(*a*) *Hunt* v. *Luck*, 1901, 1 Ch. 45, *per* Farwell, J.; 71 L. J. Ch. 239; *Aldritt* v *Machonchy*, 1908, 1 Ir. R. 333.

(*b*) *Bailey* v. *Barnes*, 1894, 1 Ch. 25, 36; 63 L. J. Ch. 73.

of any instrument, fact or thing unless it is within his own knowledge or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him." About which Lindley, L. J., said it "really does no more than state the law as it was before, but its negative form shows that a restriction rather than an extension of the doctrine of notice was intended" (*c*). The section does not extend to a personal inspection of the property (*d*).

The doctrine of constructive notice applies with peculiar force where the Court is satisfied that a man has designedly abstained from inquiry for the very purpose of avoiding knowledge. Wilful ignorance is not to be distinguished, in its equitable consequences, from actual knowledge (*e*). If, however, a man abstain from inquiry where inquiry ought to have been made, it is immaterial that the neglect to make inquiry may not have proceeded from any wish to avoid knowledge. It may be that inquiry might not have brought out the truth; but a man who abstains from inquiry where inquiry ought to have been made, cannot be heard to say so and to rely on his ignorance (*f*), nor shelter himself behind the fraud of his agent (*g*). In the absence of inquiry, where inquiry ought to have been made, the Court is bound to assume that the person from whom inquiry should have been made would have done what it was his duty to do (*h*). A man cannot escape being fixed with constructive notice by not using the ordinary caution of employing a solicitor to protect his interest. If a man employs no solicitor he will be held to

(*c*) *Ibid.*, at p. 35.

(*d*) *Slack* v. *Hancock*, 107, L. T. 14.

(*e*) *Jones* v. *Smith*, 2 Ha. 55; 1 Ph. 244; 12 L. J. Ch. 381; 58 R. R. 22; *Jones* v. *Gordon*, *supra*; *Kettlewell* v. *Watson*, 21 C. D. 706; 26 C. D. 501; 53 L. J. Ch. 717; *Hunt* v. *Luck*, 1901, 1 Ch. 45; 1902, 1 Ch. 428; 71 L. J. Ch. 239.

(*f*) *Jones* v. *Smith*, *supra*; *West* v. *Reid*, 2 Ha. 249; 12 L. J. Ch. 245; 52 R. R. 98; *Maitland* v. *Backhouse*, 17 L. J. Ch. 121; *Jones* v. *Williams*, 24 Beav. 47; 116 R. R. 25; *Mayor of Berwick* v. *Murray*, 7 D. M. & G. 497; 26 L. J. Ch. 201; 109 R. R. 218; *General Steam Navigation Co.* v. *Rolt*, 6 C. B. N. S. 550; 120 R. R. 264.

(*g*) *Davis* v. *Hutchings*, 1907, 1 Ch. 356; 76 L. J. Ch. 272.

(*h*) *Knight* v. *Bowyer*, 2 D. & J. 450; 27 L. J. Ch. 521.

have exactly the same knowledge, and will be liable to the same extent, as if he had employed a solicitor (*i*).

If mere want of caution, as distinguished from gross and culpable negligence, is all that can be imputed to a man, the doctrine of constructive notice will not apply (*k*). The doctrine does not go to the extent of fixing a man with such knowledge as he might by the exercise of extreme and extraordinary caution have obtained. A man is in no case bound to use every exertion to obtain information. The want, indeed, of that caution which a wary and prudent man might, and probably would have adopted, is not such negligence as will affix a party with notice of what he might have ascertained (*l*). A purchaser is not bound to be suspicious (*m*). The means of knowledge by which a man will be affected with notice must be means of knowledge which are practically within reach, and of which a reasonable man or a man of ordinary prudence might have been expected to avail himself (*n*). In the words of the Conveyancing Act, 1882, he will not be prejudicially affected by notice of any instrument, fact, or thing unless it would have come to his knowledge, if such inquiries and inspections had been made as ought reasonably to have been made by him (*o*). Mere suspicion, or vague and indeterminate rumour is not sufficient to put a man upon inquiry (*p*). There must be a reasonable certainty as to time,

(*i*) *Kennedy* v. *Green*, 3 M. & K. 699; 41 R. R. 176; *Harrison* v. *Guest*, 6 D. M. & G. 428; 8 H. L. C. 481; 25 L. J. Ch. 544; 106 R. R. 129.

(*k*) *Jones* v. *Smith*, *supra*; *West* v. *Reid*, 2 Ha. 249, 259; *supra*; *Ware* v. *Egmont*, 4 D. M. & G. 460; 24 L. J. Ch. 361; 102 R. R. 215; *Wilson* v. *Hart*, 2 H. & M. 551; 144 R. R. 265

(*l*) *Jones* v. *Smith*, *supra*; *West* v. *Reid*, *supra*; *Ware* v. *Egmont*, *supra*; *Hunter* v. *Walters*, 7 Ch. 84; 41 L. J. Ch. 175; *Redgrave* v. *Hurd*, 20 C. D. 1; 51 L. J. Ch. 113.

(*m*) *Bailey* v. *Barnes*, 1894, 1 Ch. 25, 36; 63 L. J. Ch. 73.

(*n*) *Broadbent* v. *Barlow*, 3 D. F. & J. 570; 30 L. J. Ch. 569; 130 R. R. 256; *Att.-Gen.* v. *Biphosphated Guano Co.*, 11 C. D. 337; 49 L. J. Ch. 68; *Jones* v. *Rimmer*, 14 C. D. 589; 49 L. J. Ch. 775; *Henderson* v. *Comptoir d'Escompte de Paris*, L. R. 5 P. C. 262; 42 L. J. P. C. 60. It is the duty of a purchaser by marriage to make inquiries just as much as it is the duty of other purchasers for value. *Jackson* v. *Rowe*, 2 Sim. & St. 472; 4 L. J. Ch. 119; 25 R. R. 250.

(*o*) 45 & 46 Vict. c. 39, s. 3 (1).

(*p*) *New Sombrero Co.* v. *Erlanger*, 5 C. D. 117; 46 L. J. Ch. 425.

place, circumstances, or persons (*q*). The question is not whether a man had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross and culpable negligence (*r*). Negligence supposes a disregard of some act known to a man which at least indicates the existence of that fact, notice of which the Court imputes to him (*s*). There is often much difficulty in drawing the line between the degree of negligence, which shall be gross negligence, and that mere want of caution which, in the absence of fraud, does not amount to negligence in the legal sense of the term. No general law can be laid down which shall govern all cases. Each case must depend on its own circumstances (*t*); and in estimating the negligence regard must be had to the usual course of business (*u*).

A blank transfer does not, independently of the relationship of the registered owner to the transferee, put the latter upon inquiry as to the authority of the transferor (*w*).

Though there is considerable difficulty in stating exactly how far the doctrine of constructive notice goes, it seems clear that it will not be extended. In a series of cases Lords Cottenham, Lyndhurst, and Cranworth, Turner, L. J., Jessel, M. R., and Esher, M. R., have said that the doctrine ought not to be extended one bit further (*x*). "The doctrine is a dangerous one. It is contrary to the truth. It is wholly founded on the doctrine that a man does not know the

(*q*) Story, Eq. Jur. 400; *General Steam Navigation Co.* v. *Rolt*, 6 C. B. N. S. 550; 120 R. R. 264.

(*r*) *Ware* v. *Egmont*, *supra*; *Montefiore* v. *Browne*, 7 H. L. C. 241; 115 R. R. 132; *Bailey* v. *Barnes*, 1894, 1 Ch. 31; 63 L. J. Ch. 73.

(*s*) *West* v. *Reid*, 2 Ha. 249, 259; see *Greenslade* v. *Dare*, 20 Beav. 284; 109 R. R. 416.

(*t*) *Jones* v. *Smith*, 1 Ha. 55; 12 L. J. Ch. 381; 58 R. R. 22; *West* v. *Reid*, 2 Ha. 249; 12 L. J. Ch. 245; 62 R. R. 98; *Ware* v. *Egmont*, *supra*; *Colyer* v. *Finch*, 5 H. L. C. 905; 21 L. J. Ch. 65; 101 R. R. 442; *Perry-Herrick* v. *Attwood*, 2 D. & J. 21; 27 L. J. Ch. 121; 119 R. R. 10; *Dixon* v. *Muckleston*, 8 Ch. 160; 42 L. J. Ch. 210; *Davis* v. *Hutchings*, 1907, 1 Ch. 356; 76 L. J. Ch. 272; see as to negligence, *ante* p. 133.

(*u*) *Bailey* v. *Barnes*, 1894, 1 Ch. p. 35; 63 L. J. Ch. 73; *per* Lindley, L.J.; *Dovey* v. *Cory*, 1901, A. C. 477; 70 L. J. Ch. 753.

(*w*) *Fry* v. *Smellie*, 1912, 3 K. B. 282; 81 L. J. K. B. 1003.

(*x*) *English and Scottish, &c., Co.* v. *Brunton*, 1892, 2 Q. B. p. 708.

facts, and yet it is said that constructively he does know them " (*y*).

When a person, said Lord Cranworth in *Ware* v. *Lord Egmont* (*z*), has actual notice of any state of facts, there can be no danger of injustice if he is held to be bound by all the consequences of what he knows to exist. But when he has not actual notice he ought not to be treated as if he had, unless the circumstances of the case are such as to enable the Court to say not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence in conducting the business in question (*a*).

" The doctrine of constructive notice is based on good sense, and is designed to prevent frauds on owners of property; but the doctrine must not be carried to such an extent as to defeat honest purchasers, and, although this limitation has sometimes been lost sight of, it is as important and as well known as the doctrine itself. In *Ware* v. *Egmont*, Lord Cranworth stated the law on this subject, which has always been accepted as correct " (*b*).

If a man has actual notice that the property in question is in fact charged, encumbered, or in some way affected, or has actual notice of facts raising a presumption that it is so, he is bound in equity, with constructive notice of all facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstances affecting the property of which he had actual notice (*c*).

Where, accordingly, a man has notice, whether by recital, description of parties, or otherwise, of an instrument, which from its nature must form directly or presumptively a link in the title, or is told at the time that it does so, he will be

(*y*) *Allen* v. *Seckham*, 11 C. D. 790, *per* Lord Esher; 48 L. J. Ch. 611; but see *infra*.

(*z*) 4 D. M. & G. p. 473.

(*a*) See *Armstrong* v. *Lynn*, I. R. 9 Eq. 195.

(*b*) *Bailey* v. *Barnes*, 1894, 1 Ch. 25, *per* Lindley, L. J.; 63 L. J. Ch. 73.

(*c*) 1 Ha. 55, *per* Wigram, V.-C.; 7 H. L. C. 262, *per* Lord Chelmsford.

presumed to have examined it, and therefore to have notice of all instruments or facts to which an examination would have led him (*d*).

So a purchaser taking less than a forty years' title is fixed with constructive notice of everything of which he would have received actual notice if he had insisted on a full title (*e*).

Notice of a deed is notice of its contents.

A purchaser, accordingly, who has actual notice of a deed necessarily forming part of the chain of title, is bound by all its contents (*f*), and has notice of all equities springing out of the deed (*g*), and of all instruments to which an examination of the deed would have led him (*h*); even although such instruments are not actually recited, but there is only a recital that the property is subject to limitations which in fact correspond with the limitations thereby created (*i*). If the deed under which he takes title be a settlement, he takes with notice of all equities springing out of the settlement (*k*). Notice of a post-nuptial and apparently voluntary settlement is notice of the ante-nuptial agreement on which it is founded (*l*). So, also, notice of an equitable claim as affecting an unspecified portion of the property is notice of the claim as in fact affecting the entirety (*m*). If the deed under which he takes title shows that there are incumbrances affecting the property to which the deed relates, he takes with notice of all such incumbrances (*n*). So the purchaser of land from the allottees of a building society, who had not inquired for the conveyance to the trustees of the society, was

(*d*) *Jones* v. *Smith*, *supra*; *West* v. *Reid*, *supra*; *Patman* v. *Harland*, 17 C. D. 353; 50 L. J. Ch. 642; *Davis* v. *Hutchings*, 1907, 1 Ch. 356; 76 L. J. Ch. 272.

(*e*) *Re Nisbet and Potts*, 1905, 1 Ch. 391; 75 L. J. Ch. 238.

(*f*) *Neesom* v. *Clarkson*, 2 Ha. 173; 12 L. J. Ch. 99; 62 R. R. 51; *Patman* v. *Harland*, *supra*.

(*g*) *Hamilton* v. *Royse*, 2 Sch. & Lef. 326; but see Ll. & G. 264, *per* Lord St Leonards, Sug. V. & P. 14th ed. 777.

(*h*) *Bisco* v. *Earl of Banbury*, 1 Ch. Ca. 287, 291; *Davies* v. *Thomas*, 2 Y. & C. 234; 47 R. R. 399.

(*i*) *Neesom* v. *Clarkson*, *supra*.

(*k*) *Hamilton* v. *Royse*, 2 Sch. & Lef. 326.

(*l*) *Ferrars* v. *Cherry*, 2 Vern. 384.

(*m*) *Att.-Gen.* v. *Flint*, 4 Ha. 147; 67 R. R. 26.

(*n*) *Montefiore* v. *Browne*, 7 H. L. C. 241; 115 R. R. 132; but see Sug. V. & P. 777.

held bound not only by the notice of the deed, but also by notice that the deed had been retained by the party who had sold the land to the trustees, as an equitable mortgage (*o*). So, also, it has been held that notice of a prior conveyance and of the then vendor's title is notice of his lien for unpaid purchase-monies (*p*). So, also, an inaccurate recital of a will has been held notice of its real contents (*q*). So, also, if a man purchases from a seller whose conveyance was "subject to all the mortgages and charges affecting the same," he will be bound by a prior deposit of the deeds relating to a portion of the estate of which he had not notice, although there were other charges of which he was informed, which satisfied the words "mortgages and charges" (*r*).

But the position is different where the deed need not necessarily affect the title, and the purchaser is informed that it does not affect the title (*s*).

In cases, however, where specific performance is sought, the rule with respect to notice is different as between vendor and purchaser from what it is as between a purchaser and the person claiming under the deed. Thus in *Jones* v. *Rimmer* (*t*), a case of specific performance, Jessel, M. R., said "Misrepresentation is not got rid of by constructive notice."

Notice of a lease is notice of all its contents.

So, also, notice of a lease is notice of all its contents (*u*). If a purchaser has notice that property is held under a lease, he cannot object that he had no notice of any particular covenant therein contained (*x*), if he had reasonable means of inspecting the lease (*y*). The omission on the part of the vendor to state unusual covenants in the particulars of sale

(*o*) *Peto* v. *Hammond*, 30 Beav. 495; 31 L. J. Ch. 354; 132 R. R. 387.

(*p*) *Davies* v. *Thomas*, 2 Y. & C. 234; 47 R. R. 399.

(*q*) *Hope* v. *Liddell*, 21 Beav. 183; 25 L. J. Ch. 90; 111 R. R. 53.

(*r*) *Jones* v. *Williams*, 24 Beav. 47; 116 R. R. 25.

(*s*) *Williams* v. *W.*, 17 C. D. 443; *English & Scottish, &c., Co.* v. *Brunton*, 1892, 2 Q. B. 709; 62 L. J. Ch. 136.

(*t*) 14 C. D. 588, 590; 49 L. J. Ch. 775.

(*u*) *Parker* v. *White*, 1 H. & M. 167; 32 L. J. Ch. 520; 136 R. R. 73; *Clements* v. *Welles*, 1 Eq. 200; 35 L. J. Ch. 265; *Fielden* v. *Slater*, 7 Eq. 523; 38 L. J. Ch. 379; *Patman* v. *Harland*, 17 C. D. 353; 50 L. J. Ch. 642.

(*x*) *Ibid.*; *Imray* v. *Oakshette*, 1897, 2 Q. B. 218; 66 L. J. Q. B. 544.

(*y*) *Infra*, n. (*g*).

does not affect the title (*z*), nor is it a misrepresentation, although the value of the premises may be lessened by such covenants (*a*). In a case where the conditions of sale were silent as to the nature of the covenants, and required that the purchaser should covenant with the vendor for the performance of the covenants and conditions in the lease, a covenant in the lease against carrying on certain specified trades, "or any other noisome or offensive trade," was held to be no objection to the title (*b*).

A man who wishes to protect himself against unusual or particular covenants should before purchasing inquire into the covenants and stipulations of the original lease, so as to know precisely the terms on which the property is held (*c*). If there be no misrepresentation by the vendor, the purchaser is bound by the contents of the lease (*d*), but if there be misrepresentation so that the acuteness and industry of the purchaser are set to sleep, and he is induced to believe the contrary of what is the real state of the case, the vendor is in such case bound by the misrepresentation (*e*). If, for instance, the terms of a particular covenant turn out to be of a much more stringent description than they were represented to be, there is fraud (*f*).

Though notice of a lease is notice of its contents, a purchaser is not so affected with notice of onerous covenants as to be bound to *complete* unless he has had an opportunity of ascertaining the terms of such covenants; and the Court may decline to grant specific performance of a lease containing covenants of an unusual nature, if the person against whom the relief is sought had no reasonable means of inspecting the

(*z*) *Pope* v. *Garland*, 4 Y. & C. 394; 10 L. J. Ex. Eq. 13; 54 R. R. 492; but see *Re White and Smith*, *infra*.

(*a*) *Spunner* v. *Walsh*, 10 Ir. Eq. 386; 11 Ir. Eq. 598.

(*b*) *Grosvenor* v. *Green*, 28 L. J. Ch. 173; *Thornewell* v. *Johnson*, 50 L. J. Ch. 661; *Patman* v. *Harland*, *supra*.

(*c*) *Pope* v. *Garland*, *supra*; *Martin* v. *Cotter*, 3 J. & L. 506; 72 R. R. 100; *Wilson* v. *Hart*, 1 Ch. 463.

(*d*) *Pope* v. *Garland*, *supra*; *Wilson* v. *Hart*, 1 Ch. 463; 144 R. R. 265.

(*e*) *Pope* v. *Garland*, *supra*.

(*f*) *Flight* v. *Booth*, 1 Bing. N. C. 377; 41 R. R. 599; *Van* v. *Corpe*, 3 M. & K. 269; *supra*, p. 63.

original lease, or knowing its contents (*g*). If the vendor does not give the purchaser express notice of the covenants, he must, in order to affect him with notice, show that he gave him an opportunity of acquainting himself with the terms of the lease (*h*). Where, therefore, on a sale of leaseholds by auction the particulars of sale omitted to state onerous covenants and gave no notice that the lease might be inspected, the purchaser was not affected with constructive notice and was not bound to complete (*i*) and was entitled to a return of his deposit (*k*). If, however, he has had reasonable means of inspecting the lease, specific performance will be decreed (*l*), although he may have intended to apply the property to a purpose which, as it turned out, was prohibited (*m*). It is immaterial in such case whether or not the vendor knew of the purchaser's intention (*n*).

Notice that a man is in possession of land is notice of his equities therein and thereto.

So, also, and upon the same principle, where a man is of right in possession of corporeal hereditaments, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, and persons so dealing cannot be heard to deny notice of the title under which the possession is held (*o*). The rule may be stated thus: (1) a tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights; and (2) actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of such person's rights. But the payment in the latter case must be actually inconsistent; and payment therefore to a house agent puts the purchaser to no inquiry and fixes him with no

(*g*) *Hyde* v. *Warden*, 3 Ex. D. p. 80; 47 L. J. Ex. 121; *Reeve* v. *Berridge*, 20 Q. B. D. 523; 57 L. J. Q. B. 265; *Re Davis and Cavey*, 40 C. D. 601; 58 L J. Ch. 153; *Re Haedicke and Lipski*, 1903, 2 Ch. 666; 70 L. J. Ch. 811.

(*h*) *Molyneux* v. *Hawtrey*, 1903, 2 K. B. 487; 72 L. J. K. B. 873.

(*i*) *Re White and Smith*, 1896, 1 Ch. 637; 65 L. J. Ch. 481.

(*k*) *Hone* v. *Gakstatter*, 53 Sol. Jo. 286.

(*l*) *Smith* v. *Capron*, 7 Ha. 191; 82 R. R. 60; *Flood* v. *Pritchard*, 40 L. T. 873.

(*m*) *Morley* v. *Clavering*, 29 Beav. 84; 131 R. R. 463.

(*n*) *Ibid.*; Fry, Spec. Perf. 199.

(*o*) *Jones* v. *Smith*, 1 Ha. 60; 12 L. J. Ch. 381; 58 R. R. 22; *Holmes* v. *Powell*, 8 D. M. & G. 580; 114 R. R. 255

notice (*p*). Notice, accordingly, that the rents are received by A. is notice of A.'s title and of the instrument under which he claims (*q*), and of the character in which he receives them (*r*). So, also, notice that receipts have been given to and accepted by the vendor for an annual payment as rent, but which the vendor and purchaser claiming under him subsequently contend was in fact a rent-charge, is notice to the purchaser of the payee's title to the freehold (*s*); nor is it necessary that such possession should be continually visible or actively asserted. If a man has once received rightful possession of land, he may go to any distance from it without authorising any servant, or agent, or other person to enter upon it, or look after it, may leave it for years uncultivated and unused, may set no mark of ownership upon it, and his possession may nevertheless continue, at least unless his conduct affords evidence of intentional abandonment. A man who knows, or cannot be heard to deny that he knows, another to be in possession of a certain property cannot for any civil purpose, as against him at least, be heard to deny having thereby notice of the title or alleged title under which, or in respect of which, the former is or claims to be in that possession (*t*). Where, accordingly, the purchaser of mines took possession under the agreement for purchase, without any conveyance, it was held that a subsequent purchaser of land, without any exception of mines, took with notice of the agreement (*u*).

The rule that if a person is in possession of property notice of the title under which he is in possession must be attributed to every one who deals with that property applies to cases where a partnership firm is in possession of property. If a partnership firm is in possession of property, a person who

(*p*) *Bailey* v. *Richardson*, 9 Ha. 734; 89 R. R. 639; *Hunt* v. *Luck*, 1901, 1 Ch. 45; 1902, 1 Ch. 428; 71 L. J. Ch. 239.

(*q*) *Knight* v. *Bowyer*, 23 Beav. 640; 27 L. J. Ch. 521; 119 R. R. 184; *Hunt* v. *Luck*, *supra*.

(*r*) *Knight* v. *Bowyer*, 2 D. & J. 421; 27 L. J. Ch. 521; *Hunt* v. *Luck*, *supra*.

(*s*) *Att.-Gen.* v. *Stephens*, 1 K. & J. 750; 6 D. M. & G. 111; 103 R. R. 339.

(*t*) *Holmes* v. *Powell*, 8 D. M. & G. 580; 114 R. R. 255; but see *Cavander* v. *Bulteel*, 9 Ch. 82, *per* James, L. J.; 43 L. J. Ch. 370.

(*u*) *Holmes* v. *Powell*, 8 D. M. & G. 580.

deals with one of the parties in respect of that property is put upon inquiry as to the interest of the firm in it. He has notice that the part-owners have made some bargain about it which gives each an interest in the moiety belonging to the other, and he is put upon inquiry what the extent of that interest is (*x*). If, moreover, the title deeds of the property are handed over by way of equitable mortgage by one of the partners to secure a private debt of his own, and the equitable mortgagee has notice that the property is partnership property, the partnership property must as against him be applied in payment of partnership debts whether contracted before or after the security (*y*).

If there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and the equity of the tenant extends not only to interests connected with his tenancy (*z*), but also to interests under collateral agreements (*a*), the principle being the same in both cases, namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact is bound either to inquire what the interest is, or to give effect to it whatever it may be (*b*). If the tenant has even changed his character by having agreed to purchase the estate, his possession amounts to notice of his equitable title as purchaser (*c*).

The principle that possession by a tenant of land is notice of the terms of his holding applies to a case where a man buys property subject to an easement. He is bound by all the equities which bound his vendors (*d*). So, also, when the mortgagee of a burial ground had notice of the purposes to

(*x*) *Cavander* v. *Bulteel*, *supra*.

(*y*) *Ibid.*

(*z*) 2 Ves. Jr. 437.

(*a*) *Daniels* v. *Davison*, 16 Ves. 249; 17 Ves. 433; 10 R. R. 171; *Allen* v. *Anthony*, 1 Mer. 282; 15 R. R. 113.

(*b*) *Barnhart* v. *Greenshields*, 9 Moo. P. C. 32; 105 R. R. 1; *Knight* v. *Bowyer*, 2 D. & J. 450; 27 L. J. Ch. 521; *Hunt* v. *Luck*, 1901, 1 Ch. 45; 1902, 1 Ch. 428; 71 L. J. Ch. 239.

(*c*) *Daniels* v. *Davison*, *supra*; *Crofton* v. *Ormsby*, 2 Sch. & Lef. 583; 9 R. R. 107; *Wilbraham* v. *Livesey*, 18 Beav. 206; 104 R. R. 434.

(*d*) *Hervey* v. *Smith*, 1 K. & J. 389; 22 Beav. 299; 103 R. R. 141; but see Sug. V. & P. 765; *Allen* v. *Seckham*, *post*, p. 286.

which it was devoted, he was held bound by the right of burial, temporary or in perpetuity, granted by his mortgagor when left in possession (*e*).

Notice, however, of a past tenancy is not notice of the tenant's equitable interests (*f*), nor when the vendor is himself the tenant, and has acknowledged payment of the purchase-money both in the body of the conveyance and by the usual endorsed receipt, is the tenancy notice of his lien for any part thereof which may in fact remain unpaid (*g*).

Nor is notice of a tenancy necessarily notice of the tenant's equities as between vendor and purchaser (*h*). The doctrine laid down in *Daniels* v. *Davison* does not apply while the matter rests in contract (*i*). A man who has notice of the occupation of a tenant is not bound to go to the tenant and inquire what is the nature of his tenancy (*k*). There are some dicta in *James* v. *Litchfield* (*l*) which go nearly to that extent, and which support the notion that the doctrine of *Daniels* v. *Davison* applies as between vendor and purchaser, and whilst the matter still rests in contract. The doctrine in question refers to equities between the purchaser and the tenant when the legal estate has passed and has nothing to do with the rights and liabilities of vendors and purchasers between themselves. If there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser and let him know what it is which is being sold (*m*). Nor is notice of a tenancy constructive notice of the lessor's title (*n*). Nor will a *bonâ fide* purchaser, otherwise without notice, be affected by the mere circumstance of the vendor having been out of possession for many years.

(*e*) *Moreland* v. *Richardson*, 22 Beav. 596; 25 L. J. Ch. 883; 111 R. R. 501.

(*f*) *Miles* v. *Langley*, 1 R. & M. 39; 2 R. & M. 626; 32 R. R. 131.

(*g*) *White* v. *Wakefield*, 7 Sim. 401; 4 L. J. Ch. 195; 40 R. R. 163; *Hunt* v. *Luck*, 1901, 1 Ch. 45; 1902, 1 Ch. 428; 71 L. J. Ch. 239.

(*h*) *Nelthorpe* v. *Holgate*, 1 Coll. 203; 66 R. R. 46.

(*i*) *Caballero* v. *Henty*, 9 Ch. 447; 42 L. J. Ch. 635.

(*k*) *Ibid.*

(*l*) 9 Eq. 54.

(*m*) *Caballero* v. *Henty*, *supra.*

(*n*) *Barnhart* v. *Greenshields*, 9 Moo. P. C. 34; 105 R. R. 1; *Hunt* v. *Luck*, *supra.*

A purchaser neglecting to inquire into the title of the occupier is not affected by any other equities than those which such occupier may insist on. If a person equitably entitled to an estate lets it to a tenant who takes possession, and then the person having the legal estate sells to a person who purchases *bonâ fide* and without notice of the equitable claim, the purchaser will hold against the equitable owner, although he had notice of the tenant being in possession (*o*). In all cases the possession relied on has been the actual occupation of the land, and the equity sought to be enforced has been on behalf of the party so in possession (*p*). But it must be remembered that by *the party in occupation* is meant, not merely the person who by himself and his labourers tills the ground, but the person who is known to receive the rents from the person in occupation (*q*). So also notice of the legal estate being outstanding is notice of the trusts on which it is held (*r*); and notice that the title deeds are in the possession of a third party other than a solicitor is notice of any charge he has upon the property (*s*), but is not notice of a fraud committed by him (*t*).

Person held to have notice of facts which he ought to have known.

So, also, and upon the same principle, a person has been held to be affected with notice of a fraud affecting a deed, and which the unusual manner in which it was executed ought to have suggested to his solicitor (*u*). So also a lessee, or a sub-lessee, has notice of the title of his lessor, and the mere fact that he is precluded by the terms of the contract or by the Vendor and Purchaser Act, 1874, s. 2, from calling for the lessor's title will not exempt him from the consequences of notice (*x*). So a purchaser taking less than a forty years' title

(*o*) *Oxwith* v. *Plummer*, 2 Vern. 636; *Barnhart* v. *Greenshields*, *supra*.

(*p*) *Barnhart* v. *Greenshields*, *ibid.*

(*q*) *Knight* v. *Bowyer*, 23 Beav. 609, 640, 641; 2 D. & J. 421; 27 L. J. Ch. 521; 119 R. R. 184.

(*r*) *Anon.*, 2 Freem. 137.

(*s*) *Maxfield* v. *Burton*, 17 Eq. 18; 43 L. J. Ch. 46; *Lloyd's Bank* v. *Jones*, 29 C. D. 221, 229; 54 L. J. Ch. 931. See *Walker* v. *Linom*, 1907, 2 Ch. 104; 76 L. J. Ch. 500.

(*t*) *Hipkins* v. *Amery*, 2 Giff. 292, 301; *Taylor* v. *London & County Bank*, 1901, 2 Ch. 231; 70 L. J. Ch. 477.

(*u*) *Kennedy* v. *Green*, 3 M. & K. 699; 41 R. R. 176.

(*x*) *Patman* v. *Harland*, 17 C. D. 353; 50 L. J. Ch. 642.

will be fixed with notice of everything which a full title would have disclosed (*y*). A person who accepts an underlease without inquiring into the superior title is guilty of such negligence as disentitles him to relief (*z*). So where a family solicitor, who had prepared a marriage settlement, became the apparent purchaser of the estate under a fictitious exercise of the usual power of sale, and subsequently executed instruments purporting to vest the estate in the husband, and then, as the husband's solicitor, applied for a loan on mortgage, and delivered an abstract of the title as above referred to in the usual way, with his name as solicitor, it was held that the purchaser had implied notice of his having been the solicitor who prepared the settlement, and of the irregularity of the nominal purchase (*a*). So a mortgagee, having notice that a bill which formed part of the consideration for the purchase of the estate by the mortgagor remained unpaid, has been held bound to inquire whether the vendor has any lien on the estate, the deed of conveyance leaving the point doubtful (*b*). So a purchaser dealing with trustees for sale, at a time or under circumstances suggestive of the probability of the sale being a breach of trust, is bound to inquire and see whether any such breach of trust is in fact being committed (*c*). So a person dealing with trustees has notice of all the subsisting trusts of the will, including incumbrances of which the trustees had received notice (*d*). So also notice of a deed is not only notice of its contents, but of the facts to a knowledge of which the insisting on its production would have necessarily led (*e*).

When, however, a sale by fiduciary vendors is apparently regular, a purchaser need not inquire into collateral questions,

(*y*) *Re Nisbet and Potts*, 1906, 1 Ch. 386; 75 L. J. Ch. 238.

(*z*) *Imray* v. *Oakshette*, 1897, 2 Q. B. 218; 66 L. J. Q. B. 544.

(*a*) *Robinson* v. *Briggs*, 1 Sm. & G. 188; 99 R. R. 372.

(*b*) *Frail* v. *Ellis*, 16 Beav. 350; 22 L. J. Ch. 467; 96 R. R. 168.

(*c*) *Stroughill* v. *Anstey*, 1 D. M. & G. 635; 22 L. J. Ch. 130; 91 R. R. 210.

(*d*) *Perham* v. *Kempster*, 1907, 1 Ch. 373; 76 L. J. Ch. 223; but see *Pearce* v. *Bulteel*, *post*, p. 289.

(*e*) *Peto* v. *Hammond*, 30 Beav. 495; 31 L. J. Ch. 354; 132 R. R. 387; *Ebbetts* v *Conquest*, 1895, 2 Ch. 377; 64 L. J. Ch. 702; *Davis* v. *Hutchings*, 1907, 1 Ch. 356; 76 L. J. Ch. 272.

such as the mode in which the sale has been conducted (*f*). The doctrine of constructive notice ought not to be applied so as to invalidate the titles of persons dealing *bonâ fide* with tenants for life when exercising their powers under the Settled Land Acts (*g*). But a purchaser will be affected with notice of a breach of trust clearly deducible from facts appearing on the face of the assurance (*h*), or suggesting inquiry (*i*). So where a mortgagee sold under his power of sale one month after the date for redemption and seven months after the date of the deed, three months' notice being necessary, the purchaser was held to have notice that the sale was irregular (*k*). But although a purchaser of a lease is bound to know from whom the lessor derived the title, he is not affected with notice of all the circumstances under which he so derived it (*l*). Nor, *semble*, is notice of a lease notice of collateral facts mentioned in the lease (*m*). Nor on the purchase of A., one of two adjoining estates belonging to the same owner, is notice of building covenants entered into by such owner with a mortgagee of the adjoining estate B. notice of the expenditure on both estates of money which, under the covenant, ought to have been expended on B. exclusively (*n*). So, also, slight discrepancies in the plans or the deeds which, if inquired into, might have led to the detection of a fraudulent dealing with the property were held not to be constructive notice of it (*o*). And a road marked private on a plan is not enough to put a purchaser on inquiry as to whether an easement existed (*p*).

Possession of deeds by solicitor of vendor is not notice.

The possession of a client's deeds by a solicitor is so usual, and so much in the ordinary course of transactions, that where a man purchases an estate and is informed that the

(*f*) See 2 Ha. p. 450.

(*g*) *Mogridge* v. *Clapp*, 1892, 3 Ch. 382; 61 L. J. Ch. 534.

(*h*) See *Att.-Gen.* v. *Pargeter*, 6 Beav. 150; 13 L. J. Ch. 81; 63 R. R. 41; *Kerr* v. *Dungannon*, 1 Dr. & War. 509, 542; 61 R. R. 137.

(*i*) *Boursot* v. *Savage*, 2 Eq. 134; 35 L. J. Ch. 627.

(*k*) *Selwyn* v. *Garfit*, 38 C. D. 273; 57 L. J. Ch. 609; cf. *Bailey* v. *Barnes*, 1894, 1 Ch. 25; 63 L. J. Ch. 73.

(*l*) *Att.-Gen.* v. *Backhouse*, 17 Ves. 293.

(*m*) See *Darlington* v. *Hamilton*, Kay, 556; 23 L. J. Ch. 1000; 101 R. R. 730.

(*n*) *Harryman* v. *Collins*, 18 Beav. 19; 104 R. R. 352.

(*o*) *Hunter* v. *Walters*, 7 Ch. 75; 41 L. J. Ch. 175.

(*p*) *Att.-Gen.* v. *Biphosphated Co.*, 11 C. D. 327; 49 L. J. Ch. 68.

deeds are in the hands of the solicitor of the owner of the estate, there is nothing which renders it necessary for him to inquire under what circumstances the solicitor held the deeds (*q*). But if a solicitor acquires by contract a different interest beyond what his character of solicitor confers (such as equitable mortgagee), it is incumbent on him immediately to give clear and distinct notice of such interest to all persons in visible ownership of the estate. Such a case is not within the principle of the cases in which a purchaser of land has been held bound to inquire of the tenant in possession the nature of his interest (*r*).

A mortgage by a client to his solicitor is not constructive notice of the state of accounts between them and does not put a subsequent purchaser on inquiry as to whether the advance was actually made (*s*).

Omission to inquire for title deeds of property.

The omission of a purchaser of property to inquire after the title deeds is gross negligence, and will affect him with the knowledge which he might have obtained upon inquiry. The possession of the legal estate will not protect a man who has omitted to inquire after the title deeds, or who accepts a frivolous excuse for their non-production against the claim of an innocent party (*t*). The Court will in such a case infer that he has abstained from inquiry in order to deprive himself of knowledge, and that he has wilfully shut his eyes to the facts (*u*). "A purchaser or mortgagee," said Lord Selborne, in *Agra Bank* v. *Barry* (*x*), "should make inquiries after the title deeds. It is merely the course which a man dealing *bonâ fide* in the proper and usual manner for his own interest ought, by himself or his solicitor, to follow with a view to his own title and his own security. If he does not follow that course the omission of it may be a thing requiring to be

(*q*) *Bozon* v. *Williams*, 3 Y. & J. 150; 32 R. R. 771; *Cory* v. *Eyre*, 1 D. J. & S. 149; 137 R. R. 184; *Bradley* v. *Riches*, 9 C. D. 193.

(*r*) *Bozon* v. *Williams*, *supra*; *Manners* v. *Mew*, 29 C. D. 725; 54 L. J. Ch. 909.

(*s*) *Powell* v. *Browne*, 1907, W. N. 228; C. A.

(*t*) *Ante*, p. 139.

(*u*) *Ratcliff* v. *Barnard*, 6 Ch. 654; 40 L. J. Ch. 777.

(*x*) L. R. 7 H. L. 157; *Manners* v. *Mew*, *supra*.

accounted for and explained. It may be evidence, if it is not explained, of a design inconsistent with *bonâ fide* dealing to avoid knowledge of the true state of the title. What is a sufficient explanation must always be a question to be decided with reference to the nature and circumstances of each particular case." The cases on the subject were considered and classified in *Northern Counties, &c., Co.* v. *Whipp* (*y*), and have been dealt with in a previous chapter (*z*).

Party not fixed by notice of deed merely because he was a witness to it, or because he heard a draft had been prepared.

Though notice of a deed is notice of its contents, the mere fact that a man has been witness to the execution of a deed will not of itself fix him with notice of the contents (*a*). Nor is notice of a will passing all the testator's real estates generally, and not specifically, notice of all the particular estates which the testator had to pass (*b*). Nor if a purchaser has notice only that a draft of the deed is prepared, and not that the deed was executed, would he be bound by notice, although the deed was actually executed; for a purchaser is not to be affected by notice of a deed in contemplation (*c*).

A mere statement that information may be had at a particular place is not notice.

But if a man be specially referred to another for information he is fixed with notice, &c.

A mere statement that further information is to be had at the office of a company is not enough to put persons upon inquiry whether statements put forward by directors are true or false (*d*). But if a man, on being specially referred to another for information, neglects to apply to him, he will be held to have notice of what he might have learnt upon inquiry (*e*). So also if a man, having reasonable grounds to suspect the existence of a fact of importance, asks one of the parties to the transaction, who refuses all information, but does not ask other parties, whom he has reason to believe to be able and willing to give him information, his ignorance is wilful (*f*).

(*y*) 26 C. D. 492; 53 L. J. Ch. 629.

(*z*) *Ante*, p. 139.

(*a*) *Beckett* v. *Cordley*, 1 Bro. C. C. 357; *Rancliffe* v. *Parkins*, 6 Dow, 149, 222; 19 R. R. 36; *ante*, p. 127.

(*b*) *Rancliffe* v. *Parkins*, *supra*.

(*c*) *Cothay* v. *Sydenham*, 2 Bro. C. C. 391. See *Jones* v. *Smith*, 1 Ha. 63; 1 Ph. 256; 12 L. J. Ch. 381; 58 R. R. 22.

(*d*) *Redgrave* v. *Hurd*, 20 C. D. p. 13; 51 L. J. Ch. 113.

(*e*) *Wason* v. *Wareing*, 15 Beav. 151; 92 R. R. 357.

(*f*) *Bainbrigge* v. *Moss*, 3 Jur. N. S. 58.

If a man has notice that property is affected, he is fixed with notice as to the nature of the charge, and cannot rely on the information given to him as to its nature.

A man who in dealing for property is told of anything as affecting the property, though incorrectly, cannot rely on what is told him, but is bound to make further inquiry and to ascertain the exact truth (*g*). If he knows that another has or claims an interest in the property, he, in dealing for that property, is bound to inquire what that interest is, although it may be inaccurately described (*h*). If he is told or has notice that a certain instrument affects the property in question in some particular respect, he will be fixed with notice of its provisions if it should turn out to affect the property in other respects also (*i*). But if a man has notice that there is a deed or document and at the same time has notice that it does not affect the property, he is put so completely off his guard that the Court will not treat him as fixed with knowledge of the document or the effect of it (*k*). This rule, however, only applies where a person might get a complete chain of title without any notice of the document. A purchaser or lessee who has notice of a deed forming part of the chain of title of his vendor or lessor is not protected from the consequences of not looking at the deed even by the most express representations of the vendor or lessor that it contains no restrictive covenants nor anything affecting the title (*l*), and notwithstanding that he is precluded by his contract from making inquiry (*m*).

Doctrine of notice does not extend to instruments or circumstances which may only by possibility affect property.

Though a man, who has actual notice that the property in respect of which he is dealing is in fact affected by a particular instrument, is bound to examine that instrument, he is not bound to examine instruments which are not directly or presumptively connected with the title to the property in

(*g*) *Wilson* v. *Hart*, 1 Ch. 463; 144 R. R. 265; *Jones* v. *Smith*, *supra*. Comp. *Re Bright's Trust*, 21 Beav. 430; 25 L. J. Ch. 449; 111 R. R. 152.

(*h*) *Gibson* v. *Ingo*, 6 Ha. 112, 124; 77 R. R. 44.

(*i*) *Taylor* v. *Baker*, 5 Pri. 306; 19 R. R. 625; *Jackson* v. *Rowe*, 2 Sim. & St. 475; 4 L. J. Ch. 119; 25 R. R. 250; *Farrow* v. *Rees*, 4 Beav. 18; 55 R. R. 1; *Mitchell* v. *Steward*, 35 L. J. Ch. 393. See *Jones* v. *Smith*, *supra*; *Davis* v. *Hutchings*, 1907, 1 Ch. 356; 76 L. J. Ch. 272; 84 R. R. 30; and see *Penny* v. *Watts*, 1 Mac. & G. 150; which, however, is considered to carry the principle too far; Sug. V. & P. 766.

(*k*) *Williams* v. *Williams*, 17 C. D. 443.

(*l*) *Patman* v. *Harland*, 17 C. D. 353; 50 L. J. Ch. 642.

(*m*) *Ibid.*; *Re Morgan, Pillgrem* v. *P.*, 18 C. D. 93; 50 L. J. Ch. 834.

question, merely because he knows that they exist and may by possibility affect it. If an instrument does not necessarily affect the title, but only may or may not do so according to circumstances, the omission to examine it will not fix a party with gross negligence, if there is no reason to suppose that he may have acted otherwise than fairly in the transaction (*n*). Nor is notice that certain circumstances exist which may by possibility affect the property in dispute sufficient to put a man upon inquiry, if he appear to have acted fairly in the transaction (*o*). A purchaser, for instance, will not be affected by an ambiguous recital (*p*), nor by the absence of an indorsed receipt (*q*), nor by circumstances inducing merely a suspicion of fraud (*r*); so notice of there being a change of solicitors who are professionally to represent a particular interest is not, in itself, notice of a change in the ownership of such interest (*s*); nor is the mere fact of a daughter, soon after coming of age, giving securities to a creditor of her father in payment of his debt of itself a ground for imputing to the creditor knowledge of undue influence having been exerted over her by her father (*t*). To affect the creditor with notice of undue influence it is not enough to show that he was aware of the reluctance of the daughter to concur in the security (*u*).

A purchaser of lands with notice that the title deeds have been deposited with a bank as security for the general balance on the vendor's present and future accounts is not bound to inquire whether the bank has after notice of the purchase made fresh advances. The burden lies on the bank advancing

(*n*) *Jones* v. *Smith*, *supra*; *Ware* v. *Egmont*, 4 D. M. & G. 460; 24 L. J. Ch. 361; 102 R. R. 215; *Re Bright's Trust*, *supra*; *Cox* v. *Coventon*, 31 Beav. 378; 135 R. R. 474; *Perry* v. *Holl*, 2 D. F. & J. 38; 129 R. R. 9; *Patman* v. *Harland*, *supra*; *English & Scottish, &c., Co.* v. *Brunton*, 1892, 2 Q. B. 709.

(*o*) *Ibid.*

(*p*) *Kenney* v. *Browne*, 3 Ridg. P. C. 512. See 2 Ha. 175.

(*q*) *Lloyd's Bank* v. *Bullock*, 1896, 2 Ch. 192; 65 L. J. Ch. 680.

(*r*) *M'Queen* v. *Farquhar*, 11 Ves. 482; 8 R. R. 212. See *Dodds* v. *Hills*, 2 H. & M. 426; 144 R. R. 210.

(*s*) *West* v. *Reid*, 2 Ha. 249; 12 L. J. Ch. 245; 62 R. R. 98.

(*t*) *Thornber* v. *Sheard*, 12 Beav. 589; 85 R. R. 169. See *Cobbett* v. *Brock*, 20 Beav. 524; 109 R. R. 523; *ante*, p. 191.

(*u*) *Rhodes* v. *Cook*, 4 L. J. Ch. 149; 2 Sim. & St. 488.

on the security of the unpaid vendor's lien to give the purchaser notice that it has so done or intends so to do (*x*).

The purchaser of property cannot be held to have constructive notice of every agreement relating to any structure which he sees on the adjoining ground (*y*). Where, accordingly, disputes having arisen between the plaintiff and the owner of an adjoining tenement as to whether a window in the plaintiff's house, overlooking the adjoining tenement, was an ancient window, an agreement, not under seal, was signed by which the owner of the adjoining tenement agreed that the plaintiff should have access of light to the window and the plaintiff agreed to keep the window opaque and make it open only in such a way that no person could look out of it, and the owner of the adjoining tenement afterwards sold the tenement to the defendant, who had no notice of the agreement, but knew of the existence of the window, it was held that the mere fact of there being windows in an adjoining house which overlooked a purchased property is not constructive notice of any agreement giving a right to the access of light to them (*z*). But if a structure upon land is of such a nature that every reasonable man must know that it affects the property, a purchaser is put upon inquiry as to it and has constructive notice. In *Morland* v. *Cook* (*a*) the purchaser saw the property protected by a sea wall, and the Court considered that every reasonable man under the circumstances must be taken to have known that the wall existed for the protection of the lands below the level of the sea, and that there must be some provision made for its maintenance and repair, and that therefore he was put upon inquiry.

So if the condition of the property at the date of the contract is such as to suggest inquiry, the purchaser may be fixed with constructive notice of rights of way or other

(*x*) *London & County Banking Co.* v. *Ratcliffe*, 6 App. Ca. 739, *per* Lord Blackburn; 51 L. J. Ch. 28.

(*y*) *Allen* v. *Seckham*, 11 C. D. 790; 48 L. J. Ch. 611; cf. *Att.-Gen.* v. *Biphosphated Co.*, 11 C. D. 327; 49 L. J. Ch. 68; *Greenhalgh* v. *Brindley*, 1901, 2 Ch. 324; 70 L. J. Ch. 740.

(*z*) *Allen* v. *Seckham*, *supra*.

(*a*) 6 Eq. 252; 37 L. J. Ch. 825.

easements affecting it. Thus, where A. purchased from B. a house, part of an estate agreed to be let to B. on a building agreement, and the house was built partly over an archway leading to mews in the rear, but not then forming the only means of access thereto, it was held that A. had constructive notice that when the building scheme was completed the road under the archway would be the only approach to the mews, and that a right of way, though not expressly reserved in the assignment to A., was reserved by implication (*b*).

Notice excluded by distinct representation.

Nor is a man bound to examine a deed or document which does not form part of the chain of title or does not necessarily from its very nature affect the property in question, if he is told that it does not affect it, and he acts fairly in the transaction, and believes the representation to be true (*c*). If a man has notice that there is a deed or document, and at the same time has notice that it is entirely worthless or does not affect the property, he is put so completely off his guard that the Court does not treat him as fixed with knowledge of the document or the effect of it (*d*). The effect, indeed, of what would otherwise be notice may be destroyed by misrepresentation. A man to whom a particular and distinct representation is made is entitled to rely on the representation, and need not make any further inquiry, although there are circumstances in the case from which an inference inconsistent with the representation might be drawn, and which independently of the representation would have been sufficient to put him upon inquiry (*e*), or although he is told that further information may be had on the matter by making inquiries from a particular person, or at a particular place (*f*). A man is entitled to rely on the representations of the vendor as to the contents of a deed, and is not bound to examine the deed

(*b*) *Davies* v. *Sear*, 7 Eq. 427; 38 L. J. Ch. 545.

(*c*) *English & Scottish, &c., Co.* v. *Brunton*, 1892, 2 Q. B. 709.

(*d*) *Williams* v. *W.*, 17 C. D. 443.

(*e*) *Wilson* v. *Short*, 6 Ha. 366, 367; *Cox* v. *Middleton*, 2 Drew. 209; 23 L. J. Ch. 618; 100 R. R. 90; *Patman* v. *Harland*, 17 C. D. 353; 50 L. J. Ch. 642; *ante*, pp. 50, 284.

(*f*) *Redgrave* v. *Hurd*, 20 C. D. p. 13; 51 L. J. Ch. 113. See 1907, A. C. 351.

itself (*g*). Misrepresentation is not got rid of by constructive notice (*h*). So, also, a man who purchases shares in a company on the faith of a prospectus may rely on the statements made therein, and is not bound to ascertain whether they are true (*i*). The mere fact that he may have attended a meeting of the company is not a sufficient ground for fixing him with notice of the falsity of the representations in the prospectus (*k*). A similar rule has also been applied where a share certificate contains a representation that it is fully paid up; the purchaser in that case need not inquire whether it has been fully paid up, and the *onus* lies on the company to prove (*l*).

If a *bonâ fide* inquiry be made in the proper quarter and a reasonable answer be given, a man may rest satisfied with the information, and need not make any further inquiry (*m*). A man, for instance, who on the purchase of property *bonâ fide* inquires for the title deeds is not bound to make further inquiry, if a reasonable excuse is made for their not forthcoming (*n*). The omission of the solicitor of a legal mortgagee to require production of deeds when a reasonable excuse is given for their non-production is not of itself a sufficient ground to postpone the legal mortgagee to a prior equitable incumbrance (*o*), but it is not a reasonable excuse that the deeds relate to other property (*p*). So, also, if deeds are

(*g*) *M'Culloch* v. *Gregory*, 1 K. & J. 286; 24 L. J. Ch. 246; 103 R. R. 86; *Re Bright's Trust*, 21 Beav. 430; 25 L. J. Ch. 449; *Cox* v. *Coventon*, 31 Beav. 378; *Ex parte Briggs*, 1 Eq. 483; 35 L. J. Ch. 320 *Williams* v. *W.*, 17 C. D. 443.

(*h*) *Jones* v. *Rimmer*, 14 C. D. 588, 590; 49 L. J. Ch. 775.

(*i*) *Redgrave* v. *Hurd*, 20 C. D., p. 13; 51 L. J. Ch. 113; cf. *Peel's Case*, 2 Ch. 674, 684; 36 L. J. Ch. 757; and see *post*, p. 300.

(*k*) *Stewart's Case*, 1 Ch. 574; 35 L. J. Ch. 738.

(*l*) *Re Hall & Co.*, 37 C. D. 712; 57 L. J. Ch. 288.

(*m*) *Jones* v. *Smith*, 1 Ha. 43; 12 L. J. Ch. 381; 58 R. R. 22; *Bird* v. *Fox*, 11 Ha. 47; *Jones* v. *Williams*, 24 Beav. 47; 116 R. R. 25; *Dawson* v. *Prince*, 2 D. & J. 44; 27 L. J. Ch. 169; 119 R. R. 21; *Espin* v. *Pemberton*, 3 D. & J. 547; 28 L. J. Ch. 311; 121 R. R. 224.

(*n*) *Hewitt* v. *Loosemore*, 9 Ha. 449; 21 L. J. Ch. 69; 89 R. R. 526; *Espin* v. *Pemberton*, *supra*; *Agra Bank* v. *Barry*, 7 E. & I. App. Ca. 149; cf. *Manners* v. *Mew*, 29 C. D. 725; 54 L. J. Ch. 909; *ante*, p. 140.

(*o*) *Ratcliff* v. *Barnard*, 6 Ch. 654; 40 L. J. Ch. 777.

(*p*) *Oliver* v. *Hinton*, 1899, 2 Ch. 264; 68 L. J. Ch. 583.

deposited with a man by the other party to the transaction, which purport or are represented to be all the material deeds relating to the estate, and he honestly believes the representation to be true, he is not guilty of gross negligence if he abstains from further inquiry on the subject (*q*). A mortgagee cannot be said to have constructive notice of equities because non-essential requisitions are not pressed home (*r*). In a case where an equitable mortgagee, with whom some of the title deeds of the mortgaged property, including the conveyance to the mortgagor, were deposited, brought an action to establish his priority over a subsequent legal mortgagee whose solicitor had omitted to examine a parcel which was given to him previously to the execution of the mortgage deed and purported to contain all the title deeds but contained only the earlier deeds, it was held that there was not such wilful negligence on the part of the solicitor as to fix the legal mortgagee with constructive notice of the prior charge so as to entitle the equitable mortgagee to enforce in equity his priority over the legal mortgagee (*s*).

"A series of authorities," said Lord Selborne, in *Dixon* v. *Muckleston* (*t*), "have decided that when the Court is satisfied of the good faith of the person who has got a prior equitable charge, and is satisfied that there has been a positive statement, honestly believed, that he has got the necessary deeds, he is not bound to examine the deeds and is not bound by constructive notice of their actual contents or of any deficiencies which by examination he might have discovered in them. This I take to be the law, even in cases where the depositor of the deeds is himself acting in the double character of borrower of the depositee's money and of solicitor for the depositee. In the cases of *Hunt* v. *Elmes* and *Hewitt* v. *Loosemore* the facts were of that character. In *Hunt* v. *Elmes* and *Colyer* v. *Finch* the deeds had never been looked at, but credit had

(*q*) *Roberts* v. *Croft*, 2 D. & J. 1; 27 L. J. Ch. 220; 119 R. R. 1; *Hunt* v. *Elmes*, 2 D. F. & J. 578; 30 L. J. Ch. 255; 129 R. R. 204; Comp. *Banfather's Claim*, 16 C. D. 179; 50 L. J. Ch. 218.

(*r*) *Pearce* v. *Bulteel*, 1916, 2 Ch. 544; 85 L. J. Ch. 677.

(*s*) *Ratcliff* v. *Barnard*, *supra*; but see *Oliver* v. *Hinton*, *supra*.

(*t*) 8 Ch. 161; 42 L. J. Ch. 210.

simply been given to a statement made, either upon the parcel containing the deeds or otherwise, that they were the proper deeds relating to the estate. In some of these cases the lender was not otherwise advised than by the solicitor of the borrower or by a solicitor having, as mortgagee, a personal contrary interest, and yet the lender was held not to be guilty of such neglect or laches as amounted to what is described by Lord Justice Turner in *Hewitt* v. *Loosemore* as 'gross and wilful negligence,' which in the eye of this Court amounts to fraud merely because he believed the statements made to him and abstained from examining the deeds and did not employ an independent solicitor.'' The fact that the person with whom he is dealing and who makes the representation may be his own solicitor is immaterial, if the representation was honestly believed to be true (*u*).

A representation or an answer to an inquiry will not, however, dispense with the necessity of further inquiry, unless it be made by a person upon whose representation the other party is entitled to rely and rest satisfied. The representations of a man bind him as far as his own interest is concerned, but do not bind the interests of other parties, unless he was authorized by them to make the representations. An under-lessee must not rest satisfied with the representations of his lessor, who is also a sub-lessee, as to the covenants in the lease. He must go back to some one who can give him more complete information (*w*). So, also, a man who accepts a conveyance without any previous investigation, relying on the mere assurances of the vendor that he is absolute owner, will be held to have constructive notice of the title, although he may have acted without any fraudulent intention (*x*). So, also, where a solicitor acting on behalf of a woman before her marriage is told by the intended husband that the title deeds of the property comprised in the marriage settlement are

(*u*) *Roberts* v. *Croft*, *supra*; *Hunt* v. *Elmes*, *supra*.

(*w*) *Parker* v. *Whyte*, 1 H. & M. 167; 32 L. J. Ch. 520. See *Clements* v. *Welles*, 1 Eq. 200; 35 L. J. Ch. 265; *Ebbetts* v. *Conquest*, 1895, 2 Ch. 377; 64 L. J. Ch. 702.

(*x*) *Jackson* v. *Rowe*, 2 Sim. & St. 472, 475; 4 L. J. Ch. 119; 25 R. R. 250; but see *Patman* v. *Harland*, 17 C. D. 353; 50 L. J. Ch. 642.

deposited at his bankers for safe custody, he has constructive notice of any lien the bankers may have on them (*y*).

The effect of what would be otherwise notice may be destroyed, not only by actual misrepresentation, but by mere silence, or by anything calculated to deceive, or even lull suspicion on a particular point (*z*). If the vendor of a lease be informed by the purchaser of his object in buying, and the lease contains covenants which will defeat that object, the silence of the vendor is equivalent to a misrepresentation (*a*). But if the agent of the purchaser has had the opportunity of inspecting the original lease, the vendor need not inform the purchaser of unusual covenants which will prevent him from carrying out his intention (*b*).

Period from which notice dates.

Although a man who has been induced to enter into a transaction by misrepresentation might have detected the misrepresentation long before the time he did, he is not bound to make inquiries, until there is something to raise suspicion (*c*).

Constructive notice operates only in cases affecting title.

Constructive notice only operates in cases affecting title. A mere constructive notice of circumstances of negligence in the mode of conducting a sale is entirely collateral to any question of title (*d*).

Notice to agent or solicitor is sufficient.

It is not necessary that notice should be brought home to the party interested himself. It is enough if it is brought home to his agent, solicitor, or counsel (*e*). There is no distinction in point of legal effect between personal notice to the party and notice affecting him through the medium of his

(*y*) *Maxfield* v. *Burton*, 17 Eq. 18; 43 L. J. Ch. 46; *Lloyd's Bank* v. *Jones*, 29 C. D., p. 229; 54 L. J. Ch. 931. See *Walker* v. *Linom*, 1907, 2 Ch. 104; 76 L. J. Ch. 500.

(*z*) *Pope* v. *Garland*, 4 Y. & C. 394; 10 L. J. Ch. 13; 54 R. R. 492; *Bartlett* v. *Salmon*, 6 D. M. & G. 41; 106 R. R. 15; *Darlington* v. *Hamilton*, Kay, 550; 23 L. J. Ch. 1000; 101 R. R. 730; *ante*, pp. 62, 63.

(*a*) *Flight* v. *Barton*, 3 M. & K. 282; *ante*, p. 80.

(*b*) *Morley* v. *Clavering*, 29 Beav. 84; 131 R. R. 463; Fry, Spec. Perf. 199.

(*c*) *Rawlins* v. *Wickham*, 3 D. & J. 304; 28 L. J. Ch. 188; 121 R. R. 134; *Redgrave* v. *Hurd*, 20 C. D. 1; 51 L. J. Ch. 113.

(*d*) *Borell* v. *Dann*, 2 Ha. 440.

(*e*) *Maxfield* v. *Burton*, 17 Eq. 18; 43 L. J. Ch. 46; *Rolland* v. *Hart*, 6 Ch. 680; *Kettlewell* v. *Watson*, 21 C. D. 685; 26 C. D. 501; 53 L. J. Ch. 717.

agent (*f*). Notice to the agent is notice to the principal; for upon general principles of public policy it must be taken for granted that the principal has notice of whatever is communicated to his agent whilst acting as such in the transaction to which the communication relates, and is fixed with the knowledge of every fact material to the transaction which his agent or solicitor either knows or has imparted to him in the course of his employment, and which it was his duty to communicate, whether it be communicated or not (*g*). But the knowledge of an agent not acquired in the course of his employment cannot be imputed to the principal. Thus the maker of a false representation cannot protect himself by proving that the agent of the other knew of the untruth (*h*). The presumption that a solicitor has communicated to his client facts which he ought to have made known to him cannot be rebutted by proof that it was the interest of the solicitor to keep back the facts (*i*). The rule that notice to an agent is notice to the principal applies to cases where the principal is an infant (*j*).

The notice which affects a principal or client through his agent or solicitor is generally treated as constructive notice (*k*); but inasmuch as the principal or client is bound by the notice, whether it be communicated to him or not, and is not presumed to have the knowledge, merely because the circumstances of the case put him on inquiry, such notice may more properly be treated as actual notice, or if it is necessary to make a distinction between the knowledge which a man possesses himself and that which is known to

(*f*) *Toulmin* v. *Steere*, 3 Mer. 224; 17 R. R. 67; *Vane* v. *Vane*, 8 Ch. 399; 42 L. J. Ch. 299.

(*g*) *Roddy* v. *Williams*, 3 J. & L. 16; 72 R. R. 1; *Espin* v. *Pemberton*, 3 D. & J. 554; 28 L. J. Ch. 311; 121 R. R. 224; *Wyllie* v. *Pollen*, 3 D. J. & S. 601; 32 L. J. Ch. 782; 142 R. R. 180; *Boursot* v. *Savage*, 2 Eq. 134; 35 L. J. Ch. 627; *Vane* v. *Vane*, *supra*; *Dixon* v. *Winch*, 1900, 1 Ch. 736; 69 L. J. Ch. 465; *Berwick* v. *Price*, 1905, 1 Ch. 632; 74 L. J. Ch. 249.

(*h*) *Wells* v. *Smith*, 1914, 3 K. B. 722; 83 L. J. K. B. 1614.

(*i*) *Bradley* v. *Riches*, 9 C. D. 193.

(*j*) *Toulmin* v. *Steere*, 3 Mer. 222; 17 R. R. 67.

(*k*) See *Toulmin* v. *Steere*, *supra*.

his agent or solicitor, the latter may be called imputed knowledge (*l*).

Notice to an agent, solicitor, or counsel should, in order to bind a principal or client, be notice in the same transaction. He is not bound unless, in the words of the Conveyancing Act, 1882, s. 3, "In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, agent, or solicitor, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by such solicitor or other agent" (*m*).

In order that the knowledge of the solicitor may be imputed to the client it must be (1) in the same transaction, (2) the matter must come to his knowledge, and (3) must come to his knowledge as such (*n*). But it is declared by sub-sect. 2 of the same clause that the section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, either mediately or immediately; and such liability may be enforced in the same manner and to the same extent as if this section had not been enacted (*o*).

The rule that notice to an agent or solicitor is notice to a principal or a client applies where the same solicitor or agent is employed by both parties to the transaction (*p*), or is himself the vendor (*q*). But the effect of the Conveyancing Act, 1882, seems to be that the solicitor in such a case is to be treated as two persons, and the purchaser only to be affected

(*l*) 3 D. & J. 554, *per* Lord Chelmsford. See *Cave* v. *Cave*, 15 C. D. 643 49 L. J. Ch. 505.

(*m*) 45 & 46 Vict. c. 39, s. 3 (2).

(*n*) *Re Cousins*, 31 C. D. 671; 55 L. J. Ch. 662.

(*o*) *Alms Corn Charity*, 1901, 2 Ch. 750; 71 L. J. Ch. 76.

(*p*) *Le Neve* v. *Le Neve*, 3 Atk. 646; 2 Wh. & Tu. 32; *Atterbury* v. *Wallis*, 8 D. M. & G. 454; 25 L. J. Ch. 792; 114 R. R. 194; *Spaight* v. *Cowne*, 1 H. & M. 359; 136 R. R. 150; *Boursot* v. *Savage*, *supra*; *Bradley* v. *Riches*, 9 C. D. 193.

(*q*) *Dryden* v. *Frost*, 3 M. & C. 670; 45 R. R. 344; *Robinson* v. *Briggs*, 1 Sm. & G. 188; 96 R. R. 372.

with notice of such facts as would or ought to have come to the knowledge of an independent solicitor (*r*). But a solicitor who acts for both vendor and purchaser and fails to disclose material facts to the purchaser is not excused by reason of his being under a conflicting duty to the vendor (*s*). The mere circumstance, however, of there being only one solicitor in the business does not necessarily constitute him the solicitor of both parties so as to affect both with notice. It does not follow that, if there be not a solicitor employed on both sides, the solicitor who does act is the solicitor of both parties. To have this effect there must be a consent to accept him as such, or something equivalent thereto (*t*).

The mortgagee or purchaser may not desire to employ a solicitor, but if he knowingly constitute the relation of solicitor and client between himself and his vendor or between himself and the solicitor of the party with whom he is dealing, he will of course be affected with notice of any prior incumbrance of which the solicitor is cognizant (*u*), and although a purchaser is not necessarily to be held to have employed his vendor's solicitor because he employed no other, yet if he employs no solicitor he must be held to have exactly the same knowledge as if he had employed one (*x*).

The rule that notice to a solicitor is notice to the client applies only as between parties dealing hostilely with each other (*y*).

It is not every description of knowledge possessed by a solicitor employed in any particular transaction that can be treated as the actual knowledge of the client. All matters affecting the title to property, or the interests of other persons in connexion with it, all circumstances which would entitle

(*r*) *Re Cousins*, 31 C. D. 671, 677; 55 L. J. Ch. 662.

(*s*) *Moody* v. *Cox*, 1917, 2 Ch. 71; 86 L. J. Ch. 424.

(*t*) *Espin* v. *Pemberton*, 4 Drew. 333; 3 D. & J. 547; 28 L. J. Ch. 311; 121 R. R. 224; *Wythes* v. *Labouchere*, 3 D. & J. 594; 121 R. R. 238; *Lloyd* v. *Attwood*, *ibid.* 614; 29 L. J. Ch. 97; 121 R. R. 252; *Perry* v. *Holl*, 2 D. F. & J. 38; 129 R. R. 9.

(*u*) *Espin* v. *Pemberton*, *supra*; *Kettlewell* v. *Watson*, 21 C. D. 685; 26 C. D. 501; 53 L. J. Ch. 717.

(*x*) *Atterbury* v. *Wallis*, *infra*, *per* Lord Romilly.

(*y*) *Austin* v. *Tawney*, 2 Ch. 143; 36 L. J. Ch. 339.

parties to equitable priorities, or change the character of rights, which depend upon want of notice, known to the solicitor, have the same effect as if actually known to the client. But this imputed knowledge will not extend to matters which have no reference to rights created or affected by the transaction, but which merely relate to the motives and objects of the parties, or to the consideration upon which the matter is founded (*z*). Nor does the employment of a solicitor to do a mere ministerial act, such as the procuring the execution of a deed or preparing a conveyance, so constitute him an agent as to affect his employer with notice of matters within his knowledge (*a*).

The rule that notice to a solicitor is notice to the client does not apply to a case where trustees and executors are in possession of a fund, and notice of a mortgage or charge on the fund is given to the solicitor employed by them in the matter. Such notice is not sufficient to create a privity and to make the trustees or executors liable to the same consequences as if notice had been given to them personally (*b*).

The rule that notice to a solicitor is notice to the client has been held to apply notwithstanding that the solicitor may be perpetrating a fraud upon the client (*c*). But in *Kennedy* v. *Green* (*d*) Lord Brougham held that a client is not to be affected with notice of a prior fraud committed by the solicitor, which the latter would of course conceal. A distinction was, however, subsequently made between cases where there was fraud independently of the question whether the act which had been done was made known or not, and cases where the question of fraud depended wholly upon whether the act had been made known or not (*e*); and in the latter class of cases it was considered that the client had

(*z*) *Per* Lord Chelmsford, 10 H. L. C. 114.

(*a*) *Wyllie* v. *Pollen*, 3 D. J. & S. 601; 32 L. J. Ch. 782; 142 R. R. 180; *Kettlewell* v. *Watson*, 21 C. D. 685; 26 C. D. 501; 53 L. J. Ch. 717

(*b*) *Saffron Walden, &c., Society* v. *Rayner*, 14 C. D. 406; 49 L. J. Ch. 465.

(*c*) *Dixon* v. *Winch*, 1900, 1 Ch. 736; 69 L. J. Ch. 465.

(*d*) 3 M. & K. 699; 41 R. R. 176. See *Green* v. *Fletcher*, 8 N. S. W. R. Eq. 58.

(*e*) *Hewitt* v. *Loosemore*, 9 Ha. 449; 21 L. J. Ch. 69; 89 R. R. 526; *Atterbury* v. *Wallis*, *infra*.

constructive notice. In *Atterbury* v. *Wallis* (*f*), for instance, where a solicitor took a mortgage of an equity of redemption which he sub-mortgaged, and afterwards joined with the first mortgagee and the mortgagor in a new mortgage of the property, acting as the solicitor of all parties to the transaction, but not disclosing the existence of the sub-mortgage, it was held that the new mortgagee was affected with the solicitor's knowledge, and his security was to that extent displaced. So also in *Rolland* v. *Hart* (*g*), where a solicitor on behalf of A., one of his clients, procured from B., another client, an advance on a mortgage of land in Middlesex, and then, concealing the incumbrance, induced C., also a client, to lend money on mortgage of the same estate, and C.'s security was the first registered, it was held that the case did not fall within the principle of *Kennedy* v. *Green*, and that C., having notice through the solicitor of B.'s mortgage, could not gain priority over it by registration. So also in *Boursot* v. *Savage* (*h*), where a purchaser employed one of three fiduciary vendors as his solicitor in the transaction, he was fixed with constructive notice of the trust. "The fact," said Kindersley, V.-C., "that the solicitor may be committing a fraud in relation to a transaction in which he is employed, cannot afford any reason why the client should not be affected with constructive knowledge of the facts. The constructive knowledge of all the facts must be imputed to him whether there is fraud relating to the transaction or not. It is the existence of the trust, and not of the fraud, of which he is held to have constructive notice. The constructive notice of the trust must be imputed to him whether there is fraud relating to it or not." So also in a case where the plaintiff jointly with his solicitor contributed money on loan on a deposit of deeds, and the solicitor subsequently took a mortgage to himself and deposited the deeds with a bank as security for moneys advanced to him, it was held that notice of the plaintiff's advance must be imputed to the bank (*i*).

(*f*) 8 D. M. & G. 466; 25 L. J. Ch. 792; 114 R. R. 194.
(*g*) 6 Ch. 678.
(*h*) 2 Eq. 134; 35 L. J. Ch. 627.
(*i*) *Bradley* v. *Riches*, 9 C. D. 193.

"Where," said Mr. Justice Fry (*k*), "there is an interest and a duty, the Court will not presume that the solicitor will follow his interest and not his duty. If, moreover, the circumstances of the case are looked to, the suggestion that the transaction would have failed if the solicitor had made known to the bank the advance of the plaintiff does not arise. The mortgage was taken by the bank as the best thing it could get."

The tendency of later decisions and of the Conveyancing Act, however, has been in favour of the doctrine that when a man employs a solicitor, whose whole purpose and meaning in the transaction is to cheat and defraud his client, and who in furtherance of this intention keeps back purposely from his knowledge the true state of the case, the presumption is conclusively repelled that the client has imputed or constructive notice through the solicitor of the fact which has been concealed from him (*l*). "This exception," said Mr. Justice Fry, in *Cave* v. *Cave* (*m*), "has been put in two ways. In the one view notice is not imputed, because the circumstances are such as not raise the conclusion of law which does ordinarily arise from the mere existence of notice to the agent; in the other view, the act done by him in his character of agent is such as cannot be said to be done by him in his character of agent, but is done by him in the character of a party to an independent fraud on his principal, and that is not to be imputed to the principal as an act done by his agent." "The presumption from duty," said further Mr. Justice Fry, in *Kettlewell* v. *Watson* (*n*), "in the agents may be repelled by showing that whilst he was acting as agent, he was also acting in another character, namely, as a party to a scheme or design of fraud, and that the knowledge he attained was attained by

(*k*) Ibid.

(*l*) *Espin* v. *Pemberton*, 3 D. & J. 547; 28 L. J. Ch. 311; *Thompson* v. *Cartwright*, 33 Beav. 185; 2 D. J. & S. 10; 33 L. J. Ch. 324; *Hopgood* v. *Ernest*, 3 D. J. & S. 116; 142 R. R. 36; *Waldy* v. *Gray*, 20 Eq. 251; 44 L. J. Ch. 394; *Jones* v. *Bygott*, 44 L. J. Ch. 487; *Banfather's Claim*, 16 C. D. 178; 50 L. J. Ch. 218; *Kettlewell* v. *Watson* 21 C. D. 685; 26 C. D. 501; 53 L. J. Ch. 717; but see *Dixon* v. *Winch*, *infra*.

(*m*) 15 C. D. 644; 49 L. J. Ch. 505.

(*n*) 21 C. D. 707; 26 C. D. 501.

him in the latter character, and therefore there would be no ground to assume that the duty of the agent was performed by a person who filled that double character."

Where, however, a client mortgaged land to his solicitor, who shortly afterwards transferred the mortgage to a transferee who gave no notice of the transfer to the mortgagor, and afterwards the solicitor and mortgagor, who put himself entirely in the hands of the solicitor, conveyed the land to the plaintiff by a deed containing a recital that it was free from incumbrances, and the proceeds of sale were received by the solicitor, who retained the mortgage debt out of them, it was held that the mortgagor, having placed himself entirely in the hands of his solicitor, must have imputed to him the knowledge which the solicitor actually had (*o*).

Where a mortgagee who was also solicitor deposited the deeds with his bankers as security and the bankers gave no notice to the mortgagor, and subsequently the mortgagor and mortgagee joined in a further mortgage to S. and the mortgagee acted throughout as solicitor for all parties without disclosing the existence of the mortgage to the bank, it was held that S. was affected with constructive notice of the bank's mortgage, and therefore the bank had priority over S., but that the mortgagor, not having placed himself entirely in the hands of the solicitor, had no such notice (*p*).

It would seem that the test whether the imputation be excluded by the fraud of the solicitor is whether the fraud is such as to exclude the doctrine of agency.

The same considerations apply where one solicitor is employed by both parties to a transaction, and the evidence establishes the fact that the solicitor has entered into a conspiracy with one client to defraud the other (*q*). Nor is notice to a solicitor notice to a client where the person giving the information knows or has good reason to believe that it will not be communicated to the client (*r*).

(*o*) *Dixon* v. *Winch*, 1900, 1 Ch. 736; 69 L. J. Ch. 465; cf. *Turner* v. *Smith*, 1901, 1 Ch. 213; 70 L. J. Ch. 144.

(*p*) *Berwick & Co.* v. *Price*, 1905, 1 Ch. 632; 74 L. J. Ch. 249.

(*q*) *Sharpe* v. *Foy*, 4 Ch. 35.

(*r*) *Ibid.*

Though a client by reason of the fraud of a solicitor be not affected with notice through the fraud of the solicitor, he may be affected by his negligence (*s*).

In determining the equities between parties who have been defrauded by a common solicitor, the Court looks to see whether there has been anything in the transaction calculated to put either of the parties upon inquiry. If there be anything in the case calculated to excite suspicion or to put either of the parties upon inquiry, and he abstains from inquiry, the same knowledge will be imputed to him as he would have been affected with, had he employed an independent solicitor (*t*).

Notice to partner.

Notice to one partner in a partnership matter during the continuance of the partnership is notice to the other partners (*u*). A partner, however, is not necessarily fixed with notice of the contents of his own books (*w*). Nor is the knowledge of a fraud by one partner necessarily the knowledge of the firm (*x*). A partner is entitled to rely on the good faith of his co-partners (*y*).

Notice to directors or shareholders of a company.

The rule that notice to one partner is notice to the other partners does not apply to the case of corporations or companies. Notice to a director does not necessarily affect the company (*z*); and knowledge by directors of fraud does not amount to notice to the company (*a*); but notice to one of the persons legally intrusted with the proper business to which the notice relates, or who has authority to act for the corporation in the particular matter in regard to which the notice is

(*s*) *Hopgood* v. *Ernest*, 3 D. J. & S. 116; 142 R. R. 36; *Kettlewell* v. *Watson*, 21 C. D. 685, 708; 53 L. J. Ch. 717.

(*t*) *Kennedy* v. *Green*, 3 M. & K. 699; 41 L. J. Ch. 176; *Frail* v. *Ellis*, 16 Beav. 357; 22 L. J. Ch. 467; 96 R. R. 168; *Atterbury* v. *Wallis*, 25 L. J. Ch. 794; 114 R. R. 194; *Perry* v. *Holl*, 2 D. F. & J. 38; 129 R. R. 9; *Taylor* v. *London and County Bank*, 1901, 2 Ch. 231; 70 L. J. Ch. 477; *Davis* v. *Hutchings*, 1907, 1 Ch. 356; 76 L. J. Ch. 272.

(*u*) *Atkinson* v. *Mackreth*, 2 Eq. 570; 35 L. J. Ch. 624. See *Williamson* v. *Barbour*, 9 C. D. 535; 50 L. J. Ch. 147.

(*w*) See *Stewart's Case*, 1 Ch. 574; 35 L. J. Ch. 738.

(*x*) *Williamson* v. *Barbour*, *supra*, *per* Jessel, M.R.

(*y*) *Betjemann* v. *B.*, 1895, 2 Ch. 474; 64 L. J. Ch. 641.

(*z*) *Re Carew's Estate*, 31 Beav. 45.

(*a*) *Montgomerie Co.* v. *Blyth*, 27 V. L. R 175.

given, will bind the corporation (*b*). Where one person is a director or officer of two companies his personal knowledge is not the knowledge of both the companies, unless he is under some duty to communicate it, and if he has been guilty of fraud the Court will not infer that he has fulfilled that duty (*c*). So notice to a company through a sole director will not be imputed if it necessarily involved disclosure by the director of his own fraud (*d*). Casual notice brought home to the secretary, not as secretary but as an individual, is not notice to the company (*e*).

There is no presumption of law that a director has notice of everything that may be discovered from entries in the books of the company (*f*).

A shareholder is not necessarily fixed with a knowledge of the contents of the memorandum or articles of association of the company (*g*). But he must, within a reasonable time after the registration of the memorandum and articles of association, be presumed to acquaint himself with their contents. After the lapse of a reasonable time he cannot be heard to say that he had no knowledge of their contents (*h*). But now under the Companies Act, 1900, s. 10, re-enacted by the Companies Act, 1908, s. 81, the memorandum must appear in the prospectus.

The shareholders in a company are not bound to look into the management, and will not be held bound to have notice of everything which has been done by the directors, who may be assumed by the shareholders to have done their duty (*i*).

(*b*) *Worcester Corn Exchange Co.*, 3 D. M. & G. 183; 22 L. J. Ch. 593; 98 R. R. 98; *Re Carew's Estate*, 31 Beav. 45.

(*c*) *Hampshire Land Co.*, 1896, 2 Ch. 743; *Re Fenwick, Stobart & Co.*, 1902, 1 Ch. 507; 71 L. J. Ch. 321.

(*d*) *Re European Bank*, 5 Ch. 358; 39 L. J. Ch. 588.

(*e*) *Société Générale* v. *Tramways Union*, 14 Q. B. D. 424, 438; 54 L. J. Q. B. 177.

(*f*) *Hallmark's Case*, 9 C. D. 329; 47 L. J. Ch. 868; *Denham & Co.*, 25 C. D. 752; 53 L. J. Ch. 1113. See 1894, I Ch., at p. 534.

(*g*) *Stewart's Case*, 1 Ch. 574; 35 L. J. Ch. 738.

(*h*) *Wilkinson's Case*, *Re Madrid Bank*, 2 Ch. 536, 540; 36 L. J. Ch. 489; Buckley, 96.

(*i*) L. R. 3 H. L., at p. 276; *Stanhope's Case*, 1 Ch. 161, 170; 35 L. J. Ch. 296.

Notice to trustees.

Notice to one of several trustees is, as a general rule, notice to all (*k*), but not where the trustee to whom alone notice is given has an interest adverse to that of his co-trustee, as, *e.g.*, where he has a beneficial interest which he has secretly incumbered (*l*). Where one only of several trustees has notice and dies, a subsequent assignee who gives notice to the then existing trustees is entitled to priority (*m*). But a trustee will not be affected with notice of a prior charge which the other trustee has fraudulently concealed if such interest would not have been disclosed to an independent solicitor making proper inquiries (*n*).

Registration of an assurance is not notice.

The registration of an assurance is not of itself notice. A prior equitable incumbrance will not, although registered, affect a subsequent purchaser without notice who has obtained the legal estate (*o*).

Registration with notice of unregistered assurance.

Registration is no protection against an unregistered assurance of which the party claiming under the registered instrument had notice prior to the completion of his purchase or security (*p*). The object of the Registration Acts being to give notice, the evils against which those statutes intended to guard do not exist where a man has notice independently of the registry. If, therefore, a man has notice of an earlier deed, which though executed is not registered, the registration which he actually effects will not give him priority over the earlier deed (*q*). The notice must, however, amount to actual

(*k*) *Low* v. *Bouverie*, 1891, 3 Ch. 82; 60 L. J. Ch. 594; *Ward* v. *Duncombe*, 1893, A. C. 369; 62 L. J. Ch. 881; *Re Wasdale*, 1899, 1 Ch. 163; 68 L. J. Ch. 117.

(*l*) *Brown* v. *Savage*, 4 Drew. 635; *Lloyd's Bank* v. *Pearson*, 1901, 1 Ch. 865; 70 L. J. Ch. 422; *Re Dallas*, 1904, 2 Ch. 385; 73 L. J. Ch. 365.

(*m*) *Re Phillips' Trusts*, 1903, 1 Ch. 183; 72 L. J. Ch. 94.

(*n*) *Taylor* v. *London and County Banking Co.*, 1901, 2 Ch. 231; 70 L. J. Ch. 477.

(*o*) *Bushel* v. *Bushel*, 1 Sch. & Lef. 98; 9 R. R. 21; *Robinson* v. *Trevor*, 12 Q. B. D. 434; 53 L. J. Q. B. 85; see *Re Greer*, *infra*; *Gresham Life Ass.* v. *Crowther*, 1912, 2 Ch. 219; 83 L. J. Ch. 867.

(*p*) *Le Neve* v. *Le Neve*, 3 Atk. 646; 2 Wh. & Tu. 43.

(*q*) *Eyre* v. *M'Dowell*, 9 H. L. C. 619, 646; 131 R. R. 373; *Chadwick* v. *Turner*, 1 Ch. 310; 35 L. J. Ch. 349; *Agra Bank* v. *Barry*, L. R. 7 H. L. 148; *Kettlewell* v. *Watson*, 21 C. D. 685; 53 L. J. Ch. 717; *Bradley* v. *Riches*, 9 C. D. 193.

notice (*r*). Constructive notice is not sufficient (*s*). But the actual knowledge of a solicitor will be imputed to a client (*t*).

A purchaser is not relieved from inquiring for and examining deeds, memorials of which are registered, the object of the Middlesex Act being to let him know what he is to inquire for rather than to dispense with inquiry (*u*). But, on the other hand, if he searches the registry, he will not be affected by constructive notice of prior unregistered charges because he neglects to make inquiries which might be necessary where no registry exists (*x*). But if he or his agent actually knows of the existence of such unregistered instruments when he takes his own deed, and has abstained from inquiry with a view to avoid notice, the Court may postpone him; but the case must be one in which the Court is able to come to a clear decision as to the fact of fraud (*y*). The non-production in a register county of deeds to the solicitor instructed to prepare a mortgage upon an estate there will not of itself be deemed a proof that the solicitor has acted fraudulently or even negligently so as to affect the interests of his client. The construction to be put upon his conduct does not depend on an inflexible rule of law, but upon the circumstances of the case (*z*). Quære whether the registration of a mortgage will negative the existence of fraud and negligence on the part of the mortgagee in not obtaining possession of the title deeds (*a*).

By the Yorkshire Registry Act, 1884, s. 14, assurances of freehold lands in that county rank according to their date of registration, and all priorities given by the Act are to have full effect, except in cases of actual fraud. A solicitor registering a mortgage to himself so as to gain priority over an

(*r*) *Chadwick* v. *Turner*, *supra*.
(*s*) *Agra Bank* v. *Barry*, L. R. 7 H. L. 148; *Lee* v. *Clutton*, 46 L. J. Ch. 48.
(*t*) *Bradley* v. *Riches*, 9 C. D. 193.
(*u*) *Kettlewell* v. *Watson*, 26 C. D. 501, 508; 53 L. J. Ch. 717.
(*x*) *Chadwick* v. *Turner*, 1 Ch. 310, 319; 35 L. J. Ch. 349.
(*y*) *Lee* v. *Clutton*, 46 L. J. Ch. 48.
(*z*) *Agra Bank* v. *Barry*, L. R. 7 H. L. 149.
(*a*) *Re Greer*, 1907, 1 Ir. R. 57.

unregistered mortgage to his client is within the exception to sect. 14 (*b*).

The Land Transfer Acts, 1875 and 1897, contain no express provision as to the effect of actual notice of unregistered or unprotected claims; but it is suggested that such notice will not affect the estate of the registered transferee for value unless the case amounts to a connivance with fraud (*c*).

The priority of charges created by the registered proprietor is decided by priority of registration (*d*); but unregistered dispositions may be created and their priorities preserved by entering notices, cautions, or inhibitions on the register (*e*).

As the register is the title itself, *semble* a person is fixed with notice of all he might have discovered by searching it, and no protection is given by any legal estate (*f*).

Registered dispositions which would be fraudulent and void if unregistered remain so under the Act of 1875, s. 98, and therefore the register can, under the Act of 1875, s. 95, and the Act of 1897, s. 7 (2), be rectified as against transferees for value (*g*); but if a disposition be voidable only, as distinguished from void, the register cannot, it is conceived, be rectified as against transferees for value.

In Australia and New Zealand the fraud which must be proved to invalidate the title of a registered purchaser for value is actual, not constructive, fraud brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents (*h*).

SECTION III.—FRAUDS RELATING TO MARRIAGE.

Marriage articles.

Another class of frauds upon third parties, which will be relieved against, is where persons, after doing acts required

(*b*) *Battison* v. *Hobson*, 1896, 2 Ch. 403; 65 L. J. Ch. 695.
(*c*) Brickdale (ed. 2), 14.
(*d*) S. 28.
(*e*) S. 49.
(*f*) Brickdale (ed. 2), 169.
(*g*) *Att.-Gen.* v. *Odell*, 1906, 2 Ch. 47; 75 L. J. Ch. 425.
(*h*) *Assets Co.* v. *Mere Roihi*, 1905, A. C. 176; 74 L. J. P. C. 49; *Butler* v. *Fairclough*, 1917, V. L. R. 175.

to be done on a treaty of marriage, render those acts unavailing by entering into other secret agreements, or derogate from those acts, or otherwise commit a fraud upon the relatives or friends of one of the contracting parties (*i*); as where a parent declines to consent to a marriage on account of the intended husband being in debt, and the brother of the latter gives a bond for the debt to procure such consent, and the intended husband then gives a counter-bond to his brother to indemnify him against the first bond (*k*). So, also, where a creditor of the intended husband concealed his own debt and misrepresented to the lady's father the amount of the debts of the intended husband, the transaction was treated as a fraud upon the marriage, and the creditor was restrained from enforcing his debt at law against the husband after the marriage (*l*). So, also, where a brother on the marriage of his sister let her have a sum of money privately that her fortune might appear to be as much as was insisted on by the other side, and the sister gave a bond to the brother to repay it, the bond was set aside (*m*). So, also, where the money due by an intended husband upon a mortgage was represented by the mortgagee to the relations of the wife to be much less than was really due, he was not allowed to recover more than he had represented the debt to amount to (*n*).

Another case of fraud upon marriage articles is where a father, who had on the marriage of his daughter covenanted that he would upon his death leave her certain tenements, and would also by his will give and leave her a full and equal share with her brothers and sisters of all his personal estates, transfers afterwards during his life a very large portion of his personal property to his son, retaining the dividends for his own life (*o*). Covenants of this sort do not prohibit a

(*i*) *Peyton* v. *Bladwell*, 1 Vern. 240.

(*k*) *Turton* v. *Benson*, 1 P. Wms. 496; *Scott* v. *Scott*, 1 Cox, 366; *Palmer* v. *Neave*, 11 Ves. 166.

(*l*) *Neville* v. *Wilkinson*, 1 Bro. C. C. 543. See *D'Albiac* v. *D'Albiac*, 16 Ves. 124; *Morris* v. *Clarkson*, 1 J. & W. 107; 19 R. R. 277.

(*m*) *Gale* v. *Lindo*, 1 Vern. 475; *Lamlee* v. *Hanman*, 2 Vern. 499.

(*n*) *Barrett* v. *Wells*, Prec. Ch. 131.

(*o*) *Jones* v. *Martin*, 3 Anst. 882; 5 Ves. 265 *n.*; 8 Bro. P. C. 242; 5 R. R. 32. See *M'Neill* v. *Cahill*, 2 Blight, 228. Cf. *Stocken* v. *Stocken*, 4 M. & C. 95. 48 R. R. 16; *Bell* v. *Clarke*, 25 Beav. 436; 27 L. J. Ch. 674.

parent from making any disposition of his property during his lifetime among his children more favourable to one than another. But they do prohibit a man from doing any acts which are designed to defeat or defraud the covenant. A parent may, if he pleases, notwithstanding the covenant, make an absolute gift to a child; but the gift must be an absolute and unqualified one, and must not be a mere reversionary gift, which saves the income to the parent during his own life (*p*).

Fraud on marital rights.

Another class of transactions which will be relieved against as being in fraud of the marriage contract are conveyances made by an unmarried woman of her property, during the treaty of marriage, without the knowledge of her intended husband, in contravention of his marital rights, or in disappointment of his just expectations (*q*).

The doctrine of fraud on marital rights has, however, since the Married Women's Property Act, lost much of its importance. In the old sense of the husband being deprived of something to which as a husband he would have a right if the wife had not before marriage executed a conveyance, fraud on marital rights does not appear to be any longer possible. It must, however, be remembered that the change is effected not by abrogation of the doctrine, but by withdrawal of the subject-matter to which it is capable of application. The necessity of the most abundant good faith in such a contract as that of a settlement made on marriage is so obvious and cogent that it would be rash to conclude that even so widely sweeping a change as that made by the Married Women's Property Act has wholly deprived of effect such a doctrine as that under consideration (*r*). Other eminent authorities have treated the doctrine as rendered altogether obsolete by the Act (*s*). But though there may be some doubt on the point, especially when it is remembered that the husband's estate by the curtesy still exists, there can be no doubt whatever that

(*p*) *Jones* v. *Martin*, 3 Anst. 882; 5 Ves. 265 *n*.

(*q*) *Strathmore* v. *Bowes*, 2 Bro. C. C. 345; 2 Cox, 33; 1 Ves. Jr. 22; 1 Wh. & Tu. 613; 1 R. R. 76.

(*r*) Vaizey on Settlements, p. 1586.

(*s*) Wolstenholme, 8th ed., 262; Pollock on Contracts, 4th ed., p. 275.

fraud on marital rights, if and so far as it still exists, is wholly changed in its nature. It is thought advisable, therefore, to omit here the cases on the subject given in the first two editions.

Fraud on marital rights rested upon the peculiar right which a husband had in his wife's property, and a wife had no similar equity to have a conveyance of the property of or a security given by the intended husband set aside as being a fraud upon her marital rights (*t*). But obviously a fraud may be committed upon an intended wife. Where upon a marriage the father of the husband agreed to give up to him a farm in consideration of the wife's fortune being paid to the father, it being then stated that the intended husband was not indebted to any extent, and a deed was drawn up and executed in pursuance of the agreement, and on the same day the intended husband gave his father a promissory note for 200*l*., it was held that the giving this note, coupled with the statement that the son was not indebted, was a fraud upon the intended wife and her father who gave the fortune, and that the father of the husband could not recover on the note against his son if he was alive, nor against his assets after his death (*u*).

Brokage bonds.

Another class of transactions which are relieved against as being in fraud of third parties are contracts or agreements to negotiate a marriage between two parties for a certain compensation. In equity it has long been settled that such bonds will be relieved against, as well upon grounds of public policy as because they tend to induce the exercise of undue influence in the promotion of marriages, and are a fraud on the families of those who are so induced to marry without taking the advice of their friends (*x*). There is no distinction between a contract to bring about a marriage with a particular individual and one to bring about a marriage with one of several persons (*y*). Marriage brokage contracts are so adverse to

(*t*) *M'Keogh* v. *M'Keogh*, I. R. 4 Eq. 338.

(*u*) *M'Keogh* v. *M'Keogh*, I. R. 4 Eq. 338.

(*x*) *Arundel* v. *Trevillian*, 1 Ch. Rep. 47; *Law* v. *Law*, Ca. t. Talb. 140, 142; *Vauxhall Bridge Co.*, v. *Spencer*, Jac. 67.

(*y*) *Hermann* v. *Charlesworth*, 1905, 2 K. B. 123; 74 L. J. K. B. 620.

public policy as not to be capable of confirmation (*z*); and money paid under them may be reclaimed (*a*), even though something has been done under the contract and it has been part performed (*b*). It makes no difference that the marriage is between persons of equal rank, age, and fortune, for the contract is equally open to objection upon general principles, as being of dangerous consequence (*c*). The principle has even gone further, and a bond given for assisting a clandestine marriage has been set aside, though given voluntarily after the marriage and without any previous agreement for the purpose (*d*).

Upon a similar ground, if a parent or guardian, or any person nearly connected to a party, privately connive with a third person, and agree to procure a marriage between such parties in consideration of a certain compensation, or agree upon payment of a certain sum to consent to such marriage, the contract is utterly void upon the ground that it is a bargain in contravention of the rights of third parties, whose interests are thus controlled and sacrificed (*e*).

Of a kindred nature to marriage brokage contracts, and governed by the same rule, are cases where bonds are given or other agreements made as a reward for using influence and power over another person to induce him to make a will in favour of the obligee and for his benefit, for all such contracts tend to the deceit and injury of third parties, and encourage artifice and improper attempt to control the exercise of their free judgment (*f*). But such cases are to be carefully distinguished from those in which there is an agreement among heirs or other near relatives to share the estate equally between them, whatever may be the will made by the testator; for such an agreement is generally made to suppress fraud and undue influence, and cannot truly be said to disappoint the

(*z*) *Cole* v. *Gibson*, 1 Ves. 503, 506, 507; *Roche* v. *O'Brien*, 1 Ba. & Be. 358.
(*a*) *Smith* v. *Bruning*, 2 Vern. 392; *Goldsmith* v. *Bruning*, 1 Eq. Ca. Ab. 89.
(*b*) *Hermann* v. *Charlesworth*, 1905, 2 K. B. 123; 74 L. J. K. B. 620.
(*c*) *Hall* v. *Potter*, 3 Lev. 411.
(*d*) *Williamson* v. *Gihon*, 2 Sch. & Lef. 357.
(*e*) *Peyton* v. *Bladwell*, 1 Vern. 240; *Keat* v. *Allen*, 2 Vern. 588; Story, Eq. Jur. 266.
(*f*) *Debenham* v. *Ox*, 1 Ves. 176.

testator's intention, if he does not impose any restriction on his devisee (*g*).

Office brokage bonds.

Of a kindred nature to marriage brokage contracts are office brokage bonds. Bonds of this sort are fraudulent, and therefore void upon grounds of public policy, the tendency of such bonds being to introduce unfit persons into places of great public trust, and to defraud the public of the service of the most efficient candidates or officers (*h*).

Bonds to marry.

A bond given by a young woman secretly to a man, conditioned to pay him a sum of money if she did not marry him on the death of the parent or other individual from whom she has expectancies, but kept secret from him, is in equity looked on as a fraud on the parent or other individual from whom she has expectations, who disapproved of the marriage, and might be misled into making a provision for her, which, had he known of the bond, he might have done in such a manner as would have prevented the marriage (*i*).

Withholding consent to marriage.

Gifts and legacies are often bestowed upon persons upon condition that they shall not marry without the consent of parents, guardians, or other confidential persons. If such consent to the marriage is withheld from a corrupt motive the Court may interfere. It has been contended that if the person whose consent is required is interested in withholding it he must show a reason for his dissent. But if the author of the trust chooses to require the consent of a person whom he knows at the time to have an interest in refusing it, it is difficult to conceive an equity interfering with his choice. At all events, no equity will arise if the trustee has meant to act honestly, though his decision may not be the same as that at which the Court would have arrived (*j*).

Marriage Act.

Under the Marriage Act, 4 Geo. IV. c. 76, the guardian of any minor who has married without his consent may on pro-

(*g*) *Beckley* v. *Newland*, 2 P. Wms. 181; *Wethered* v. *Wethered*, 2 Sim. 183; 29 R. R. 77; *Higgins* v. *Hill*, 56 L. T. 426.

(*h*) *Law* v. *Law*, Ca. t. Talb. 140; 3 P. Wms. 391; *Osborne* v. *Williams*, 18 Ves. 379; 11 R. R. 218.

(*i*) *Woodhouse* v. *Shepley*, 2 Atk. 536; *Cock* v. *Richards*, 10 Ves. 429; 8 R. R. 23.

(*j*) *Clarke* v. *Parker*, 19 Ves. 1; 12 R. R. 124.

ceedings by way of information obtain a declaration of forfeiture against either party who has procured a solemnization of the marriage by falsely stating that such consent has been given, and the Court will thereupon order a settlement on the innocent party and the issue of the marriage.

Marriage annulled by fraud.

The rule that the Courts refuse to recognize as binding contracts to which the consent of either party has been obtained by fraud or duress applies to contracts of marriage, and therefore a marriage so obtained may be annulled (*k*). But a marriage cannot be held void merely upon proof that it was contracted upon false representations, unless the party imposed upon was deceived as to the person and thus has given no consent (*l*).

SECTION IV.—FRAUD IN RESPECT OF SALES BY AUCTION.

Agreements whereby parties for the purpose of preventing competition at an auction, and of depressing the value of the property below its market price, engage not to bid against each other, were formerly thought to operate as a fraud upon third parties (*m*). But in several cases an agreement to this effect has been held good (*n*).

In sales by auction the employment by the vendor of a puffer or agent to bid for the purpose of increasing the price without disclosing the fact was held by the Courts of Common Law to be fraudulent, and the purchaser might avoid the sale, and bids by the auctioneer as the vendor's agent had the same effect (*o*). Courts of equity drew a distinction between the employment of a bidder for the purpose of protecting the property from being sold at an undervalue, which was not considered fraudulent, and the employment of a bidder to increase the price; but the employment of more persons than one to bid was held to be fraudulent, because only one could

(*k*) *Scott* v. *Sebright*, 12 P. D. 21; *Ford* v. *Stier*, 1896. P. 1; 65 L. J. P. 13.
(*l*) *Swift* v. *Kelly*, 3 Knapp, 293; *Scott* v. *Scott*, 26 V. L. R. 588.
(*m*) Story, Eq. Jur. 293.
(*n*) *Galton* v. *Emuss*, 1 Coll. 242; 13 L. J. Ch. 388; *Re Carew's Estate*, 26 Beav. 187; 122 R. R. 76; *Heffer* v. *Martyn*, 36 L. J. Ch. 372.
(*o*) *Parfitt* v. *Jepson*, 46 L. J. C. P. 529.

be necessary for the protection of the property, and the employment of more could only be for the purpose of increasing the price (*p*). The extraordinary result followed that in this particular instance a contract might be valid in equity though voidable at law on the ground of fraud. In order to remove any conflict between the rule at law and in equity upon the subject in the case of sales by auction of land, the Sale of Land by Auction Act (30 & 31 Vict. c. 48) was passed, enacting by sect. 4 that where a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law (*q*).

The announcement that property is to be sold by auction "without reserve" imports that there shall be no bidding directly or indirectly on the part of the vendor, and the employment of any bidder at a sale under such conditions is fraudulent (*r*).

In a case where a sale was stated to be "without reserve but with liberty to the parties interested to bid," it was held that the purchaser could not avoid his contract upon the ground that the vendor had increased the price by bidding against him (*s*), nor on the ground that, unknown to the vendors, a fictitious bidding was made by a stranger, and the purchaser was thereby induced to give more than he had previously bid, which was more than the reserved price (*t*).

With respect to sales "without reserve," the above statute has enacted by sect. 5 that the particulars or conditions of sale by auction of land shall state whether such land will be sold without reserve or subject to a reserve price, or whether a right to bid is reserved, and that if it is stated that such land shall be sold without reserve it shall not be lawful for the seller to employ any person to bid at such sale or for the auctioneer to take knowingly any bidding from any such person. And a similar provision as to goods is contained in the Sale of Goods Act, 1893, s. 58.

(*p*) *Flint* v. *Woodin*, 9 Ha. 618; 89 R. R. 602.
(*q*) See *Heatley* v. *Newton*, 19 Ch. D. 326; 51 L. J. Ch. 225.
(*r*) *Robinson* v. *Wall*, 2 Ph. 372, 375; 16 L. J. Ch. 401; 78 R. R. 119.
(*s*) *Dimmock* v. *Hallett*, 2 Ch. 26; 36 L. J. Ch. 146.
(*t*) *Union Bank* v. *Munster*, 37 C. D. 51; 57 L. J. Ch. 124.

The section makes a distinction between a reserved price and a reserved right to bid, and under conditions stating the former only it is not competent for the vendor to employ a person to bid up to the price stated to be reserved, and a sale effected by means of such bidding was set aside (*u*).

By sect. 6 it is enacted that where any sale by auction of land is declared either in the particulars or conditions of such sale to be subject to a right for the seller to bid, it shall be lawful for the seller or any one person on his behalf to bid; but in a case where the seller reserved a right to bid once, and the auctioneer, with his sanction, bid thrice, the sale was held voidable at the option of the purchaser (*x*). It seems that a seller's right to bid once would be exercised by the auctioneer starting the property at a price, or by the seller or auctioneer naming a reserve (*y*).

Sect. 7 takes away the power of the Court to open biddings after sales by auction of land under its authority unless on the ground of fraud or improper conduct in the management of the sale (*z*).

On the other hand, if a purchaser procure a sale to himself by fraudulently or wrongfully preventing other persons from bidding, the vendor may avoid the sale (*a*). So, also, where the purchaser employed the vendor's agent to bid for him, which deterred other persons from bidding who supposed him to be bidding for the vendor, it was held sufficient ground for refusing specific performance (*b*).

(*u*) *Gilliatt* v. *Gilliatt*, 9 Eq. 60; 39 L. J. Ch. 142.
(*x*) *Parfitt* v. *Jepson*, 46 L. J. C. P. 529.
(*y*) *Ibid.* 531, *per* Grove, J.
(*z*) See *Delves* v. *Delves*, 20 Eq. 77.
(*a*) *Fuller* v. *Abrahams*, 3 B. & B. 116; 23 R. R. 626.
(*b*) *Twining* v. *Morrice*, 2 Bro. C. C. 326.

CHAPTER V.

MISCELLANEOUS FRAUDS.

SECTION I.—FRAUD IN WILLS.

Frauds upon testators in the making of wills are a class of frauds against which the Court will relieve.

The execution of a will with due solemnities by a person of competent understanding and apparently a free agent being duly proved, the presumption is that the testator was cognizant of its contents, and that the instrument expresses his will (*a*), unless there be other circumstances to lead to a different conclusion, in which case the burden of proof lies upon the party propounding the will, and the Court will not pronounce in its favour unless it is judicially satisfied that the instrument propounded is the last will of a free and capable testator (*b*). So where a will is prepared and executed under suspicious circumstances it is for the party propounding it to adduce evidence to remove such suspicion and to satisfy the Court that the testator knew and approved of the contents of the will (*c*). The burden of proving capacity to make a will rests upon those who propounded the will, and *à fortiori* when it appears that the testator was subject to delusions (*d*).

If a person benefited by a will has himself prepared it, or procured it to be prepared, the law looks on the case with suspicion, and the Court requires clear and satisfactory proof that the testator knew and approved the contents of the instrument, and that it expressed his real intentions (*e*). If

(*a*) *Boyse* v. *Russborough*, 6 H. L. C. 49; 26 L. J. Ch. 256; 108 R. R. 1.
(*b*) *Browning* v. *Budd*, 6 Moo. P. C. 435.
(*c*) *Tyrrell* v. *Painton* (No. 1), 1894, P. 151.
(*d*) *Smee* v. *Smee*, 5 P. D. 84; 49 L. J. P. 8.
(*e*) *Baker* v. *Batt*, 2 Moo. P. C. 321; 46 R. R. 52; *Greville* v. *Tylee*, 7 Moo. P. C. 320; 83 R. R. 57.

there be no evidence of instructions previously given, or knowledge of its contents, the party propounding it must prove by evidence of some description or other that the testator knew and approved of the instrument (*f*). The *onus* of proof may be increased by circumstances, such as unbounded confidence in the drawer of the will, extreme debility in the testator, clandestine and other circumstances, which may increase the presumption even so much as to be conclusive against the instrument (*g*).

Proof of knowledge of the contents of a will may be given in any form. The degree of proof depends on the circumstances of each case. Although in perfect capacity, knowledge of the contents will be inferred; yet where capacity is impaired, and the benefit of the drawer of the will large, the suspicion is strong, and the proof must be most stringent. Where the drawer of an instrument gives himself a benefit under the instrument, it is a case for suspicion, depending more or less upon the circumstances of each individual case, and the proof must be in proportion to the degree of suspicion, which of course will vary. The greater the benefit and the less the capacity, the more stringent is the requirement of proof of knowledge of the contents (*h*).

If a testator being of sound mind and capacity has read the will, there is, as a general rule, sufficient evidence to show that he knew and approved of its contents (*i*). So, also, if a will has been read over to a capable testator on the occasion of its execution, or there is evidence to show that its contents have been brought to his notice in any other way, this fact when coupled with his execution thereof will, as a general rule, be sufficient to show that he approved as well as knew the contents thereof (*k*). But circumstances may exist which may require that something further shall be done in the

(*f*) *Barry* v. *Butlin*, 2 Moo. P. C. 491; 46 R. R. 123; *Mitchell* v. *Thomas*, 6 Moo. P. C. 137.

(*g*) *Paske* v. *Ollatt*, 2 Phillim. 324; *Jones* v. *Goodrich*, 5 Moo. P. C. 16; *Greville* v. *Tylee*, *supra*; *Ashwell* v. *Lomi*, 2 P. & D. 477.

(*h*) *Durnell* v. *Corfield*, 1 Roberts, 63.

(*i*) *Atter* v. *Atkinson*, 1 P. & D. 665.

(*k*) *Guardhouse* v. *Blackburn*, 1 P. & D. 116; 35 L. J. P. 116.

matter than the mere establishment of the fact of the testator having been a person of sound mind and capacity, and also of his having had read over to him that which had been prepared for him, and which he executed as his will. There is no unyielding rule of law (especially when the ingredient of fraud enters into the case) that when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all further inquiry is shut out (*l*).

The exercise of undue influence may be a ground for the interposition of the Court to set aside a will. Though a man may have a mind of sufficient soundness and discretion to manage his own affairs in general, still, if such a dominion or influence be obtained over him as to prevent his exercising that discretion in the making a will, he cannot be considered as having such a disposing mind as will give it effect (*m*).

In cases of weakness of mind, arising from the near approach of death or otherwise, strong evidence may be required that the contents of the will were known to and approved by the testator executing the will at such time (*n*), and that the execution was his spontaneous act (*o*).

When it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence rests on the party who alleges it (*p*), or at least he must show facts from which the Court would be justified in treating the circumstances attending the bounty as suspicious. Further, in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis that it was obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis (*q*).

(*l*) *Fulton* v. *Andrew*, L. R. 7 H. L. 469; 44 L. J. P. 17.
(*m*) *Mountain* v. *Bennett*, 1 Cox, 355.
(*n*) *Mitchell* v. *Thomas*, 6 Moo. P. C. 137; *Durnell* v. *Corfield*, 1 Roberts, 63.
(*o*) *Tribe* v. *Tribe*, 13 Jur. 793.
(*p*) *Boyse* v. *Russborough*, 6 H. L. C. 2, 49; 26 L. J. Ch. 256; 108 R. R. 1.
(*q*) *Ibid.*, 51.

A distinction exists between the influence which is held to be undue in the case of transactions *inter vivos* and that which is called undue in relation to a will. In the first place, in the case of gifts or contracts *inter vivos*, there is a transaction in which the person benefited at least takes part, whether he unduly urges his influence or not, and in calling on him to explain the part he took, and the circumstances that brought about the gift or obligation, the Court is plainly requiring of him an explanation within his knowledge. But in the case of a legacy under a will, the legatee may have and in general has no part or even knowledge of the act; and to cast on him, on the bare proof of the legacy and his relation to the testator, the burden of showing how the thing came about, and under what influence or with what motives the legacy was made, or what advice the testator had, professional or otherwise, would be to cast a duty on him which in many, if not in most, cases he could not possibly discharge. Another distinction is this: In the case of gifts or transactions *inter vivos*, it is considered that the natural influence which such relation as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are therefore set aside, unless the party benefited can show affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment. The law regarding wills is very different. The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy so long as the testator thoroughly understood what he was doing and was a free agent. There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a recognition of these claims in a legacy, providing that persuasion stops short of coercion, and that the volition of the testator, though biassed and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another (*r*).

(*r*) *Parfitt* v. *Lawless*, 2 P. & D. 469; 41 L. J. P. 68.

The influence which will set aside a will must amount to force and coercion destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion, by importunity which could not be resisted—that it was done merely for the sake of peace, so that the motive was tantamount to force and fear. "To make a good will a man must be a free agent, but all influences are not unlawful. Persuasion appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like—these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats such as the testator has not the courage to resist: moral command asserted and yielded to for the sake of peace and quiet or of escaping from distress of mind or social discomfort—these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, not driven, and his will must be the offspring of his own volition and not that of another" (*s*). To establish undue influence sufficient to invalidate a will it must be shown that the will of the testator was coerced into doing that which he did not desire to do, and the mere fact that in making his will he was influenced by immoral considerations does not amount to such undue influence so long as the dispositions of the will express the wishes of the testator. A very little pressure may be sufficient, and the mere talking to him and pressing something upon him may so fatigue the brain that the sick person may be induced for quietness' sake to do anything. This would

(*s*) *Hall* v. *Hall*, 1 P. & D. 482, *per* Lord Penzance; 37 L. J. P. 40.

equally be coercion though not actual violence (*t*). There must be "coercion" and not merely persuasion or inducement, however improper that may be (*u*). In a case, accordingly, where the plaintiff, a Roman Catholic priest, had resided with the testatrix and her husband many years as chaplain, and for a part of the time as confessor, and was confessor at the time the will in dispute was made, but there was no evidence that the plaintiff had interfered in the making of the will, or that he had procured the gift of the residue to himself, or that he had brought such gift about by coercion or dominion exercised over the testatrix against her will or by importunity not to be resisted, it was held that there was no evidence to go to the jury on the issue of undue influence (*x*). So, also, a solicitor may take a benefit under the will of a client, although he may himself have prepared it, if no undue influence has been exerted by him over the testator (*y*). So, also, a bequest of the bulk of her property by an old woman to her medical attendant (who was a stranger to her in blood, and in whose house she resided) was upheld, though many of the acts of the medical man with respect to the property deserved serious reprobation; none of them, however, being so connected with the will as to justify the Court in deciding that the execution of the will was procured by means which the law holds to be fraudulent (*z*).

The difficulty of defining the point at which influence over the mind of a testator becomes so pressing as to be properly described as coercion is greatly enhanced when the question is one between husband and wife (*a*).

The influence to be undue within the rule of law which would make it sufficient to vitiate a will may be exercised by means of fraud. "If," said Lord Cranworth, in *Boyse* v.

(*t*) *Wingrove* v. *Wingrove*, 11 P. D. 81; 55 L. J. P. 7.

(*u*) *Baudains* v. *Richardson*, 1906, A. C. 169; 75 L. J. P. C. 57.

(*x*) *Parfitt* v. *Lawless*, 2 P. & D. 472; 41 L. J. P. 68.

(*y*) *Paske* v. *Ollatt*, 2 Phillim. 323; *Barry* v. *Butlin*, 2 Moo. P. C. 480; 46 R. R. 123; *Walker* v. *Smith*, 29 Beav. 394; 131 R. R. 637. See L. R. 2 P. & D. p. 469.

(*z*) *Jones* v *Goodrich*, 7 Moo. P. C. 16. See *Greville* v. *Tylee*, *ibid.*, 320; 83 R. R. 57.

(*a*) *Boyse* v. *Russborough*, 6 H. L. C. 48; 26 L. J. Ch. 256; 108 R. R. 1.

Russborough (*b*), "a wife by falsehood raises prejudice in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relations to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed, such contrivances may, perhaps, be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive" (*c*). So, also, the revocation of a will procured by false and fraudulent representations respecting the character and conduct of a legatee, when made for the purpose of imposing on a testator and inducing him to revoke the bequest in favour of the person calumniated, is void (*d*).

Relief also has been given in equity on the ground of fraud, where a testator was induced to omit the insertion in his will of a formal provision for any intended object of his bounty, upon the faith of assurances, given by his heir or other person who would take his property in the event of his omitting to insert the particular bequest in his will, that his, the testator's, wishes shall be executed as punctually and as fully as if the bequest were formally made (*e*). An engagement of a like nature may be entered into not only by words but may be inferred from conduct (*f*). The case of course will be much the stronger if the insertion of the provision be prevented by physical interference on the part of the interested person (*g*). So where a testator destroyed a codicil on the faith of a promise by the donee of a power of appointment that he would exercise the power in a particular way, an appointment in infringement of the promise was held to be fraudulent and void (*h*).

Where a will is made on the faith of an antecedent promise to perform a secret trust by one alone of two joint tenants,

(*b*) 6 H. L. C. 49.

(*c*) Cf. *Browning* v. *Budd*, 6 Moo. P. C. 430.

(*d*) *Allen* v. *Macpherson*, 1 H. L. C. 207; 73 R. R. 30.

(*e*) *Russell* v. *Jackson*, 10 Ha. 213; 90 R. R. 336; *M'Cormick* v. *Grogan*, L. R. 4 H. L. 88.

(*f*) *Ibid.*; *Paine* v. *Hall*, 18 Ves. 475.

(*g*) *Dixon* v. *Olmius*, 1 Cox, 414.

(*h*) *Tharp* v. *Tharp*, 1916, 2 Ch. 205; 85 L. J. Ch. 162, 622.

the other joint tenant is bound by the trust, the reason being that no one can claim an interest under a fraud committed by another (*i*).

To invalidate a will on the ground of fraud or undue influence it must be shown that they were practised with reference to the will itself, or so contemporaneously with the will or connected with it as by almost necessary presumption to affect it (*k*). But where it appears that at or near the time when the will sought to be impeached was executed the testator was in other important transactions so under the influence of the person benefited by the will that as to him he was not a free agent, but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised (*l*).

An issue whether a will was obtained by fraud ought not to be submitted to a jury unless there is reasonable evidence: 1, that fraud has been practised; 2, that its influence continued so that the testator was labouring under it at the time he made his will; 3, that he was by that means induced to make his will (*m*).

Nor ought an issue whether a will was obtained by undue influence to be submitted to a jury unless there is reasonable evidence: 1, that the person charged had influence over the testator; 2, that he exercised that influence over the testator to the extent of coercion in relation to the will itself; 3, that the execution of the impeached instrument was procured by the exercise of such influence as the *causa causans* of the act itself (*n*).

It lies on the person who brings the charge to prove it by direct or circumstantial evidence. Circumstantial evidence is enough; for a jury is at liberty to infer undue influence, not

(*i*) *Re Stead*, 1900, 1 Ch. 237; 69 L. J. Ch. 49.

(*k*) *Jones* v. *Goodrich*, 5 Moo. P. C. 40.

(*l*) *Boyse* v. *Russborough*, 6 H. L. C. 51; 26 L. J. Ch. 256; 108 R. R. 1. See *Parfitt* v. *Lawless*, 2 P. & D. 472; 41 L. J. P. 68.

(*m*) *Longford* v. *Purdon*, 1 L. R. I. 75.

(*n*) *Ibid.*

as a matter of surmise, but if the evidence leaves no other rational hypothesis on which the conduct of the testator can be accounted for (*o*).

If *part* of a will has been obtained by fraud, probate will be refused of that part and granted as to the rest (*p*). So words and clauses introduced into a will by fraud or mistake will be struck out of the probate (*q*).

SECTION II.—FRAUD UPON POWERS.

A class of fraud against which the Court will relieve are frauds upon powers. The term "fraud" is here used in a technical sense (*r*). It does not necessarily denote conduct which could be termed dishonest or immoral, it merely means that the power has been exercised for a purpose or with an intention beyond the scope of the instrument creating the power (*s*), and it often happens that the persons implicated in what is called a fraud upon a power were actuated by honest and unselfish motives (*t*).

There is a fraud upon a power if a man, having a power of appointment, corruptly exercises the power with a view to his own personal benefit and advantage. An appointment under a power, accordingly, will be set aside in equity, if it appear that the person in whose favour the power has been exercised has agreed or stipulated to give the donee of the power some benefit or advantage in the event of the power being exercised in his favour (*u*), or if the circumstances of the case attending

(*o*) *Barry* v. *Butlin*, 2 Moo. P. C. 491; 46 R. R. 123; *Longford* v. *Purdon*, 1 L. R. I. 80.

(*p*) *Allen* v. *Macpherson*, 1 H. L. C. 207, 208; 73 R. R. 30; *Farrelly* v. *Corrigan*, 1899, A. C. 563; 68 L. J. P. C. 133.

(*q*) *Briscoe* v. *Baillie Hamilton*, 1902, P. 234; 71 L. J. P. 121; *Karunaratne* v. *Ferdinandus*, 1902, A. C. 405; 71 L. J. P. C. 76.

(*r*) *Nocton* v. *Ashburton*, *ante*, p. 5.

(*s*) *Vatcher* v. *Paull*, 1915, A. C. 372; 84 L. J. P. C. 89, *per* Lord Parker.

(*t*) *Aleyn* v. *Belcher*, 2 Wh. & Tu. 314; *Crawshay* v. *Crawshay*, 43 C. D. 615; 59 L. J. Ch. 395.

(*u*) *Lane* v. *Page*, Ambl. 233; *Farmer* v. *Martin*, 2 Sim. 511; 29 R. R. 151; *Arnold* v. *Hardwick*, 7 Sim. 343; 4 L. J. Ch. 152; 40 R. R. 159; *Jackson* v. *Jackson*, 7 Cl. & Fin. 977; 51 R. R. 190; *Rowley* v. *Rowley*, Kay, 242; 23 L. J. Ch. 275; 101 R. R. 574; *Reid* v. *Reid*, 25 Beav. 478; 119 R. R. 491. See *Askham* v. *Barber*, 17 Beav. 44; 22 L. J. Ch. 769; 99 R. R. 18.

the execution of the power are such as to show conclusively that the appointment was made with a view to some profit ultimately accruing to the donee of the power (*x*); as, for instance, where a parent, having a power of appointment among children, exercises it in favour of a son, a lunatic, in very bad health and likely to die, in which event the parent would of course become entitled to the fund, as the personal representative of the son (*y*). So, also, and for the same reason, where a parent having power to raise portions for children appointed a portion to a child in a delicate state of health long before it was required, and the child died shortly afterwards, the appointment was held invalid (*z*). So, also, an appointment by a parent in favour of a daughter, with a view to obtaining the benefit of the fund so appointed, through the exercise of undue parental influence over her, would be held invalid (*a*).

An appointment by will to an object of the power, unobjectionable when it was executed, may be rendered invalid as a fraud on the power by the appointee entering into an arrangement with the appointor under which a person not an object of the power was to take an interest in the sum appointed (*b*).

Under a power to appoint to children a fund actually set apart or provided, shares may be appointed to a child so as to vest long before they are required. A *bonâ fide* appointment to a child of very tender age, and in good health, of an estate or fund which has been previously set apart or provided for the benefit of children is in itself no sign of fraud. It is of no consequence that the child may die shortly afterwards, if it was in good health at the time the power was exercised. If the power be in other respects well executed, it is immaterial that it may have in fact been exercised with the object of

(*x*) *Humphrey* v. *Olver*, 28 L. J. Ch. 406. See *Cooper* v. *Cooper*, 8 Eq. 312; 5 Ch. 203; 39 L. J. Ch. 240; *Duggan* v. *Duggan*, 7 L. R. 1. 155.

(*y*) *Wellesley* v. *Mornington*, 2 K. & J. 143; 110 R. R. 143.

(*z*) *Hinchinbrooke* v *Seymour*, 1 Bro. C. C. 395. See *Henty* v. *Wrey*, 21 C. D. 332; 53 L. J. Ch. 674.

(*a*) *Re Marsden's Trusts*, 4 Drew. 601; 28 L. J. Ch. 906; 113 R. R. 474.

(*b*) *Re Kirwan's Trusts*, 25 C. D. 373; 52 L. J. Ch. 952; *Knowles* v. *Morgan*, 54 S. J. 117.

providing that in any event the persons entitled in remainder on failure of children shall not take the estate or fund (*c*).

Where the donee of a power of raising portions for the benefit of children has under the terms of the power clear authority to fix the times at which portions shall vest, and appoints a portion to vest immediately, the Court will not hold the appointment invalid as a fraud upon the power because in the events which have happened the donee of the power has obtained a benefit from its exercise. In a case, accordingly, where a parent having such a power exercised it in favour of three daughters of tender age, it was held that the mere fact that the portions were appointed so that upon the death of the children the father took the benefit of their shares as next of kin was not of itself sufficient to induce the Court to set aside the appointment as a fraud on the power (*d*). It would be otherwise, however, if there were evidence to show that the early death of any of the children might have been reasonably expected (*e*).

"The results," said Lord Justice Lindley, in *Henty* v. *Wrey* (*f*), "at which I have arrived from a careful examination of all the authorities are as follows:—First, that powers to appoint portions charged on land ought, if their language is doubtful, to be construed so as not to authorise appointments vesting those portions in the appointees before they want them, that is, before they attain twenty-one, or, if daughters, marry; secondly, that when, on the true construction of the power and the appointment, the portion has not vested in the lifetime of the appointee, the portion is not raisable, but sinks into the inheritance; thirdly, that when the language is clear and unambiguous, effect must be given to it; fourthly, that when, upon the true construction of both instruments, the portion has vested in the appointee, the portion is raisable, even although the appointee dies under twenty-one, or, if a daughter, unmarried; fifthly, that appointments

(*c*) *Butcher* v. *Jackson*, 14 Sim. 444; 65 R. R. 625; *Fearon* v. *Desbrisay*, 14 Beav. 635; 21 L. J. Ch. 505; 92 R. R. 269.

(*d*) *Henty* v. *Wrey*, 21 C. D. 332; 53 L. J. Ch. 674.

(*e*) *Ibid.*

(*f*) 21 C. D. 359.

vesting portions charged on land in children of tender years who die soon afterwards are looked at with suspicion, and very little additional evidence of improper motive or object will induce the Court to set aside the appointment or treat it as invalid, but that, without some additional evidence, the Court cannot do so."

An appointment of interest on children's portions will be supported where it is within the terms of the power and for the benefit of the children, although it is made by a revocable deed, and the interest will be payable to the donee of the power as guardian (*g*).

The fact that the donee of the power may derive a benefit under the appointment does not necessarily render the appointment invalid (*h*). It is not every possible benefit to the donee of a power from the exercise of it which will make the execution of the power bad (*i*). It is no objection to an appointment of a jointure that the husband receives a consideration for exercising the power (*k*).

If the object of the appointment be to secure a benefit for all the objects of the power, the appointment is good, though the appointor may to some extent participate in such benefit (*l*). Thus, in a case where it was urged that certain appointments (made by a tenant for life acting under a power given by a marriage settlement), the object of which was to affect building leases, were for the benefit of the appointor, and therefore, not being authorised by the settlement, were invalid, the Court considered that this principle should give way when the benefit of the appointment extended to parties in interest. The building leases had indeed benefited the tenant for life, but they had also benefited the other interested parties in the improved value of the property, which they would lose if the appointment were declared void. To hold otherwise would be to strain a rule intended to benefit the

(*g*) *De Hoghton* v. *De Hoghton*, 1896, 2 Ch. 385; 65 L. J. Ch. 667.
(*h*) *Beere* v. *Hoffmeister*, 23 Beav. 101; 26 L. J. Ch. 177.
(*i*) *Palmer* v. *Locke*, 15 C. D. p. 303; 50 L. J. Ch. 113.
(*k*) *Post*, p. 326.
(*l*) *Re Huish's Charity*, 10 Eq. 5; 39 L. J. Ch. 499; *Palmer* v. *Locke*, *supra*.

objects of the power to a rigid exactness which would inflict manifest injury on them (*m*).

So, also, where a father, having a power of appointment over a fund in favour of children, on the marriage of a daughter appointed a share to her to be held upon the trusts declared by her marriage settlement, and by the settlement the fund so appointed was limited for the benefit of the husband and wife during their respective lives and then for the benefit of children, with an ultimate trust in default of children for the father, his executors, administrators, and assigns, it was held that the appointment was not in fraud of the power (*n*). "The transaction," said Lord Hatherley (*o*), "is a virtuous and proper transaction, in which the father takes care that the interests of the children shall be protected, and simply protects the property against the marital right, which would otherwise transfer it altogether from the source from which it came, and he puts it back into the channel in which it was at the time of the marriage."

If a person be the only child who has been kind to a parent in distress, there is no fraud if the parent exercises a power of appointment in his favour (*p*). Nor is there fraud if a parent exercises a power of appointment in favour of two of his sons to enable them to embark in business, and then, at their request, becomes a partner with them in the business, there being no evidence to prove any bargain between them in the event of his exercising the power in a particular way (*q*). An appointment, however, to one of several objects of a power in payment of a debt due to him from the appointor is bad (*r*).

Although an appointment by a parent in favour of a child, over whom he exercises undue influence, cannot be sup-

(*m*) *Ibid.*
(*n*) *Cooper* v. *Cooper*, 5 Ch. 212; 39 L. J. Ch. 240.
(*o*) *Ibid.*
(*p*) *Palmer* v. *Wheeler*, 2 Ba. & Be. 31; 12 R. R. 60.
(*q*) *Cockroft* v. *Sutcliffe*, 2 Jur. N. S. 323.
(*r*) *Reid* v. *Reid*, 25 Beav. 478; 119 R. R. 491. See *Beddoes* v. *Pugh*, 26 Beav. 411.

ported (*s*), it is otherwise if the exercise of undue influence be disproved (*t*). A child to whom property has been appointed by a parent may, in such a case, give the parent a benefit or advantage in the property so appointed (*u*).

In an arrangement settling the interests of all the branches of a family, children may contract with each other to give to a parent, who had power to distribute property among them, some advantage which the parent, without their contract with each other, could not have (*x*).

In order, however, to constitute a fraud upon a power, it is not necessary that the object of the exercise of the power should be the personal benefit or advantage of the donee of the power. If the design of the donee in exercising the power is to confer a benefit, not upon himself actually, but upon some other person not being an object of the power, that motive just as much interferes with and defeats the purpose for which the power was created as if it had been for the personal benefit of the donee himself. If the donee of a power of appointment exercises the power in favour of one of several objects of the power, with a view to the benefit of a stranger, the appointment is fraudulent and void, even although the motive of the donee is not morally wrong (*y*). The mere conferring of a benefit upon a person not an object of the power will not avoid the exercise of the power if made with the approbation of the real objects of the power (*z*). A man who takes property absolutely under an appointment may do with the property so appointed as he pleases, and may settle it on persons who are not objects of the power (*a*). The mere existence of an antecedent contract between the donee of the

(*s*) *Re Marsden's Trusts*, 4 Drew. 601; 28 L. J. Ch. 906; 113 R. R. 474. See *Topham* v. *Duke of Portland*, 1 D. J. & S. 517; 32 L. J. Ch. 606; 137 R. R. 313.

(*t*) See *ante*, p. 189.

(*u*) *Davis* v. *Uphill*, 1 Sw. 136; *Warde* v. *Dickson*, 5 Jur. N. S. 699.

(*x*) *Davis* v. *Uphill*, 1 Sw. 136.

(*y*) *Re Marsden's Trusts*, 4 Drew. 601; 28 L. J. Ch. 906; 113 R. R. 474; *Knowles* v. *Morgan*, 54 S. J. 117.

(*z*) *Re Turner's S. E.*, 28 C. D. p. 216; 54 L. J. Ch. 690.

(*a*) *Routledge* v. *Dorrill*, 2 Ves. Jr. 357; 2 R. R. 250. See *Birley* v. *Birley*; 25 Beav 299; 27 L. J. Ch. 569; *Re Turner's S. E.*, *supra*.

power and the appointee for a resettlement conferring benefits on a stranger is not enough to invalidate the appointment (*b*).

The exercise of a power of jointuring can be the subject of a bargain between husband and wife, and so long as no part of the jointure itself is to be received by any person other than the wife, the husband can exercise the power in consideration of receiving some benefit out of her property, and the fact that the consideration given by her is the full actuarial value of the jointure is immaterial (*c*). *Secus*, if the bargain deals with the actual jointure and the wife only receives part of the sum secured by the jointure (*d*).

But in the case of appointments to children the appointment will be bad if made upon a bargain for the benefit of persons who are not objects of the power (*e*). The appointment, accordingly, of a portion of a fund to a daughter, for the purpose of paying her husband's debts, was held void (*f*). So, also, where a married woman, having a power to appoint a fund of which she received the income for her life, appointed the whole fund at her death absolutely in favour of her daughter, in order that thereout the daughter should benefit the father, the appointment was held invalid (*g*). The principle has been held even to apply to a case where an arrangement was entered into between the original donor and creator of the power and any of the objects of the power, to benefit persons other than those within the power (*h*). The principle that the donee of a power may not appoint to a person who is not an object of the power applies even although the appointee is not privy to the intentions of the donee of the power. The design to defeat the purpose for which the power was created will stand just the same whether the appointee was aware of

(*b*) *Re Turner's S. E.*, *supra.*

(*c*) *Saunders* v. *Shafto*, 1905, 1 Ch. 126; 74 L. J. Ch. 110; overruling *Whelan* v. *Palmer*, 39 C. D. 648; 57 L. J. Ch. 784.

(*d*) *Ibid.*

(*e*) *Birley* v. *Birley*, *supra*; *Pryor* v. *Pryor*, 2 D. J. & S. 205; 33 L. J. Ch. 441; 139 R. R. 90.

(*f*) *Ranking* v. *Barnes*, 12 W. R. 568.

(*g*) *Re Marsden's Trusts*, 4 Drew. 601; 28 L. J. Ch. 906; 113 R. R. 474.

(*h*) *Lee* v. *Fernie*, 1 Beav. 483; 49 R. R. 412, *supra.*

it or not (*i*). Where, accordingly, a married woman, having a power to appoint a fund of which she received the income for her life among her children, appointed the whole fund at her death in favour of her daughter in order that thereout the daughter should benefit her father, relying on the influence which the father would have over her to carry out the secret arrangement, the appointment was held invalid, although the daughter was not informed of the mother's intention until after her mother's death (*k*).

The fact, however, that under the provisions of an appointment, whether such provisions appear on the face of the instrument itself or are to be gathered from intrinsic evidence, some persons who are not objects of the power may take interests in the appointed fund, either in conjunction with or in succession to persons who are objects of the power, is not of itself sufficient to invalidate the appointment (*l*).

If there is nothing on the face of the transaction or in the evidence to indicate that the appointment was made with the intention of benefiting the donee of the power, or that it was other than part of a fair and reasonable division of the property of a father among his children, the appointment is not invalid, though the effect may be to confer a benefit, not only upon the donee, but also upon others who were not objects of the power (*m*).

Although children may contract with each other to give to a parent, who has power to distribute property among them, some advantage which the parent, without their contract with each other, would not have (*n*), a transaction of the sort cannot be upheld if, taken as a whole, it appears not to be a *bonâ fide* family arrangement, but to have been entered into in fraud of the power, for the purpose of giving a benefit to a person who was by the donor excluded from being an

(*i*) *Re Marsden's Trusts, supra; Topham* v. *Duke of Portland*, 5 Ch. 61; 32 L. J. Ch. 606; 137 R. R. 313.

(*k*) *Ibid.* See *Ranking* v. *Barnes*, 12 W. R. 568.

(*l*) *Roach* v. *Trood*, 3 C. D. 440, *per* Baggallay, J.; see 54 S. J. 117.

(*m*) *Roach* v. *Trood*, 3 C. D. 440; *Re Turner's S. E.*, 28 C. D. p. 216; 54 L. J. Ch. 690.

(*n*) *Davis* v. *Uphill*, 1 Sw. 136.

appointee or from deriving any advantage from the exercise of the power (*o*).

There is a fraud upon a power, not only where it is exercised in favour of persons who are not the proper objects of the power, but also where it is exercised for purposes foreign to those for which the power was created (*p*). The donee of the power shall, at the time of the exercise of the power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any object which is beyond the purpose and intent of the power (*q*). It is, accordingly, a fraud upon a power if a man having a power to appoint among two sisters appoints the whole to one of them, it being understood that she was only to receive one moiety of the fund to her own use, and was to allow the other to accumulate, subject to some future arrangement (*r*). In determining whether there is a fraud upon a power, the Court looks to the purpose with which the power was exercised (*s*). In *Scroggs* v. *Scroggs* (*t*) the consent of a trustee was necessary to the exercise of a power, and the donee of the power procured the trustee's consent by a false representation, to which the appointee does not appear to have been in any way a party; yet the Court set aside the appointment (*u*).

Any attempt to exceed the limitations of a power is equally invalid, whether the purpose of the donee be selfish or, as he supposes, a more beneficial mode of effecting that which he takes the donor of the power to have desired. The Court will not allow him to interpret the donor's intention in any other sense than the Court itself holds to be the true construction

(*o*) *Agassiz* v. *Squire*, 18 Beav. 431; 23 L. J. Ch. 985; 104 R. R. 499.

(*p*) *Topham* v. *Duke of Portland*, 1 D. J. & S. 570; 32 L. J. Ch. 606; 147 R. R. 313.

(*q*) *Duke of Portland* v. *Topham*, 11 H. L. C. 54, *per* Lord Westbury; *Duggan* v. *Duggan*, 7 L. R. I. 155; *Molyneux* v. *Fletcher*, 1898, 1 Q. B. 648; 67 L. J. Q. B. 392.

(*r*) 11 H. L. C. 32.

(*s*) *Topham* v. *Duke of Portland*, 1 D. J. & S. 570; 5 Ch. 60; 32 L. J. Ch. 606.

(*t*) Ambl. 272.

(*u*) *Per* Turner, L.J., 1 D. J. & S. 570.

of the instrument creating the power, and a literal execution of the power with a purpose which it does not sanction is regarded as a fraud on the power (*x*).

Where a mother having a power of appointment among her children appointed one-third to one daughter for life, or until she should become a Roman Catholic, and subject as aforesaid to the other two daughters, it was held that the gift over was not void as being a fraud upon the power (*y*).

If there be a fraudulent arrangement between the donee of a power and the appointee, the bad purpose will, in general, vitiate the appointment *in toto*, and not merely the part to which the fraud extends (*z*). Appointments to children, accordingly, in part fraudulent, have almost always been avoided altogether (*a*). In cases, however, where the evidence enables the Court to distinguish what is attributable to an authorised from what is attributable to an unauthorised purpose, the bad purpose will not affect the whole appointment (*b*). Where there is no bargain and no suspicion of improper motive, but the appointor has annexed a condition to the appointment which would, if observed, be a fraud upon the power although in itself *bonâ fide* and honest, the question arises whether there is a complete execution of the power with something *ex abundanti* added, in which case the excess will be void and the execution good, or is the execution and excess not severable, in which case the execution will be bad (*c*). So, where a man appointed to his wife on condition that she paid his debts, it was held that the appointment could not be severed from the condition, and that the appoint-

(*x*) *Topham* v. *Duke of Portland*, 5 Ch. 59; 32 L. J. Ch. 606; 147 R. R. 313

(*y*) *Wainwright* v. *Miller*, 1897, 2 Ch. 255; 66 L. J. Ch. 616; *Re Gage*, 1898, 1 Ch. 498; 67 L. J. Ch. 200.

(*z*) *Daubeny* v. *Cockburn*, 1 Mer. 626; 15 R. R. 174; *Re Perkins*, 1893, 1 Ch. 283; 62 L. J. Ch. 531.

(*a*) *Ibid.*; *Farmer* v. *Martin*, 2 Sim. 511; 29 R. R. 151; *Arnold* v. *Hardwicke*, 7 Sim. 343; 4 L. J. Ch. 152; 40 R. R. 159. See *Rowley* v. *Rowley*, Kay, 259; 23 L. J. Ch. 275; 101 R. R. 574.

(*b*) *Topham* v. *Duke of Portland*, 1 D. J. & S. 572, *per* Turner, L. J. See *Carver* v. *Richards*, 27 Beav. 488; *Ranking* v. *Barnes*, 12 W. R. 565; *Re Oliphant*, 86 L. J. Ch. 452.

(*c*) *Crawshay* v. *Crawshay*, 43 C. D. 615; 59 L. J. Ch. 395; *Viant* v. *Cooper*, 76 L. T. 768; *Re Perkins*, 1893, 1 Ch. 283; 62 L. J. Ch. 531.

ment was fraudulent and void (*d*). But where a wife appointed to her husband on condition that he paid certain annuities, the appointment was held good and the condition nugatory (*e*).

There is no authority for holding an appointment bad because it is made on a condition to be performed not by the appointee but by a third party. Nor can a condition, the performance of which will leave the fund to go as in default of appointment be impeached (*f*).

Although in the case of appointments to children a fraudulent arrangement between the donee of the power and the appointee will, in general, vitiate the whole appointment, a different doctrine has been maintained in the case of appointments by way of jointure. The appointment will, in such cases, be only vitiated to the extent to which the jointure goes to any person other than the wife (*g*).

The fact that a release of a limited power of appointment will result in a benefit to the donee of the power is not sufficient to make the release fraudulent and void. The doctrines applicable to the fraudulent exercise of a power of appointment do not apply to the release of a power not coupled with a duty (*h*). But the doctrine applies to the revocation of an appointment, and a donee cannot revoke a previous appointment with the avowed object of obtaining a benefit (*i*).

With regard to the measure of liability of a person making a fraudulent appointment, such person is liable to make good the whole loss to the trust estate (*k*).

The legitimate purpose of a power of sale in a mortgage being to secure the repayment of the money advanced in the mortgage, if the mortgagee uses the power for another purpose, either from an ill motive to effect other purposes or to

(*d*) *Re Cohen*, 1911, 1 Ch. 37; 80 L. J. Ch. 208.
(*e*) *Re Holland*, 84 L. J. Ch. 389.
(*f*) *Vatcher* v. *Paull*, 1915, A. C. 372; 84 L. J. P. C. 86.
(*g*) *Lane* v. *Page*, Amb. 233; *Aleyn* v. *Belcher*, 1 Eden, 138; *Saunders* v. *Shafto*, 1905, 1 Ch. 126; 74 L. J. Ch. 110.
(*h*) *Re Somes*, 1896, 1 Ch. 250; 65 L. J. Ch. 262.
(*i*) *Re Jones' Settlement*, 1915, 1 Ch. 373; 84 L. J. Ch. 406.
(*k*) *Re Deane*, 42 C. D. 9.

serve the purposes of individuals, the Court considers that to be a fraud in the exercise of the power, because it is using the power for purposes foreign to that for which the power was intended (*l*). But if he exercises the power of sale for the purpose of realising his debt and without collusion with the purchaser, the Court will not interfere, even though the sale be disadvantageous, unless the price be so low as to be evidence of fraud (*m*).

Illusory appointments.

It was formerly held that illusory appointments under a power were void in equity, *e.g.*, appointments of a nominal instead of a substantial share to one of the members of a class where power was given to appoint among them all. An appointment of this kind was always valid at law, and it would perhaps be difficult to reconcile with principle its avoidance in equity. The doctrine has been abolished by statute (*n*). And an appointment is now valid though an object of the power is altogether excluded (*o*).

SECTION III.—FRAUDS RELATING TO DEEDS AND OTHER INSTRUMENTS.

Fraud in the prevention of acts to be done for benefit of third parties.

There is fraud against which the Court will relieve, if a man be prevented by undue means from doing an act for the benefit of third parties. If a man be prevented by duress, undue influence, or other undue means from executing an instrument, the Court will treat it as if it had been executed (*p*). When, for instance, a tenant in tail, meaning to suffer a recovery, was prevented on his deathbed from suffering it, by the fraud of the person whose wife was entitled in remainder, it was held that the estate ought to be held as if the recovery had been perfected, though even in favour of a volunteer, and against one not a party to the fraud (*q*). So also when a person interested in the non-execu-

(*l*) *Robertson* v. *Norris*, 1 Giff. 421; 114 R. R. 486; *ante*, p. 172.
(*m*) *Warner* v. *Jacob*, 20 C. D. 220; 51 L. J. Ch. 642.
(*n*) 1 Will. IV. c. 46; *Re Capon's Trust*, 10 C. D. 484; 48 L. J. Ch. 355.
(*o*) 37 & 38 Vict. c. 37.
(*p*) *Middleton* v. *Middleton*, 1 J. & W. 96; 20 R. R. 233.
(*q*) *Luttrell* v. *Olmius*, cit. 11 Ves. 638; 14 Ves. 290; 1 J. & W. 96.

tion of a power has the deed creating the power in his custody, and the donee of the power, wishing to execute it, sends for the deed, which the party refuses to deliver, and thereupon the donee does an act with an intend to execute the power, equity will uphold the execution, although defective by reason of the fraud in the person who was to have the benefit of the original settlement (*r*). But the mere refusal or neglect of an attorney with whom a deed containing a power has been deposited to deliver it up to the donee of the power, in the absence of fraud, is no ground for relief against informality (*s*). Equity would extend the relief to a case where a wife, having a power of revocation over an estate vested in her husband, is desirous to exercise it, but the husband hinders anybody from coming to her, or prevents the execution or obstructs the engrossing of the deed of revocation (*t*).

The principle applies to cases where a man has been induced by false promises to abstain from doing an act for the benefit of third parties. If, for example, a testator be induced to omit the insertion in his will of a formal provision for any intended object of his bounty upon the faith of assurances given by his heir or other person, who would take his property in the event of his omitting to insert the particular bequest in his will, that his, the testator's, wishes shall be executed as punctually and fully as if the bequest were formally made, this promise and undertaking will raise a trust, which, though not available at law, would be enforced in equity on the ground of fraud (*u*). So, also, if a father devises an estate to one son who engages if the estate is devised to him to give a certain amount of money to another

(*r*) See 3 Ch. Ca. 69, 83, 84, 89, 93, 108, 122. See *West* v. *Ray*, Kay, 385; 23 L. J. Ch. 447; 101 R. R. 66.

(*s*) *Buckell* v. *Blenkhorn*, 5 Ha. 131.

(*t*) *Seagrave* v. *Kirwan*, Beatt. 157; *Bulkley* v. *Wilford*, 2 Cl. & Fin. 102; 37 R. R. 39; *Nanney* v. *Williams*, 22 Beav. 452; 111 R. R. 435.

(*u*) *Chamberlaine* v. *Chamberlaine*, 2 Freem. Ch. 34; *Reech* v. *Kennigate*, Amb. 67; *Barrow* v. *Greenough*, 3 Ves. 153; *Chamberlaine* v. *Agar*, 2 V. & B. 262; *Podmore* v. *Gunning*, 7 Sim. 660; 40 R. R. 203; *Russell* v. *Jackson*, 10 Ha. 213; 90 R. R. 336; *Tharp* v. *Tharp*, 1916, 2 Ch. 205.

son, the promise will be enforced in equity (*x*). An engagement to the same effect may be entered into not only by words, but by silent assent, or may be inferred from conduct so as equally to raise a trust (*y*).

Suppression or destruction of deeds, &c.

If an heir should suppress deeds, wills, &c., in order to prevent another party, as grantee or devisee, from obtaining the estate vested in him thereby, Courts of Equity, upon due proof by other evidence, would grant relief and perpetuate the possession and enjoyment of the estate in such grantee or devisee (*z*). If the contents of a suppressed or destroyed instrument are proved, the party will receive the same benefit as if the instrument were produced (*a*).

No valid instrument which effectually conveys property can lose its effect merely by reason of its fraudulent cancellation or destruction (*b*).

Where there has been a spoliation or suppression of instruments, which might have thrown light upon a suit, everything will be presumed against the party by whose agent such spoliation and suppression have been practised, and every presumption will be made in favour of the *primâ facie* rights of the other party (*c*).

Primâ facie the cancellation of a deed is evidence of its discharge, but in a Court of Equity it is open to the party claiming under the deed to show that it was cancelled by fraud, mistake, or accident. Where the deed has always been in the hands of the party beneficially interested under it, should it appear to have been cancelled, the proof that this was done by fraud would rest with that party; but where the deed has constantly remained in the power of the maker thereof, or has been deposited by him with a person of his own selection, circumstances may throw upon the maker of

(*x*) *M'Cormick* v. *Grogan*, L. R. 4 H. L. 88.

(*y*) *Byrne* v. *Godfrey*, 4 Ves. 10; 4 R. R. 155; *Paine* v. *Hall*, 18 Ves. 475; *M'Cormick* v. *Grogan*, L. R. 4 H. L. 88.

(*z*) *Hunt* v. *Matthews*, 1 Vern. 408; *Barnesley* v. *Powell*, 1 Ves. 289; *Tucker* v. *Phipps*, 3 Atk. 360.

(*a*) *Saltern* v. *Melhuish*, Amb. 247; *Cowper* v. *Cowper*, 2 P. Wms. 719.

(*b*) *Donaldson* v. *Gillott*, L. R. 3 Eq. 277; *Rannie* v. *Ogg*, 18 R. 903.

(*c*) *Bowles* v. *Stuart*, 1 Sch. & Lef. 222; *Hampden* v. *Hampden*, 1 Bro. P. C. 252.

the deed the *onus* of showing not only that such deed is cancelled, but that the obligation it imposed has been duly discharged and satisfied (*d*).

Fraud in procuring the execution of a deed.

No man will be permitted to take advantage of a deed which he has fraudulently induced another to execute that the former may commit an offence against morality, to the injury or loss of the party by whom the deed is executed. Thus, where a married woman obtains a separation deed from her husband, with pecuniary allowance, for the purpose of enabling her the more effectually to carry on an adulterous intercourse with another, the Court will, on the petition of the husband, order that the deed be delivered up to be cancelled, and proof of subsequent adultery with a person with whom the wife had sexual intercourse before marriage, and had continued on terms of improper intimacy afterwards, seems to be sufficient evidence that such a deed was obtained for the fraudulent purpose of promoting the adultery (*e*). But such a deed will not be set aside for adultery previously committed; nor will a marriage settlement be annulled on the ground that the wife has concealed from her husband the fact of previous incontinence, though he alleges that he would not have married her had he known it (*f*). And where a husband sought to set aside his marriage settlement on the ground that his wife had concealed the fact that she had been divorced for her adultery, the statement of claim was struck out as showing no cause of action (*g*).

Execution in false name.

A person who executes a deed cannot avoid liability under it by signing a name which is not in fact his own, nor can he impose liability on the person whose name he uses (*h*).

Setting up a deed obtained for one purpose for another purpose.

Where a man obtains an instrument or conveyance from another in order to answer one particular purpose, but afterwards makes use of it for another, a Court of Equity will relieve under the head of fraud. It is immaterial that the

(*d*) *Sluysken* v. *Hunter*, 1 Mer. 45.

(*e*) *Evans* v. *Carrington*, 2 D. F. & J. 481; 30 L. J. Ch. 364; 129 R. R. 158; *Fearon* v. *Aylesford*, 14 Q. B. D. 792; 54 L. J. Q. B. 33.

(*f*) *Ibid.*

(*g*) *Johnston* v. *J.*, 52 L. T. 76.

(*h*) *Fung Ping Shan* v. *Tong Shun*, 1918, A. C. 403.

conveyance may be perfected by act of record (*i*). Where, accordingly, a father, who was tenant for life of real estate, fearing that the husband of his daughter, who was tenant in tail of the property, would waste the property, induced him and the daughter to join in a recovery with a view to protecting the property from his creditors, and the property was conveyed to the father for a mere nominal sum, the recovery was set aside at the suit of the assignees in insolvency of his son-in-law (*k*).

SECTION IV.—FRAUD BY AND UPON COMPANIES.

Fraud which consists in misrepresentation or concealment on the part of directors or promoters of companies has been already considered (*l*); but there are other acts on the part of companies which are fraudulent in the contemplation of the Court.

Transfer of shares.

On the question of shareholders' right to transfer their shares the following broad rules have been laid down (*m*):—

A shareholder may, although the company is in difficulty or even *in extremis*, effect a valid transfer of his shares, though made avowedly to escape liability, though made to a man of straw, and though made without consideration or even with a consideration paid *to* the transferee, provided the transaction be *bonâ fide* an absolute out and out disposal of the property without any trust or reservation for the benefit of the transferor (*n*). And a director, in the absence of an equity against him, has the same right of transfer (*o*).

But if the transaction be colourable and fictitious and the transfer be merely nominal, and there be any trust or reserva-

(*i*) *Young* v. *Peachey*, *infra*: *Nixon* v. *Fetzer*, 30 N. Z. L. R. 229.

(*k*) *Young* v. *Peachey*, 2 Atk. 256. See *Evans* v. *Bicknell*, 6 Ves. 191; 5 R. R. 245; *Pickett* v. *Loggon*, 14 Ves. 234.

(*l*) *Ante*, pp. 86, 163, 166.

(*m*) Buckley, 9th ed., 36.

(*n*) *Slater's Case*, 35 Beav. 391; 35 L. J. Ch. 304; 147 R. R. 230; *Battie's Case*, 39 L. J. Ch. 391; *Bishop's Case*. 7 Ch. 296, *n.*; *Lindlar's Case*, 54 S. J. 287.

(*o*) *Cawley & Co.*, 42 C. D. 209; 58 L. J. Ch. 633; cf. *South London Fish-market Co.*, *infra*.

tion of benefit in favour of the transferor, the transaction is invalid, and the transferor remains liable (*p*).

Or if the transfer be not open and *bonâ fide*, but be made with colour indicating an attempt to escape liability in a manner tainted with fraud, or be made upon an opportunity fraudulently obtained, it cannot be supported (*q*), unless the transfer has been recognised by the company (*r*).

Further, in cases where directors have by the articles a discretion as to accepting transferees, and the facts have been wilfully misstated to the directors, and were such that, if the directors had known them, they ought to have refused to register the transfer, then the transfer will be set aside and the transferor rendered liable (*s*).

The mere fact that a person in a humble station of life has been described by the vague title of gentleman does not necessarily constitute such a fraudulent misrepresentation as will avoid the transaction (*t*). The principle on which such transactions are set aside is that a person cannot profit by his own fraud—that having been guilty of misrepresentation he cannot complain that his representation was believed, and insist that it was the duty of the company to make inquiry. The whole point is that the representation was intended to mislead, but if there is no such intention, and the transferee is honestly described, the mere fact of there having been some misdescription is unimportant (*u*).

The power of directors to refuse a transfer is a fiduciary power to be exercised for the benefit of the company (*x*), and must be exercised reasonably (*y*).

(*p*) *Budd's Case*, 3 D. F. & J. 297; 31 L. J. Ch. 4; 130 R. R. 138; *Lund's Case*, 27 Beav. 465; 28 L. J. Ch. 628; 122 R. R. 491.

(*q*) *Costello's Case*, 2 D. F. & J. 302; 30 L. J. Ch. 113; 129 R. R. 101; *South London Fishmarket Co.*, 39 C. D. 324; *Lankester's Case*, 6 Ch. 905, *n.*; *Discoverers Finance Corporation*, 1908, 1 Ch. 141; 77 L. J. Ch. 288; *Lindlar's Case*, *supra*.

(*r*) *Chynoweth's Case*, 15 C. D. 13.

(*s*) *Payne's Case*, 9 Eq. 223; *Ex p. Kintrea*, 5 Ch. 95; 39 L. J. Ch. 193. For cases under the European Arbitration, see Buckley, 8th ed. 39.

(*t*) *Williams' Case*, 1 C. D. 576; 45 L. J. Ch. 48.

(*u*) *Ibid.*; *Master's Case*, 7 Ch. 292; 41 L. J. Ch. 501.

(*x*) *Coalport China Co.*, 1895, 2 Ch. 404, 410; 64 L. J. Ch. 710.

(*y*) *Nation's Case*, 3 Eq. 77, 2 Ch. 16; 36 L. J. Ch. 112.

Fraudulent trusts of shares.

The trustee of shares, and not the *cestui que trust*, is liable as contributory in respect of them, but this must be understood only of a *bonâ fide* trusteeship, for if the trusteeship be only colourable or fraudulent the real owner will be liable (*z*). So, too, if a person takes shares in the name of a fictitious person (*a*) or applies for shares under an *alias* he is liable as a shareholder (*b*). But if a person without any intention to take shares falsely applies for shares in the name of another, he may be liable for fraud, but is not liable as a contributory (*c*).

Winding-up order.

The mere fact of there having been fraud in the promotion of the company or fraudulent misrepresentation in the prospectus will not of itself be sufficient to found a winding-up order, for the majority of the shareholders may waive the fraud and confirm the transaction (*d*). And *à fortiori* charges of fraud not connected with the formation or promotion of the company do not form a ground for a compulsory order by reason of the fact that investigation under such an order would be desirable (*e*).

Where a winding-up petition contains an allegation of fraud against an officer of the company, the statutory affidavit is not sufficient; the facts of the alleged fraud must be stated on affidavit (*f*).

Where a company is formed for a fraudulent purpose the signatories to the memorandum are guilty of a fraudulent conspiracy, and will be restrained from effecting that purpose (*g*).

(*z*) *Cox's Case*, 4 D. J. & S. 53; 33 L. J. Ch. 145; 146 R. R. 219.
(*a*) *London, Bombay, &c., Bank*, 18 C. D. 581; 50 L. J. Ch. 557.
(*b*) *Savigny's Case*, 5 Manson, 336, distinguishing *Coventry's Case, infra*.
(*c*) *Coventry's Case*, 1891, 1 Ch. 202; 60 L. J. Ch. 186.
(*d*) *Haven Gold Mining Co.*, 20 C. D. 151; 51 L. J. Ch. 242; but see *Brinsmead and Sons*, 1897, 1 Ch. 45, 406; 66 L. J. Ch. 290.
(*e*) *Medical Battery Co.*, 1894, 1 Ch. 444; 63 L. J. Ch. 189.
(*f*) *London and Hull Soap Works*, 1907, W. N. 254.
(*g*) *La Société Anonyme, &c.* v. *Panhard*, 1901, 2 Ch. 513; 70 L. J. Ch. 736.

SECTION V.—FRAUD ON THE STOCK EXCHANGE.

A stockbroker is in a fiduciary position, and like any other agent he must account for secret profits (*h*). If he takes to himself the bargain which his principal has instructed him to make, the principal can either adopt the transaction and claim any profit which the broker has made out of it, or he may repudiate the transaction and claim the return of his money (*i*). If a broker sells securities to close a principal's account and repurchases them at a lower price than he could have purchased in the market in the ordinary way, he must account to the principal for the profit thus obtained (*k*).

Another case of fraud is where parties conspire together in procuring a settling day and a quotation on the Stock Exchange for the purpose of inducing those who deal on the Stock Exchange and see the quotation to believe that the rules of the Stock Exchange have been complied with, so that in consequence of that belief they should think the company was a better company than it really was.

In *Bedford* v. *Bagshaw* (*l*) the director of a company, in order to obtain a quotation on the Stock Exchange, gave to the Committee false information as to the number of shares allotted and paid for. In consequence the Committee granted a special settling day and allowed a quotation in the Official List. The plaintiff, knowing of the Stock Exchange rules regarding special settlements, took shares in the belief that the necessary amount had been subscribed. The shares proved to be valueless, and the Court of Exchequer held that an action could be maintained against the defendant for false and fraudulent representations made by him. "All persons," said Pollock, C.B., "buying shares upon the Stock Exchange must be considered as persons to whom it was contemplated the representations would be made. I am not prepared to lay down as a general rule, that if a person makes a false

(*h*) *Nicholson* v. *Mansfield*, 17 T. L. R. 259; *Stubbs* v. *Slater*, 1910, 1 Ch. 195; 79 L. J. Ch. 420.

(*i*) *Rothschild* v. *Brookman*, 5 Bli. N. S. 165; 30 R. R. 147.

(*k*) *Erskine* v. *Sachs*, 1901, 2 K. B. 504; 70 L. J. K. B. 978.

(*l*) 4 H. & N. 538; 29 L. J. Ex. 59.

representation, everyone to whom it is repeated and who acts upon it may sue him. But it is a different thing where a director of a company procures an artificial and false value to be given to shares which he professes to offer to the public. . . . There must always be this evidence against the party to be charged, viz.: that the plaintiff was one of the persons to whom he contemplated that the representation could be made or a person whom the defendant ought to have been aware he was injuring or might injure."

In *Barry* v. *Croskey* (*m*), V.-C. Page Wood said he assented to every word of the Chief Baron's judgment in that case; but he also made this significant statement: "Your argument would show that every person who, in consequence of B.'s frauds on the Stock Exchange, was induced to purchase stock at an advanced price in reliance on the false rumour he had circulated, was entitled to maintain an action against B. Would not such consequences be too remote to form ground for an action?"

In *Peek* v. *Gurney* (*n*), Lord Chelmsford, referring to *Bedford* v. *Bagshaw*, said: "The actions were brought upon the allegation of a false representation made to the plaintiff. But no representation was made which reached either his eyes or his ears. From his knowing the rules of the Stock Exchange he assumed that a certain representation had been made, and acted upon it. According to the judgment it was his knowledge of the rules which led him to appropriate the representation to himself, and therefore it could not be taken to be made to any one who was ignorant of these rules. The decisions and the grounds on which they proceeded appear to me to be extraordinary, and I cannot bring my mind to agree to them."

In *Salaman* v. *Warner* (*o*), the plaintiff, who was a jobber on the Stock Exchange, on the strength of a prospectus issued by the defendants, sold shares before allotment for the special settling day to brokers who had been instructed by the

(*m*) 2 J. & H. p. 22.
(*n*) L. R. 6 H. L. p. 397; 43 L. J. Ch. 19.
(*o*) 65 L. T. 132; *Vickery* v. *Taylor*, 11 N. S. W. St. R. 119.

defendants to contract on the Stock Exchange for the purchase of the shares. The defendants then procured allotment of a large majority of the shares to their own nominees, and subsequently induced the Committee of the Stock Exchange to grant a special settling day. In consequence of the control of the shares thus obtained by the defendants, the plaintiff when called upon to deliver was only able to do so at a price dictated by the defendants, and incurred heavy loss. The Court of Appeal held that the plaintiff could not recover damages on the ground of fraud, because his contract was made on his own judgment, and that although there was a conspiracy to obtain a special settlement by means of a misleading statement, such conspiracy did not give rise to civil liability unless the plaintiff's rights were thereby infringed.

The case of *Salaman* v. *Warner* affords an instance of a method of dealing known as "cornering the market." The process consists in getting into the hands of the person creating the corner, or his nominees, so large a number of shares in a particular undertaking as will practically give him complete control over all transactions connected with the undertaking. There is not, of course, anything necessarily illegal in such a process, but it may become illegal if used for the purpose of perpetrating a fraud.

"Rigging the market" is a somewhat different method of dealing, and is employed to induce the public to purchase shares of a new company by creating an artificial price in the market by means of transactions which, if not actually fictitious, are not *bonâ fide*. When two or more persons combine with the intention of obtaining purchasers by such means, or of making purchasers pay more for the shares than they would otherwise have done, they are guilty of a conspiracy to defraud (*p*). The remedy for this fraud consists primarily in criminal proceedings for conspiracy. But whether there is a sufficiently direct communication between the conspirators and party defrauded to enable the latter to sue for damages seems doubtful. The case is not quite the

(*p*) *Reg.* v. *Aspinall*, 2 Q. B. D. 48; 46 L. J. M. C. 145.

same as where fraud is perpetrated to obtain a special settlement, since the representation is made not to the Committee, but only to the public, though it is made through the same source, namely, the Official List. But there is no doubt that as between the conspirators themselves the transaction is illegal and cannot give rise to any rights enforceable in a Court of law (*q*).

SECTION VI.—FRAUD IN ARBITRATIONS.

Courts of Equity have from a very early period had jurisdiction to set aside awards on the ground of fraud, except where it is excluded by statute (*r*).

By the Arbitration Act, 1889, s. 11, it is provided that where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.

The application to set aside an award is by notice of motion in the Chancery Division to the judge in Court and in the King's Bench Division to a Divisional Court.

There is fraud in an award if it be obtained through corruption or partiality on the part of the arbitrator (*s*). But the fraud must of course be strictly proved; and evidence of an admission out of Court by an arbitrator that he had received a bribe is not admissible to set aside the award (*t*). And in the absence of fraud on the part of the parties it is competent for them to agree not to raise any question of fraud in the arbitrator (*u*). In a case where arbitrators had, either by force or fraud, excluded a co-arbitrator, or either of the parties, from their meetings, it was held to furnish such a presumption of corruption as to be a sufficient ground for setting aside the award (*w*). So, also, it is against good faith for a person appointed arbitrator to consider himself as agent

(*q*) *Scott* v. *Brown*, 1892, 2 Q. B. 724; 61 L. J. Q. B. 738.
(*r*) *Smith* v. *Whitmore*, 1 H. & M. 576; 2 D. J. & S. 297; 136 R. R. 249.
(*s*) *Moseley* v. *Simpson*, 16 Eq. 226; 42 L. J. Ch. 739.
(*t*) *Re Whiteley*, 1891, 1 Ch. 558; 60 L. J. Ch. 149.
(*u*) *Tullis* v. *Jacson*, 1892, 3 Ch. 441; 61 L. J. Ch. 655; *Pearson* v. *Dublin Corporation*, 1907, A. C. 351, *per* Lord Atkinson, 77 L. J. P. C. 1.
(*w*) *Burton* v. *Knight*, 2 Vern. 514. See *Gregson* v. *Armstrong*, 70 L. T. 106.

of the person appointing him (*x*), or to buy up the unsustained claims of any of the parties to the reference (*y*). So, also, there is fraud if the award has been obtained by fraud or concealment of material circumstances on the part of one of the parties so as to mislead the arbitrator. If either party be guilty of fraudulent concealment of matters which he ought to have declared, or if he wilfully mislead or deceive the arbitrator, the award may be set aside (*z*). An award will not, however, be set aside on the ground that the arbitrator has been misled by the evidence of a witness who might have been cross-examined (*a*). There is also fraud to set aside an award if the award be obtained by undue means, as, for instance, if the witnesses have been examined in the absence of the parties (*b*); or if the award has been made clandestinely without hearing each party (*c*); or if the award has been made by one arbitrator apart from the others (*d*); or if the interviews have taken place between the arbitrator and one party in the absence of the others (*e*). So, also, the existence of any ground calculated to bias the mind of the arbitrator, unknown to either of the parties, is sufficient for the interference of the Court (*f*); or if one of the parties has not been allowed a proper opportunity of discussing his case (*g*). If interviews have taken place between the arbitrator and one of the parties in the absence of the other, similar misconduct on the part of the person applying will not prevent the Court from setting aside the award, for the matter concerns the due administration of justice (*h*).

(*x*) *Calcraft* v. *Roebuck*, 1 Ves. Jr. 226; 1 R. R. 126.

(*y*) *Blennerhasset* v. *Day*, 2 Ba. & Be. 116; 53 R. R. 79.

(*z*) *South Sea Co.* v. *Bumpstead*, Vin. Ab. Arbitr. (1 a.) 39, 2 Eq. Ca. Ab. 80; *Ives* v. *Medcalfe*, 1 Atk. 64; *Gartside* v. *Gartside*, 3 Anst. 735.

(*a*) *Pilmore* v. *Hood*, 8 Scott, 180; 50 R. R. 622.

(*b*) *Re Plews and Middleton*, 6 Q. B. 845; 14 L. J. Q. B. 149. See *Haigh* v. *Haigh*, 3 D. F. & J. 159.

(*c*) *Harding* v. *Wickham*, 2 J. & H. 676; 134 R. R. 387. See *Smith* v. *Whitmore*, 1 H. & M. 576; 136 R. R. 249.

(*d*) *Re Plews and Middleton*, *supra*.

(*e*) *Harvey* v. *Shelton*, 7 Beav. 455; 13 L. J. Ch. 466; 64 R. R. 116; *Gregson* v. *Armstrong*, 70 L. T. 106.

(*f*) *Kemp* v. *Rose*, 1 Giff. 258; 114 R. R. 429.

(*g*) *Spettigue* v. *Carpenter*, 3 P. Wms. 361.

(*h*) *Harvey* v. *Shelton*, *supra*.

The Court will not give relief against an award if the conduct of the party making the application has been such as to destroy his right to resort to the Court for relief (*i*). An agreement for reference, accordingly, cannot be set aside as obtained by undue pressure if the party objecting has attended the reference and taken the chance of an award in his favour (*k*). Nor can relief be had against an award when there has been any laches on the part of the person making the application (*l*). Similar misconduct, however, to that complained of on the part of the person making the application will not prevent the Court from setting aside an award, if the award has been obtained by undue means (*m*).

In cases where fraud is charged, the Court will in general refuse to send the dispute to arbitration, if the party charged with fraud desires a public inquiry. But where the objection to arbitration is by the party charging the fraud, the Court will not necessarily accede to it, and will never do so, unless a *primâ facie* case of fraud is proved (*n*).

So disputes between partners where a *primâ facie* case of fraud is set up should not as a rule be referred to arbitration (*o*). So an allegation by a contractor that he was induced to enter into the contract by fraudulent misrepresentation is not a dispute within a clause referring to arbitration disputes arising in relation to or in connection with the contract (*p*). But a condition in a policy requiring the liability of the insurance company, and not merely the amount of such liability, to be referred to arbitration is binding even though a charge of fraud be made against the insured (*q*).

Where there is a question of account which can be referred compulsorily under sect. 14 of the Arbitration Act, 1889, the

(*i*) *Smith* v. *Whitmore*, 1 H. & M. 576; 2 D. J. & S. 297.

(*k*) *Ormes* v. *Beadel*, 2 Giff. 166; 2 D. F. & J. 333; 30 L. J. Ch. 1; 128 R. R. 77; *Ex p. Wyld*, 2 D. F. & J. 642; 30 L. J. B. 10; 129 R. R. 225.

(*l*) *Jones* v. *Bennett*, 1 Bro. P. C. 528. See *Nickels* v. *Hancock*, 7 D. M. & G. 300; 109 R. R. 130.

(*m*) *Harvey* v. *Shelton*, *supra*.

(*n*) *Russell* v. *Russell*, 14 C. D. 471; 49 L. J. Ch. 268.

(*o*) *Barnes* v. *Youngs*, 67 L. J. Ch. 263.

(*p*) *Monro* v. *Bognor D. C.*, 1915, 3 K. B. 167; 84 L. J. K. B. 1091.

(*q*) *Trainor* v. *Phœnix Fire Ass. Co.*, 65 L. T. 825; *Gaw* v. *British Law Fire Ins. Co.*, 1908, 1 Ir. R. 245.

Court has power to refer the whole action even though the issues involve questions of fraud (*r*). But such issues ought not to be referred unless so mixed up with matters of account as to be incapable of being tried separately (*s*).

SECTION VII.—FRAUD IN JUDGMENTS.

A judgment or decree obtained by fraud upon a Court binds not such Court or any other, and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding (*t*). "Fraud," said De Grey, C. J., "is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts ecclesiastical and temporal" (*u*). In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest court of judicature in the realm, but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud (*x*). Whether an innocent party would be allowed to prove in one Court that a judgment against him in another Court was obtained by fraud is a question not equally clear, as it would be in his power to apply directly to the Court which pronounced it to vacate it. But however this may be, it is evident that a guilty party would not be permitted to defeat a judgment by showing that in obtaining it he had practised an imposition on the Court (*y*).

In order to sustain an action to impeach a judgment actual fraud must be shown; mere constructive fraud is not, at all events after long delay, sufficient (*z*). The Court has jurisdic-

(*r*) *Sacker* v. *Rajozine*, 44 L. T. 308; *Hoch* v. *Boor*, 43 L. T. 425.

(*s*) *Leigh* v. *Brooks*, 5 C. D. 592; 46 L. J. Ch. 344; *Russell* v. *Harris*, 65 L. T. 752.

(*t*) *Shedden* v. *Patrick*, 1 Macq. 535; 149 R. R. 55; *Reg.* v. *Saddlers' Co.*, 10 H. L. C. 431, *per* Willes, J., 32 L. J. Q. B. 337; 138 R. R. 217.

(*u*) *Rex* v. *Duchess of Kingston*, 20 How. St. Tr. 544; 2 Smith L. C. 687.

(*x*) *Shedden* v. *Patrick*, 1 Macq. 535. *Post*, Chap. VII., s. 1.

(*y*) 20 How. St. Tr. 479; *Doe* v. *Roberts*, 2 B. & Ald. 367; 20 R. R. 477; *Bessey* v. *Windham*, 6 Q. B. 166; 14 L. J. Q. B. 7.

(*z*) *Patch* v. *Ward*, 3 Ch. 203.

tion to set aside a judgment obtained by fraud in a subsequent action brought for that purpose, the proper remedy being an original action and not a rehearing (*a*), but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury (*b*).

An action to set aside a judgment in a probate action on the ground of fraud ought not to be allowed to proceed unless the plaintiff can produce evidence showing a reasonable probability of the alleged fraud being established; but such evidence need not necessarily be of such a character that it would be evidence in the action itself (*c*).

Though in most cases a judgment obtained by fraud can be set aside only as against the person guilty of the fraud, this limitation does not apply to an action to set aside a judgment granting probate of a will, inasmuch as a will must be good or bad against all the world (*d*).

The Divorce Court has no jurisdiction on motion by a co-respondent to rescind a decree absolute on the ground of fraud, where the co-respondent has failed to appeal from the decree nisi (*e*).

An action will lie to set aside a judgment on the ground of fraud although such judgment was obtained by default; but, inasmuch as a shorter method of doing it in chambers in such a case has been provided by Order XXVII., r. 15, it may be a question whether a plaintiff who adopts the more dilatory method will not be put upon terms (*f*).

Where the order as drawn up correctly represents the decision of the Court, but that decision is based upon a misrepresentation not caused by an accidental slip, it cannot be corrected under Order XXVIII., r. 11 (*g*).

(*a*) *Cole* v. *Langford*, 1898, 2 Q. B. 36; 67 L. J. Q. B. 698; but see *Nixon* v. *Loundes*, 1909, 2 Ir. R. 1.

(*b*) *Baker* v. *Wadsworth*, 67 L. J. Q. B. 301; *Flower* v. *Lloyd*, 3 C. D. 297; 46 L. J. Ch. 838.

(*c*) *Birch* v. *Birch*, 1902, P. 130; 71 L. J. P. 58.

(*d*) *Ibid.*

(*e*) *Kemp Welch* v. *Kemp Welch*, 1912, P. 82; 81 L. J. P. 25.

(*f*) *Wyatt* v. *Palmer*, 1899, 2 Q. B. 106, 110; 68 L. J. Q. B. 709.

(*g*) *Preston Banking Co.* v. *Allsup*, 1895, 1 Ch. 141; 64 L. J. Ch. 196; cf. *Chessum* v. *Gordon*, 1901, 1 Q. B. 694; 70 L. J. Q. B. 394.

A foreign judgment can be impeached, if it be made to appear that it was fraudulently obtained. When a question between the parties has been decided by a foreign Court, with jurisdiction, that decision is, as a general rule, conclusive, and cannot be opened on the merits; but if the foreign judgment was obtained by fraud, that would be an answer to any proceeding founded on the judgment (*h*). But an English Court will not refuse to enforce a foreign judgment as being contrary to natural justice merely because the foreign Court has excluded evidence tendered to show that the contract was induced by fraud (*i*).

A judgment by consent is binding, but if it appear that the consent was obtained by fraud, the Court will treat the consent as a nullity (*k*). So, also, if it be made to appear that a judge's order has been obtained by fraud or by the suppression of information which it was essential the Court should know, the order will be set aside (*l*).

The Court of Chancery would give assistance to enforce the judgments of other Courts of competent jurisdiction, when the execution of such judgments was defeated or obstructed by fraudulent contrivances (*m*).

A voluntary settlement, accordingly, of real and personal estate, made by a man who was defendant in a suit in the Ecclesiastical Court, with the intent of withdrawing his property from the process of that Court, was set aside. Although the deed might have been executed before any right was declared, or any order for payment of money was made, yet if it appeared that the deed was executed for the purpose of defeating the right which the defendant knew the plaintiff was entitled to establish, it was considered

(*h*) *Bank of Australasia* v. *Nias*, 16 Q. B. 717; 20 L. J. Q. B. 284; *Ochsenbein* v. *Papelier*, 8 Ch. 700; 42 L. J. Ch. 861; *Messina* v. *Petroccochino*, L. R. 4 P. C. 144; 41 L. J. C. P. 27; *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295; 52 L. J. Q. B. 309; *Vadala* v. *Lawes*, 25 Q. B. D. 310, 316.

(*i*) *Robinson* v. *Fenner*, 1913, 3 K. B. 835; 83 L. J. K. B. 81.

(*k*) *Stannard* v. *Harrison*, 19 W. R. 812.

(*l*) *Ex p. Cockerell*, 4 C. P. D. 39, *per* Lord Coleridge.

(*m*) *Blenkinsopp* v. *Blenkinsopp*, 12 Beav. 586, 1 D. M. & G. 500; 21 L. J. Ch. 401.

to have been executed with the view and intention of defrauding him (*n*).

Faculty.

A faculty granted by the Ordinary after citation and unappealed against cannot in the absence of the consent of all the parties interested be revoked for any cause other than fraud (*o*).

Fraud on statute.

An agreement intended as a contrivance to evade the scope and policy of an Act of Parliament is void (*p*).

Fraud upon Legislature.

In *Vauxhall Bridge Co.* v. *Earl Spencer* (*q*) it was held that an agreement between a landowner and a company, that, in the event of his not opposing an application to Parliament, the landowner should receive a sum of money, is a fraud upon the Legislature if concealed from Parliament, and is therefore void upon grounds of public policy. But the principle upon which that case was founded is open to much question. The better opinion would seem to be that there is no fraud upon the Legislature unless the agreement is one which the parties are bound to communicate. There may be cases in which an agreement of the sort should be communicated to the Legislature, but there can be no doubt that in ordinary cases it is open to parties to enter into such an agreement, and that there is no obligation incumbent on them to communicate it to the Legislature (*r*). The question whether such an agreement is binding on the company after incorporation is a very different one.

It is a fraud upon the Legislature for a company to obtain an Act authorising land to be taken apparently for the purposes of the company, but really with a view to selling it again to other parties in order to make a profit. It is a fraud upon the Act by which the powers were conferred (*s*).

(*n*) *Ibid.*; cf. *Reg.* v. *Hopkins*, 1896, 1 Q. B. 652; 65 L. J. M. C. 125.

(*o*) *London County Council* v. *Dundas*, 1904, P. 1.

(*p*) *Nash* v. *Neazor*, 1908, 2 Ir. R. 46.

(*q*) 2 Madd. 366; S. C. Jac. 64.

(*r*) *Simpson* v. *Lord Howden*, 10 A. & E. 793, 9 Cl. & Fin. 61; 50 R. R. 555; *Taylor* v. *Chichester, &c., Rly. Co.*, L. R. 4 H. L. 628; 39 L. J. Ex. 213. See as to fraud in obtaining a local Act of Parliament, *Mangles* v. *Grand Dock Colliery Co.*, 10 Sim. 519; 54 R. R. 380.

(*s*) *Carington* v. *Wycombe Rly. Co.*, 3 Ch. 377; and see 11 C. D. p. 484.

CHAPTER VI.

HOW THE RIGHT TO IMPEACH A TRANSACTION ON THE GROUND OF FRAUD MAY BE LOST.

TRANSACTIONS, although impeachable in equity at the time of inception, and for some time afterwards, on the ground of fraud, may become unimpeachable by a subsequent confirmation by acquiescence, or by the mere lapse of time. But though a voidable transaction may be confirmed, there can be no ratification of one which is void *ab initio* or illegal (*a*). By voidable is meant not that it is void until ratified, but that it is valid until rescinded (*b*).

SECTION I.—CONFIRMATION.

No confirmation, release, acquiescence, or laches will bar the right to relief unless the party was *sui juris*, a free agent, and had full knowledge of the facts, and to some extent the law also; for example, he must know that the transaction is one which might not improbably be set aside (*c*).

In order that an act may have any effect or validity as a confirmation, it must clearly appear that the party confirming was fully apprised of his right to impeach the transaction, and acted freely, deliberately, and advisedly, with the intention of confirming a transaction which he knew, or might or ought with reasonable or proper diligence to have known, to be impeachable. If his right to impeach the transaction be concealed from him, or a free disclosure be not made to him of every circumstance which it is material for him to know,

(*a*) *Brook* v. *Hook*, L. R. 6 Ex. 89; 40 L. J. Ex. 50.
(*b*) L. R. 2 H. L. at p. 375; L. R. 4 H. L., at p. 73.
(*c*) *Allcard* v. *Skinner*, 36 C. D. pp. 188, 192; 56 L. J. Ch. 1052.

or if the act takes place under pressure or constraint, or by the exercise of undue influence, or under the delusive opinion that the original transaction is binding on him, or if it be merely a continuation of the original transaction, the confirmation operates as nothing (*d*). To make a confirmation of any value, the parties must be at arms' length, on equal terms, with equal knowledge, and with sufficient advice for protection. There must be full knowledge of all the facts, full knowledge of the equitable rights arising out of these facts, and an absolute release from the undue influence by which the fraud was practised (*e*). It will not be valid if done in distress and difficulties, under the force, pressure, and influence of the former transaction (*f*); and it must be an act separate and distinct from the impeachable transaction (*g*). In short, an act "the effect of which is to ratify that which in justice ought never to have taken place" ought to stand only on the clearest evidence (*h*). A confirmation by will of a previous gift to a person filling a fiduciary character will confirm the gift, although the fiduciary relation was still subsisting at the death of the testator (*i*), unless the will was part of the same scheme of fraud (*k*). If an independent legal adviser be employed, it will be assumed that he has satisfied himself, before approving of the transaction, that it was for the benefit of his client to confirm it (*l*). But an agreement by way of

(*d*) *Say* v. *Barwick*, 1 V. & B. 195; *Cockerell* v. *Chalmondeley*, 1 R. & M. 425; 36 R. R. 16; *Wedderburn* v. *Wedderburn*, 2 Keen, 722; 8 L. J. Ch. 177; 44 R. R. 531; *Salmon* v. *Cutts*, 4 De G. & S. 132; 21 L. J. Ch. 750; 87 R. R. 320; *Savery* v. *King*, 5 H. L. C. 627; 25 L. J. Ch. 482; 101 R. R. 299; *Athenæum Life Society* v. *Pooley*, 3 D. & J. 299; *Smith* v. *Kay*, 7 H. L. C. 750; 30 L. J. Ch. 35; *Wall* v. *Cockerell*, 10 H. L. C. 229; 32 L. J. Ch. 276; *Potts* v. *Surr*, 34 Beav. 543; 145 R. R. 663; *Kempson* v. *Ashbee*, 10 Ch. 15; 44 L. J. Ch. 195; *Barron* v. *Willis*, 1900, 2 Ch. 135, 137; 69 L. J. Ch. 532.

(*e*) *Moxon* v. *Payne*, 8 Ch. 881; 43 L. J. Ch. 240; *Barron* v. *Willis*, *supra*.

(*f*) *Wood* v. *Downes*, 18 Ves. 128; 11 R. R. 160; *Roberts* v. *Tunstall*, 4 Ha. 257; 14 L. J. Ch. 184; 67 R. R. 54.

(*g*) *Wood* v. *Downes*, *supra*.

(*h*) *Morse* v. *Royal*, 12 Ves. p. 374; 8 R. R. 338.

(*i*) *Stump* v. *Gaby*, 2 D. M. & G. 623; 22 L. J. Ch. 352; 95 R. R. 257.

(*k*) *Lyon* v. *Home*, 6 Eq. 658; 37 L. J. Ch. 674.

(*l*) *Staines* v. *Parker*, 9 Beav. 388; *De Montmorency* v. *Devereux*, 7 Cl. & Fin. 188; *Aspland* v. *Watte*, 20 Beav. 474; 25 L. J. Ch. 53; 109 R. R. 504; *Bainbridge* v. *Browne*, 18 C. D. 188; 50 L. J. Ch. 522.

confirmation, though prepared by an independent solicitor, may be set aside, if that one of the parties for whom the solicitor is acting is under the influence of the other party (*m*). There can be no confirmation where there is such a gross fraud as that a deed is void on the face of it at law (*n*), and neither directors nor the shareholder can ratify a transaction *ultra vires* the company (*o*); nor can an agreement rendered inoperative by a collateral fraudulent agreement be made valid by an abandonment of the collateral agreement (*p*). In the case of a deliberate confirmation, after the relation of influence has ceased to exist, it need not be shown that the donor knew the gift to be voidable (*q*). But it is otherwise where the alleged confirmation is connected with the original transaction and takes place under similar circumstances (*r*).

An insurance company by accepting premiums after discovering that a mistake has been made in the age of the assured must be taken to have confirmed the policy (*s*).

An adoption of the instrument impeached for a particular purpose as by the exercise of a power contained in it may operate as an absolute confirmation of the whole (*t*).

When no legal estate has passed there can be no ratification or confirmation of an appointment which is void in equity (*u*).

SECTION II.—RELEASE.

The same requisites which are necessary to render a confirmation valid are necessary to render a release valid (*w*).

The general words in a release are limited always to that thing or those things which were especially in the contemplation of the parties at the time when the release was

(*m*) *Moxon* v. *Payne*, 8 Ch. 881; 43 L. J. Ch. 240.
(*n*) *Stump* v. *Gaby*, *supra*.
(*o*) *Mann* v. *Edinburgh Tramways*, 1893, A. C. 69; 62 L. J. P. C. 74.
(*p*) *Moxon* v. *Payne*, *supra*.
(*q*) *Mitchell* v. *Homfray*, 8 Q. B. D. 587; 50 L. J. Q. B. 460.
(*r*) *Kempson* v. *Ashbee*, 10 Ch. 15; 44 L. J. Ch. 195.
(*s*) *Hemmings* v. *Sceptre Life Ass.*, 1905, 1 Ch. 365; 74 L. J. Ch. 231.
(*t*) *Jarratt* v. *Aldam*, 9 Eq. 463; 39 L. J. Ch. 349.
(*u*) *Cloutte* v. *Storey*, 1911, 1 Ch. 18; 80 L. J. Ch. 193.
(*w*) *Allcard* v. *Skinner*, 36 C. D. pp. 188, 192; 56 L. J. Ch. 1052; *Barron* v. *Willis*, 1900, 2 Ch. 121; 69 L. J. Ch. 532.

made. But a dispute that had not emerged on a question which had not at all arisen cannot be considered as bound or concluded by the anticipatory words of a general release (*x*).

A release to a trustee was set aside after the lapse of more than twenty years, and after the death of the trustee, on the evidence of the plaintiff, corroborated by the tenor of the deed, that it was executed in error. In such a case it is not necessary to prove fraud (*y*).

A release in respect of a transaction which the Court would hold to be not merely voidable, but void, will not bind the *cestui que trust* executing it (*z*).

SECTION III.—ACQUIESCENCE.

It is not necessary, in order to render a transaction unimpeachable, that any positive act of confirmation or release should take place. It is enough if proof can be given of a fixed and unbiassed determination not to impeach the transaction. This may be proved either by acts evidencing acquiescence, or by the mere lapse of time during which the transaction has been allowed to stand (*a*). The proper meaning of acquiescence is quiescence under such circumstances that assent may be reasonably inferred from it (*b*). It means being content not to oppose (*c*).

The rule as to acquiescence is different in actions for damages and for rescission. A person may by his conduct lose his right to rescind his contract, and yet retain his right to sue for damages (*d*): and delay, which would render it unjust for him to claim rescission, will not deprive him of his right to bring an action of deceit (*e*).

(*x*) *London and South-Western Rly. Co.* v. *Blackmore*, L. R. 4 H. L. 623. *per* Lord Westbury; *Turner* v. *Turner*, 14 C. D. 829.

(*y*) *Gandy* v. *Macaulay*, 31 C. D. 1.

(*z*) *Thomson* v. *Eastwood*, 2 App. Ca. 234, 247.

(*a*) *Wright* v. *Vanderplank*, 8 D. M. & G. 133; 25 L. J. Ch. 753; 114 R. R. 60; *Jarratt* v. *Aldam*, *supra*; *Turner* v. *Collins*, 7 Ch. 329; 41 L. J. Ch. 558; *Mitchell* v. *Homfray*, 8 Q. B. D. 587; 50 L. J. Q. B. 460.

(*b*) *De Bussche* v. *Alt*, 8 C. D. p. 314; 47 L. J. Ch. 386.

(*c*) L. R. 3 H. L. p. 265.

(*d*) *Peek* v. *Derry*, 37 C. D. 576; 58 L. J. Ch. 864.

(*e*) *Arnison* v. *Smith*, 41 C. D. 374.

Acquiescence or delay for a length of time after a man is in a situation to enforce a right, and with a full knowledge of facts, is, in equity, cogent evidence of a waiver and abandonment of the right (*f*); but it is not the time, but the acquiescence, which changes what would otherwise be a void act into a valid one (*g*). If a voidable contract, or other transaction, is voluntarily acted on, with a knowledge of all the facts, in a hope that it may turn out to the advantage of a party who might have avoided it, he may not void it when, after abiding that event, it has turned out to his disadvantage (*h*).

To fix acquiescence upon a party it must unequivocally appear that he knew or had notice of the fact upon which the alleged acquiescence is founded and to which it refers (*i*). Acquiescence imports and is founded on knowledge. A recognition resulting from ignorance of a material fact goes for nothing. The question as to acquiescence cannot arise unless the party against whom it is set up was aware of his rights. A man cannot be said to acquiesce in what he does not know, nor can he be bound by acquiescence unless he is fully apprised as to his rights and all the material facts and circumstances of the case (*k*). Acquiescence in what has been done will not be a bar to relief when the party alleged to have acquiesced has acted or abstained from acting through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed (*l*). A man cannot permit

(*f*) *Duke of Leeds* v. *Lord Amherst*, 2 Ph. 117, 123; 78 R. R. 47; *Life Association of Scotland* v. *Siddall*, 3 D. F. & J. 73; 130 R. R. 28; *Skottowe* v. *Williams*, *ibid.* 535; 130 R. R. 243.

(*g*) L. R. 3 H. L. 233, 260.

(*h*) *Ormes* v. *Beadel*, 2 D. F. & J. 336, *per* Lord Campbell; 30 L. J. Ch. 1.

(*i*) *Randall* v. *Errington*, 10 Ves. 428; 8 R. R. 18; *Spackman's Case*, 34 L. J. Ch. 321, 326; *Stanhope's Case*, 1 Ch. 161; 35 L. J. Ch. 296; *Stewart's Case*, *ibid.* 514; 35 L. J. Ch. 738.

(*k*) *Lloyd* v. *Attwood*, 3 D. & J. 624; 29 L. J. Ch. 97; 121 R. R. 252; *Savery* v. *King*, 5 H. L. C. 627; 25 L. J. Ch. 482; 101 R. R. 299; *Bright* v. *Legerton*, 2 D. F. & J. 617; 30 L. J. Ch. 338; *Life Association of Scotland* v. *Siddall*, 3 D. F. & J. 74; 130 R. R. 28; *Bullock* v. *Downes*, 9 H. L. C. 1; 131 R. R. 1; *Wall* v. *Cockerell*, 10 H. L. C. 229; 32 L. J. Ch. 276; 138 R. R. 124; *Bagnall* v. *Carlton*, 6 C. D. 371; 47 L. J. Ch. 30; *De Bussche* v. *Alt*, 8 C. D. 287; 47 L. J. Ch. 386; *ante*, pp. 128, 129.

(*l*) *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 223.

who does not know that he has a right to refuse (*m*). You cannot consent to a thing unless you have knowledge of it (*n*). In the absence of full information mere lapse of time cannot grow into acquiescence (*o*).

Nor, indeed, is a recognition of avail which assumes the validity of a transaction, if the question as to its validity does not appear to have come before the parties (*p*). In order that acquiescence may be a bar to relief the party must be aware not only of the facts on which his claim is based, but of his legal rights to redress in respect of them (*q*). The mere fact that a man may have heard unfavourable rumours, and conceived suspicions, is not enough to fix him with acquiescence (*r*). The proof of knowledge lies on the party who alleges acquiescence, and sets it up as a defence (*s*). If the transaction has taken place under pressure, or the exercise of undue influence, it must clearly and unequivocally appear that the party against whom acquiescence is alleged was *sui juris*, and was released from the influence or the pressure under which he stood at the time of the transaction, and acted freely and advisedly in abstaining from impeaching it. Acquiescence goes for nothing so long as a man continues in the same situation in which he was at the date of the transaction (*t*). But as soon as a man with full knowledge,

(*m*) *Per* Alderson, B., 15 M. & W. p. 217.

(*n*) *Per Jessel*, M. R., 1 C. D. p. 528.

(*o*) L. R. 3 H. L. 233, 260.

(*p*) *Honner* v. *Morton*, 3 Russ. 65; 27 R. R. 15; *Wright* v. *Vanderplank*, 8 D. M. & G. 133; 25 L. J. Ch. 753; 114 R. R. 60. See *Baker* v. *Bradley*, 7 D. M. & G. 597; 25 L. J. Ch. 7; 109 R. R. 245.

(*q*) *Robinson* v. *Abbott*, 20 V. L. R. 346.

(*r*) *Central Rly. Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 112; 36 L. J. Ch. 849; 142 R. R. 39.

(*s*) *Bennett* v. *Colley*, 2 M. & K. 225; *Burrows* v. *Walls*, 5 D. M. & G. 233; 104 R. R. 95; *Life Association of Scotland* v. *Siddall*, 3 D. F. & J. 58; 130 R. R. 28; *Wall* v. *Cockerell*, *supra*; *Spackman's Case*, 34 L. J. Ch. 329.

(*t*) *Gregory* v. *Gregory*, Coop. 201; 14 R. R. 244; *Roche* v. *O'Brien*, 1 B. & B. 338; *Aylward* v. *Kearney*, 2 B. & B. 463; *Honner* v. *Morton*, *supra*; *Duke of Leeds* v. *Lord Amherst*, 2 Ph. 117; 78 R. R. 47; *Addis* v. *Campbell*, 4 Beav. 401; 10 L. J Ch. 284; 55 R. R. 122; *Roberts* v. *Tunstall*, 7 Ha. 257; 14 L. J. Ch. 184; 67 R. R. 54; *Salmon* v. *Cutts*, 4 De G. & Sm. 132; 21 L. J. Ch. 750; 87 R. R. 320; *Wright* v. *Vanderplank*, *supra*; *Berdoe* v. *Dawson*, 34 Beav. 603; 145 R. R. 693.

or at least with sufficient notice or means of knowledge, of his rights, and of all the material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time, and knowingly and deliberately permits another to deal with the property, or incur expense, under the belief that the transaction has been recognised, or freely and advisedly abstains for a considerable lapse of time from impeaching it, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity (*u*).

So a shareholder who is registered to his knowledge as the holder of shares for which he has been induced to subscribe by misrepresentation will lose his right to rescission (1) by doing something after notice of the misrepresentation which is inconsistent with repudiation (*w*); or (2) by the commencement of the winding up of the company (*x*); or (3) by the company becoming insolvent and stopping payment (*y*), unless in cases (2) and (3) he has previously repudiated the shares, and proceedings for rectification have been commenced by him or by some other person, and he has, in the latter case, agreed with the company to be bound by such proceedings (*z*), or he has previously repudiated the shares and filed an affidavit setting up the misrepresentation in an action for calls (*a*), or (4) by not repudiating his shares within a reason-

(*u*) *Selsey* v. *Rhodes*, 1 Bligh, N. S. 1; 30 R. R. 1; *Vigers* v. *Pike*, 8 Cl. & Fin. 652; 54 R. R. 114; *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714; 65 R. R. 305; *Stone* v. *Godfrey*, 5 D. M. & G. 76; 23 L. J. Ch. 769; 104 R. R. 32; *Farrant* v. *Blanchford*, 1 D. J. & S. 107; 32 L. J. Ch. 327; 137 R. R. 164; *Cairncross* v. *Lorimer*, 3 Macq. 830; *Archbold* v. *Scully*, 9 H. L. 360; 131 R. R. 223; *Turner* v. *Collins*, 7 Ch. 329; 41 L. J. Ch. 558; *Smethurst* v. *Hastings*, 30 C. D. p. 497; 55 L. J. Ch. 173.

(*w*) *Ex p. Briggs*, 1 Eq. 483; 35 L. J. Ch. 320; *Aarons Reefs* v. *Twiss*, 1896, A. C. 273; 65 L. J. P. C. 54; *Ex p. Shearman*, 66 L. J. Ch. 25; cf. *Tomlin's Case*, 1898, 1 Ch. 104; 67 L. J. Ch. 11.

(*x*) *Burgess's Case*, 15 C. D. 507; *Scottish Petroleum Co.*, 23 C. D. 436.

(*y*) *Tennent* v. *Glasgow Bank*, 4 App. Ca. 615.

(*z*) *Pawle's Case*, 4 Ch. 497; 38 L. J. Ch. 412; *Scottish Petroleum Co.*, 23 C. D. 414.

(*a*) *Whiteley's Case*, 1900, 1 Ch. 365; 69 L. J. Ch. 250.

able time (*b*). The shareholder is also debarred in cases (2) and (3) from obtaining damages (*c*).

The equitable rule as to acquiescence applies with peculiar force to the case of property which is of a speculative character, or is subject to contingencies, and can only be rendered productive by a large and uncertain outlay (*d*).

A distinction must be taken between cases where the acquiescence alleged takes place while the act is in progress and cases where it does not take place until after the act has been completed. "The term 'acquiescence,'" said Thesiger, L.J., in *De Bussche* v. *Alt* (*e*), "is one which was said by Lord Cottenham, in *Duke of Leeds* v. *Amherst*, ought not to be used; in other words, it does not accurately express any known legal defence, but if used at all, it must have attached to it a very different signification, according to whether the acquiescence alleged occurs while the act is in progress, or only after it has been completed. If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing on that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottenham said, is the proper sense of the word 'acquiescence,' and in that sense may be defined as quiescence under such circumstances, as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to

(*b*) As to what is reasonable time, see Buckley, 96.

(*c*) *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 317.

(*d*) *Norway* v. *Rowe*, 19 Ves. 144; 12 R. R. 157; *Small* v. *Attwood*, 6 Cl. & Fin. 232, 359; *Prendergast* v. *Turton*, 1 Y. & C. C. C. 98; 13 L. J. Ch. 268; 57 R. R. 255; *Lovell* v. *Hicks*, 2 Y. & C. 46; 6 L. J. Ex. Eq. 85; *Jennings* v. *Broughton*, 5 D. M. & G. 140; 23 L. J. Ch. 999; 104 R. R. 58; *Clegg* v. *Edmondson*, 8 D. M. & G. 787; 114 R. R. 336; *Clements* v. *Hall*, 2 D. & J. 173; 27 L. J. Ch. 349; 119 R. R. 74; *Grosvenor* v. *Sherratt*, 28 Beav. 659; 126 R. R. 284; *Whalley* v. *Whalley*, 2 D. F. & J. 310; 129 R. R. 105.

(*e*) 8 C. D. 314; 47 L. J. Ch. 386.

be determined on very different legal considerations. A right was then vested in him, which at all events cannot be divested without accord and satisfaction or release under seal. Mere submission to the injury for any period short of the period limited by statute for the enforcement of the right of action, cannot take away any such right, although, under the name of laches, it may afford ground for refusing relief under particular circumstances, and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him, could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding" (*f*).

Where a wrongful act has been completed without the knowledge or assent of the party injured, his right of action is not ordinarily barred by mere submission to the injury, or even by a voluntary promise not to seek redress; some conduct amounting to release, or accord and satisfaction, must be shown, although on account of laches relief may be refused under certain circumstances (*g*).

The representatives of a man who has acquiesced in a particular transaction cannot be in a better position than the man himself (*h*).

So, also, may a remainderman be bound by acquiescence (*i*). But there is no acquiescence if the remainderman acts in a transaction merely as the attorney of the tenant for life (*k*).

If a company have recognised a transfer of shares, by forfeiting the shares for non-payment of calls, they lose the right to set aside the transfer, or to deal with the transferee as a shareholder (*l*). If a company, before the winding-up, have recognised a transfer of shares, the Court

(*f*) See *Re Hulkes*, 33 C. D. 552; 55 L. J. Ch. 846.
(*g*) 8 C. D. 314.
(*h*) *Skottowe* v. *Williams*, 3 D. F. & J. 535; 130 R. R. 243.
(*i*) *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 73; 9 R. R. 11.
(*k*) *Liebman* v. *Harcourt*, 2 Mer. 520.
(*l*) *Chynoweth's Case*, 15 C. D. 20.

will not, in the winding-up, set aside the transfer, and put the name of the transferor on the list of contributories (*m*).

The doctrine of acquiescence applies even as between trustee and *cestui que trust*, even in cases of express trusts (*n*). A *cestui que trust*, whose interest is reversionary, though not bound to assert his title until he comes into possession, is not less capable of giving his assent to a breach of trust while the interest is in reversion than when it is in possession. Whether he has done so or not depends on the facts of each particular case (*o*).

SECTION IV.—DELAY AND LAPSE OF TIME.

The two propositions of a bar by length of time and by acquiescence are not distinct propositions. Length of time is evidence of acquiescence, but only if there is knowledge of the facts, for a man cannot acquiesce in what he does not know (*p*). Time alone, even half a century, is no bar to the right to rescind a voidable transaction (*q*), but there are cases where from great lapse of time acquiescence might and ought to be presumed (*r*). Lapse of time strengthens the presumption of law that a transaction is legal and honest (*s*), and where the facts are capable of explanation the Court ought not to draw inferences against the integrity of persons who have long since been dead (*t*).

The mere lapse of time during which a transaction has been allowed to stand may render it unimpeachable in equity. A man who seeks the aid of the Court must assert his claim

(*m*) *Ibid.*

(*n*) *Walker* v. *Symonds*, 3 Sw. 64, 75; 19 R. R. 155; *Burrows* v. *Walls*, 5 D. M. & G. 233; 104 R. R. 95; *Farrant* v. *Blanchford*, 1 D. J. & S. 107; 32 L. J. Ch. 237; *Re Hulkes*, 33 C. D. 552; 55 L. J. Ch. 846.

(*o*) *Life Association of Scotland* v. *Siddall*, 3 D. F. & J. 58, 73; 130 R. R. 28.

(*p*) *Ibid.*

(*q*) *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714, 740; 65 R. R. 305; *Gandy* v. *Macaulay*, 31 C. D. 1.

(*r*) 3 D. F. & J. p. 77.

(*s*) *Re Postlethwaite*, 37 W. R. 200.

(*t*) *Vatcher* v. *Paull*, 1915, A. C. 372; 84 L. J. P. C. 86.

with reasonable diligence (*u*). It is a rule of equity not to encourage stale demands, or give relief to parties who sleep on their rights. The rule is founded on the difficulty of procuring full evidence of the character and particulars of remote transactions, and is independent of the Statutes of Limitations (*w*). In the case of legal titles and legal demands, Courts of Equity act in obedience to the Statutes of Limitations (*x*); a legal right cannot be lost by mere delay, unless the delay is such as to cause a statutory bar. The rule of equity as to laches does not therefore apply to cases falling within 13 Eliz. c. 5 (*y*). But if the demand is not of a legal nature, or is strictly equitable, the Statutes of Limitations are not a bar in equity. Courts of Equity, however, look to them as guides (*z*), and assimilate their rules, as far as the transactions will admit, to the law (*a*); and though they are not within the words of the statute, they are within its spirit and meaning, and have uniformly adopted its rules (*b*). Where a bar exists by statute, equity will, in analogous cases, consider the equitable rights as bound by the same limitations (*c*); but in cases where the analogies of law do not apply, a Court of Equity is governed by its own inherent doctrine not to encourage stale demands. Parties who would have had the clearest title to relief, had they come in reason-

(*u*) *Hicks* v. *Cooke*, 4 Dow, 16; 16 R. R. 1; *Chalmer* v. *Bradley*, 1 J. & W. 59; 20 R. R. 216; *Walford* v. *Adie*, 5 Ha. 112.

(*w*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 630; 9 R. R. 119; *Beckford* v. *Wade*, 17 Ves. 87; 11 R. R. 20; *Rancliffe* v. *Parkins*, 6 Dow, 149, 232; 19 R. R. 36; *Cholmondeley* v. *Clinton*, 4 Bligh, 119; *Bright* v. *Legerton*, 2 D. F. & J. 606, 617; 129 R. R. 216; *Knight* v. *Bowyer*, 2 D. & J. 421, 443; 27 L. J. Ch. 521; 119 R. R. 184; *Gresley* v. *Mousley*, 4 D. & J. 78; 28 L. J. Ch. 620; 124 R. R. 164; *Skottowe* v. *Williams*, 3 D. F. & J. 535; 130 R. R. 243.

(*x*) *Hovenden* v. *Lord Annesley*, *supra*; *Fulwood* v. *Fulwood*, 9 C. D. 178; 47 L. J. Ch. 459; *Gibbs* v. *Guild*, 9 Q. B. D. 59; 51 L. J. Q. B. 313.

(*y*) *Re Maddever*, 27 C. D. 523; 53 L. J. Ch. 998.

(*z*) *Whalley* v. *Whalley*, 3 Bligh, 17; *Knox* v. *Gye*, L. R. 5 H. L. 656; 42 L. J. Ch. 234.

(*a*) *Cholmondeley* v. *Clinton*, 4 Bligh, 1, 95; *Brooksbank* v. *Smith*, 2 Y. & C. 60; 6 L. J. Ex. Eq. 34; *Knox* v. *Gye*, *supra*; *Gibbs* v. *Guild*, *supra*.

(*b*) *Bulli Coal Mining Co.* v. *Osborne*, 1899, A. C. 351; 68 L. J. P. C. 49.

(*c*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 607, 632; *Whalley* v. *Whalley*, 3 Bligh, 17; *Cholmondeley* v. *Clinton*, 4 Bligh. 1, 119; *Sibbering* v. *Balcarres*, 3 De G. & S. 735; 19 L. J. Ch. 252; 84 R. R. 418; *Leeds* v. *Amherst*, 2 Ph. 117; 78 R. R. 47; *Fulwood* v. *Fulwood*, *supra*.

able time, may deprive themselves of their equity by a delay which falls short of the period fixed by the statutes (*d*). Lapse of time, when it does not operate as a positive or statutory bar, operates in equity as an evidence of assent, acquiescence, or waiver (*e*). The two propositions of bar by length of time and bar by acquiescence are not distinct propositions. They constitute but one proposition (*f*). Acquiescence, however, as distinguished from delay, imports conduct (*g*).

"The doctrine of laches in a Court of Equity," said the Court in *Lindsey Petroleum Co.* v. *Hurd* (*h*), "is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to an evasion of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which would otherwise be just, is founded on mere delay, that delay, of course, not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable.

"Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy. If the situation

(*d*) *Oliver* v. *Court*, 8 Pri. 167, 168; 22 R. R. 720; *Wright* v. *Vanderplank*, 8 D. M. & G. 133; 25 L. J. Ch. 73; 114 R. R. 60; *Gresley* v. *Mousley*, 4 D. & J. 78; 28 L. J. Ch. 620; 124 R. R. 164; *Clegg* v. *Edmondson*, 8 D. M. & G. 810; 114 R. R. 336; *Thompson* v. *Eastwood*, 2 App. Ca. 236; *Allcard* v. *Skinner*, 36 C. D. p. 187; 56 L. J. Ch. 1052.

(*e*) *Whalley* v. *Whalley*, 3 Bligh, 1, 13; *Roberts* v. *Tunstall*, 4 Ha. 257; 14 L. J. Ch. 184; 67 R. R. 54; *Turner* v. *Collins*, 7 Ch. 320; 41 L. J. Ch. 558; *Allcard* v. *Skinner*, *supra*.

(*f*) *Life Association of Scotland* v. *Siddall*, 3 D. F. & J. 73, *per* Turner, L. J.; 130 R. R. 28.

(*g*) *Lyddon* v. *Moss*, 4 D. & J. 104; 124 R. R. 179.

(*h*) L. R. 5 P. C. 240.

of the parties has in no substantial way been altered, either by the delay, or by anything done during the interval, there is nothing to give special importance to the defence founded on time."

"I have looked in vain," said Lord Blackburn, in *Erlanger* v. *New Sombrero Phosphate Co.* (*i*), "for any authority which gives a more distinct and definite rule than the passage just cited; and I think, from the nature of the inquiry, it must always be a question of more or less depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice and injustice is in favour of granting the remedy, or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty, but that is inherent in the nature of the inquiry."

The effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence. No mere delay short of the period fixed by the Statute of Limitations is sufficient to deprive a man of his right to rescind on the ground of fraud (*k*). Nor to an action for damages for deceit is there a bar arising from delay, unless the delay is such as would bring the Statute of Limitations applicable to the case into operation (*l*).

The rule that a man who sleeps on his rights cannot come to a Court of Equity for relief holds good, not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would have been given had there been no delay (*m*).

No precise or defined limit of time can be stated within

(*i*) 3 App. Ca. 1279; 48 L. J. Ch. 73; *Re Gallard*, 1897; 2 Q. B. 8; 66 L. J. Q. B. 484.

(*k*) *Redgrave* v. *Hurd*, 20 C. D. 13, *per* Jessel, M. R.; 51 L. J. Ch. 113.

(*l*) *Peek* v. *Gurney*, L. R. 6 H. L. 402, *per* Lord Cairns; 43 L. J. Ch. 19.

(*m*) *Beckford* v. *Wade*, 17 Ves. 87, 97; 11 R. R. 20; *Soar* v. *Ashwell*, 1893, 2 Q. B. 297, 401.

which the interposition of the Court must be sought. What is a reasonable time cannot well be defined so as to establish any general rule, and must in a great measure depend upon the exercise of the sound discretion of the Court under all the circumstances of each particular case (*n*). In *Gregory* v. *Gregory* (*o*), Sir W. Grant, M.R., refused to set aside a purchase by a trustee after a lapse of eighteen years. So in *Selsey* v. *Rhoades* (*p*), where a lease was granted to a steward, and eleven years had elapsed, the Court refused to set the lease aside, though there were special circumstances in the case. So in *Baker* v. *Read* (*q*), a bill filed after the lapse of seventeen years to set aside a purchase of a testator's estate by his executor, at an undervalue, was dismissed on the ground of delay. But in *Kempson* v. *Ashbee* (*r*), where a young lady executed a bond as surety to secure the repayment of money by her stepfather, and some years afterwards executed a second bond as security for money due by him, the Court held that she was entitled, notwithstanding the lapse of thirteen years from the date of the first bond, to have the bonds delivered up to be cancelled. And in *Gandy* v. *Macaulay* (*s*) a release executed in error was set aside after the lapse of more than twenty years.

The question as to delay may be much affected by reference to the nature of the property (*t*), or to the change of circumstances as to the character or value of the property in the intermediate period (*u*). A delay which might have been of no consequence in an ordinary case may be amply sufficient to bar the title of relief, when the property is of a speculative

(*n*) *Gresley* v. *Mousley*, 4 D. & J. 78; 28 L. J. Ch. 620; *Bagnall* v. *Carlton*, 6 C. D. 371; 47 L. J. Ch. 30.

(*o*) Coop. 201. See *Nutt* v. *Easton*, 1900, 1 Ch. 29; 69 L. J. Ch. 46.

(*p*) 2 Sim. & St. 41; 1 Bligh, N. S. 1: 30 R. R. 1.

(*q*) 18 Beav. 398; 104 R. R. 484.

(*r*) 10 Ch. 15; 44 L. J. Ch. 195.

(*s*) 31 C. D. 1; *ante*, p. 351.

(*t*) *Hatch* v. *Hatch*, 9 Ves. 292; 7 R. R. 195; *Wright* v. *Vanderplank*, 8 D. M. & G. 133; 25 L. J. Ch. 73; 114 R. R. 60; *Clegg* v. *Edmondson*, *ibid.* 807; *Ernest* v. *Vivian*, 33 L. J. Ch. 513; 143 R. R. 395.

(*u*) *Hicks* v. *Cooke*, 4 Dow, 16; 16 R. R. 1; *Wentworth* v. *Lloyd*, 32 Beav. 467; 138 R. R. 824; *Ridgway* v. *Newstead*, 3 D. F. & J. 474; 30 L. J. Ch. 889: 130 R. R. 211.

character, or is subject to contingencies (*x*), or where the rights and liabilities of others have been in the meantime varied (*y*), or where an innocent third party has acquired an interest in the matter, or where in consequence of the delay the position even of the wrongdoer is affected (*z*). If the property is of a speculative or precarious nature, it is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time (*a*). He cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper or to repudiate it if that should prove to his advantage (*b*).

In an action of deceit against directors in respect of shares taken under a false prospectus, the House of Lords has laid down that equity will follow by analogy the rule of law, and that the only amount of delay which could be a bar to relief is that fixed by the Statute of Limitations (*c*). But if shareholders come to the Court to be released from their shares on the ground of fraud, they must come with diligence and promptitude (*d*). A man indeed who, after being fully aware of the false representation in the prospectus of a company, by which he has been induced to take shares, delays for an unreasonable time in taking proceedings to have his name removed from the list of shareholders, cannot claim to be

(*x*) *Attwood* v. *Small*, 6 Cl. & Fin. 232, 357; 49 R. R. 115; *Clegg* v. *Edmondson*, 8 D. M. & G. 787; 114 R. R. 336; *Clements* v. *Hall*, 2 D. & J. 173; 27 L. J. Ch. 349; 119 R. R. 74; *Mills* v. *Haywood*, 6 Ch. p. 202; *Rule* v. *Jewell*, 18 C. D. 660; *Tadcaster Brewery* v. *Wilson*, 1897, 1 Ch. p. 711; 66 L. J. Ch. 402.

(*y*) *Ridgway* v. *Newstead*, *supra*; *Levy* v. *Stogden*, 1899, 1 Ch. 5; 68 L. J. Ch. 19. Where the lapse of time has not altered the position of the parties interested, it is of little or no importance. *Wollaston* v. *Tribe*, 9 Eq. 50; *Beauchamp* v. *Winn*, L. R. 6 H. L. 232.

(*z*) *Clough* v. *London and North Western Rly. Co.*, L. R. 7 Ex. 34; 41 L. J. Ex. 17; *Smethurst* v. *Hastings*, 30 C. D. p. 497; 55 L. J. Ch. 173; *ante*, p. 11.

(*a*) *Jennings* v. *Broughton*, 5 D. M. & G. 126; 23 L. J. Ch. 999; 104 R. R. 58; *Ernest* v. *Vivian*, *supra*; *Levy* v. *Stogden*, *supra*; *Seddon* v. *North Eastern Salt Co.*, 1905, 1 Ch. 326; 74 L. J. Ch. 199.

(*b*) *Walford* v. *Adie*, 5 Ha. 112; *Lawrence's Case*, 2 Ch. 425; 36 L. J. Ch. 490; *Rule* v. *Jewell*, 18 C. D. 660; *Levy* v. *Stogden*, *supra*.

(*c*) *Peek* v. *Gurney*, L. R. 6 H. L. 377, 384, 402; 43 L. J. Ch. 19.

(*d*) *Kent* v. *Freehold Land*, *&c.*, *Co.*, 3 Ch. 493; 37 L. J. Ch. 653; *Scottish Petroleum Co.*, 23 C. D. 413; *Aarons Reefs* v. *Twiss*, 1896, A. C. 273, 294; 65 L. J. P. C. 54.

entitled, even after the creditors are paid, to be treated as between himself and the company as if he were not a shareholder, and to have repayment upon that footing (*e*). So, also, persons who apply for shares on the faith of a prospectus are bound to ascertain at the earliest possible moment whether the memorandum and articles of association are in accordance with the prospectus. If they fail to do so, and the objects of the company are extended beyond those described in the prospectus, the persons who have so taken shares on the faith of the prospectus will be held bound by acquiescence (*f*).

It is difficult to lay down any general rule as to the time within which an objection on the ground of misrepresentation in the prospectus of a company should be made the ground of repudiation of shares after it has been discovered. In every case attention must be paid to the circumstances (*g*). A delay pending the hearing and decision of the case of another shareholder in the same position, agreed to be taken as a representative case, was held not to prejudice the party, notwithstanding that a winding-up order intervened (*h*). But a shareholder who did not repudiate, but remained silent, and attended meetings, and took no steps in the matter until after the winding-up order and after the result of the trial, was held debarred by his delay from taking proceedings to have his name removed from the list of shareholders (*i*). Where an allottee of shares did not move to have his name removed from the register until five months after he became fully aware of the misrepresentation, the unexplained delay was held to preclude him from relief (*j*).

The rule is that the repudiating shareholder must not only repudiate, but also get his name removed or commence pro-

(*e*) *Ogilvie* v. *Currie*, 37 L. J. Ch. 541.

(*f*) *Oakes* v. *Turquand*, L. R. 2 H. L. p. 352, *per* Lord Chelmsford; 36 L. J. Ch. 949. By the Companies Act, 1908, every prospectus must now state the contents of the memorandum.

(*g*) *Ogilvie* v. *Currie*, 37 L. J. Ch. 544, *per* Lord Cairns. See 1896 A. C. at p. 294.

(*h*) *Pawle's Case*, 4 Ch. 497; 38 L. J. Ch. 412; *Karberg's Case*, 1892, 3 Ch. 1; 61 L. J. Ch. 741; cf. *M'Neill's Case*, 10 Eq. 507; 39 L. J. Ch. 822.

(*i*) *Ashley's Case*, 9 Eq. 263; 39 L. J. Ch. 354.

(*j*) *Re Christineville Rubber Estates*, 81 L. J. Ch. 63.

ceedings to have it removed, subject, however, to this, that if one repudiating shareholder takes proceedings, the others will have the benefit of them, if there is an agreement with the company that they shall stand or fall by the result (*k*).

The question as to delay may be also materially affected by reference to the relation which subsists between the parties. A delay which might be available by way of defence to persons not under any fiduciary relation or obligation may not be available to those who are affected by a fiduciary relation or obligation (*l*). If, for instance, the transaction be between solicitor and client, a delay (which would be fatal in other cases) may be permitted, for the solicitor must know that the onus of supporting the transaction will rest on him, and that if he desire it to be upheld he must preserve the evidence which will be required to uphold it (*m*).

The time within which a client must assert his right as against his solicitor to obtain or in case of error to open an account is not limited to six years or to any other definite period (*n*).

The rules of the Court as to lapse of time being a bar in equity apply to cases of constructive trust (*o*), and even to transactions between trustee and *cestui que trust* in respect of the trust estate (*p*), as well as to ordinary transactions. Length of time can, however, have no effect between trustee and *cestui que trust*, except the trusts are properly executed (*q*). There is a wide distinction between trusts which are actual and express and constructive trusts. A trust by which a man

(*k*) *Scottish Petroleum Co.*, 23 C. D. 413, 436; *ante*, p. 354.

(*l*) *Lindsey Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 242; *Erlanger* v. *New Sombrero Co.*, 3 App. Ca. 1248; 48 L. J. Ch. 73.

(*m*) *Gresley* v. *Mousley*, 4 D. & J. 78, 99; 28 L. J. Ch. 620; 124 R. R. 164; *Boswell* v. *Coaks*, 27 C. D. 456; 55 L. J. Ch. 761.

(*n*) *Cheese* v. *Keen*, 1908, 1 Ch. 245; 77 L. J. Ch. 163.

(*o*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 633; 9 R. R. 119; *Beckford* v. *Wade*, 17 Ves. 97; 11 R. R. 20; *Clegg* v. *Edmondson*, 8 D. M. & G. 787; 114 R. R. 336; *Clanricarde* v. *Henning*, 30 Beav. 180; 30 L. J. Ch. 865; 132 R. R. 227; *Soar* v. *Ashwell*, 1893, 2 Q. B. 390.

(*p*) *Gregory* v. *Gregory*, Coop. 201; 14 R. R. 244; *Roberts* v. *Tunstall*, 4 Ha. 257; 14 L. J. Ch. 184; 67 R. R. 54; *Baker* v. *Read*, 18 Beav. 398; 104 R. R. 484; *Barwell* v. *Barwell*, 34 Beav. 371; *Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196; 66 L. J. Ch. 74.

(*q*) *Franks* v. *Bollans*, 37 L. J. Ch. 155.

undertakes to hold and apply property for the benefit of another is widely different from the case of ownership, subject to the claims of another, if he thinks proper to enforce it (*r*). In the case of a bribe received or profit made by a person in a fiduciary position, the *cestui que trust* who is wronged is not barred by any length of time, so long as that wrong is concealed from him by the wrongdoer; but a Court of Equity will, whether by analogy or in obedience to the Statute of Limitations, hold the claim barred, if the *cestui que trust* stands by and takes no proceedings for six years from the time when he became aware of it. The money sought to be recovered in such a case is in no sense the money of the *cestui que trust*, unless it is made so by a judgment founded on the act by which the trustee got the money into his hands. The case is different from that of a *cestui que trust* seeking to recover money which was his own before an act wrongfully done by the trustee (*s*). In the case of continuing express trusts, created by act of parties, no time is a bar, for from the privity existing between the parties the possession of the one is the possession of the other, and there is no adverse title (*t*). Nor is length of time a bar where a debt has accrued in consequence of a violation of confidence bestowed in a fiduciary character (*u*). But if the trust, though express, be not continuous, and the case be one of gross laches, the general rule of equity, that encouragement is not to be given to stale demands, is equally applicable (*w*).

If there be laches on both sides, the ordinary rules as to delay and acquiescence may not apply (*x*).

(*r*) *Toft* v. *Stephenson*, 7 Ha. 15; 21 L. J. Ch. 129; 91 R. R. 14.

(*s*) *Metropolitan Bank* v. *Heiron*, 5 Ex. D. 323.

(*t*) *Cholmondeley* v. *Clinton*, 4 Bligh, 1; *Wedderburn* v. *Wedderburn*, 2 Keen 749; 4 M. & C. 41; 8 L. J. Ch. 177; 44 R. R. 331; *Knight* v. *Bowyer*, 2 D. & J. 421, 443; 27 L. J. Ch. 521; 119 R. R. 184; *Clanricarde* v. *Henning*, 30 Beav. 175. *supra*; *Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196; 66 L. J. Ch. 74.

(*u*) *Teed* v. *Beere*, 5 Jur. N. S. 381; *Burdick* v. *Garrick*, 5 Ch. 233; 39 L. J. Ch. 661.

(*w*) *Bright* v. *Legerton*, 2 D. F. & J. 606; 30 L. J. Ch. 338; *Harston* v. *Tenison*, 20 C. D. 120; 51 L. J. Ch. 645; *Re Postlethwaite*, 60 L. T. 54; *Rochefoucauld* v. *Boustead*, *supra*.

(*x*) *Hicks* v. *Morant*, 2 Dow & Cl. 414.

Time, however, does not begin to run against a man in cases of fraud until he has knowledge of the fraud. Time begins to run only from the discovery (*y*). But the discovery of a concealed fraud only gives a new cause of action where the fraud is the fraud of the defendant himself or of some one for whom he is directly responsible (*z*). The Statute of Limitations is no bar in equity in cases of fraud (*a*); and the Trustee Act, 1888, s. 8, does not apply to cases of fraud or fraudulent breaches of trust; but if fraud is relied on, it must be fraud imputable to the person who invokes the aid of the statute (*b*). The right of the party defrauded is not affected by lapse of time, or, generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed (*c*). Lapse of time imputed as laches may be excused by the obscurity of the transaction, whereby a man is disabled from obtaining full information of his rights (*d*). Time does not begin to run against a man, so as to bar the remedy, until he has full information of his rights and injuries (*e*), or has in his possession full means of knowledge (*f*), or might by the exercise of reasonable diligence have obtained evidence of the fraud (*g*). But if he delays his claim to rescission until after the lapse of six years from his discovery of the fraud, the Court will act by analogy to

(*y*) *Ante*, p. 16.

(*z*) *John* v. *Dodwell*, 1918, A. C. 563; 87 L. J. P. C. 92.

(*a*) *Sturgis* v. *Morse*, 24 Beav. 541; 29 L. J. Ch. 766; 116 R. R. 219.

(*b*) *Thorne* v. *Heard*, 1895, A. C. 495; 64 L. J. Ch. 652.

(*c*) *Rolfe* v. *Gregory*, 4 D. J. & S. 579; 34 L. J. Ch. 274; 146 R. R. 463. See *Allfrey* v. *Allfrey*, 1 Mac. & G. 99; 84 R. R. 15.

(*d*) *Murray* v. *Palmer*, 2 Sch. & Lef. 486; *Erlanger* v. *New Sombrero Co.*, 3 App. Ca. 1231; 48 L. J. Ch. 73.

(*e*) *Blennerhassett* v. *Day*, 2 Ba. & Be. 104, 119; 53 R. R. 79; *Whalley* v. *Whalley*, 3 Bligh, 1; *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714; 65 R. R. 305; *Browne* v. *Cross*, 14 Beav. 106; *Parker* v. *Bloxam*, 20 Beav. 295; 109 R. R. 423; *Savery* v. *King*, 5 H. L. C. 627; 25 L. J. Ch. 482; 101 R. R. 299.

(*f*) *Browne* v. *M'Clintock*, L. R. 6 H. L. 456; *Redgrave* v. *Hurd*, 20 C. D. 13; 51 L. J. Ch. 113. The fact, however, that a man has the means of knowledge is not the same thing as knowledge, if no culpable negligence can be imputed to him. *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 233.

(*g*) *Chetham* v. *Hoare*, 9 Eq. 571; 39 L. J. Ch. 376; *Vane* v. *Vane*, 8 Ch. 383; 42 L. J. Ch. 299; *Willis* v. *Lord Howe*, 50 L. J. Ch. 4.

the Statute of Limitations and refuse to grant relief (*h*). As between partners concealed fraud prevents the operation of the statute, although such fraud might have been discovered at the time by the use of due caution; a partner being entitled to rely on the good faith of his co-partners (*i*). In an action for negligence concealment of the negligence until six years before action is no answer to the defence of the statute if the defendant has not been guilty of fraud (*j*).

In cases of pressure or undue influence time does not begin to run until the person is emancipated from the dominion under which he stood at the date of the transaction (*k*). The objection of time is removed so long as a man remains, without any fault of his own, in ignorance of his rights and injuries (*l*), or is under a legal disability (*m*), or so long as the dominion or undue influence which vitiated the transaction is in full force (*n*). The mere fact, however, of the poverty or pecuniary embarrassment of the injured or defrauded party is not a sufficient excuse for delay (*o*); nor will the mere notice or assertion of a claim, unaccompanied by any act to

(*h*) *Oelkers* v. *Ellis*, 1914, 2 K. B. 151; 83 L. J. Ch. 658; *Armstrong* v. *Jackson*, 1917, 2 K. B. 822; 86 L. J. K. B. 1375.

(*i*) *Betjemann* v. *B.*, 1895, 2 Ch. 474; 64 L. J. Ch. 641.

(*j*) *Armstrong* v. *Milburn*, 54 L. T. 723; but see *Osgood* v. *Sunderland*, 111 L. T. 529.

(*k*) *Gregory* v. *Gregory*, Coop. 201; 14 R. R. 244; *Addis* v. *Campbell*, 4 Beav. 401; 10 L. J. Ch. 284; 55 R. R. 122; *Bellamy* v. *Sabine*, 2 Ph. 425; 17 L. J. Ch. 105; 78 R. R. 132; *Grosvenor* v. *Sherratt*, 28 Beav. 659; 124 R. R. 284; *Sharp* v. *Leach*, 31 Beav. 491; 135 R. R. 526; *Kempson* v. *Ashbee*, 10 Ch. 15; 44 L. J. Ch. 195; *Allcard* v. *Skinner*, 36 C. D. 145, 187; 56 L. J. Ch. 1052.

(*l*) *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714; 65 R. R. 305; *Allfrey* v. *Allfrey*, 1 Mac. & G. 87; 84 R. R. 15; *Rolfe* v. *Gregory*, 4 D. J. & S. 579; 34 L. J. Ch. 274; 146 R. R. 463; *Spackman's Case*, 34 L. J. Ch. 329; *Stanhope's Case*, 1 Ch. 161; 35 L. J. Ch. 296; but see *Re McCallum*, 1901, 1 Ch. 143; 70 L. J. Ch. 206.

(*m*) *Duke of Leeds* v. *Lord Amherst*, 2 Ph. 117; 78 R. R. 47; *Neesom* v. *Clarkson*, 2 Ha. 163; 12 L. J. Ch. 99; 62 R. R. 51; *Wright* v. *Vanderplank*, 8 D. M. & G. 133; 25 L. J. Ch. 73; 114 R. R. 60; *Gresley* v. *Mousley*, 4 D. & J. 78; 28 L. J. Ch. 620; 124 R. R. 164.

(*n*) *Wright* v. *Vanderplank*, *supra*; *Gresley* v. *Mousley*, *supra*; *Sharp* v. *Leach*, *supra*; *Kempson* v. *Ashbee*, *supra*; *Allcard* v. *Skinner*, *supra*.

(*o*) *Roberts* v. *Tunstall*, 4 Ha. 257; 14 L. J. Ch. 184; 67 R. R. 54; *Champion* v. *Rigby*, Taml. 421; 9 L. J. Ch. 211; 31 R. R. 107. See *Beningfield* v. *Baxter*, 12 App. Ca. 167; 56 L. J. P. C. 13.

give it effect, keep alive a right which would be otherwise barred (*p*).

In every case of concealed fraud the right of any person to bring a suit in equity for the recovery of any *land or rent* of which he or any person through whom he claims may have been deprived by such fraud shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered (*q*). In order to enable a plaintiff to take advantage of the section he must show that he or some one through whom he claims was deprived of the land by the fraud (*r*), and that the fraud was the fraud of the person setting up the statute or of some one through whom he claims (*s*).

Laches may be set up against a company as well as against an individual. In considering the question of laches when set up against a company the Court cannot divest itself of the knowledge that a corporation is an aggregate of individuals. The knowledge of one shareholder is not the knowledge of the others, but great injustice might sometimes be done, if it were held that when it is shown that all the shareholders who paid reasonable attention to the affairs of the company had notice sufficient to make it laches in them not to act promptly, there could be no laches in the company, unless the notice was brought home to the company in its corporate capacity. At the same time it should be recollected that shareholders who seek to set aside a contract made by the governing body have practically first to change that governing body, and must have time to do so (*t*).

Those, on the other hand, who deal inequitably with a company know that it must be necessarily slow in its proceedings, and are not entitled to complain that time elapses, and that it is not desirable to lay down such a rule as would practically

(*p*) *Clegg* v. *Edmondson*, 8 D. M. & G. 787; 114 R. R. 336; *Ernest* v. *Vivian*, 33 L. J. Ch. 513; 143 R. R. 395.

(*q*) 3 & 4 Will. IV. c. 27, s. 26.

(*r*) *Lawrence* v. *Norreys*, 15 App. Ca. 210; 59 L. J. Ch. 681; *Willis* v. *Howe*, 1893, 2 Ch. 545; 62 L. J. Ch. 690.

(*s*) *Re McCallum*, 1901, 1 Ch. 143; 70 L. J. Ch. 206.

(*t*) *Erlanger* v. *New Sombrero Co.*, 3 App. Ca. 1280, *per* Lord Blackburn; 48 L. J. Ch. 73.

deprive a company when defrauded of relief; and this is a reason against considering a company as precluded from that relief to which it would be otherwise entitled on account of delay unless the delay is excessive (*u*).

"I can find no case," said Lord Blackburn (*u*), "in which even a private individual has been precluded by mere delay, except where the delay has been much greater than in this case. In *Prendergast* v. *Turton* (*w*) nine years elapsed, in *Clegg* v. *Edmondson* (*x*) nearly as long; and in both cases the plaintiff had lain by whilst the defendants were investing money in the mine, until that investment proved remunerative. It was clearly not equitable to leave the defendants to all the risk of loss and claim to themselves a profit, and this seems to be what Lord Eldon principally relied on in *Norway* v. *Row* (*y*). In the present case there is no ground for imputing to the plaintiff what Lord Lyndhurst in *Prendergast* v. *Turton* calls a conditional acquiescence. As it is pointed out in *Clarke* v. *Hart* (*z*), there was in *Prendergast* v. *Turton* very nearly if not quite a legal defence. Here, taking the time at which the active shareholders were put upon exerting diligence to be February, there was not quite nine months before the filing of the bill. That is not very long for getting the majority of shareholders to make an inquiry, turn out the board, and get proper advice before instituting a suit; and having come to the conclusion that the company once had the right to this relief, I think the burden is on the defendant to show that the company have precluded themselves from the relief to which they had a right."

When time has once begun to run against a man, all persons who derive their right through him will be affected with the disabilities which affect him (*a*). Nor can the representatives

(*u*) App: Ca. 1282; *ante*, p. 360.
(*w*) 1 Y. & C. C. C. 98; 13 L. J. Ch. 268; 57 R. R. 255.
(*x*) 8 D. M. & G. 789; 114 R. R. 336.
(*y*) 19 Ves. 144; 12 R. R. 157.
(*z*) 6 H. L. C. 658; 108 R. R. 231.
(*a*) *Clanricarde* v. *Henning*, 30 Beav. 175; 30 L. J. Ch. 865; 132 R. R. 227; *Ernest* v. *Vivian*, 33 L. J. Ch. 513; 143 R. R. 395.

of a man be in a better position than the man himself (*b*). A remainderman may during the life of the tenant for life bring an action to impeach a sale under a judgment, but he is not barred by laches, if he waits until the death of the tenant for life (*c*).

SECTION V.—PURCHASE FOR VALUE WITHOUT NOTICE.

Where equities are equal, legal estate prevails.

The right to impeach a transaction on the ground of fraud has no place as against third parties, who have paid money and acquired a legal right to property, without notice of the fraud. As against a purchaser for valuable consideration without notice, having the legal title, no relief can be had in equity. If a man has paid his money in ignorance of the fact that another party has an equitable claim to the property, the Courts will not deprive him of the benefit of his legal title, even although his equitable claim be of later date than that of the other party (*d*).

A purchaser for valuable consideration without notice of any defect in his title, or of the existence of any prior equitable incumbrance at the time when he advanced his money, may buy in or obtain any outstanding legal estate, not held upon express trust for an adverse claimant, or a judgment, or any other legal advantage, the possession of which may be a protection to himself or an embarrassment to other claimants (*e*). A man who has *bonâ fide* paid money without notice of any other title, though at the time of payment he as purchaser gets nothing but an equitable title, may afterwards get in a legal title and hold it, though during the interval he may have had notice of some prior dealing inconsistent with his own title (*f*), unless the circumstances are such as

(*b*) *Skottowe* v. *Williams*, 3 D. F. & J. 535; 130 R. R. 243.

(*c*) *Bowen* v. *Evans*, 1 J. & L. 265; 81 R. R. 136.

(*d*) *Pilcher* v. *Rawlins*, 7 Ch. 271; 41 L. J. Ch. 485; *Taylor* v. *London and County Banking Co.*, 1901, 2 Ch. 231; 70 L. J. Ch. 477.

(*e*) *Saunders* v. *Dehew*, 2 Vern. 471; *Willoughby* v. *Willoughby*, 1 T. R. 763; 1 R. R. 397; *Maundrell* v. *Maundrell*, 10 Ves. 246; 7 R. R. 383; *Hughes* v. *Garner*, 2 Y. & C. 328; *Bates* v. *Johnson*, John. 304; 28 L. J. Ch. 509; 123 R. R. 131; *Bailey* v. *Barnes*, 1894, 1 Ch. 25, 37; 63 L. J. Ch. 73.

(*f*) *Per* Lord Selborne, L. R. 5 P. C. p. 111.

to make it inequitable for him to do so, as, for instance, if the legal estate were held upon express trusts or vested in a satisfied mortgagee. The fact that he has notice when he gets in the legal estate counts for nothing (*g*), and it is even immaterial that it is got in *pendente lite* (*h*). But if a purchaser, however honest, on the completion of his purchase acquires a defective title, the Court will not allow this defective title to be strengthened either by his own fraud or by assisting in the fraud or by the known fraud of any other person (*i*), or through further acts on the part of the person from whom he derives title, which would be a continuation of the fraud (*k*).

The possession of a legal estate obtained through the medium of a breach of trust on the part of a mortgagor does not give priority over a prior equitable mortgagee (*l*).

Whatever may be the accident by which a purchaser has obtained a good legal title, and in respect of which he has paid his money, and is in possession of the property, he is entitled to the benefit of it (*m*); and even the execution of the conveyance having been procured by the fraud of a third party has not been allowed in equity to prejudice an innocent purchaser without notice, the deed remaining unimpeached at law (*n*). This, however, is not so where the purchaser has not got the legal estate, though even then the vendor may be estopped from denying the conveyance; and *quære* whether the vendor, where so estopped, can plead the fraud of the third party (*o*).

Where the fraud is by a person in a fiduciary character.

When a trustee of two different settlements misapplied the trust funds under one, and transferred the trust funds of the other to make good the misappropriation, it was held that the transfer was in effect an alienation for value without

(*g*) *Taylor* v. *Russell*, 1892, A. C. 244, *per* Lord Macnaghten; 60 L. J. Ch. 1.
(*h*) *Bailey* v. *Barnes*, *supra*.
(*i*) *Heath* v. *Crealock*, 10 Ch. 33; 44 L. J. Ch. 157; *Marnham* v. *Weaver*, 80 L. T. 412.
(*k*) *Ortigosa* v. *Brown*, 47 L. J. Ch. 168.
(*l*) *Perham* v. *Kempster*, 1907, 1 Ch. 373; 76 L. J. Ch. 223.
(*m*) *Pilcher* v. *Rawlins*, 7 Ch. 270, *per* James, L. J.; 41 L. J. Ch. 485.
(*n*) *Hiorns* v. *Holtom*, 16 Beav. 259; 96 R. R. 123.
(*o*) *Onward Bldg. Soc.* v. *Smithson*, 1893, 1 Ch. 1; 62 L. J. Ch. 138.

notice, and that the *cestuis que trustent* under the latter settlement could not follow the trust funds into the hands of the transferee (*p*). And in a similar case the Court of Appeal held that an innocent trustee receiving stock belonging to another trust from his co-trustee without notice of the breach of trust was entitled to be treated as a purchaser for value without notice (*q*). So a person who on being appointed a trustee requires and obtains a transfer of the legal estate from his co-trustee to himself and the co-trustee jointly becomes a purchaser for value inasmuch as he gives up a right of action against the co-trustee (*r*). So, also, where A., solicitor of B., a mortgagee, put up the mortgaged estate for sale without his client's authority, and bought it himself, and then procured B., who had been informed of the sale, to execute a conveyance and sign the endorsed receipt for the purchase-money, on the faith of representations which, however, were not considered to be such as affected the validity of the deed at law, and A. afterwards deposited the title deeds with C., as security for an advance, it was held that C. had priority over B. (*s*).

Where the holder of a legal estate is an express trustee.

But if the trustee has executed a declaration in favour of the incumbrancer, or if his trust involves the discharge of active duties, he can only transfer the property subject to the trusts on which he holds it, even though he conveys the legal estate to a purchaser for value, if the purchaser has notice that he is getting the legal estate from a trustee (*t*). Thus, when the person having the legal estate holds it in the character of trustee for several incumbrancers, he cannot make a priority by transferring it to any of them (*u*), and whenever the purchaser has notice of the existence of such a

(*p*) *Thorndike* v. *Hunt*, 3 D. & J. 563; 28 L. J. Ch. 417; 131 R. R. 232; *Taylor* v. *London and County Banking Co.*, 1901, 2 Ch. 231; 70 L. J. Ch. 477.

(*q*) *Taylor* v. *Blakelock*, 32 C. D. 560; 56 L. J. Ch. 390.

(*r*) *Taylor* v. *London and County Banking Co.*, *supra*.

(*s*) *Hunter* v. *Walters*, 7 Ch. 75; 41 L. J. Ch. 175. See *King* v. *Smith*, 1900, 2 Ch. 425; 69 L. J. Ch. 598.

(*t*) *Perham* v. *Kempster*, 1907, 1 Ch. 373; 76 L. J. Ch. 223; cf. *Walker* v. *Linom*, 1907, 2 Ch. 104; 76 L. J. Ch. 500.

(*u*) *Sharples* v. *Adams*, 32 Beav. 213; 138 R. R. 705; *Harpham* v. *Shacklock*, 19 C. D. 207

trust at the time of getting in the legal estate, he will take it subject to the claim of the *cestuis que trustent* (*x*), and perhaps even if he does not know of it (*y*).

A trustee who has the legal estate and takes a charge from his *cestui que trust* can avail himself of the protection of the legal estate as against a prior incumbrance of which he had no notice (*z*).

If the legal estate has been acquired by the purchaser or mortgagee he may defend his estate by relying on an instrument which discloses the trust even if he had no notice of it when he purchased. Where a trustee had lent trust money on mortgage (the mortgage deed mentioning that it was trust money), and, acting in concert with the mortgagor, procured the advance of money for which the second mortgage was granted by suppressing the existence of the first mortgage; in that state of things, the first mortgagee having both priority of time and the legal estate, his priority seemed incontestable; but a curious thing transpired, and not until after the institution of the suit. It appeared that on the day of the date of the second mortgage, but before the execution of it, the first mortgagee had executed a deed by which, in consideration of a part payment by the mortgagor on foot of the first mortgage, he, the first mortgagee, reconveyed a part of the mortgaged premises, by which means, at the time of the execution of the second mortgage, the mortgagor had got back in law again his legal estate in that part, which accordingly passed to the second mortgagee. The existence of this deed, as well as of the first mortgage, was wholly unknown to him. When it was discovered, he claimed the benefit of the legal estate which accident had thus thrown upon him; and it was held he was entitled to rely on the windfall which wholly without his knowledge had fallen to him in the shape of this accidental legal estate, and that the notice which did

(*x*) *Saunders* v. *Dehew*, 2 Vern. 271; *Allen* v. *Knight*, 5 Ha. 272, affd.; 16 L. J. Ch. 370; *Taylor* v. *London and County Bank*, 1901, 2 Ch. 231; 70 L. J. Ch. 477.

(*y*) *Bailey* v. *Barnes*, 1894, 1 Ch. 25, 37; 63 L. J. Ch. 73.

(*z*) *Newman* v. *N.*, 28 C. D. 674; 54 L. J. Ch. 598.

not come to him until after his purchase had been completed was immaterial (*a*).

Protection of legal estate extends to cases where vendor had no title in equity.

The protection from getting in the legal estate extends even to cases where the apparent or asserted equitable title is deduced through a forged instrument, provided the asserted or apparent title of the party from whom it was derived was clothed with possession (*b*). If the asserted or apparent title is deduced through a forged instrument, or through an instrument which has been obtained by a trick or a cheat, the doctrine of purchase for value without notice cannot apply, unless the party from whom the title is deduced had taken possession, and being in possession, as apparent owner, had sold and conveyed for value (*c*).

To raise the equity of purchase for value without notice it is not necessary to prove possession. It is enough that the purchase be from an apparent owner who was actually in possession (*d*). If, however, an instrument which purports to convey a legal estate or interest be a forged instrument no title can be acquired under it. A man who takes under such an instrument has no title at all, and cannot claim as a purchaser without notice (*e*).

Notice of another having better right to call for legal estate is notice of all equities.

The legal estate will not protect a purchaser against the claims of persons whose prior right to its protection was known to him before completion of the purchase, even although the extent of such claims was unknown: for instance, when A., knowing that B. had a charge on the property, accepted a mortgage on the estate, relying on the mortgagee's covenant, and then got in an old outstanding term of years, it was held that B., having in respect of A.'s notice of the first incumbrance a preferable right to acquire

(*a*) *Pilcher* v. *Rawlins*, 7 Ch. 269; 41 L. J. Ch. 485; disapproving *Carter* v. *Carter*, 3 K. & J. 617; 27 L. J. Ch. 74.

(*b*) *Jones* v. *Powles*, 3 M. & K. 596; 3 L. J. Ch. 210; 41 R. R. 137; *Ogilvie* v. *Jeaffreson*, 2 Giff. 380; 128 R. R. 148. See *Carlisle Bank* v. *Thompson*, 28 C D. 398.

(*c*) *Ogilvie* v. *Jeaffreson*, 2 Giff. 380; 128 R. R. 148.

(*d*) *Wallwynn* v. *Lee*, 9 Ves. 24; 7 R. R. 142; *Ogilvie* v. *Jeaffreson*, *supra*.

(*e*) *Esdaile* v. *La Nauze*, 1 Y. & C. 399; 4 L. J. Ex. Eq. 46; 41 R. R. 299; *Johnston* v. *Renton*, 9 Eq. 181; 39 L. J. Ch. 390; *Cooper* v. *Vesey*, 20 C. D. 629; 51 L. J. Ch. 862; and see *Fawkes* v. *Att.-Gen.*, 6 Ont. L. R. 490.

an assignment of the term, was entitled to priority not only in respect of such first incumbrance, but also in respect of a subsequent charge of which A. had no notice at the date of his advance (*f*). So where a man bought a freehold messuage which was subject to three mortgages, two only of which were disclosed to him, and took an assignment and paid the purchase-money by cheque, but shortly afterwards having some misgiving stopped the cheque and then for the first time had actual notice of the third incumbrance, but eventually under threats of legal proceedings allowed the cheque to be paid to the vendor, it was held that he was not a purchaser without notice and that he was bound to redeem the third mortgage (*g*). In one case a transfer of shares to a mortgagee who had no notice of a trust affecting them was upheld, notwithstanding that he received notice before the transfer was registered (*h*).

Unsatisfied mortgagee.

A purchaser by paying off and getting in a legal estate from an unsatisfied mortgagee may hold it as against all mesne incumbrances of which he had no notice at the time of completion, and this may be done *pendente lite* at any time before decree to settle priorities (*i*). But an equitable incumbrancer cannot after receiving notice of a prior equitable incumbrance obtain priority over it by getting in a legal estate from a bare trustee (*k*).

Legal estate of bare trustee.

Person affected by notice has benefit of want of notice by intermediate purchaser.

The doctrine in regard to the effect of notice does not affect a title derived from another person, in whose hands it stood free from any such taint. A purchaser will not be affected by notice of an equitable claim if he purchase from a vendor who himself bought *bonâ fide* without notice (*l*). A *bonâ fide* purchaser for value without notice has a right to convey to a person even with notice any legal or equitable interest which

(*f*) *Willoughby* v. *Willoughby*, 1 T. R. 763; 1 R. R. 397.

(*g*) *Tildesley* v. *Lodge*, 3 Sm. & G. 543; 107 R. R. 154.

(*h*) *Dodds* v. *Hills*, 2 H. & M. 424; 144 R. R. 210; cf. *Powell* v. *London and Prov. Bank*, 1893, 2 Ch. 555; 62 L. J. Ch. 795.

(*i*) *Bates* v. *Johnson*, John. 315; 25 L. J. Ch. 509; 123 R. R. 131; *Bailey* v. *Barnes*, 1894, 1 Ch. 25, 37; 63 L. J. Ch. 73.

(*k*) *Harpham* v. *Shacklock*, 19 C. D. 207.

(*l*) *Brandlyn* v. *Ord*, 1 Atk. 571; *Andrew* v. *Wrigley*, 4 Bro. C. C. 125; *Barrow's Case*, 14 C. D. 432, 445; 49 L. J. Ch. 498.

he has acquired, and a person acquiring such legal or equitable interest under such purchaser has a valid title to it (*m*). So, also, if a person who has notice sells to another who has no notice, and is also, a *bonâ fide* purchaser for valuable consideration, the latter may protect his title, although it was affected with the equity arising from notice in the hands of the person from whom he received it (*n*). A person affected by notice has the benefit of want of notice by intermediate purchasers (*o*). The *bonâ fide* purchase of an estate for valuable consideration purges away the equity from the estate in the hands of all persons who may derive title under it, with the exception of the original party, whose conscience stands bound by the meditated fraud. If the estate becomes revested in him, the original equity will attach to it in his hands (*p*).

Purchaser with notice of facts which ought to have put him on inquiry cannot claim as purchaser without notice.

A purchaser, however, having notice, cannot insist on holding the legal estate as against those parties with notice of whose right that estate was taken (*q*). A man who has notice of a fact which ought to have put him on inquiry, and which he might have discovered by using due diligence, cannot claim as a purchaser without notice (*r*). If a purchaser chooses to rest satisfied without the knowledge which he has a right to require, he cannot claim as a purchaser without notice (*s*). Gross negligence may preclude him from taking up the position of a *bonâ fide* purchaser for value (*t*). Nor can a man who has by his own act precluded himself from the means of knowledge or from information set up, as against persons as innocent as himself, the want of information which

(*m*) *Kettlewell* v. *Watson*, 21 C. D. 707; 26 C. D. 501; 53 L. J. Ch. 717.

(*n*) *Ferrars* v. *Cherry*, 2 Vern. 384; *Mertins* v. *Joliffe*, Amb. 313; *Lowther* v. *Carlton*, Barnard. Ch. 358; For. 187; 2 Atk. 242.

(*o*) *McQueen* v. *Farquhar*, 11 Ves. 467; 8 R. R. 212.

(*p*) *Kennedy* v. *Daly*, 1 Sch. & Lef. 379; cf. *Bates* v. *Johnson*, *supra*.

(*q*) *Allen* v. *Knight*, 5 Ha. 278; 16 L. J. Ch. 370; 71 R. R. 100; *Taylor* v. *London and County Banking Co.*, 1901, 2 Ch. 231; 70 L. J. Ch. 477.

(*r*) *Jackson* v. *Rowe*, 2 Sim. & St. 475; 4 L. J. Ch. 119; *Jones* v. *Powles*, 3 M. & K. 596; 3 L. J. Ch. 210; *Robinson* v. *Briggs*, 1 Sm. & G. 188; 96 R. R. 372; *Davies* v. *Thomas*, 2 Y. & C. 234; 47 R. R. 399; *Jenkins* v. *Jones*, 2 Giff. 99; 29 L. J. Ch. 493; *Ogilvie* v. *Jeaffreson*, *ibid.* 378; *Maxfield* v. *Burton*, 17 Eq. 18; 43 L. J. Ch. 46; *Selwyn* v. *Garfit*, 38 C. D. 273; 57 L. J. Ch. 609; *Aldritt* v. *Maconchy*, 1908, 1 Ir. R. 333.

(*s*) *Parker* v. *Whyte*, 1 H. & M. 167; 32 L. J. Ch. 520; 136 R. R. 73.

(*t*) *Oliver* v. *Hinton*, 1899, 2 Ch. 264; 68 L. J. Ch. 583.

he has precluded himself from obtaining (*u*). A purchaser, for example, who buys with notice of circumstances sufficient to invalidate the sale is not protected by a proviso that the purchaser need not inquire (*x*). So the doctrine does not apply where prior to completion there has been notice of a charge and a fraudulent representation that the charge has been paid off (*y*). So, also, a man who takes the assignment of a lease under a condition not to inquire into the lessor's title must have imputed to him the knowledge which, on prudent inquiry, he would have obtained (*z*). Nor are special conditions of sale, limiting the extent of title, an excuse for a purchaser not insisting on the production of a deed beyond those limits of which he had notice (*a*). Trustees of a settlement for the benefit of a particular person cannot stand any higher than the person for whom they are trustees in respect of notice. If he is affected by notice, they cannot claim as purchasers for value without notice (*b*). On the other hand, if trustees are by their negligence postponed to a subsequent purchaser their beneficiary is in no better position (*c*).

Purchaser for value affected by agent's knowledge of fraud.

A purchaser for value who though not having any personal knowledge of a fraud contracts through an agent who knows of the fraud is not a *bonâ fide* purchaser for value without notice (*d*). But if the solicitor who is acting for the purchaser is committing such a fraud in the transaction that notice of the fraud cannot be imputed to the purchaser, the Court will consider him a purchaser for value without notice (*e*).

(*u*) *Nicol's Case*, 3 D. & J. 387; 28 L. J. Ch. 257; 121 R. R. 169.

(*x*) *Jenkins* v. *Jones*, *supra*.

(*y*) *Jared* v. *Clements*, 1903, 1 Ch. 428; 72 L. J. Ch. 291; see *Perham* v. *Kempster*, 1907, 1 Ch. 373; 76 L. J. Ch. 223.

(*z*) *Robson* v. *Flight*, 4 D. J. & S. 608; 34 L. J. Ch. 226; 146 R. R. 478; *Clements* v. *Welles*, 1 Eq. 200; 35 L. J. Ch. 265.

(*a*) *Peto* v. *Hammond*, 30 Beav. 495; 31 L. J. Ch. 354; 132 R. R. 387; *ante*, p. 273.

(*b*) *Spaight* v. *Cowne*, 1 H. & M. 359; 136 R. R. 150.

(*c*) *Walker* v. *Linom*, 1907, 2 Ch. 104; 76 L. J. Ch. 500; but see *Coleman* v. *London County &c., Bank*, 1916, 2 Ch. 353; 85 L. J. Ch. 652.

(*d*) *Vane* v. *Vane*, 8 Ch. 399; 42 L. J. Ch. 299.

(*e*) *Waldy* v. *Gray*, 29 Eq. 251; 44 L. J. Ch. 394; *ante*, p. 297.

Purchasers under a decree affected by notice.

Purchasers under a judgment of the Court take with notice of fraud apparent on the face of the judgment (*f*). But an order of the Court cannot as against a purchaser be invalidated on the ground of want of jurisdiction or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not (*g*).

Actual payment of purchase-monies necessary.

To entitle a man to the character of a *bonâ fide* purchaser without notice, he must have acquired the legal title, and have actually paid the purchase-money, or parted with something of the value by way of payment before receiving notice (*h*). A party claiming to be a purchaser for value without notice under a marriage contract, entered into in pursuance of articles, must show that he had no notice at the time of the settlement; proof that he had no notice at the time of the articles is not sufficient (*i*). The protection to which a *bonâ fide* purchaser without notice is entitled extends only to the money which has been actually paid, or to the securities which have been actually appropriated by way of payment before notice (*k*). Notice before the actual payment of all the purchase-money, although it be secured (*l*), and the execution of the conveyance (*m*), is binding in the same manner as notice had before the contract. A purchaser for value without notice is entitled to the priority conferred by the legal title not only where he has actually got it in, but also where he has a better right to call for it (*n*); for instance, if he procures at the time of his purchase the person in whom the legal title is vested to declare himself a trustee

Best right to call for legal estate a protection in equity.

(*f*) *Toulmin* v. *Steere*, 3 Mer. 210; 17 R. R. 67; *Gore* v. *Stackpoole*, 1 Dow, 30, cit. 1 J. & L. 247; 14 R. R. 1.

(*g*) Conv. Act. 1881, s. 70.

(*h*) *How* v. *Weldon*, 2 Ves. 516; *Borell* v. *Dann*, 2 Ha. 440; *Rayne* v. *Baker*, 1 Giff. 245; 114 R. R. 418.

(*i*) *Davies* v. *Thomas*, 2 Y. & C. 234; 47 R. R. 399.

(*k*) *Hardingham* v. *Nicholls*, 3 Atk. 304; *Rayne* v. *Baker*, 1 Giff. 245.

(*l*) *Hardingham* v. *Nicholls*, 3 Atk. 304; *Tildesley* v. *Lodge*, 3 Sm. & G. 543; 107 R. R. 154.

(*m*) *Jones* v. *Stanley*, 2 Eq. Ca. Ab. 685. See *Allen* v. *Knight*, 5 Ha. 272; 16 L. J. Ch. 370; 71 R. R. 100.

(*n*) *Bowen* v. *Evans*, 1 J. & L. 265; 81 R. R. 136; *Parker* v. *Carter*, 4 Ha. 410; 67 R. R. 101.

for the purchaser, or even to join as party in a conveyance of the equitable interest (*o*).

But although the Court holds that priority will give equity, yet it does not hold that it gives so superior an equity, as between several incumbrancers and purchasers, as to enable the anterior claimant to wrest the legal estate from the person who has obtained it without notice of the anterior claim (*p*).

As between mere equities.

Where there are circumstances which give rise to an "equity" as distinguished from an equitable estate—for example, an equity to set aside a deed for fraud or rectify it for mistake—the plead of purchase for valuable consideration without notice is a good defence and the Court will not interfere (*q*). The distinction between an equity and an equitable estate is explained in *Cave* v. *Cave* (*r*), where Kay, J., recognized and approved the above principle laid down by Lord Westbury in *Phillips* v. *Phillips*.

As between equitable estates.

But as regards "equitable estates" as distinguished from mere equities, where neither party has the legal estate or the best right to call for it, the Court does not give any aid or preference to either, but determines their rights with reference to their respective dates. The first grantee of an equity has the right to be paid first, and it is quite immaterial whether the subsequent incumbrancers had, at the time they took their securities and paid their money, notice of a prior incumbrance (*s*).

"I think it to be a clear proposition," said Lord Westbury in *Phillips* v. *Phillips* (*t*), "that every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seised of an equitable interest (the legal interest being

(*o*) *Taylor* v. *London and County Banking Co.*, 1901, 2 Ch. 231; 70 L. J .Ch. 477.

(*p*) *Rooper* v. *Harrison*, 1 K. & J. 108, 109; 110 R. R. 112.

(*q*) *Phillips* v. *Phillips*, 4 D. F. & J. 208, 217; 31 L. J. Ch. 321; 135 R. R. 97.

(*r*) 15 C. D. p. 639; 49 L. J. Cb. 505.

(*s*) *Phillips* v. *Phillips*, *supra*; *Bradley* v. *Riches*, 9 C. D. 193.

(*t*) 4 D. F. & J. 215.

outstanding) makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, namely, the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence, grantees and incumbrancers claiming equity take and are ranked according to the date of their securities, and the maxim applies, *Qui prior est tempore potior est jure.*"

The rule, however, that as between equities priority of time gives the better equity is not an absolute rule, but is subject to the condition that the equity which ranks prior in point of time is an equity of equal rank in all other respects with the equity which ranks later in point of time. If after a close examination of all the circumstances of the case there appears to be nothing to give the one a better equity than the other, then and then only resort must be had to the maxim *Qui prior est tempore potior est jure* (*u*). As between equitable incumbrancers, relief will be given to the incumbrancer prior in point of date, unless he has lost his priority by some act or neglect of his own; and relief will not be refused him as against a subsequent incumbrancer on the sole ground of the latter being a purchaser for value without notice, unless he has the legal estate or the best right to call for it (*x*).

As between two persons whose equitable interests are of precisely the same nature and quality, and in that respect precisely equal, the possession of the title deeds gives the better equity. But the possession of the title deeds will not in all cases and under all circumstances give the better equity (*y*). The deeds may be in the possession of a party in such a manner and under such circumstances that such

(*u*) *Rice* v. *Rice*, 2 Drew. 85; 23 L. J. Ch. 289; 100 R. R. 43. See *Case* v. *James*, 3 D. F. & J. 263; 30 L. J. Ch. 724; *Shropshire Union Canal Co.* v. *Reg.*, L. R. 7 H. L. 510; *Bradley* v. *Riches*, 9 C. D. 193; *Lloyd's Bank* v. *Bullock*, 1896, 2 Ch. 192; 65 L. J. Ch. 680; *Capell* v. *Winter*, 1907, 2 Ch. 376; 76 L. J. Ch. 496.

(*x*) *Taylor* v. *London and County Bank*, 1901, 2 Ch. 231; 70 L. J. Ch. 477 See *Walker* v. *Linom*, 1907, 2 Ch. 104; 76 L. J. Ch. 500.

(*y*) *Rice* v. *Rice*, *supra*; *Thorpe* v. *Holdsworth*, 7 Eq. 139; 38 L. J. Ch. 194.

possession will confer no advantage whatever. For example, where the deeds had been delivered to the first equitable mortgagee, and by some unexplained means they had got back into the possession of the mortgagor, who delivered them to a subsequent equitable incumbrancer, the Court held that the *onus* lay on the second mortgagee to prove neglect of the first mortgagee, and as he had failed to prove it, the Court decreed in favour of the first mortgagee (*z*). So the deeds may have come into the hands of a subsequent equitable mortgagee by means of an act committed by another person which constituted a breach of an express trust as against the person having the prior equitable interest. In such a case it would be contrary to the principles of equity to allow the subsequent mortgagee to avail himself of the injury which had been thus done to the party having the prior equitable estate or interest (*a*). In all cases of contests between persons having equitable interests, the conduct of the parties and all the circumstances must be taken into consideration in order to determine which has the better equity; and if it appear, after a close examination of all these matters, that there has been some default or neglect on the part of the first mortgagee or incumbrancer, the possession of the deeds will give the better equity (*b*).

So if a vendor executes a conveyance containing a receipt for the purchase-money and hands such conveyance to the purchaser, who subsequently deposits it with an equitable mortgagee without notice of the vendor's lien, the equity of the mortgagee may be superior to the vendor's lien by reason of his possession of the conveyance. This is the effect, having regard to the Conveyancing Act, 1881, ss. 54 and 55, of the case of *Rice* v. *Rice* (*c*); and the case of *Lloyd's Bank* v. *Bullock* (*d*) decides that where a vendor is a trustee having a power of sale his *cestuis que trust* are with regard to enforcing

(*z*) *Allen* v. *Knight*, 5 Ha. 272; affd., 16 L. J. Ch. 370; 71 R. R. 100.
(*a*) *Rice* v. *Rice*, *supra*.
(*b*) *Rice* v. *Rice*, *supra*; *Walker* v. *Linom*, *supra*; *ante*, p. 139.
(*c*) 2 Drew. 82.
(*d*) 1896, 2 Ch. 192; 65 L. J. Ch. 680.

the vendor's lien in no better position than the trustee himself (*e*).

The right of the *cestui que trust* to follow into land trust monies which have been misappropriated by the trustee, being an equitable lien of the same quality as an equitable mortgage by deposit of deeds, the claim of the *cestui que trust*, when prior in point of date, has priority over the claim of the equitable mortgagee, though a purchaser for value without notice (*f*). So when bankers took an equitable mortgage by deposit of title deeds of an estate which was subject to a trust of which they had no notice, it was held that such trust must prevail against their security (*g*). In a case, however, accompanied by circumstances of a very complicated nature, it was held that the rule, *Qui prior est tempore potior est jure*, could not be applied, and that a purchaser for value without notice, by deposit of title deeds, though subsequent in date, was entitled to priority (*h*).

Assignee of chose in action.

The assignee of a chose in action cannot set up the defence of purchase for value without notice as against equities which attached to the security in the hands of the assignor (*i*).

There may be such dealings between the assignee and the party liable originally as to preclude him from insisting as against the assignee upon rights which he might have claimed as against the assignor; but, as a general rule, a person who buys a chose in action takes subject to the equities which affect the assignor, even although he be a *bonâ fide* purchaser without notice (*j*). The assignee of a debt also takes it subject to any right of the debtor to set it aside on the ground of fraud, but if the debtor does not claim rescission he cannot set off damages for the fraud against the claim of the assignee

(*e*) *Capell* v. *Winter*, 1907, 2 Ch. 376; 76 L. J. Ch. 496.

(*f*) *Cave* v. *Cave*, 15 C. D. 643; 49 L. J. Ch. 505. See *Bradley* v. *Riches*, 9 C. D. 193.

(*g*) *Manningford* v. *Toleman*, 1 Coll. 670; 14 L. J. Ch. 160; 66 R. R. 239; *Taylor* v. *London and County Bank*, 1901, 2 Ch. 231; 70 L. J. Ch. 477.

(*h*) *Keate* v. *Philipps*, 18 C. D. 570; 50 L. J. Ch. 664.

(*i*) *Turton* v. *Benson*, 1 P. Wms. 496; *Mangles* v. *Dixon*, 3 H. L. C. 702, 731; 88 R. R. 296; *Phipps* v. *Lovegrove*, 16 Eq. 80, 88; 42 L. J. Ch. 892.

(*j*) *Athenæum Life Ass. Society* v. *Pooley*, 3 D. & J. 294; 121 R. R. 128; *Ex p. Asiatic Banking Co.*, 2 Ch. 391; 36 L. J. Ch. 222.

to the debt (*k*). So the debentures of a company are *primâ facie*, and in the absence of special conditions, subject in the hands of the assignee to all the equities to which they were liable in the hands of the assignor. But it is otherwise if the company with a view to induce people to become assignees represent that there are no equities or that they will not take advantage of them (*l*). But such conditions only protect a registered transferee and do not preclude the company from setting up equities against an unregistered transferee (*m*).

Notice of equitable interests in land.

As respects equitable interests in land, the priority of a purchaser or incumbrancer is not affected by his giving or neglecting to give notice of his purchase or security to the trustees, mortgagees, or other persons in whom the legal estate may happen to be vested. The ordinary rule as to notice of assignments of choses in action does not apply in such cases (*n*).

Delivery up of title deeds.

Under the former procedure the Court of Chancery would not as against a purchaser for value without notice give any assistance to the legal title or deprive him of anything which he had honestly acquired (*o*). If he had got possession of title deeds honestly, the Court of Chancery would not interfere with him or deprive him of the possession (*p*). But now that the Court can administer both legal and equitable remedies in every case this rule has lost its practical importance, and the Chancery Division has jurisdiction on the application of the owner of the legal estate to order title deeds to be delivered up by a purchaser for value without notice (*q*). But these were cases where either delivery was necessary for the relief granted or the holder had no interest, and it would seem that, where the Court is called upon to establish a prior equitable

(*k*) *Stoddart* v. *Union Trust*, 1912, 1 K. B. 181; 81 L. J. K. B. 140.

(*l*) *Re Goy & Co.*, 1900, 2 Ch. 149; 69 L. J. Ch. 481; cf. *Re Brown and Gregory*, 1904, 2 Ch. 448; 73 L. J. Ch. 430.

(*m*) *Re Palmer's Co.*, 1904, 2 Ch. 743; 73 L. J. Ch. 828.

(*n*) *Re Richards*, 45 C. D. 589; *Hopkins* v. *Hemsworth*, 1898, 2 Ch. 347; 67 L. J. Ch. 526.

(*o*) *Phillips* v. *Phillips*, 4 D. F. & J. 217; 31 L. J. Ch. 321; 135 R. R. 97; *Heath* v. *Crealock*, 10 Ch. 33; 44 L. J. Ch. 157.

(*p*) *Ibid.*

(*q*) *Cooper* v. *Vesey*, 20 C. D. 629, 632; 51 L. J. Ch. 862.

title to the estate, it will not permit its decree that a prior equitable claimant is entitled to the possession of the estate which of itself confers the right to the possession of the deeds to be deprived of its full efficacy by allowing them to remain in the hands of a defendant who claims under an adverse title which the Court declared to be invalid (*r*). And it seems to be settled by recent cases that where it is of practical importance for the purpose of carrying into effect a decree, the plea will not be allowed, but delivery of deeds ordered (*s*).

Tacking.

If the legal estate is got in by paying off a prior mortgage and such mortgage was affected by concealing a trust upon which the property was held, the mortgagee who has thus obtained the legal estate is entitled to keep it even after an action has been begun by the *cestui que trust*, but only until he is redeemed (*t*).

Statutory protection.

The equitable doctrine above discussed as depending on possession of the legal estate must, of course, be distinguished from cases in which a statute gives protection to a purchaser for value without notice, in which the terms may be sufficient to include equitable estates. Thus where a settlement was void against creditors under 13 Eliz. c. 5, it was held that sect. 5 protected a subsequent purchaser who without notice purchased any interest under the settlement, whether legal or equitable, and that the deed impeached was not voidable in respect of such interest (*u*). So, too, the Solicitors Act, 1860, s. 28, contains a provision avoiding conveyances which defeat a charging order in favour of the solicitor, unless made to a *bonâ fide* purchaser without notice (*x*). Again, the Bankruptcy Act, 1914, s. 45, contains a protection of *bonâ fide* transactions by or with the bankrupt for valuable considera-

(*r*) *Newton* v. *Newton*, 6 Eq. 135; 4 Ch. 143; 38 L. J. Ch. 145; *Thorpe* v. *Holdsworth*, 7 Eq. 146; 38 L. J. Ch. 194; but see *Heath* v. *Crealock*, *supra*.

(*s*) *Manners* v. *Mew*, 29 C. D. 725; 54 L. J. Ch. 909; *Re Ingham*, 1893, 1 Ch. 352; 62 L. J. Ch. 100.

(*t*) *Bates* v. *Johnson*, John. 304; 28 L. J. Ch. 509; 123 R. R. 131.

(*u*) *Halifax Banking Co.* v. *Gledhill*, 1891, 1 Ch. 31; 60 L. J. Ch. 181.

(*x*) *Faithful* v. *Ewen*, 7 C. D. 495; 47 L. J. Ch. 457.

tion without notice of any available act of bankruptcy (*y*); and *semble* that protection may extend to persons not taking immediately from the debtor (*z*). Lastly, the Statute of Limitations (*a*), enacting that in case of concealed fraud time runs from the date when the fraud is discovered, provides that no conveyance shall be set aside on the ground of fraud against a *bonâ fide* purchaser for valuable consideration who has not aided in the commission of such fraud, and who at the time he made his purchase did not know and had no reason to believe that any such fraud had been committed (*b*).

On the other hand, by the Yorkshire Registry Act, 1884 (*c*), registration confers priority even against a purchaser for valuable consideration without notice; and the priorities given by the Act are not to be altered except in the case of *actual* fraud (*d*), by which is meant fraud in the ordinary meaning of the term, and not legal or constructive fraud.

(*y*) *Re Carter and Kenderdine*, 1897, 1 Ch. 776; 66 L. J. Ch. 408; *Re Jukes*, 1902, 2 K. B. 58; 71 L. J. K. B. 710; *Re Dunkley*, 1905, 2 K. B. 683; 74 L. J. K. B. 963.

(*z*) *Re Slobodinsky*, 1903, 2 K. B. 517; 72 L. J. K. B. 883.

(*a*) 3 & 4 Will. IV. c. 27, s. 25.

(*b*) See as to this section, *Re McCallum*, 1901, 1 Ch. 143; 70 L. J. Ch. 206.

(*c*) 47 & 48 Vict. c. 54, s. 116.

(*d*) *Battison* v. *Hobson*, 1896, 2 Ch. 403; 65 L. J. Ch. 695.

CHAPTER VII.

REMEDIES.

SECTION I.—RESCISSION, AND OTHER REMEDIES OF A LIKE CHARACTER.

If a contract for sale or purchase of goods, chattels, or real estate be induced by false and fraudulent representations, or a transaction be in any way tainted by fraud, and the defrauding party is party to the contract or transaction, the party defrauded has a right at his election, after knowledge of the fraud, to rescind and avoid the contract or other transaction, and to recover back what he has paid, or sold or conveyed, provided always the parties can be restored to the position in which they stood before or at the time of the contract or transaction (*a*), for it would be unjust that a person who has been in possession of property under the contract or transaction which he seeks to repudiate should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration (*b*).

The effect of the avoidance of an agreement on the ground of fraud is to place the parties in the same position as if it had never been made, and all rights which are transferred or created by the agreement are revested or discharged by the

(*a*) *Load* v. *Green*, 15 M. & W. 220; 15 L. J. Ex. 113; 71 R. R. 627; *Rawlins* v. *Wickham*, 3 D. & J. 322; 28 L. J. Ch. 188; 121 R. R. 134; *Clough* v. *London and North Western Rly. Co.*, L. R. 7 Ex. 26; 41 L. J. Ex. 17; *Lagunas Co.* v. *Lagunas Syndicate*, 1899, 2 Ch. 392; 68 L. J. Ch. 699; *Re Eastgate*, 1905, 1 K. B. 465; 74 L. J. K. B. 324. As to the difference between repudiation and rescission, see *Halkett* v. *Dudley*, 1907, 1 Ch. 590; 76 L. J. Ch. 330.

(*b*) 3 App. Ca. 1278, *per* Lord Blackburn; *Lagunas Co.* v. *Lagunas Syndicate*, *supra*.

avoidance. If, when it is avoided, nothing has occurred to alter the position of affairs, the rights and remedies of the parties are the same as if it had been void from the beginning; but if any alteration has taken place, their rights and remedies are subject to the effect of that alteration (*c*). There can be no avoidance of an agreement unless the parties can be restored to their original condition. As a condition to rescission, there must be a *restitutio in integrum*. Though the party defrauded may rescind the transaction and demand restitution, he can only do so on the terms that he himself makes restitution. If, either from his own act, or from misfortune, it is impossible to make such restitution, it is too late to rescind (*d*).

Rescission in part.

A party to a contract who alleges fraud cannot avoid one part of the contract and affirm another unless the parts are so severable as to form independent contracts (*e*). A contract cannot be rescinded in part and stand good for the residue. A man cannot treat the agreement as avoided by him, so as to resume the property which he parted with under it, and at the same time keep the money or other advantages which he has obtained under it. There cannot be rescission if the circumstances have in the meantime so far changed that the parties cannot be restored to the position in which they stood before or at the time of the contract. There cannot, indeed, be rescission if the position of the wrong-doer is so affected that he cannot be placed *in statu quo* (*f*). But the rule has no application where the subject-matter has been reduced by the wrong-doer himself, and where compensation can be made for any deterioration (*g*).

(*c*) *Queen* v. *Sadler's Co.*, 10 H. L. C. 420, *per* Lord Blackburn; 32 L. J. Q. B. 337; 138 R. R. 217.

(*d*) 5 App. Ca. 338, *per* Lord Blackburn; *Lagunas Co.* v. *Lagunas Syndicate*, *supra*.

(*e*) *United Shoe Manufacturing Co.* v. *Brunet*, 1909, A. C. 330; 78 L. J. P. C. 101; see *Howatson* v. *Webb*, 1908, 1 Ch 1; 77 L. J. Ch. 32; and see *post*, p. 390.

(*f*) *Clarke* v. *Dickson*, El. Bl. & El. 148; 27 L. J. Q. B. 223; 113 R. R. 583; *Clough* v. *London and North Western Rly. Co.*, *supra*; *Erlanger* v. *New Sombrero Co.*, 3 App. Ca. 1268; 48 L. J. Ch. 73; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 338, *per* Lord Blackburn.

(*g*) *Lagunas Co.* v. *Lagunas Syndicate*, 1899, 2 Ch. 392, *per* Rigby, L. J.; 68 L. J. Ch. 699; cf. *Re Gallard*, 1897, 2 Q. B. 8; 66 L. J. Q. B. 484.

Restitutio in integrum.

As a general rule a Court of Equity will not decree rescission of a contract except on condition of there being *restitutio in integrum*. The phrase is somewhat vague and must be applied with care. It must be considered with regard to the facts of each case. Deterioration of the subject-matter does not destroy the right to rescind nor prevent *restitutio in integrum*. Indeed, it is only in cases where the plaintiff has sustained loss by deterioration of the subject-matter that he will desire to exert his power of rescission (*h*). The Court has full power to make all just allowances, and in practice it always grants such relief when it can do what is practically just, although it may not be able to restore the parties precisely to the state in which they were before they entered into the contract (*i*). The extent to which the requirements of *restitutio in integrum* may be limited is strikingly illustrated in *Adam* v. *Newbiggin* (*j*).

A party exercising his option to rescind is entitled to be restored as far as possible to his former position. This includes a right to be indemnified against obligations incurred under the contract. The nature and extent of this right to indemnity in the case of innocent misrepresentation is very fully considered in *Newbiggin* v. *Adam* (*k*). It seems that the right to indemnity does not extend to liabilities which are natural consequences of the contract but are not created by the contract itself, for otherwise the indemnity would not be distinguishable from the damages recoverable in an action of deceit, and a person misled by an innocent misrepresentation is not entitled to damages (*l*).

Nor can there be rescission of a contract if third parties, without notice of the fraud, have in the meantime acquired rights under it for value (*m*). Thus, where a man has bought goods by means of a fraud upon the seller, and, whilst the contract of sale is still subsisting, sells them to a third party,

(*h*) *Armstrong* v. *Jackson*, 1917, 2 K. B. 822; 86 L. J. K. B. 1375.
(*i*) *Hulton* v. *Hulton*, 1917, 1 K. B. 813; 86 L. J. K. B. 633.
(*j*) 13 A. C. 308; 57 L. J. Ch. 1066.
(*k*) 34 C. D. 582; 56 L. J. Ch. 275.
(*l*) *Ibid.*; *post*, p. 413.
(*m*) *Clough* v. *L. & N. W. Rly. Co.*, L. R. 7 Ex. 34; 41 L. J. Ex. 17.

who takes them *bonâ fide*, and without notice of the fraud, the latter acquires a good title to the goods, which cannot be defeated by the original seller subsequently disaffirming the contract (*n*). So, also, where a negotiable instrument is obtained by fraud, the negotiation of the instrument gives a valid title to a transferee who takes it without notice of the fraud (*o*). And a person who takes with notice of the fraud is a lawful possessor as against third persons, and as such is entitled to sue them for all injuries to the property, unless and until the party defrauded exercises his right of rescission (*p*). But where a sale of goods is induced by the fraud of the purchaser the vendor is entitled to retake possession of the goods although he has notice of an act of bankruptcy on which the purchaser is subsequently adjudicated bankrupt (*q*), and even after a receiving order has been made (*r*).

Upon the same principle, a shareholder in a company who has been induced to take shares by the fraud of the company cannot avoid the contract and have his name removed from the register of shareholders after an order for winding up of the company, or after a resolution for a voluntary winding up of the company, or after the company has ceased to be a going concern, on account of the intervening rights of the creditors accruing under the order, nor after a petition for winding up has been presented on which an order is subsequently made (*s*), and the rule holds even if there are no unpaid creditors. "The doctrine is that after the company is wound up it ceases to exist and rescission is impossible" (*t*). But if a man take proceedings within a reasonable time after the discovery of

(*n*) *White* v. *Garden*, 10 C. B. 919; 20 L. J. C. P. 166; 84 R. R. 846; *ante*, p. 11.

(*o*) *May* v. *Chapman*, 16 M. & W. 355; 73 R. R. 519.

(*p*) *Stevenson* v. *Newnham*, 13 C. B. 285, 303; 22 L. J. C. P. 110; 93 R. R. 532.

(*q*) *Re Eastgate, Ex p. Ward*, 1905, 1 K. B. 465; 74 L. J. K. B. 324.

(*r*) *Tilley* v. *Bowman*, *ante*, p. 58.

(*s*) *Kent* v. *Freehold Land, &c., Co.*, 3 Ch. 493; 37 L. J. Ch. 653; *Stone* v. *City and County Bank*, 3 C. P. D. 282; 47 L. J. C. P. 681; *Scottish Petroleum Co.*, 23 C. D. 436; Buckley, 98; 4 A. C. at p. 622; 1896, 1 Ch. 98.

(*t*) *Burgess's Case*, 15 C. D. 507, 509; 49 L. J. Ch. 541.

the fraud, and before any proceedings for winding up the company have been taken, he is entitled to be relieved from his shares on the ground of the fraud (*u*), and where in an action for calls a shareholder filed an affidavit that he intended to counter-claim for rescission and obtained leave to defend on that footing, that was held equivalent to taking proceedings (*w*).

Whether up to the time of the commencement of the winding up a contract to take shares can be rescinded on the ground of fraud depends on the particular circumstances of the case. If the company has become insolvent and has stopped payment, a rescission of the contract to take shares cannot be permitted (*x*).

Though as a general rule there cannot be a rescission of a contract unless the circumstances of the case are such that the contract can be rescinded *in toto*, and that there can be a *restitutio in integrum*, there is an exception to the rule when the subject of the sale is practically worthless, as, for example, a concession from a foreign government that had become forfeited before sale, there being nothing in such a case to return (*y*).

So, also, is there an exception to the rule where the contract or transaction is severable, or is of such a nature that it can be partially rescinded. If the contract or transaction is severable, inability to rescind it as to part is not fatal to the right to rescind it as to another part (*z*). A deed may be void as against a person exercising undue influence, but good as regards benefits conferred on other persons not induced by the undue influence (*a*). Nor is the inability of a man to rescind a transaction as a whole fatal to his right of rescission, if his inability to do so is attributable to the party against whom he seeks relief. If the latter has entangled

(*u*) *Ross* v. *Estates Investment Co.*, 3 Ch. 682; 37 L. J. Ch. 873; *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 64; 39 L. J. Ch. 849.

(*w*) *Whiteley's Case*, 1900, 1 Ch. 365; 69 L. J. Ch. 250.

(*x*) *Tennent* v. *Glasgow Bank*, 4 App. Ca. 615; *ante*, p. 354.

(*y*) *Phosphate Sewage Co.* v. *Hartmont*, 5 C. D. 394; 46 L. J. Ch. 661.

(*z*) *Maturin* v. *Tredennick*, 12 W. R. 740; 140 R. R. 867.

(*a*) *Wright* v. *Carter*, 1903, 1 Ch. 27; 72 L. J. Ch. 138.

and complicated the subject of the transaction in such a manner as to render it impossible that he should be restored, the party defrauded may, on doing whatever it is in his power to do, have the transaction rescinded (*b*). So, also, it is no objection to the rescission of a transaction for the purchase of shares obtained by fraud that the shares have fallen in value since the date of the transaction (*c*). Nor is a man, if the property is of a perishable nature, bound to keep it in a state of preservation until commencing proceedings. His only duty is to do nothing with the property after action brought; and in cases where damage is likely to occur, and might be prevented, he ought, perhaps, to give intimation to the defendant, leaving him to do what he pleased (*d*). A party seeking to set aside a sale of shares is not bound to pay calls on them to prevent forfeiture after action brought. It is not fatal to his right of recission that some of the shares may have been forfeited for non-payment of calls since action brought (*e*). So the purchaser of a horse who had been defrauded in the transaction had a right to rescind without restitution, where the horse had died without any neglect on his part (*f*).

A sale, however, of several kinds of shares in one transaction cannot be set aside for misrepresentation, if the person seeking relief is unable to restore all the shares he has taken (*g*).

So, also, there may be rescission when the situation of the parties has been in no substantial way altered, and the Court is satisfied that by the exercise of its equitable powers to impose terms upon the parties, as a condition of rescission, it can do what is practically just, and can restore the party against whom relief is sought to that which shall be a just situation with reference to the rights which he held antecedently to the transaction, though it may not be able to

(*b*) *Lagunas Co.* v. *Lagunas Syndicate*, 1899, 2 Ch. 392; 68 L. J. Ch. 699.
(*c*) *Blake* v. *Mowatt*, 21 Beav. 613; 111 R. R. 220.
(*d*) *Maturin* v. *Tredennick*, 2 N. R. 514; 4 N. R. 15, *supra*.
(*e*) *Ibid.*
(*f*) *Moore* v. *Scott*, 5 W. L. R. 8, 381; 16 Man. L. R. 492.
(*g*) *Ibid.*

restore the parties precisely to the state they were in before the transaction (*h*).

Cancellation.

The terms on which a transaction will be rescinded vary with the particular circumstances of the case. In some cases deeds have been absolutely rescinded (*i*) by the Court ordering them to be delivered up to be cancelled (*j*); but cancellation is not the proper remedy unless the instrument is liable to be completely avoided (*k*). The special jurisdiction of Courts of equity to order the cancellation of an instrument obtained by fraud or misrepresentation is not affected by the fact that the plaintiff would have a good defence to an action on the instrument, or even that the instrument is already in his possession. He is entitled, not only not to have the contract enforced against him, but to have it judicially annulled (*l*).

The usual course of the Court in setting aside a transaction, where equitable relief is claimed, is to proceed on the maxim that he who seeks equity must do equity (*m*). Instruments, accordingly, are either set aside on repayment of the actual consideration with interest thereon at a reasonable rate (*n*), or are directed to stand as a security for the monies actually advanced, with interest thereon at a reasonable rate (*o*),

(*h*) *Bellamy* v. *Sabine*, 2 Ph. 425; 17 L. J. Ch. 105; 78 R. R. 132; *Savery* v. *King*, 5 H. L. C. 627; 25 L. J. Ch. 482; 101 R. R. 299; *Erlanger* v. *New Sombrero Co.*, 3 App. Ca. 1278; 48 L. J. Ch. 73; *Lindsey Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 240; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 338, Per Lord Blackburn, *Newbiggin* v. *Adam*, 34 C. D. 582, 592; 56 L. J. Ch. 275.

(*i*) *Bates* v. *Graves*, 2 Vès. Jr. 287.

(*j*) See *Jackman* v. *Mitchell*, 13 Ves. 586; 9 R. R. 229.

(*k*) *Brooking* v. *Maudslay*, 38 C. D. 636; 57 L. J. Ch. 1001; *Ideal Bedding Co.* v. *Holland*, 1907, 2 Ch. 157; 76 L. J. Ch. 441.

(*l*) *London and Provincial Ins. Co.* v. *Seymour*, 17 Eq. 85; 43 L. J. Ch. 120; *Hoare* v. *Bremridge*, L. R. 8 Ch. 22; 42 L. J. Ch. 1.

(*m*) *Wilkinson* v. *Fowkes*, 9 Ha. 594.

(*n*) *Lovell* v. *Hicks*, 2 Y. & C. 55; 6 L. J. Ex. Eq. 85; 47 R. R. 335; *Wilson* v. *Short*, 6 Ha. 384; 17 L. J. Ch. 289; 77 R. R. 139; *Ingram* v. *Thorp*, 7 Ha. 67; 82 R. R 25; *Lodge* v. *National Union Investment Co.*, 1907, 1 Ch. 300; 76 L. J. Ch. 187.

(*o*) *Aldborough* v. *Trye*, 7 Cl. & Fin. 436, 462; 51 R. R. 32; *Carter* v. *Palmer*, 8 Cl. & Fin, 657; 11 Bligh, 397; 54 R. R. 145; *Billage* v. *Southee*, 9 Ha. 540; 21 L. J. Ch. 472; 89 R. R. 564; *Baker* v. *Bradley*, 7 D. M. & G. 597; 25 L. J. Ch. 7; 109 R. R. 245; *Croft* v. *Graham*, 2 D. J. & S. 155; *Tyler* v. *Yates*, 6 Ch. 665; 40 L. J. Ch. 768; *Aylesford* v. *Morris*, 8 Ch. 484; 42 L. J. Ch. 546; *Thurston* v. *Nottingham Society*, 1901, 1 Ch. 88; 1903 A. C. 6; 72 L. J. Ch. 134.

or for what upon investigation shall be ascertained to be really due (*p*). But if the plaintiff claims merely a declaration that the transaction is illegal and no equitable relief, no terms of repayment will be imposed (*q*). If the property is personal, a decree for the repayment of monies, or the delivery up and cancellation of the instrument, will be complete relief, although the legal interest should have been conveyed (*r*). But if the subject-matter of the transaction be real estate, it is usual to direct a reconveyance, because, if this is not done, a question may arise as to what has become of the real estate (*s*). If, however, the deed is not merely voidable, but wholly void, no reconveyance is necessary (*t*).

Reconveyance ordered when subject-matter is real estate.

The terms on which a reconveyance will be ordered are the repayment of the purchase-monies and all sums laid out in improvements and repairs of a permanent and substantial nature, by which the present value is improved, with interest thereon from the times when they were actually disbursed. On the other hand, charges for the deterioration of the property must be set off against the allowances for permanent improvements. The party in possession must also account for all rents received by him and for all profits, such as monies arising from the sale of timber, or from working mines, with interest thereon, from the times of the receipts thereof. He must also pay an occupation rent for such part of the estate as may have been in his actual possession (*u*).

Terms of reconveyance.

(*p*) *Purcell* v. *Macnamara*, 14 Ves. 91; *Watt* v. *Grove*, 2 Sch. & Lef. 492; *Longmate* v. *Ledger*, 2 Giff. 157; 128 R. R. 72.

(*q*) *Chapman* v. *Michaelson*, 1909, 1 Ch. 238; 78 L. J. Ch. 272.

(*r*) See 1 Ves. 376; 3 Ves. 445; *Cooper* v. *Joel*, 1 D. F. & J. 240; 125 R. R. 432; *Slim* v. *Croucher*, *ibid.* 520; 29 L. J. Ch. 273; 125 R. R. 529.

(*s*) *Clark* v. *Malpas*, 4 D. F. & J. 401; 135 R. R. 212; *Lindsey Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 242; but see *Hoghton* v. *Hoghton*, 15 Beav. 278; 21 L. J. Ch. 482; *Att.-Gen.* v. *Magdalen College*, 18 Beav. 255; 23 L. J. Ch. 844.

(*t*) *Ogilvie* v. *Jeaffreson*, 2 Giff. 381; 128 R. R. 148.

(*u*) *Trevelyan* v. *Charter*, 4 L. J. Ch. 214; *Mulhallen* v. *Marum*, 3 Dr. & War. 337; *Gibson* v. *D'Este*, 2 Y. & C. 581; 60 R. R. 262; *Davey* v. *Durrant*, 1 D. & J. 554; 26 L. J. Ch. 830; 118 R. R. 213; *Tyrrell* v. *Bank of London*, 10 H. L. C. 26; 31 L. J. Ch. 369; 138 R. R. 14; *Dally* v. *Wonham*, 33 Beav. 162, 32 L. J. Ch. 790; 140 R. R. 64.

Allowance for lasting improvements can only be for such as were made during the period of accounting for the rents (*w*). The account of rents and profits on the one side, and of lasting improvements on the other, must be carried back to the same time (*x*). The party in possession would also, it is conceived, be required to reinstate premises which he had materially altered; *e.g.*, a private residence into a shop (*y*).

The value of permanent and substantial improvements of all kinds, by which the present value of the property is improved, such as for the erection of a mansion house, will be allowed (*z*). But no allowance will be made for monies expended by the party in possession, as a matter of taste or personal enjoyment (*a*). Nor will allowance be made for monies which have been expended upon the property with the view of rendering it impossible for the real owner to recover his estate, and so improving him out of it, as it may be called (*b*).

A purchaser who seeks to set aside a transaction on the ground of fraud should specially pray in his statement of claim for the repayment of repairs and improvements. He will be credited with the amount of lasting repairs and improvements, executed before the discovery of the defect in title, if their repayment is specially prayed (*c*); and probably, if necessary, repairs executed during or pending litigation, if specially prayed; but the relief will not go beyond what is specially prayed (*d*).

A purchaser who has a contract for the sale of land set aside on the ground of fraud is entitled to a lien on the land or to recover the purchase-money which he has paid (*e*).

In a case where a purchase was set aside for fraud, and the

(*w*) *Att.-Gen.* v. *Earl of Craven*, 21 Beav. 411; 111 R. R. 133.
(*x*) *Neesom* v. *Clarkson*, 4 Ha. 103; 12 L. J. Ch. 99; 62 R. R. 51.
(*y*) *Donovan* v. *Fricker*, Jac. 165.
(*z*) *Stepney* v. *Biddulph*, 13 W. R. 576, 5 N. R. 506.
(*a*) *Mill* v. *Hill*, 3 H. L. C. 828; 88 R. R. 356.
(*b*) *Stepney* v. *Biddulph*, 13 W. R. 576; Sug. V. & P. 287.
(*c*) *See Edwards* v. *M'Cleay*, 2 Sw. 289; 14 R. R. 261.
(*d*) Sug. V. & P. 254; Dart, V. & P. 811.
(*e*) *Aberaman Iron Works Co.* v. *Wickens*, 4 Ch. 101; *Fleming* v. *Loe*, 1901, 2 Ch. 594; reversed on facts, 1902, 2 Ch. 359; 70 L. J. Ch. 805.

purchaser was decreed to pay an occupation rent, receiving back his purchase-monies with interest, there being a considerable excess of the rent over the interest, annual rests were directed, until the principal should be liquidated (*f*); but a special case must be shown to warrant such a direction (*g*).

It is not the course of the Court to direct an account of wilful neglect and default, in cases where the possession is not primarily referable to the character of mortgagee (*h*). When persons, though in fact mortgagees, enter into possession of rents and profits in another character, they cannot be subjected to that special liability (*i*). The rule may be different if a special case of fraud be made out (*k*).

Terms of rescission where trustee, agent, &c., has sold property of his own surreptitiously to *cestui que trust*, principal, &c.—

If the transaction complained of is one in which a trustee or agent, employed to purchase, has sold property of his own surreptitiously, to his *cestui que trust* or principal, the right of the latter is not merely to rescind the contract *in toto*, or to abide by it in its integrity, but to hold the property, and to pay no more for it than the trustee or agent himself had paid (*l*). If the agent sells to his principal property of his own for which he has paid nothing, the principal can only retain the property upon the terms of paying its proper value (*m*).

Where a promoter or other person standing in a fiduciary position towards the company has sold to the company his own property without disclosing his interest, the company is entitled to rescind, and for this purpose it is immaterial whether at the time when he acquired the property he stood in a fiduciary relation or not. If he did so stand when he bought, the company can either rescind or retain the property,

(*f*) *Donovan* v. *Fricker*, Jac. 165.

(*g*) See *Neesam* v. *Clarkson*, *supra*.

(*h*) *Kensington* v. *Bouverie*, 7 D. M. & G. 134, 156, 157; 29 L. J. Ch. 537; 109 R. R. 650; *Barber* v. *Mackrell*, 12 C. D. 534.

(*i*) *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1; 36 L. J. Ch. 292.

(*k*) *Adams* v. *Sworder*, 2 D. J. & S. 44; *Parkinson* v. *Hanbury*, L. R. 2 H. L. p. 15.

(*l*) *Bank of London* v. *Tyrrell*, 10 H. L. C. 26; 31 L. J. Ch. 369; 138 R. R. 14; *Kimber* v. *Barber*, 8 Ch. 57.

(*m*) *Great Luxemburg Rly. Co.* v. *Magnay*, 25 Beav. 595; 119 R. R. 555.

paying for it no more than he gave (*n*). If he did not so stand, then if the company does not elect to rescind, or rescission has become impossible, the company may be without remedy (*o*), but *quære* whether this applies where there is not only concealment but misrepresentation (*p*). But although a company may not be able to rescind, yet it may have a cause of action in respect of the fraud of the vendor (*q*), and the difference between the fair value and the price given by the company is recoverable as secret profit (*r*). The price at which the promoter bought the property is not the measure of its value at the time of the sale to the company (*s*). The measure of damages is the profit which the promoter obtained on the purchase and resale of the property (*t*).

If a company make out a case for recission of a contract on the ground of fraudulent representation and concealment by the promoters or directors, the terms of rescission are that the promoters or directors repay the whole of the purchase-monies with interest at 4 per cent., and all monies in the nature of a bribe which they have received for neglecting their duty, and all profits which they have unduly made, the company on the other hand to account for any profit they may have made (*u*).

If a company which has been brought into existence by promoters do not seek to rescind the contract under which the company has been formed, but elect to recover from the promoters a sum of money as due to them for profits unfairly made, the promoters will be allowed all expenses properly

(*n*) 10 H. L. C., p. 47; *Ambrose Lake Co.*, 14 C. D. 390, 398; 49 L. J. Ch. 457; *Bentinck* v. *Fenn*, 12 A. C. 652, 658.

(*o*) *Bentinck* v. *Fenn*, *supra*, at p. 659; *Ladywell Co.* v. *Brookes*, 35 C. D. 400; 56 L. J. Ch. 684; *Lady Forest Gold Mine*, 1901, 1 Ch. 582; 70 L. J. Ch. 275; *Burland* v. *Earle*, 1902, A. C. 83; 71 L. J. P. C. 1.

(*p*) 1898, 2 Ch. at p. 179; 1901, 1 Ch. at p. 589.

(*q*) 12 App. Ca. p. 664, *per* Lord Herschell.

(*r*) *Gluckstein* v. *Barnes*, 1900, A. C. 240; 69 L. J. Ch. 385.

(*s*) *Ladywell Co.* v. *Brooks*, *supra*; *Lagunas Co.* v. *Lagunas Syndicate*, 1899, 2 Ch. 411; 68 L. J. Ch. 699.

(*t*) *Leeds and Hanley Theatres*, 1902, 2 Ch. 809; 72 L. J. Ch. 1.

(*u*) *New Sombrero Co.* v. *Erlanger*, 5 C. D. 125; 3 A. C. 1218; 48 L. J. Ch. 73; *Phosphate Sewage Co.* v. *Hartmont*, 5 C. D. 394, 456; 46 L. J. Ch. 661; cf. *Silkstone Coal Co.* v. *Edey*, 1900, 1 Ch. 167; 69 L. J. Ch. 73.

incurred in bringing out the company, but they are not entitled to a commission (*x*); and in estimating the amount of profits which a promoter is liable to refund, he will be allowed all sums *bonâ fide* expended in securing the services of directors, and providing their qualifications, and in payments to the brokers and officers of the company, and to the public Press in relation to the company (*y*).

—or has bought property surreptitiously from him.

If the trustee, or other person, filling a fiduciary character, has purchased surreptitiously from the person towards whom he stands in such relation, and the latter does not wish for a reconveyance of the property, the former will be held strictly to his bargain, if it be beneficial to the estate. If it be not beneficial to the estate, the property will be ordered to be resold and reconveyed to another purchaser, if a better can be found, otherwise he will be held to his purchase; if a better purchaser be found, he will be regarded as a trustee for the profit on the resale (*z*). In a case where an estate sold under a decree of the Court was purchased by a solicitor in the cause without leave of the Court, the Court, after the purchase had been confirmed, ordered the estate to be again offered for sale at the price at which he had purchased it; and, if there should be no higher price, that he should be held to his purchase (*a*). The usual course is to order that the expense of repairs and improvements, not only substantial and lasting, but such as have a tendency to bring the estate to a better sale, after making an allowance for acts that deteriorate the value of the estate, shall be added to the purchase-monies, and that the estate shall be put up at the accumulated sum (*b*). In estimating lasting improvements, old buildings which had been pulled down after the purchase

(*x*) *Bagnall* v. *Carlton*, 6 C. D. 371, 389; 47 L. J. Ch. 30; *Emma Silver Mining Co.* v. *Lewis*, 4 C. P. D. 407; 48 L. J. C. P. 257.

(*y*) *Emma Silver Mining Co.* v. *Grant*, 11 C. D. 922, 938; *Lydney Co.* v. *Bird*, 33 C. D. 85.

(*z*) *Randall* v. *Errington*, 10 Ves. 428; 8 R. R. 18; *Ex p. Morgan*, 12 Ves. 6; 8 R. R. 276; Lewin, 570; *ante*, p. 158.

(*a*) *Sidny* v. *Ranger*, 12 Sim. 118; 56 R. R. 29; cf. *Re Gallard*, 1897, 2 Q. B. 8; 66 L. J. Q. B. 484.

(*b*) *Ex p. Lacey*, 6 Ves. 625; 629; 6 R. R. 9; *Ex p. Bennett*, 10 Ves. 381; 8 R. R. 1; Lewin, 570; *ante*, p. 158.

shall, if incapable of repair, be valued as old materials; but otherwise, as buildings standing (*c*). If the trustee, or other person filling a fiduciary character, who has purchased property surreptitiously from the person towards whom he stands in such relation, has resold the property at a profit, he must account for such profit with interest (*d*).

In a case where a servant took an agreement for a lease of premises in his own name, but really as the agent of his master, and having afterwards denied the agency, claimed to hold the premises for his own benefit, he was decreed by the Court to be a trustee for his master (*e*).

Interest allowed and debited on monies.

In taking the accounts between the parties, interest will be allowed on all monies expended in lasting and substantial improvements by the party in possession. Interest will also, as a general rule, be debited to him in respect of monies, &c., received by him, and of costs, charges, and expenses properly incurred by the complaining party (*f*). If there has been negligence on the part of the complaining party, interest will not be allowed (*g*).

No reconveyance until account be taken.

In ordinary cases, when the Court sets aside a transaction, the defendant has a right to insist upon an account before he is called upon to reconvey (*h*); but a defendant who is in possession under a pretended purchase cannot, if the Court shall be of opinion that there has been in fact no purchase, insist upon an account of monies paid by, or owing to him, which he alleged, but failed to prove, was the consideration agreed upon for such purchase (*i*). If a reconveyance is ordered, and an account of rents and payment of the balance is ordered, but no lien for such balance is given on the estate,

(*c*) *Robinson* v. *Ridley*, 6 Madd. 2.

(*d*) *Ante*, p. 161.

(*e*) *Stamford* v. *Dawson*, 15 W. R. 896; cf. *James* v. *Smith*, 1891, 1 Ch. 384.

(*f*) *Gibson* v. *D'Este*, 2 Y. & C. C. C. 581; 6 R. R. 262; *Sharp* v. *Leach*, 31 Beav. 503. As to rate of interest, see *Re Barclay*, 1899, 1 Ch. 674; 68 L. J. Ch. 383.

(*g*) *M'Culloch* v. *Gregory*, 1 K. & J. 286; 24 L. J. Ch. 246; 103 R. R. 86.

(*h*) *Gibson* v. *D'Este*, *supra*; *Wilkinson* v. *Fowkes*, 9 Ha. 594.

(*i*) *Wilkinson* v. *Fowkes*, *ibid.*

the conveyance must be made at once, without waiting for the result of the accounts (*k*).

Following purchase-money or bribe.

In one case the purchaser, obtaining a decree for rescinding a contract, on the ground of fraud was allowed to follow the stock in which part of the purchase-money had been invested (*l*). But where an agent corruptly receives commission, the principal cannot, until he has obtained judgment against the agent, follow the money into investments made by the agent and obtain an injunction against his dealing therewith (*m*). The principal as regards unpaid commission is only entitled to a declaration that the agent will become indebted to the principal for such commission as and when he shall receive the same (*n*). But in an action to set aside an assignment of a policy under 13 Eliz. c. 5, where the policy moneys had been received by the assignee and could be traced, the Court granted an injunction restraining the assignee from dealing with the moneys (*o*).

Terms of rescission of partnership transactions.

If the transaction into which a man has been induced by fraud or misrepresentation to enter is a partnership, the terms of rescission will be that his partner or co-partners repay him whatever he may have paid, with interest thereon, and indemnify him against all claims and demands which he may have become subject to by reason of his having entered into the partnership; he, on the other hand, accounting for what he may have received since his entry into the concern (*p*). He is also entitled, in respect of the purchase-money which he has brought into the partnership, to a lien on the surplus of the partnership assets, after satisfying the partnership debts and liabilities, and in respect of any sums which he has paid or might pay in satisfaction of partnership debts, he is entitled to stand in the place of the partnership creditors to whom he made the payment, and also to be indemnified by the person

(*k*) *Trevelyan* v. *Charter*, 9 Beav. 140; 6 L. J. Ch. 274.
(*l*) *Small* v. *Attwood*, Younge, 507.
(*m*) *Lister & Co.* v. *Stubbs*, 45 C. D. 1; 59 L. J. Ch. 570.
(*n*) *Powell* v. *Evan Jones & Co.*, 1905, 1 K. B. 11; 74 L. J. K. B. 115.
(*o*) *Re Mouatt*, 1899, 1 Ch. 831; 68 L. J. Ch. 390.
(*p*) Lindl. on Partnership, p. 525; Partnership Act, 1890, s. 41.

guilty of the fraud or making the representation against all the debts and liabilities of the firm (*q*).

Terms of rescission where a man has been induced by fraud to take shares in a company.

If a man has been induced by false representations in the prospectus of a company to take shares from the company, he is entitled to recover his money, and to have his name removed from the register (*r*). He is entitled to have the money paid by him on calls repaid with interest at 4 per cent. (*s*). If he has received dividends before discovering the fraud, the terms of rescission are that his name shall be removed from the register, and that an account shall be taken of what sums have been paid to him by the company, and of what sums he has received with interest at a reasonable rate, and that the balance shall be paid to him with all costs (*t*).

If the company admit misrepresentation and apply *ex parte* to rectify the register by removing the name after repayment to the shareholder of the balance due to him, an *ex parte* order may be made (*u*).

Removal of name of transferee when there is fraud in the company.

When the directors of a company have registered a transfer of shares which they had reason to believe was a *bonâ fide* instrument, the Court will, after a winding-up order has been made, expunge from the list of shareholders the name of the transferee and substitute in his place the name of the shareholder, if it be shown that the deed of transfer has been executed in collusion between him and the shareholder, so as to enable the latter to escape from his liability to the creditors of the company (*x*). So, also, when there is a transfer of shares, the name of the transferee will be struck out from the register, and that of the transferor substituted in his stead, if it appear, not only that the transfer was made to get rid of liability, but that it was a sham and not a real transaction, and was not intended to divest the interest of the transferor and to render the transferee the real owner of the shares,

(*q*) *Mycock* v. *Beatson*, 13 C. D. 384; 49 L. J. Ch. 127; *Newbiggin* v. *Adam*, 34 C. D. 582; 56 L. J. Ch. 275.

(*r*) *Ross* v. *Estates Investment Co.*, 3 Eq. 122; 37 L. J. Ch. 873.

(*s*) *Karberg's Case*, 1892, 3 Ch. 1; 61 L. J. Ch. 741.

(*t*) *Kent* v. *Freehold Land and Brickmaking Co.*, 4 Eq. 598; 37 L. J. Ch. 653.

(*u*) *Re London Electrobus Co.*, 1906, W. N. 147.

(*x*) *Kintrea's Case*, 5 Ch. 95; 39 L. J. Ch. 193; *ante*, p. 335.

but the transferee held them subject to the order of the transferor (*y*).

Reasonable time.

The contract must be repudiated or rescinded within a reasonable time, that is, before the lapse of a time, after the true state of things is known, so long that under the circumstances the other party may fairly infer that the right of rescission is waived (*z*). It is a condition precedent which must be fulfilled before a person can escape from a contract however fraudulent it may be (*a*). This is especially so in the case of shareholders; if a man claims to rescind his contract to take shares in a company on the ground of misrepresentation he must rescind as soon as he learns the facts or else he forfeits all claim to relief (*b*). So a principal must reprobate a contract as soon as he learns of the fraud of his agent, otherwise he will be bound by it (*c*).

Waiver of right to rescind.

There can be no rescission of a contract or other transaction if it appear that the defrauded party has at any time after knowledge of the fraud, either by express words or unequivocal acts, elected to affirm the contract. If after discovering the fraud he has in any manner elected to affirm the contract, his right to rescind is waived. He cannot revoke his election, and avail himself of the fraud in avoidance of the contract, according to the general maxim as to election *quod semel placuit in electionibus amplius displicere non potest* (*d*). Thus, where a man after knowledge of the fraud continues to deal with the property as his own, he thereby affirms the contract (*e*). So, also, the taking steps to enforce a contract is a conclusive election not to rescind on account of anything known at the

(*y*) *King's Case*, 6 Ch. 196; 40 L. J. Ch. 361; *Massey's Case*, 1907, 1 Ch. 582; 76 L. J. Ch. 290; *ante*, p. 335.

(*z*) Pollock, Contracts, 590; *Isaacs* v. *Towell*, 1898, 2 Ch. 285; 67 L. J. Ch. 508; *Re Eastgate*, 1905, 1 K. B. 465; 74 L. J. K. B. 324; *Seddon* v. *North Eastern Salt Co.*, 1905, 1 Ch. 326; 74 L. J. Ch. 199.

(*a*) *United Shoe Co.* v. *Brunet*, 1909, A. C. 330; 78 L. J. P C. 101.

(*b*) *Aarons Reefs* v. *Twiss*, 1896, A. C. 273, 294; 65 L. J. P. C. 54; *Components Tube Co.* v. *Naylor*, 1900, 2 Ir. R. 1; Buckley, 96.

(*c*) *Bartram & Sons* v. *Lloyd*, 88 L. T. 286.

(*d*) Co. Litt. 146; Com. Dig. Election, C. 2; *Clough* v. *London and North Western Rly. Co.*, L. R. 7 Ex. 35; 41 L. J. Ex. 17; see 1909, A. C. at p. 339.

(*e*) *Campbell* v. *Fleming*, 1 A. & E. 40; 3 L. J. Q. B. 136; 53 R. R. 194; *Seddon* v. *North Eastern Salt Co.*, *supra*.

time (*f*). So a man who had been induced by fraudulent misrepresentations to take a lease of a mine, having continued to work the mine after full discovery of all the circumstances of fraud, was held to have lost thereby his claim to be relieved from the lease (*g*). But in a case where the insurance of a ship had been obtained by the non-disclosure of material information respecting it, entitling the underwriter to an election to avoid the insurance, it was held that the merely formal act of delivering out the stamped policy, in conformity with the slip or memorandum previously signed, was not such an act as of itself determined the election (*h*).

Upon the same principle, when a man has been induced to take shares in a company by misrepresentation contained in the prospectus, and after discovering the true state of the facts, exercises acts of ownership over the shares inconsistent with the repudiation of them, as by contracting to sell them, he can no longer have the contract set aside, and his name removed from the register of shareholders (*i*). So, also, the same principle applies where a man, after notice of the fraud, accepts dividends upon the shares (*k*) or pays money in respect of the shares (*l*); or does any act in affirmance of his position as shareholder (*m*). But he is not bound by a condition providing that he shall waive the statutory requirements as to the contents of a prospectus (*n*); nor having elected to rescind does he waive his right by subsequent opposing a winding-up petition as a contributory (*o*).

If the party defrauded, having once discovered his right to avoid the contract as fraudulent, elects to affirm it, his right to avoid it is not revived by the subsequent discovery of addi-

(*f*) *Gray* v. *Fowler*, L. R. 8 Ex 280, *per* Lord Blackburn; *Chapman* v. *Michaelson*, 1909, 1 Ch. 238; 78 L. J. Ch. 272; 42 Ir. J. Ex. 161.

(*g*) *Vigers* v. *Pike*, 8 Cl. & Fin. 562; 54 R. R. 114.

(*h*) *Morrison* v. *Universal Marine Ins. Ass.*, L. R. 8 Ex. 197; 42 L. J. Ex. 115.

(*i*) *Ex p. Briggs*, 1 Eq. 483; 35 L. J. Ch. 320.

(*k*) *Clarke* v. *Dickson*, El. Bl. & El. 148; 27 L. J. Q. B. 223; 113 R. R. 583.

(*l*) *Ex p. Shearman*, 66 L. J. Ch. 25.

(*m*) *Ante*, p. 354.

(*n*) Companies Act, 1908, s. 81 (4).

(*o*) *Tomlin's Case*, 1898, 1 Ch. 104; 67 L. J. Ch. 11.

tional incidents of fraud by which it was obtained, the effect of such discovery being only to strengthen the evidence of the fraud and not to affect the right of repudiation which had been waived (*p*). But the repudiation of the contract may be supported by any grounds of fraud subsequently discovered (*q*).

Mere delay in determining his election may in some cases preclude the party defrauded from avoiding the contract, and so operate in affirmance of it. Lapse of time without rescinding will furnish evidence that he has determined to affirm the contract, and when the lapse of time is great, it probably would in practice be treated as conclusive evidence that he has so determined (*r*). Thus when a contract for insurance is voidable for concealment, if the insurer were to accept premiums after knowledge of the facts or by delaying his election to rescind were to prevent the insured from insuring elsewhere, he would be precluded from afterwards avoiding the insurance (*s*).

Semble, a statutory fraud, if it can be waived at all, is not waived unless the parties to the transaction expressly recognize its invalidity at the time of the alleged waiver (*t*).

Right of party defrauded to affirm contract and recover damages.

The party defrauded may, instead of rescinding his contract, stand to the bargain even after the discovery of the fraud, and recover damages for the fraud, or he may recoup in damages if sued by the vendor for the price. The affirmance of the contract by the vendee after discovery of the fraud merely extinguishes his right to rescind. His other remedies remain unimpaired (*u*). The party defrauded may elect to affirm the

(*p*) *Campbell* v. *Fleming*, 1 A. & E. 40, *supra; Re Law*, 1905, 1 Ch. 140; 74 L. J. Ch. 169; *Barron* v. *Kelly*, 56 Can. S. C. R. 455; cf. *Carrique* v. *Catts*, 32 Ont. L. R. 548.

(*q*) *Wright's Case*, 7 Ch. 55; 41 L. J. Ch. 1.

(*r*) *Clough* v. *London and North Western Rly. Co.*, L. R. 7 Ex. 35; *per Cur.*, 41 L. J. Ex. 17; *Morrison* v. *Universal Marine Ins. Co.*, *ibid.*, 8 Ex. 204; 42 L. J. Ex. 115; *Seddon* v. *N. E. Salt Co.*, 1905, 1 Ch. 326; 74 L. J. Ch. 199; *ante*, p. 357.

(*s*) *Morrison* v. *Universal Marine Ins. Co.*, *supra; Hemmings* v. *Sceptre Life Ass.*, 1905, 1 Ch. 365; 74 L. J. Ch. 231.

(*t*) *Chapman* v. *Michaelson*, 1909, 1 Ch. 238; 78 L. J. Ch. 272.

(*u*) *Millward* v. *Littlewood*, *infra; Clarke* v. *Dickson*, El. Bl. & El. 148; 27 L. J. Q. B. 223; 113 R. R. 583; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 323, *per* Lord Cairns; and see *Re Gallard*, 1897, 2 Q. B. 8; 66 L. J. Q. B. 484, but see *Stoddart* v. *Union Trust*, *infra*.

contract for the purpose of obtaining the remedy upon it in damages, although the fraud renders the performance impossible, and the other party cannot allege his own fraud by way of defence; thus, when a woman was induced to enter into a promise to marry a man by his concealing the fact that he was already married, it was held that she might affirm the contract by remaining unmarried for the purpose of claiming damages for the breach, and that he could not set up the marriage which he had fraudulently concealed in order to discharge him from his promise (*x*). Though a person purchasing a chattel or goods concerning which the vendor makes a fraudulent misrepresentation, may, on finding out the fraud, elect to retain the chattel or goods, and still have his action to recover any damages he has sustained, the same principle does not apply to shares or stock in a joint stock company, for a person induced by the fraud of the agents of a joint stock company to become a partner in that company can bring no action against the company whilst he remains in it: his only remedy is *restitutio in integrum* and rescission of the contract; and if that becomes impossible by the winding up of the company or by any other means, his action for damages cannot be maintained (*y*).

Where a vendor is entitled to rescind on the ground of fraud by the purchaser and withdraws such right, the purchaser, though guilty of fraud, may claim rescission on the ground of non-disclosure (*z*).

The assignee of a debt takes subject to the right of the debtor to set it aside on the ground of fraud, but if the debtor does not claim rescission he cannot set off damages for the fraud against the claim of the assignee for the debt (*a*).

Mode of exercise of right of election to rescind.

If a party elects to rescind, he must manifest that election by communicating to the other party his intention to rescind the transaction and claim no interest under it. The com-

(*x*) *Millward* v. *Littlewood*, 5 Exch. 775; 20 L. J. Ex. 2; 82 R. R. 771.

(*y*) *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 317; cf. *Addlestone Linoleum Co.*, 37 C. D. 191.

(*z*) *Moody* v. *Cox*, 1917, 2 Ch. 71; 86 L. J. Ch. 424.

(*a*) *Stoddart* v. *Union Trust*, 1912, 1 K. B. 181; 81 L. J. K. B. 140.

munication need not be formal, provided it is a distinct and positive repudiation of the transaction. The true question in determining whether there has been rescission is whether the acts and conduct of the party evince an intention to rescind (*b*). If a buyer of goods has been imposed on by the vendor, he may refuse to accept the goods; if he discover the fraud before delivery, or return them, if the discovery be not made till after delivery; and if he has paid the price, he may recover it back on offering to return the goods in the same state in which he received them (*c*). If the party defrauded has executed a conveyance, he may, on returning or offering to return the consideration or whatever property he may have received in exchange for that which he has conveyed, recover back what he has conveyed. If the subject-matter of the contract be land, and there has been a conveyance to him, he should tender a reconveyance. After the tender of the property, or a reconveyance if it be land, on refusal by the vendor to receive the same, the expense of keeping the property from the time of the tender may be recovered (*d*).

If, notwithstanding an express repudiation, the other party persists in treating the contract as in force, judicial steps should be taken in order to make the rescission complete as against rights of third persons which may subsequently intervene (*e*). A repudiating shareholder must not only repudiate, but must get his name removed or commence proceedings to have it removed, though if one shareholder commence proceedings the others will have the benefit of them if there is an agreement between them and the company that they shall stand or fall by the result of those proceedings (*f*).

When the original contract was made with an agent for

(*b*) *Mersey Steel Co.* v. *Naylor*, 9 Q. B. D. 648, 666; 51 L. J. Q. B. 576; *Carrique* v. *Catts*, 32 Ont. L. R. 548.

(*c*) *Clarke* v. *Dickson*, *supra*.

(*d*) *Caswell* v. *Coare*, 1 Taunt. 566; 10 R. R. 606.

(*e*) *Kent* v. *Freehold, &c., Land Society*, 3 Ch. 493; 37 L. J. Ch. 653.

(*f*) *Scottish Petroleum Co.*, 23 C. D. 413, 436; *Whiteley's Case*, 1900, 1 Ch. 365; 69 L. J. Ch. 250; see *Thomson's Case*, 5 Manson, 282; *Canadian Bank* v. *Wait*, 7 W. L. R. 255.

the other party, communication of the rescission to that agent is sufficient, at all events before the principal is disclosed (*g*).

It remains open to the party defrauded to rescind the contract by way of defence to any action or legal proceeding brought upon it. The plea of fraud would be a sufficient determination of election to avoid the contract, although there was no declaration of intent to rescind before the time of pleading (*h*).

Where the effect of the contract is to place the party in a position or invest him with property to which liabilities are attached, as in the case of an allotment of shares in a company induced by fraud or misrepresentation on the part of the company, the party defrauded, in order to discharge the liability, must not only avoid the contract, but must also disclaim and repudiate the property to which the liability is incident (*i*). But it is not necessary for the defendant expressly to repudiate the contract; it is for the plaintiff to show that the defendant adhered to the contract notwithstanding the discovery of the fraud (*j*). The effect of repudiating the shares upon the ground of fraudulent allotment is to discharge the liabilities *ab initio*, and a shareholder was held entitled to the full benefit of such discharge, although in ignorance of the fraud he had accepted a cancellation of the shares at a later date upon other grounds (*k*).

Parties privy to the fraud affected by rescission.

Parties who are implicated in the fraud, or who take with notice of the fraud, acquire no rights against the party defrauded, and their rights acquired through the contract are voidable together with the contract upon which they depend. Thus where goods bought under a fraudulent sale were consigned to a third party who assisted in the fraud, and who sought to recover them from the carrier through whom they had been consigned, it was held that the avoidance of the

(*g*) *Maynard* v. *Eaton*, 9 Ch. 414; 43 L. J. Ch. 641.

(*h*) *Morrison* v. *Universal Marine Ins. Co.*, L. R. 8 Ex. 204; 42 L. J. Ex. 115.

(*i*) *Bwlch y Plwm Mining Co.* v. *Baynes*, L. R. 2 Ex. 324; 36 L. J. Ex. 183; *Re Murray*, 57 L. T. 223.

(*j*) *Aarons Reefs* v. *Twiss*, 1896, A. C. 273; 65 L. J. P. C 54.

(*k*) *Wright's Case*, 7 Ch. 55; 41 L. J. Ch. 1.

contract by the seller was an answer to his claim, and even after he had commenced an action against the carrier (*l*).

Rescission when contract is induced by fraud of agent.

There may be rescission, if the fraud inducing the contract was that of an agent acting in the business of his principal and within the scope of his authority, though the principal was ignorant of the fraud and free from all moral guilt, or even, being a corporation, was necessarily incapable of knowing anything except by its agents, and therefore, free from all moral guilt, if such a phrase can be properly applied to a corporation (*m*). But in order to have a right to rescind it must be shown that the agent had an interest conflicting with his duty (*n*).

Where a vendor has procured the sale of his property by misrepresentation, the purchaser can set aside the contract prior to completion even though the misrepresentation be innocent (*o*). But after a conveyance has been executed, the Court will set aside a transaction only on the ground of actual fraud. Mere constructive notice is not sufficient (*p*). "When the conveyance takes place, it is not, as far as I know, the principle of equity that relief should afterwards be given against the conveyance (*q*), unless there be fraud, but where there has been fraud the conveyance may be set aside unless something has occurred to prevent it" (*r*). Rescission after conveyance of land can only be obtained on the ground of unfair dealing (*s*), and a lease when executed cannot be rescinded merely on the ground of innocent misrepresentation (*t*). But rescission on the ground of mutual mistake

Rescission after conveyance executed.

(*l*) *Clough* v. *London & North Western Rly. Co.*, L. R. 7 Ex. 26; 41 L. J. Ex. 17; and see *Danby* v. *Coutts*, 29 C. D. 500; 54 L. J. Ch. 577; *Re Gallard*, 1897, 2 Q. B. 8; 66 L. J. Q. B. 484.

(*m*) *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 338, *per* Lord Blackburn; *Hambro* v. *Burnand*, 1904, 2 K. B. 10; 73 L. J. K. B. 669; *Kettlewell* v. *Refuge Ass. Co.*, 1909, A. C. 243; 77 L. J. K. B. 421.

(*n*) *Rowland* v. *Chapman*, 17 T. L. R. 670

(*o*) *Redgrave* v. *Hurd*, 20 C. D. 1, 12; 51 L. J. Ch. 117.

(*p*) *Wilde* v. *Gibson*, 1 H. L. C. 624; 73 R. R. 191; *Rutherford* v. *Acton Adams*, 1915, A. C. 866; 84 L. J. P. C. 238.

(*q*) *Brownlie* v. *Campbell*, 5 App. Ca. pp. 937, 949.

(*r*) *Ibid.*, p. 949; *Soper* v. *Arnold*, 37 C. D. 96, 102; 14 App. Ca. 429; 59 L. J. Ch. 214.

(*s*) *May* v. *Platt*, 1900, 1 Ch. at p. 623; 69 L. J. Ch. 357.

(*t*) *Angel* v. *Jay*, 1911, 1 K. B. 666; 80 L. J. K. B. 458.

may undoubtedly be granted in a proper sense even after conveyance, although there has been nothing in the nature of fraud (*u*). There must be fraud or misrepresentation amounting to fraud or an error *in substantialibus* going to the root of the contract and so as to constitute a failure of consideration (*x*), but such error must be induced by misrepresentation, fraudulent or otherwise (*y*). There is, however, an important difference between cases where a contract may be rescinded on account of fraud and those where it may be rescinded on the ground of difference in substance. It is enought to show that there was a fraudulent representation as to *any part* of that which induced the contract; but where there has been an innocent misrepresentation or mistake it does not authorise a rescission unless it is such as to show a complete difference in substance between what was supposed to be and what was taken so as to constitute a failure of consideration (*z*). The above principles apply not only to conveyances of land, but also to a completed contract for the sale of shares in a company (*a*). But where a fiduciary relationship exists between the parties the rule is infinitely stricter and more severe (*b*).

Where property is sold with a warranty that it answers a certain description and a conveyance is afterwards executed which contains no covenant corresponding to the warranty, an action for damages can be brought upon the warranty (*c*). Covenants for title apply to all defects within their terms, whether such defects are known to the purchaser or not (*d*).

Opening accounts.

Where accounts are impeached, the Court will order them to be opened, though extending over a long period of years,

(*u*) *Debenham* v. *Sawbridge*, 1901, 2 Ch. at p. 109; 70 L. J. Ch. 525.

(*x*) *Brownlie* v. *Campbell*, 5 App. Ca. at p. 936; *Adam* v. *Newbiggin*, 34 C. D. at p. 592; 57 L. J. Ch. 1066.

(*y*) *Stewart* v. *Kennedy*, 15 App. Ca. at p. 121.

(*z*) *Kennedy* v. *Panama, &c., Co.*, L. R. 2 Q. B. at p. 587; 36 L. J. Q. B. 260.

(*a*) *Seddon* v. *North Eastern Salt Co.*, 1905, 1 Ch. 326; 74 L. J. Ch. 199.

(*b*) *Armstrong* v. *Jackson*, 1917, 2 K. B. 822; 86 L. J. K. B. 1375.

(*c*) *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215; 70 L. J. K. B. 533; but see *Greswolde-Williams* v. *Barneby*, 49 W. R. 203.

(*d*) *Page* v. *Midland Rly. Co.*, 1894, 1 Ch. 11; 63 L. J. Ch. 126.

if they contain a single fraudulent entry, and will not merely give liberty to surcharge and falsify (*e*).

Rescission by seller in case of bankruptcy of fraudulent buyer.

In the case of the bankruptcy of the fraudulent buyer, the seller may avoid the sale and claim back the goods against the trustee in bankruptcy, because the trustee takes only the right and interest of the bankrupt; nor can the trustee claim to retain the goods as having been in the possession of the bankrupt with the consent of the true owner, for the seller never consented to any other possession in the bankrupt than in the right of buyer, and the seller does not resume the position of real owner until disaffirmance of the sale (*f*).

Rescission when there is surreptitious dealing between one principal and the agent of the other principal to a contract.

It has been said that any surreptitious dealing between one principal to a contract and the agent of the other principal is a fraud in equity, and entitles the last-named principal to have the contract rescinded and to refuse altogether to proceed with it (*g*). But Lord Justice Mellish was not willing to go so far. The consequence of fraud in his opinion was that the Court would see that the defrauded party obtained full redress for the fraud, as far as that could be given. If it could be obtained *with* the contract it should be so given; if not, it must be given *without* the contract, and rescission must be allowed. It was his opinion that the situation of the contract in question was one of the latter kind. The only way in which the injured party could be suitably relieved was by rescission. The case was this:—A telegraph works company had agreed with a telegraph cable company to lay a cable, the same to be paid for by a sum payable when the cable was begun, and by twelve instalments payable on certificates by the cable company's engineer, named in the contract. Shortly afterwards the engineer, who was engaged to lay other cables for the works company, agreed with them

(*e*) *Gething* v. *Keighley*, 9 C. D. 550; 48 L. J. Ch. 45. See *Watson* v. *Rodwell*, 11 C. D. 150; 48 L. J. Ch. 209; *Holgate* v. *Shutt*, 28 C. D. 111; 54 L. J. Ch. 436; *Cheese* v. *Keen*, 1908, 1 Ch. 245; 77 L. J. Ch. 163.

(*f*) *Load* v. *Green*, 15 M. & W. 216; 15 L. J. Ex. 113; 71 R. R. 627; *Re Eastgate, Ex p. Ward*, 1905, 1 K. B. 465; 74 L. J. K. B. 324, *ante*, p. 389. See *Re Reed*, 3 C. D. 123; 45 L. J. B. 120.

(*g*) *Panama Telegraph Co.* v. *India Rubber Co.*, 10 Ch. 515; 45 L. J. Ch. 121, *per* James, L. J. See *Rowland* v. *Chapman*, 17 T. L. R. 670.

to lay this cable also for a sum of money to be paid to him by instalments payable by the works company when they received the instalments from the cable company. It was held that, under the circumstances, the agreement between the engineer and the works company was a fraud, entitling the cable company to have their contract rescinded, with a return of the money which they had paid under it (*h*).

Rescission though a profit may accrue to a party to the fraud.

It is no argument against setting aside a contract that has been obtained by fraud that a profit may be given to a shareholder who is a party to the fraud, a profit because he will take it in respect of his shares, and that, since as between co-conspirators there is no contribution, his brother conspirators who are made liable for the fraud cannot make him repay his contributions (*i*). The Court will not hold its hands and avoid doing justice in favour of the innocent because it cannot apportion the punishment fully amongst the guilty. A dozen parties to a fraud may be defendants and one judgment go against all, and if it is a fraud of such a character that none of them can bring an action for contribution, the plaintiff may, at his will and pleasure, enforce that judgment against any one of them and perhaps pass over the most guilty of them, still there is no remedy as between those who commit the fraud. It is one of the punishments of fraud that there is no such remedy, and that a guilty party, though not the most guilty, may suffer the greatest amount of punishment. It is one of the deterrents to prevent men from committing fraud (*k*).

Rescission of chattels sold under a warranty.

If a specific chattel be sold under a warranty, and the property has passed to the purchaser, he cannot return the chattel and claim back what he has paid, or resist an action for the price, on the ground of breach of warranty, unless there was a condition to that effect in the contract; but must have recourse to an action for damages in respect of the breach of warranty (*l*). The case, however, is different if

(*h*) *Panama Telegraph Co.* v. *India Rubber Co.*, *supra*.

(*i*) *New Sombrero Phosphate Co.* v. *Erlanger*, 5 C. D. 114; 46 L. J. Ch. 425.

(*k*) *Ibid.*, *per* Jessel, M. R.

(*l*) *Street* v. *Blay*, 2 B. & Ad. 462; 36 R. R. 626; *Dawson* v. *Collis*, 10 C. B. 523; 20 L. J. C. P. 116; *Behn* v. *Burness*, 3 B. & S. 755; 32 L. J. Q. B. 204.

fraud can be shown. If a representation be made fraudulently for the purpose of inducing a party to enter into a contract, the party defrauded is entitled to avoid the contract on the ground of fraud, and may recover back the price, notwithstanding the warranty of the same matter (*m*).

Actions to recover money.

In the case of money paid as the consideration of a contract, the party defrauded may on avoidance of the contract recover the amount as a debt (*n*).

When a defendant has fraudulently procured the plaintiff to sell goods to a person who cannot pay for them, and the defendant gets the goods into his possession, he cannot set up the sale to him because his own fraud had procured it, and the mere possession unaccounted for raises an *assumpsit* to pay (*o*). So, also, if under similar circumstances there has been a resale of the goods, and the defendant obtains possession of the monies on such resale, the plaintiff may in an action for money had and received recover from the defendant the value of the goods unpaid for by the purchaser (*p*).

Though rescission cannot be had, action of deceit may be maintained.

Although it may no longer be open to the party defrauded, from the change of circumstances which has taken place in the meantime, to avoid the contract or transaction upon discovery of the fraud, he has a remedy by action of deceit for damages against the person by whose misrepresentation he has been misled to his injury (*q*), or if sued on the contract he may recoup in damages or claim a reduction from the contract price to the same extent, if the price is still unpaid.

Sales by Court set aside on ground of fraud.

The rules with respect to sales by the Court are not less stringent than in ordinary cases (*r*). If a sale has taken place under an order of the Court, and there has been false repre-

(*m*) *Street* v. *Blay*, *supra*; *Murray* v. *Mann*, 2 Exch. 538; 17 L. J. Ex. 256: 76 R. R. 686; *ante*, p. 409; *post*, p. 432.

(*n*) See *Oakes* v. *Turquand*, L. R. 2 H. L. 325; 36 L. J. Ch. 949; *Fleming* v. *Loe*, 1901, 2 Ch. 594; 70 L. J. Ch. 805; *Kettlewell* v. *Refuge Ass. Co.*, 1908, 1 K. B. 545; 77 L. J. K. B. 421.

(*o*) *Hill* v. *Perrot*, 3 Taunt. 274; see 5 M. & W. at p. 84.

(*p*) *Abbotts* v. *Barry*, 2 Bro. & B. 369; Benjamin on Sales, 83.

(*q*) *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 338, *per* Lord Blackburn, *ante*, p. 381.

(*r*) *Lachlan* v. *Reynolds*, Kay, 55; 101 R. R. 523; *Coaks* v. *Boswell*, 11 App. Ca. 232; 55 L. J. Ch. 761.

sentation or undue concealment in the conditions or particulars, or a good title cannot be shown, the sale will be set aside if application be made before conveyance executed (*s*). If the conveyance be executed, the purchaser must take the consequences, and can only rely on the covenants (*t*), or a collateral warranty (*u*), unless it seems he can prove fraud or mutual mistake amounting to a total failure of consideration (*x*).

Rights of parties on rescission.

In cases where the right of rescission is available and has been exercised, the contract is as if void *ab initio*, and the rights of the parties must be determined as if a contract had never existed. The defrauded party is therefore entitled to recover back as upon a total failure of consideration all sums paid by him under the contract, and has a valid defence against an action for recovery of sums which would otherwise be due under the contract. Anything which in law constitutes a consideration moving to the innocent party, and which actually passes from the contracting party, is a benefit within the rule that benefits received by a person seeking to avoid a fraudulent contract must be restored before avoidance (*y*).

When a contract to take shares is rescinded, the shareholder is entitled to a return of the amount paid for his shares with interest at 4 per cent. (*z*), or if rescission is granted after the beginning of the winding-up, he is entitled to prove for the amount paid on the shares and the costs of the application (*a*).

Indemnity.

The nature and extent of the right to indemnity on rescission of contract, on the ground of simple misrepresentation not fraudulent, was very fully considered in the case of *New-*

(*s*) *Ibid.*; *M'Culloch* v. *Gregory*, 1 K. & J. 286; 24 L. J. Ch. 246; 103 R. R. 86; *Else* v. *Else*, 13 Eq. 196; 41 L. J. Ch. 213; *Broad* v. *Munton*, 12 C. D. 131; 48 L. J. Ch. 837; 2 R. R. 86.

(*t*) *Thomas* v. *Powell*, 2 Cox, 394; but see *Hart* v *Swaine*, 7 C. D. 42; 47 L. J. Ch. 5.

(*u*) *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215; 70 L. J. K. B. 533; but see *Greswolde-Williams* v. *Barneby*, 49 W. R. 203.

(*x*) *Debenham* v. *Sawbridge*, 1901, 2 Ch. 98; 70 L. J. Ch. 525; *ante*, p. 408.

(*y*) *Hogan* v. *Healey*, I. R. 11 C. L. 122; *Fleming* v. *Loe*, 1901, 2 Ch. 594; 70 L. J. Ch. 805.

(*z*) *Karberg's Case*, 1892, 3 Ch. 1; 61 L. J. Ch. 741.

(*a*) *British Gold Fields, &c.*, 1899, 2 Ch. 7; 68 L. J. Ch. 412.

biggin v. *Adam* (*b*). The general rule is that the party who misleads is to put back the party misled into the position in which he was before the contract, and that the right carries with it the right to be indemnified from the consequences and obligations which are the result of the contract set aside (*c*). Bowen, L.J., said (*d*): "It seems to me that when you are dealing with innocent misrepresentation, you must understand the proposition that he is to be replaced *in statu quo* with this limitation—that he is not to be replaced in exactly the same position in all respects, otherwise he would be entitled to recover damages, but is to be replaced in his position so far as regards the rights and obligations which have been created by the contract." There is nothing in the case of *Rawlins* v. *Wickham* which carries the doctrine beyond that (*e*). This was followed by Farwell, J., in a recent case (*f*), where it was held that on rescission of a lease on the ground of misrepresentation as to the sanitary condition of the premises, the plaintiff could not claim to be indemnified by way of compensation for injuries sustained by the insanitary state of the premises.

Where a company is requested to register a transfer of stock which is apparently valid but in reality forged, there is an implied contract to indemnify the company (*g*).

Compensation allowed in case of false representation through mistake.

If the false representation by which a contract has been induced was not made fraudulently, but was made through mistake or misapprehension, and the subject-matter of the contract, though different in some respects and in certain incidents from what it was represented to be, is not so different in substance from what it was represented to be as to amount to a failure of consideration, the transaction will not be set aside, if the party who made the representation is willing to give compensation for the variance, and the variance is such

(*b*) 34 C. D. 582; affirmed without deciding this point, 13 App. Ca. 308; 56 L. J. Ch. 275.

(*c*) *Ibid.*, p. 589, *per* Cotton, L.J. See Partnership Act, 1890, s. 41.

(*d*) 34 C. D. p. 592.

(*e*) 34 C. D. p. 595, *per* Bowen, L.J.

(*f*) *Whittington* v. *Seale Hayne*, 82 L. T. 49.

(*g*) *Sheffield Corporation* v. *Barclay*, 1905, A. C. 392; 74 L. J. K. B. 747.

as to admit of compensation by a pecuniary equivalent (*h*). If, however, the misdescription of the property is such that it cannot be estimated by a pecuniary equivalent, there is no case for compensation, and the transaction will be set aside (*i*).

No rescission if defrauding party is not a party to the transaction.

If the person by whose fraudulent misrepresentation a transaction has been induced, is not himself a party to the transaction, the transaction stands good and cannot be repudiated, if the other party to the transaction has not been party or privy to the fraud (*k*). If, for instance, a man has been induced by the false representations of a third party to deal with another, he cannot have the transaction rescinded, if the other party to the transaction has not been party or privy to the false representation (*l*). So, also, if a man has been induced to take shares from a company by fraudulent misrepresentations made by some person, not by an agent of the company, authorised to make any representations or authorised to deal on behalf of the company, he is bound by his contract with the company, and cannot have it rescinded (*m*). But a misrepresentation in a prospectus issued by promoters before the incorporation of the company may be a ground for rescission of a contract to take shares (*n*); though this does not apply to a subscriber of a memorandum of association (*o*).

Cases in which a man has been induced by false representations to purchase shares directly from a company must be distinguished from cases in which the transaction is between two individuals, meeting in the market and dealing for their private interests, like the seller and purchaser of transferable shares. If a man be induced by false representations on the part of the directors of a company to purchase shares from

(*h*) *Post*, p. 443.

(*i*) *Post*, p. 444.

(*k*) *Worth's Case*, 4 Drew. 529; 28 L. J. Ch. 589; 113 R. R. 451; *Re Felgate's Case*, 2 D. J. & S. 456; 139 R. R. 182.

(*l*) *Pulsford* v. *Richards*, 17 Beav. 95; 22 L. J. Ch. 559; 99 R. R. 48; *Duranty's Case*, 26 Beav. 271; 28 L. J. Ch. 37; 122 R. R. 104.

(*m*) *Brockwell's Case*, 4 Drew. 205; 26 L. J. Ch. 855; 113 R. R. 344; *Nicol's Case*, 3 D. & J. 427; 28 L. J. Ch. 257; 121 R. R. 169; cf. *Andrews* v. *Mockford*, *infra*.

(*n*) *Karberg's Case*, 1892, 3 Ch. 1; 61 L. J. Ch. 741.

(*o*) *Re Metal Constituents, Ltd.*, 1902, 1 Ch. 707; 71 L. J. Ch. 323; *Buff Pressed Brick Co.* v. *Ford*, 33 Ont. L. R. 264.

an actual shareholder who has not been himself a party to the false representations, the shares cannot be forced back on the vendor, nor can the transaction be set aside as between the purchaser of the shares and the company. The purchaser of the shares must seek his remedy in an action against the parties by whose false representations he has been misled (*p*). But if the prospectus was in fact intended not merely to induce applicants for shares but to induce buyers, then a buyer may sue on the prospectus (*q*).

Sub-sale after misrepresentation.

If A. induce B. by misrepresentation to buy, and B. sell without misrepresentation to C., an action will not lie by B. and C. against A. to rescind (*r*).

Where a person who has purchased through misrepresentation resells the property and repeats the misrepresentation to the sub-purchaser, *quære* whether the latter can set aside the original sale without impeaching the sub-sale (*s*).

Making good a representation by person not a party to the transaction.

Where a person who has been induced by misrepresentation to buy property parts with it and then gets it back again so as to be in a position to restore it, it does not follow that he can impeach the sale (*t*).

On the other hand, where a vendor induces a sale by misrepresentation and assigns the benefit of the contract, the purchaser can recover any payments made by him under the contract as on a total failure of consideration (*u*).

Where a man has been induced to enter into a transaction by the false and fraudulent representations of a person who is not a party to the transaction, it was at one time thought that the Court would, when it could do so, make him make good his assertion as far as possible (*x*). But the doctrine of making representations good is said to be now exploded. At

(*p*) *Duranty's Case*, *supra*, at p. 274. See 16 Eq. p. 431; Buckley, 110.
(*q*) *Andrews* v. *Mockford*, 1896, 1 Q. B. 372, 383; 65 L. J. Q. B. 302.
(*r*) *Edinboro' Breweries* v. *Mollison*, 1894, A. C. 96, 109, 112; Buckley, 627.
(*s*) *Ibid.*, p. 109.
(*t*) *Ibid.*, p 112.
(*u*) *Fleming* v. *Loe*, 1901, 2 Ch. 594; 70 L. J. Ch. 805.
(*x*) *Pulsford* v. *Richards*, 17 Beav. 87, 95; 22 L. J. Ch. 559; 99 R. R. 48; *Neville* v. *Wilkinson*, 1 Bro. C. C. 543; *Gale* v. *Lindo*, 1 Vern. 475; *Ingram* v. *Thorpe*, 7 Ha. 67; 82 R. R. 35; *Hobbs* v. *Norton*, 1 Vern. 135; *Peek* v. *Gurney*, L. R. 6 H. L. p. 393; 43 L. J. Ch. 19.

one time it seems to have been thought by some judges of the Court of Chancery that under certain conditions a representation which did not support an action of deceit, which did not amount to contract, and which did not operate by way of estoppel, might yet be binding on the person making it. But when these three effects are duly considered it appears that there is no other way in which it can be binding (*y*), unless under the circumstances there is a legal duty to be careful (*z*). The cases referred to as supporting the supposed doctrine will be found in the second edition of the present work (*a*).

Rectification of marriage settlement on ground of fraud or unilateral mistake.

Though, as a general rule, there can be no rectification when an instrument is founded on fraud (*b*), or where the mistake is of one party only (*c*), there may be rectification where one party acts as another's agent in preparing an instrument which concerns them both, and that other relies on the good faith and competence of the acting party to carry out the true intention. Thus there may be rectification of a marriage settlement when the Court is satisfied that the settlement has been drawn up and prepared in violation of the agreement and understanding which was come to between the husband and wife before the marriage. When a party acting in the transaction and claiming a benefit under it is proved to have occupied a confidential relation to a lady whom he afterwards marries, and has undertaken to have a proper settlement prepared for her, has an improper settlement made in his own favour, the Court makes the settlement as it ought to have been made, on the principle that the husband undertook to the wife as agent to see that a right settlement was made, and that he is bound by such undertaking (*d*). In *Clark* v. *Girdwood* (*e*), where the intended husband had undertaken as agent of the intended wife to have a settlement prepared, and marriage articles were drawn up by a solicitor

(*y*) Pollock on Contracts, 8th ed. 558; but see *ante*, p. 8.
(*z*) *Nocton* v. *Ashburton*, 1914. A. C. at p. 951; 83 L. J. Ch. at p. 792.
(*a*) Kerr on Fraud, 2nd ed., p. 395.
(*b*) *Watt* v. *Grove*, 2 Sch. & Lef. 502.
(*c*) 31 Beav. p. 151.
(*d*) *Corley* v. *Stafford*, 1 D. & J. 239; 26 L. J. Ch. 865.
(*e*) 7 Ch. D. 18.

upon instructions given by the intended husband the night before the marriage, by which the wife's property was limited in the first instance to him for life, the Court held, in an action by the wife, that he was bound under the circumstances to have such a settlement prepared as the Court would sanction, that such settlement would give the wife the first life interest in her own property, and that therefore the limitations were contrary to the intentions of the plaintiff, and it was ordered that the settlement should be rectified (*f*). The order was made on the uncorroborated testimony of the wife (*g*).

So, also, in *Smith* v. *Iliffe* (*h*), a lady, a ward of Court, had married during her minority, and the Court had approved of the settlement. Her personalty was by the instrument limited on the death of her husband and in default of children (both which events had happened) to the wife as she should by will appoint, and in default to her next of kin. She complained that the Court had not provided for her interests as they ought to have been provided for, she being an infant; and the Court held that it was the right of the lady after the death of the husband to have the settlement reformed and put in such a shape as the Court would have approved of if the thing were new and nothing had been done, and rectified the settlement by limiting the property in the events which had happened to herself, her executors, and administrators absolutely (*i*).

Another class of cases in which the Court will rectify a settlement is when an action is brought by the grantor to set aside a voluntary deed in so far as it conferred a benefit on collateral volunteers on the ground that the grantor did not know the precise effect of the deed or the consequences of its execution. In a case, accordingly, where the Court was satisfied that a lady did not understand the true effect of the limitation to collaterals in a voluntary deed executed by her,

(*f*) See *Lovesy* v. *Smith*, 15 C. D. 655; 49 L. J. Ch. 809; but see *Tucker* v. *Bennett*, 38 C. D. 1; 57 L. J. Ch. 507.

(*g*) *Ibid.*

(*h*) 20 Eq. 666; 44 L. J. Ch. 755; but see *Tucker* v. *Bennett*, *supra*.

(*i*) See *Cogan* v. *Duffield*, 20 Eq. 789; 45 L. J. Ch. 307.

that it was not properly explained to her, and that the instructions she had given for the preparation of the settlement were materially departed from, the limitation in question to collaterals was cancelled, and a clause introduced so as to bring the settlement into accordance with the instructions she had given (*k*). But the Court will not set aside or rectify a voluntary settlement unless a substantial reason for so doing is shown (*l*).

Relief by declaring a party trustee.

The Court may in the exercise of its equitable powers relieve against fraud by converting the person guilty of the fraud into a trustee for the person defrauded. The Court will never allow a man to take advantage of his own wrong, and therefore if an heir or devisee, or legatee or next of kin contrive to secure to himself the succession of the property through fraud, the Court affects the conscience of the legal holder and converts him into a trustee, and compels him to execute the disappointed intention (*m*). So, also, in cases where a man has fraudulently appropriated to his own use monies belonging to another, the Court will declare him a trustee of such monies, and order him to make them good (*n*).

Relief against judgments, probates, &c.

The Court has jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose (*o*). If a party has been induced by fraud to consent to a judgment, or if fraud in obtaining a judgment has been practised on the Court, the Court will grant relief on being satisfied that the conduct of the party himself has not deprived him of his title to relief, and that the relief can be given with due regard to the just interests of others (*p*).

Where any fraud or collusion has been practised, a sale and conveyance cannot be held valid, although they have the colourable protection of a judgment of the Court (*q*). The

(*k*) *Maunsell* v. *Maunsell*, 1 L. R. I. 547.

(*l*) *Ante*, p. 210.

(*m*) *M'Cormick* v. *Grogan*, L. R. 4 H. L. 82; Lewin, 62.

(*n*) *Rolfe* v. *Gregory*, 4 D. J. & S. 576; 34 L. J. Ch. 274; 146 R. R. 463; *Spencer* v. *Clarke*, 9 Ch. D. 137; 47 L. J. Ch. 692; cf. *Powell* v. *Jones*, *ante*, p. 399.

(*o*) *Cole* v. *Langford*, 1898, 2 Q. B. 36; 67 L. J. Q. B. 698.

(*p*) *Ante*, p. 344.

(*q*) *Colclough* v. *Bolger*, 4 Dow, 64; 16 R. R. 24.

orders of the Court cannot, however, be set aside on grounds less strong than those which would be required to set aside transactions between competent parties (*r*). To set aside a judgment on the ground of fraud, actual positive fraud must be shown. There must be on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion, and acting, in order to take an undue advantage for the purpose of actually and knowingly committing a fraud. The fraud must be a fraud which can be explained and defined upon the face of the judgment. Mere irregularity, or even perjury, is not the kind of fraud which will authorise the Court to set aside a judgment (*s*).

Where a person adjudicated bankrupt alleges that the petitioning creditor's judgment was obtained by fraud he may apply to the Bankruptcy Court to be allowed to contest the validity of the judgment, but he cannot while the adjudication stands contest the judgment in any other Court (*t*).

The Chancery Division has no jurisdiction to relieve against fraud in obtaining the setting up or execution of a will, nor to relieve against a probate obtained by fraud by converting the party taking under the instrument into a trustee for the party defrauded (*u*). A probate cannot, so long as it remains unrevoked, be impeached in any Court but that which granted it, even on the ground of fraud (*x*), and an action to set aside probate will not be allowed to proceed unless there is a reasonable probability of the alleged fraud being established (*y*).

A grant of letters of administration obtained by fraud is not when revoked by the Probate Court void *ab initio* (*z*), but only as from the date of the revocation, and therefore the

(*r*) *Brooke* v. *Mostyn*, 2 D. J. & S. 416; 34 L. J. Ch. 65. See 19 W. R. 555.
(*s*) *Patch* v. *Ward*, 3 Ch. 203; *Baker* v. *Wadsworth*, 67 L. J. Q. B. 301.
(*t*) *Boaler* v. *Power*, 1910, 2 K. B. 229; 79 L. J. K. B. 486.
(*u*) *Allen* v. *Macpherson*, 1 H. L. C. 191; 73 R. R. 30; *Meluish* v. *Milton*, 3 C. D. 27; 45 L. J. Ch. 836.
(*x*) *Meluish* v. *Milton*, *supra*.
(*y*) *Ante*, p. 345.
(*z*) *Hewson* v. *Shelley*, *infra*, overruling *Ellis* v. *Ellis*, 1905, 1 Ch. 613.

administrator has power to deal with the assets until such revocation (*a*).

The cases in which Courts of Equity have declared a legatee or executor to be a trustee for other persons have been cases in which there have been either questions of construction, or cases in which the party has been named as trustee, or has engaged to take as such, or in which the Court of Probate could afford no adequate or proper remedy (*b*).

A charter which has been obtained from the Crown by fraud, may be repealed by *sci. fa.*; but so long as it remains unrepealed its validity cannot be disputed (*c*).

SECTION II.—ACTION OF DECEIT—DAMAGES.

An action on the case for damages in the nature of a writ of deceit lies against a man for making a false and fraudulent representation, whereby another is induced to enter into a transaction, and by so doing sustains damage. An action of deceit is a common law action, and must be decided on the same principles whether it be brought in the Chancery or the King's Bench Division; there is no such thing as an equitable action of deceit (*d*).

In order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. "Although," said Lord Herschell, "I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth. And

(*a*) *Craster* v. *Thomas*, 1909, 2 Ch. 348; 78 L. J. Ch. 734; *Hewson* v. *Shelley*, 1914, 2 Ch. 13; 83 L. J. Ch. 607.

(*b*) 1 H. L. C. p. 214.

(*c*) See *Macbride* v. *Lindsay*, 9 Ha. 574.

(*d*) *Smith* v. *Chadwick*, 9 App. Ca. 187, 193; 53 L. J. Ch. 873; *Derry* v. *Peek*, 14 App. Ca. 337, 360; 58 L. J. Ch. 864.

this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief" (*e*).

It is not, however, necessary that the misrepresentation which will sustain an action of deceit should be made in actual terms; words conveying a false inference are enough (*f*).

If fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made (*g*).

An action of deceit for a negligent as distinguished from a fraudulent misrepresentation cannot be supported (*h*). It is not enough that a false statement has been made through carelessness which ought to have been known to be untrue (*i*). Making a false statement through want of care falls far short of and is a very different thing from fraud, and the same may be said of a false representation honestly believed though on insufficient grounds (*k*). To state that which the speaker believes to be true, but which is not so, is to tell the truth. There is not in a person who receives a statement any right to have true statements only made to him (*l*); his right is that the speaker shall tell him the truth, that is, should state only matters of whose truth he has a real belief (*m*). An untrue statement as to the truth or falsity of which the man who makes it has no belief, is fraudulent; for in making it he affirms he believes it, which is false (*n*). But, on the other hand, though the statement is untrue, yet if he had reasonable ground for believing, and if, taking into consideration among other evidence such reasonable ground, you determine as a

(*e*) *Derry* v. *Peek*, 14 App. Ca. p. 374.
(*f*) *Delany* v. *Keogh*, 1905, 2 I. R. 267.
(*g*) *Ibid.*; *Arnison* v. *Smith*, 41 C. D. 348, 372; *ante*, p. 29.
(*h*) *Angus* v. *Clifford*, 1891, 2 Ch. 449, 464; 60 L. J. Ch. 443.
(*i*) 14 App. Ca. p. 373.
(*k*) 14 App. Ca. p. 361, 375; *Angus* v. *Clifford*, *supra*; *Bishop* v. *Balkis Co.*, 25 Q. B. D. 512, 521.
(*l*) 37 C. D. p. 568, *per* Cotton, L. J.
(*m*) 14 App. Ca. 344, 350, 362.
(*n*) *Smith* v. *Chadwick*, 9 App. Ca. p. 203; 53 L. J. Ch. 873.

fact that he did believe it to be true, he is not liable (*o*). The test is whether the statement was made without positive belief in its truth, not necessarily with positive belief in its falsehood (*p*).

A statement made without reasonable grounds for believing it, is not necessarily fraudulent. The absence of such grounds is evidence but not proof of a want of belief. It may be most material as evidence upon the question whether the belief was really entertained; but if it be found as a fact that the belief was really entertained the absence of reasonable grounds will not constitute a fraud (*q*). Whether there were reasonable grounds for the statement, and what were the means of knowledge of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. "If I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false" (*r*).

A distinction must be drawn between an action of deceit and an action to set aside a contract. Mere concealment is not sufficient to give a right of action to a man who if the real facts had been known would not have entered into the contract. Mere non-disclosure of material facts, however morally censurable, however sufficient it may be as a ground for setting aside a contract, will not form a ground for an action of deceit. There must be some active misstatement of fact, or at all events such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false (*s*). Mere silence will not ground an action of deceit, but silence as to a

(*o*) *Derry* v. *Peek*, *supra*; *Angus* v. *Clifford*, *supra*.
(*p*) See Pollock, Contracts, 537.
(*q*) 14 App. Ca. 344, 350, 352, 358, 360, 363, 369.
(*r*) 14 App. Ca. 375, 376, *per* Lord Herschell.
(*s*) *Peek* v. *Gurney*, L. R. 6 H. L. 377, 403; 43 L. J. Ch. 19; *Derry* v. *Peek*, 14 App. Ca. 337; 58 L. J. Ch. 864.

material fact in a prospectus may be a ground for rescission (*t*). In an action, moreover, for setting aside a contract, the plaintiff may succeed, although the misrepresentation was innocent; but in an action of deceit the representation must be fraudulent. The coming into existence of a fact which would have made a statement untrue if it had existed at the time of issuing the prospectus will not in an action for deceit entitle the plaintiff to relief: nor are persons issuing a prospectus liable to an action for deceit because they do not mention a fact coming to their knowledge before allotment which falsifies the prospectus. Moreover, in an action of deceit the plaintiff cannot establish title to relief simply by showing that the defendants have made a fraudulent statement; he must also show that he was deceived by the statement and acted on it to his prejudice (*u*).

Materiality.

To be a ground for an action of deceit the false statement must be material. With respect to the materiality of the statement, the untrue statement may be of such a character as to be clearly material and such as to induce the contract; in such case no evidence of its materiality, or of its having in fact been an inducement, is wanted. It is an inference of fact, not of law, that the representation was the inducement (*x*). The defence, if any, in such case must be either (1) that the applicant knew the true facts; or (2) that he avowedly did not rely upon the facts stated; or (3) that he contracted to take the matter at his own risk (*y*).

It is not sufficient to prove that the person deceived made some investigation into the facts, or that he had the means of discovering the truth and did not sufficiently avail himself of them. In the case of false representation negligence

(*t*) *Components Tube Co.* v. *Naylor*, 1900, 2 I. R. 1.

(*u*) *Arkwright* v. *Newbold*, 17 C. D. 320; 50 L. J. Ch. 372; *Smith* v. *Chadwick*, 20 C. D. 27; 53 L. J. Ch. 873; *Angus* v. *Clifford*, 1891, 2 Ch. 449; 60 L. J. Ch. 443.

(*x*) *Arnison* v. *Smith*, 41 C. D. 348, 369; *Aaron's Reefs* v. *Twiss*, 1896, A. C. 273, 280; 65 L. J. P. C. 54.

(*y*) *Brownlie* v. *Campbell*, 5 App. Ca. 925; *Smith* v. *Chadwick*, 20 C. D. 44, 45; 53 L. J. Ch. 873; *Redgrave* v. *Hurd*, 20 C. D. 1, 21; 51 L. J. Ch. 113.

or laches affords no answer unless there is such delay as to bring in the Statute of Limitations (*z*).

But if the statement be not obviously material, or if it be ambiguous, the applicant must in the former case prove it to be material, and in the latter prove the sense in which he understood it, and must in either case prove that he was induced by it (*a*). The defendants cannot be heard to say that they did not know the popular meaning of the words they used (*b*). If a man uses language which taken in its natural sense conveys a wrong impression, he cannot be heard to say that he did not intend to deceive (*c*).

It is not necessary to prove that the representation was the sole inducement. The question is whether the plaintiff acted on the misrepresentation, not whether he acted on the misrepresentation alone. He may therefore recover although he was induced also by other things, as for instance his own mistake (*d*).

It is not, however, every misstatement, although untrue, and untrue to the defendant's knowledge, that will do. It may be that the misstatement is trivial—so trivial that the Court will be of opinion that it could not have affected the plaintiff's mind at all, or induced him to enter into the contract; or it may be that although the means of knowledge were in the hands of the defendant, yet the matter was minute and required a careful examination, and there may have been reasonable grounds for the defendant to believe that this statement was true, although he had those means of knowledge in his possession. In that way also he would be entitled to succeed (*e*).

In a case where there was a misstatement of the valuation of a property in the prospectus of a company to the amount

(*z*) *Redgrave* v. *Hurd*, 20 C. D. 13, 22, 24; *Oelkers* v. *Ellis*, 1914, 2 K. B. 139; 83 L. J. K. B. 658.

(*a*) *Smith* v. *Chadwick*, 20 C. D. 45, 64; 9 App. Ca. 187.

(*b*) *Arnison* v. *Smith*, 41 C. D. 348, 368, 373.

(*c*) *Ibid.*; but cf. *Derry* v. *Peek*, *supra*; and see *Glasier* v. *Rolls*, 42 C. D. 436; 58 L. J. Ch. 820.

(*d*) *Edgington* v. *Fitzmaurice*, 29 C. D. 459; *Arnison* v. *Smith*, 41 C. D. 359, 369.

(*e*) *Smith* v. *Chadwick*, 20 C. D. 27, 44; 53 L. J. Ch. 873.

of 3,000*l*. out of 300,000*l*. the misstatement was held not material (*f*). So, also, when money was to be paid by instalments, the omission to mention that interest was also payable was held not material (*g*).

If the name of a person is improperly placed on the list of directors of a company, it must depend on the circumstances of the case whether it is a material misstatement. There may be cases in which the name of a man is so well known and notorious in connection with the business and subject-matter of a company that the occurrence of his name on the list of directors would be a clear and undoubted inducement to persons to embark in the concern (*h*). But in the absence of some special reason, the mere fact that one name out of several happens to be wrongly inserted in the list of directors is not sufficient to support an action of deceit (*i*).

Where a transaction has been induced by fraud, but rescission is not competent to the party defrauded, either because the parties cannot be restored to their original condition (*k*), or because the person by whose fraud the transaction has been induced is not a party to the transaction (*l*), the party defrauded may bring an action of deceit against the party by whose fraud he has been misled to his injury (*m*). So, also, the party defrauded may if he pleases stand to the contract after discovery of the fraud, and recover damages in an action of deceit for the fraud (*n*). So, also, where a man enters into a contract for the sale of real estate, knowing that he has no title to it nor any means of acquiring it, the purchaser may recover damages in an action of deceit (*o*).

(*f*) *Ibid.*

(*g*) *Ibid.*

(*h*) *Karberg's Case*, 1892, 3 Ch. 1; 61 L. J. Ch. 741.

(*i*) *Smith* v. *Chadwick*, 20 C. D. 44; 9 App. Ca. 187, *supra*.

(*k*) *Ante*, p 388.

(*l*) *Ante*, p. 414.

(*m*) *Pasley* v. *Freeman*, 3 T. R. 62; 1 R. R. 634; *Pulsford* v. *Richards*, 17 Beav. 95; 22 L. J. Ch. 559; 99 R. R. 48; *Duranty's Case*, 26 Beav. 271; 28 L. J. Ch. 37; 122 R. R. 104.

(*n*) *Ante*, p. 403.

(*o*) *Bain* v. *Fothergill*, L. R. 7 H. L. 207; see *Day* v. *Singleton*, 1899, 2 Ch. 320; 68 L. J. Ch. 593.

A purchaser may, after the execution of a conveyance, bring an action for compensation in damages for fraudulent misrepresentation of the property. The fact that he had the means of discovering an error amounting in law to fraudulent misrepresentation before completion does not take away his right to compensation in damages, if the Court is satisfied that the error was not in fact discovered by himself or his solicitor until after the completion of the purchase (*p*).

Under Lord Tenterden's Act (9 Geo. IV. c. 14, s. 6), no action shall be brought whereby to charge any person upon or by reason of any representation or assurance, made or given concerning or relating to the character, credit, conduct, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance be made in writing signed by the party to be charged therewith (*q*). The section is confined to fraudulent representations (*r*).

A representation partly written and partly verbal is sufficient, if the written part forms a material part of the representation (*s*). The representation must be signed by the party, a signature by his agent will not suffice; and the word "person" applies to corporations (*t*). One partner of a firm signing such a representation in the name of the firm with the authority of the firm will thereby make himself only, and not his partners, liable on such representation (*u*).

Action of deceit against principal for fraud of agent.

A principal is liable to third persons for frauds, deceits, concealments, torts, and omissions of duty of his agent, when acting in the course of his employment, although the principal did not authorise or justify or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them. But the principal is not liable for the

(*p*) *Dobell* v. *Stevens*, 3 B. & C. 623; 3 L. J. K. B. 89; 27 R. R. 441.

(*q*) See *Clydesdale Bank* v. *Paton*, 1896, A. C. 381; 65 L. J. P. C. 73.

(*r*) *Banbury* v. *Bank of Montreal*, 1918, A. C. 626; 87 L. J. K. B. 1158.

(*s*) *Tatton* v. *Wade*, 18 C. B. 371; 25 L. J. C. P. 240; 107 R. R. 336.

(*t*) *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301; 43 L. J. Q. B. 56; *Bishop* v. *Balkis Co.*, 25 Q. B. D. 77; *Hirst* v. *West Riding Bank*, 1901, 2 K. B. 560; 70 L. J. K. B. 828.

(*u*) *Williams* v. *Mason*, 28 L. T. 232.

torts or negligence of his agent in any matter beyond the scope of his agency, unless he has expressly authorised or has subsequently adopted them for his own use and benefit (*x*).

It was formerly considered to be the law that to found an action of deceit, the fraud must be a personal one on the part of the person making the representation, and that a principal was not liable in damages for the false representation of his agent, unless he had impliedly authorised him to make the representation (*y*). But in *Barwick* v. *English Joint Stock Bank* (*z*) Mr. Justice Willes in delivering the judgment of the Court laid it down as the law that an innocent principal is civilly responsible for the fraud of his authorised agent acting within his authority, and in the course of the business which he is employed to perform, to the same extent as if it were his own fraud (*a*).

This doctrine of law proceeds not on the ground of any imputation of vicarious fraud to the principal, but because with respect to the question as to the liability of a principal for the acts of his agent done in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and any other wrong (*b*). But a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent (*c*). It is not necessary that the principal should

(*x*) *M'Gowan* v. *Dyer*, L. R. 8 Q. B. 145, *per* Lord Balckburn; *British Mutual, &c., Co.* v. *Charnwood Forest, &c., Co.*, 18 Q. B. D. 714; 56 L. J. Q. B. 449; *Kettlewell* v. *Refuge Ass. Co.*, 1908, 1 K. B. 545; 77 L. J. K. B. 421; *Hambro* v. *Burnand*, 1904, 2 K. B. 10; 73 L. J. K. B. 669. See 1910, A. C. 174.

(*y*) *Udell* v. *Atherton*, 7 H. & N. 172, *per* Martin, B.; 30 L. J. Ex. 337; 126 R. R. 383; *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 162, *per* Lords Chelmsford and Cranworth.

(*z*) L. R. 2 Ex. 265; 36 L. J. Ex. 147.

(*a*) *Mair* v. *Rio Grande Rubber Estates*, *post*, p. 429.

(*b*) *Barwick* v. *English Joint Stock Bank*, *supra*; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 326, *per* Lord Selborne; *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; 43 L. J. P. C. 31; cf. *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215; 70 L. J. K. B. 533.

(*c*) *Lloyd* v. *Grace Smith & Co.*, 1912, A. C. 716; 81 L. J. K. B. 1140, *ante*, p. 94.

have actually derived benefit (*d*). The principal cannot escape liability upon the ground that the agent acted for his own purposes and not in the interest of the principal (*e*), nor on the ground that he, the principal, has incurred other liability (*f*). The principle of the law of agency applies equally to all such cases. It may be that the master has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he is answerable for the manner in which that agent has conducted himself in doing the business which it was the act of the master to place him in (*g*). It is of course assumed in all such cases that the third party who may seek for redress has been dealing in good faith with the agent in reliance upon the credentials with which he has been entrusted by the principal, and had no notice, either of any limitation material to the question of the agent's authority, or of any fraud or other wrong-doing on the agent's part at the time when the cause of the action arose (*h*).

A company, whether incorporated or not, is like any other principal liable to an action of deceit for the misrepresentation of its directors, or other agents, if the statement relates to a matter as to which they are agents, and if it be made in the course and as part of the business which they are appointed by the company to transact (*i*). Although the particular act which gives the cause of action may not be authorised, still if the act is done in the course of employment, then the principal is liable; and the rule is as applicable to companies as to individuals (*k*). This doctrine was approved of in *Swire* v. *Francis* (*l*) and *Mackay* v. *Commercial Bank of New Brunswick* (*m*). In the latter case the officer of a banking

(*d*) *Swire* v. *Francis*, 3 App. Ca. 113: 47 L. J. P. C. 18; *Hambro* v. *Burnand*, 1904, 2 K. B. 10; 73 L. J. K. B. 669.

(*e*) *Hambro* v. *Burnand*, *supra*.

(*f*) *Kettlewell* v. *Refuge Ass. Co.*, 1908, 1 K. B. 545; 77 L. J. K. B. 421.

(*g*) See note (*b*), p. 427.

(*h*) *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 326, *per* Lord Selborne; *Rimmer* v. *Webster*, 1902, 2 Ch. 163; 71 L. J. Ch. 561. See 1910, A. C. 174.

(*i*) *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 265; 36 L. J. Ex. 147.

(*k*) *Citizens' Life Ass. Co.* v. *Brown*, 1904, A. C. 423; 73 L. J. P. C. 102.

(*l*) 3 App. Ca. 106; 47 L. J. P. C. 18; and see 5 App. Ca. 317, 326.

(*m*) L. R. 5 P. C. 394; 43 L. J. P. C. 31.

corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently and without the knowledge of the president and directors of the bank, made a representation to a man, which by omitting a material fact misled him and induced him to accept a bill in which the bank was interested, and he was compelled to pay the bill. It was held he could recover from the bank the amount so paid.

The principle on which *Barwick* v. *English Joint Stock Bank* proceeded was followed in *Swire* v. *Francis* (*n*), and *Weir* v. *Bell* (*o*). But in the latter case Lord Bramwell said he did not consider the reasoning on which *Barwick* v. *English Joint Stock Bank* was founded was satisfactory, but, nevertheless, he thought it might be supported on the ground that "every person who authorises another to act for him in the making of any contract undertakes for the absence of fraud in that person in the execution of the authority given as much as he undertakes for its absence in himself when he makes the contract." This statement was approved by Lord Macnaughten in *Lloyd* v. *Grace Smith & Co.* (*p*) and Lord Haldane in *Mair* v. *Rio Grande Rubber Estates* (*q*). The authority of *Barwick* v. *English Joint Stock Bank*, is, however, conclusive.

But a company is not liable for a fraudulent representation as to the credit of another person made by its agent, though made in the interest of the company (*r*).

Action of deceit under Companies Act, 1867, s. 38, against directors of companies.

When the prospectus of a company omits to specify contracts entered into by the promoters or directors before the issue of such prospectus, as required by section 38 of the Companies Act, 1867, a man who has been induced by the concealment to take shares in the company has his remedy against the promoters or directors personally (*s*), but he is

(*n*) *Supra*.
(*o*) 3 Ex. D. 244; 47 L. J. Ex. 704.
(*p*) 1912, A. C. 716; 81 L. J. K. B. 1140.
(*q*) 1913, A. C. 853; 83 L. J. P. C. 35.
(*r*) *Hirst* v. *West Riding, &c., Bank*, 1901, 2 K. B. 560; 70 L. J. K. B. 828, *ante*, p. 92.
(*s*) *Ante*, p. 91.

not entitled to relief by removal of his name from the list of shareholders (*t*). The difference in the wording of section 38 and section 81 of the Companies (Consolidation) Act, 1908, has not altered the law in this respect (*u*).

One agent not liable for fraud of other agent.

As a general rule one agent is not responsible for the acts of another agent unless he does something by which he makes himself a principal in the fraud (*x*). The director of a company, for instance, before the Directors Liability Act, 1890, was not liable for a fraud, such as the issue of a fraudulent prospectus, committed by his co-directors or any other agent of the company, unless he either expressly authorised or tacitly permitted its commission (*y*).

Laches.

A man who has by his laches or delay barred his right to repudiate a contract to take shares in a company on the ground of fraudulent representation may nevertheless maintain an action of deceit against the directors for damages founded on the same misrepresentation (*z*). A man may affirm a contract, and yet sue the person who by fraud induced him to enter into it (*a*); but if he affirms the contract he cannot defend an action for calls on the ground of fraud (*b*).

Measure of damages.

In actions of deceit the measure of damages is not the full consideration which has passed from the defrauded party. Any benefits received by him under the contract must be taken into consideration, and the damages recoverable will be the excess only of the value of the one over the other (*c*): The measure of damages is the difference between the actual value of the property and its value if the property had been what it was represented to be. When a man has been induced by false representations in a prospectus to take shares in the company, the proper mode of measuring the damages is to

(*t*) *Gover's Case*, 1 C. D. 182; 45 L. J. Ch. 83.
(*u*) *Re South of England Natural Gas Co.*, 1911, 1 Ch. 573; 80 L. J. Ch. 358.
(*x*) *Cargill* v. *Bower*, 10 C. D. 514; 47 L. J. Ch. 649.
(*y*) *Ibid.*; *Peek* v. *Gurney*, L. R. 6 H. L. 378; 43 L. J. Ch. 19; cf. *Dovey* v. *Cory*, 1901, A. C. 477; 70 L. J. Ch. 753.
(*z*) *Eaglesfield* v. *Londonderry*, 4 C. D. p. 715.
(*a*) *Arnison* v. *Smith*, 41 C. D. p. 371, *per* Cotton, L. J.
(*b*) *Aarons Reefs* v. *Twiss*, 1896, A. C. 273, 294; 65 L. J. P. C. 54.
(*c*) *Hogan* v. *Healey*, I. R. 11 C. L. 122.

ascertain the difference between the price paid for the shares and the actual value at the time of allotment, such value to be ascertained, not by the market value at the time, but by the light of subsequent events, including, if the company be in liquidation, the result of the winding up (*d*). So far as the shares are an equivalent for the money the plaintiff paid for them, he is not damaged, but so far as they fall short of being an equivalent he is damaged (*e*), and he is entitled to an inquiry as to the difference between the price paid by him for the shares and their real value on the day after allotment (*f*). But the real value of the shares at the date of allotment is not the market value, which may be inflated by the very misrepresentation of which the plaintiff complains, but the value of the assets which is behind them (*g*).

The party defrauded can only recover damages to the extent of the loss he has actually sustained. He cannot recover the entire price he paid unless the thing prove wholly worthless. If the article which he has been induced to buy is of any value, that value in assessing the damages must be deducted from the price. If the article had any value and he has by his own act diminished or destroyed that value, he cannot throw the loss so occasioned on the defendant. But if the article was worthless from the beginning and only derived its apparent value from the representation which has proved false, the measure of damages is the price which the plaintiff was induced to give for it by the fraud on which the action is founded. If the article was a share in a company it may be that it may have had some fictitious value in the share market at the time of the purchase, but the plaintiff having invested was not bound to sell it immediately. He was fully entitled to wait until the company was in operation (*h*). When the purchaser has sold the property at a profit he can recover no

(*d*) *Arkwright* v. *Newbold*, 17 C. D. 302; 50 L. J. Ch. 372; *Arnison* v. *Smith*, 41 C. D. p. 363; *Shaw* v. *Holland*, 1900, 2 Ch. 305; 69 L. J. Ch. 621; *Cackett* v. *Keswick*, 1902, 2 Ch. 456; 71 L. J. Ch. 641.

(*e*) *McConnel* v. *Wright*, 1903, 1 Ch. 546, *per* Collins, M. R.; 72 L. J. Ch. 347.

(*f*) *Cackett* v. *Keswick*, *supra*.

(*g*) *Fawcett* v. *Johnson*, 15 S. R. 51.

(*h*) *Twycross* v. *Grant*, 2 C. P. D. 469; 46 L. J. C. P. 636. See *Jury* v. *Stoker*, 9 L. R. I. 397; *Lamb* v. *Johnson*, 15 N. S. W. St. R. 65.

damages, although he has failed to realise the profit he could reasonably have expected if the representations had been true (*i*). It is a general rule that persons in a fiduciary position should be charged with the highest value of property which they have wrongfully taken while it was in their hands. But where allotments of shares were made *ultra vires* to directors, it was held that the measure of damage was the value when they were allotted to the directors (*k*).

Where there is a fraudulent misrepresentation of the character or condition of goods, the vendor is responsible for all injury which is the direct and natural result of the purchaser acting on the faith of the representation. Where, therefore, a cattle dealer fraudulently represented a cow to be free from infectious disease when he knew it was not so, and the purchaser placed it with five others which caught the disease and died, the latter was held entitled to recover as damages in an action for fraudulent misrepresentation the value of all the cows (*l*).

In an action for false representation the plaintiff cannot recover damages if they are too remote and not the immediate consequence of the defendant's act (*m*). Costs incurred, upon the discovery of the falsehood of a representation, in order to reverse the consequences of the representation are too remote an injury to be included in a verdict upon an action of deceit (*n*).

In a case where a man had purchased shares under a forged transfer, and the name of the real owner was afterwards substituted, it was held that the purchaser was entitled to recover from the company for their negligence in registering the forged transfer, as damages for the loss of the shares, the value of the shares at the time the company first refused to recognise him as a shareholder, with interest at four per

(*i*) *Rosen* v. *Lindsay*, 7 W. L. R. 115; 17 Man. L. R. 251.

(*k*) *Shaw* v. *Holland*, 1900, 2 Ch. 305; 69 L. J. Ch. 621.

(*l*) *Mullett* v. *Mason*, L. R. 1 C. P. 559; 35 L. J. C. P. 209.

(*m*) *Collins* v. *Cave*, 4 H. & N. 225; 118 R. R. 403; *Barry* v. *Crosskey*, 2 J. & H. 1; *Peek* v. *Gurney*, L. R. 6 H. L. 412; 43 L. J. Ch. 19; *Angus* v. *Clifford*, 1891, 2 Ch. p. 481; 60 L. J. Ch. 443.

(*n*) *Hyde* v. *Bulmer*, 18 L. T. 293.

cent. (*o*). So where a company is estopped from denying that the person named in a share certificate is the owner of the shares, and the company cannot give the shares, the measure of damages is the value of the shares at the time of the refusal (*p*).

The measure of damages in an action for fraudulent misrepresentation on a sale is the difference between the price paid and the fair value at the time of the purchase, and therefore it is not sufficient for the plaintiff to show that the property was not worth as much as it would have been if the representation had been true (*q*).

If a mine owner fraudulently works into the mines of his neighbour and abstracts his minerals, he will be charged the full value of the minerals when gotten, without being allowed the expenses of getting and severing them. The expenses, however, of raising the minerals to the pit's mouth will be allowed him (*r*). He will also have to pay compensation for the use of a way-leave under the land. If he dies, his executor will not after his death be liable in damages for what damage the owner of the mine may have sustained by the abstraction of coal from under his land. The estate of the wrong-doer is only liable for such profit as it may have derived from the fraud (*s*).

The measure of damages for which an agent is responsible in consequence of his misrepresentations is the actual loss which the principal thereby sustains, and does not include the anticipated profit which the principal might have made if the representation had been true (*t*).

When a person employed to purchase purchases secretly from himself but the fraud complained of does not touch the value of the article sold, but consisted only of the fraudulent

(*o*) *Re Bahia and San Francisco Railway*, L. R. 3 Q. B. 594; 37 L. J. Q. B. 176; *Karberg's Case*, 1892, 3 Ch. p. 17; 61 L. J. Ch. 741.

(*p*) *Re Ottos Kopje Diamond Mines*, 1893, 1 Ch. 618; 62 L. J. Ch. 166

(*q*) *Holmes* v. *Jones*, 4 C. L. R. 1692; 7 S. R. 821

(*r*) *Phillips* v. *Homfray*, 6 Ch. 770; 59 L. J. Ch. 547; *Bulli Mining Co.* v. *Osborne*, 1899, A. C. 351; 68 L. J. P. C. 49; cf. *Jegon* v. *Vivian*, 6 Ch. 742; 40 L. J. Ch. 389.

(*s*) *Phillips* v. *Homfray*, 24 C. D. 454; *supra*.

(*t*) *Salvesen* v. *Rederi Aktiebolaget, &c.*, 1905, A. C. 302; 74 L. J. P. C. 96

concealment by the agent that he was selling to his principal, the proper measure of damages is the difference which the agent paid and the price at which the principal might have resold it upon the same day upon which he bought it from the agent. What occurs afterwards cannot be taken into account (*u*).

Although it is a general principle that directors or other persons in a fiduciary position should be charged with the highest value of the property wrongfully taken by them, they ought not to be charged with more than the real value, which is not necessarily the market value (*x*).

SECTION III.—INJUNCTION—RECEIVER—SUMMONS.

The appropriate remedy of the Court may under the peculiar circumstances of the case be by way of injunction. In restraining by injunction acts which are fraudulent the Court exercises a most extensive jurisdiction. Injunctions may be had upon a proper case being made out to restrain a man from parting with or transferring property, or paying or recovering monies (*y*), from negotiating securities (*z*), from selling property, &c. (*a*). So, also, if a man has by his conduct encouraged another to expend monies on property, or deal in a matter of interest, the Court will restrain him from derogating from the interest in which that other has been induced to deal, or from enforcing his legal right against him, unless the latter has received the benefit which he contemplated at the time he was induced to alter his condition (*b*). Where, accordingly, a lessor, pending an agreement for a building lease, represented to the intended lessee that he could not obstruct the sea view from the houses to be built by the lessee, pursuant to the proposed lease, because he himself was a lessee under a lease for 999 years, containing covenants which restricted him from so doing; but after the

(*u*) *Waddell* v. *Blockey*, 4 Q. B. D. 680; 48 L. J. Q. B. 517.
(*x*) *Shaw* v. *Holland*, 1900, 2 Ch. 305; 69 LL. J. Ch. 621; *ante*, 432.
(*y*) Kerr on Inj. (4th ed.), 537.
(*z*) *Ibid.* 536.
(*a*) *Ibid.* 533.
(*b*) *Ante*, p. 124.

building lease had been taken, and the houses built upon the faith of the representation, the lessor surrendered his 999 years' lease, and took a new lease omitting the restrictive covenants, the Court restrained him by injunction from building so as to obstruct the sea view (*c*).

So, also, the Court will interfere by injunction to restrain any unfair competition in trade. The protection of trade marks and trade names was originally undertaken by the Courts on the ground of preventing fraud (*d*), but in cases within the Patents, Designs, and Trade Marks Acts, 1883 and 1888, the wrong to be redressed is now thought to be no longer a species of fraud, but a wrong in the nature of a trespass upon a proprietary right. (*dd*). In cases of trade names and the like outside the statute the principle is that no one may canvass for custom by falsely holding out his goods or business, whether by misleading description or by colourable imitation, as being the goods or business of another. Its application is not excluded by showing that the style or words appropriated by the defendant are in themselves not false as he uses them, or that the plaintiff if he succeeds will have a virtual monopoly in an exclusive designation which is not capable of registration as a trade mark. Thus the assumption of a surname by a man, or even the use of his own name, for the purpose of fraudulent competition, is a fraud which the Court will restrain (*e*). So where a plaintiff establishes that the defendant has represented him as his principal or partner, or been responsibly connected with him in a venture and there is a tangible probability of injury to the plaintiff, he is entitled to an injunction (*f*). The question in all these cases is whether the defendant's action is calculated to deceive (*g*). Underselling, even at a manifest loss, is not in itself unfair competition (*h*).

(*c*) *Piggott* v. *Stratton*, John. 359; 1 D. F. & J. 33; 29 L. J. Ch. 1; 135 R. R. 336.

(*d*) See *per* Lord Blackburn, 8 App. Ca p. 29. (*dd*) *Post*, p. 450.

(*e*) *Cash* v. *Cash*, 92 L. T. 655.

(*f*) *Walter* v. *Ashton*, 1902, 2 Ch. 282; 71 L. J. Ch. 839.

(*g*) *Reddaway* v. *Banham*, 1896, A. C. 199; 65 L. J. Q. B. 381; *Bourne* v. *Swan & Edgar*, 1903, 1 Ch. 211; 72 L. J. Ch. 168.

(*h*) *Ajello* v. *Worsley*, 1898, 1 Ch. 274; 67 L. J. Ch. 172.

Where by contract between the plaintiffs and certain factors the latter were contractually bound not to sell to the defendants any of the plaintiffs' goods, and the defendants by deceit induced the factors to sell to them the plaintiffs' goods, whereby damage resulted to the plaintiffs, it was held that the defendants had committed an actionable wrong and that the plaintiffs were entitled to an injunction and an inquiry as to damages (*i*).

If a fair *primâ facie* case of fraud be made out, the Court may appoint a receiver before the hearing, even against a party having the legal title (*k*).

Summons.

Questions of fraud cannot be raised or decided on an originating summons (*l*), nor can accounts on the footing of wilful default be directed (*m*). A question as to the validity of a contract in its inception cannot be decided on a summons under the Vendor and Purchaser Act (*n*), but the validity of a notice to rescind may be decided (*o*). And on a vendor's application for a declaration that a good title had been shown, an order was made in the purchaser's favour rescinding the contract (*p*).

SECTION IV.—DEFENCE TO SPECIFIC PERFORMANCE.

Fraud a bar to specific performance.

Where a party comes to the Court for specific performance of a contract, he must as to every part of the transaction be free from any imputation of fraud or deceit. An agreement affected by misrepresentation or tainted by deceit is incapable of being made the subject of the interference of the Court in order to compel its specific performance (*q*). A contract will

(*i*) *National Phonograph Co.* v. *Edison-Bell Co.*, 1908, 1 Ch. 335; 77 L. J. Ch. 218.

(*k*) *Kerr on Receivers*, 26, 73, 105. See *Re Mouatt*, 1899, 1 Ch. 831; 68 L. J. Ch. 390.

(*l*) *Sandbach and Edmondson*, 1891, 1 Ch. 99; 60 L. J. Ch. 60; *Re Johnson*, 2 Tas. L. R. 92.

(*m*) *Re Hengler*, 1893, W. N. 37.

(*n*) *Sandbach and Edmondson*, *supra*; *Wallis and Barnard*, 1899, 2 Ch. 515; 68 L. J. Ch. 753.

(*o*) *Jackson and Woodburn*, 37 C. D. 44; 57 L. J. Ch. 243.

(*p*) *Higgins and Perceval*, 1888, W. N. 172; *Walker and Oakshott*, 1901, 2 Ch. 383; 70 L. J. Ch. 666.

(*q*) *Harris* v. *Kemble*, 5 Bligh, 730; 35 R. R. 83; but see *Greenhalgh* v. *Brindley*, 1901, 2 Ch. 324; 70 L. J. Ch. 740.

not be specifically enforced against a defendant who establishes that his entering into it was procured or occasioned by some fraud on the part of the plaintiff or his agent; but whether the fraudulent act of a stranger can ever operate to deprive the innocent vendor of his right to enforce a contract seems doubtful (*r*). When the aid of the Court is sought by way of specific performance of a contract, the principles of ethics have a more extensive sway than when a contract is sought to be rescinded. The Court is not bound to decree specific performance in every case where it will not set aside a contract, or to set aside every contract that it will not specifically perform (*s*). Specific performance rests with the discretion of the Court upon a view of all the circumstances, and with an eye to the substantial justice of the case (*t*). There can be no specific performance if a material and important fact be untruly stated (*u*), or if there be a misdescription of the property to a material extent in the conditions of the sale (*x*). It is no answer, in a suit for specific performance, to the fact of the plaintiff having made a false representation, to say that the defendant was imprudent. A man who calls for specific performance must be able to show that his conduct has been clear, honourable, and fair (*y*). The Court must see its way very clearly before it will decree specific performance, and must be satisfied as to the integrity and good faith of the party seeking its interference (*z*). Misrepresentation as to a small portion only of the property, the subject of the contract, will, if the misrepresentation is intentional, prevent a man from coming to the Court to have the

(*r*) *Union Bank* v. *Munster*, 37 C. D. pp. 53—55; 57 L. J. Ch. 124.

(*s*) *Wilde* v. *Gibson*. 1 H. L. C. 607; 73 R. R. 191; *Rawlins* v. *Wickham*, 3 D. & J. 322; 28 L. J. Ch. 188; 121 R. R. 134; *Broad* v. *Munton*, 12 C. D. 131; 48 L. J. Ch. 837.

(*t*) *Watson* v. *Marston*, 4 D. M. & G. 230; 102 R. R. 100; *Re Hare and O'More*, 1901, 1 Ch. 93; 70 L. J. Ch. 45.

(*u*) *Price* v. *Macaulay*, 2 D. M. & G. 339; 95 R. R. 129.

(*x*) *Caballero* v. *Henty*, 9 Ch 447; 42 L. J. Ch. 635; *Goddard* v. *Jeffreys*, 51 L. J. Ch. 57.

(*y*) *Cox* v. *Middleton*, 2 Drew. 220; 23 L. J. Ch. 618; 100 R. R. 90; *Walters* v. *Morgan*, 3 D. F. & J. 718; 130 R. R. 309. See *Phillips* v. *Homfray*, 6 Ch. 770; 59 L. J. Ch. 547.

(*z*) *Walters* v. *Morgan*, 3 D. F. & J. 718.

contract enforced. It is not sufficient that the vendor offer to waive the portion affected by the representation (*a*). The effect of a partial misrepresentation is not to alter or modify the agreement, *pro tanto*, but to destroy it entirely, and to operate as a personal bar to the party making the application (*b*). Misrepresentation of a material fact, by a party or his agent, although innocently made, will be a bar to the application (*c*). If a prospectus be issued containing material representations, and a person accepts shares on the faith of the representations, the party who made the representations cannot, if they prove to be untrue, compel the other party to accept the shares, although he believed what he stated to be true (*d*). It is a defence to an action for specific performance that the plaintiff has made inaccurate representations with respect to the property, the subject of the contract, although these representations proceeded upon and had reference to sources of information which were equally open to all parties, and might have enabled the defendant to detect the alleged inaccuracies, if the evidence shows that they could not have been easily detected (*e*).

There may, however, be specific performance although the description of the property, the subject of the contract, be incorrect, if it appear that the purchaser knew at the time of the purchase that the representation was untrue, or inspected the property before making the purchase, and so acted upon his own judgment in the matter (*f*); or if there were circumstances in the case which demanded further investigation, for which the vendor afforded every facility (*g*), or if the repre-

(*a*) *Clermont* v. *Tasburgh*, 1 J. & W. 119, 120; 20 R. R. 243.

(*b*) *Ibid.*; *Stewart* v. *Alliston*, 1 Mer. 26; 15 R. R. 81. See *Rawlins* v. *Wickham*, 3 D. & J. 321; *supra*.

(*c*) *Mullens* v. *Miller*, 22 C. D. p. 199; 52 L. J. Ch. 380; *Wauton* v. *Coppard*, 1899, 1 Ch. p. 97; 68 L. J. Ch. 8.

(*d*) *New Brunswick, &c., Railway Co.* v. *Muggeridge*, 1 Dr. & Sm. 363, 382; 30 L. J. Ch. 242; 127 R. R. 142.

(*e*) *Harris* v. *Kemble*, 5 Bligh, 730; 35 R. R. 83; *Denny* v. *Hancock*, 6 Ch. 1; 40 L. J. Ch. 193.

(*f*) *Dyer* v. *Hargrave*, 10 Ves. 505; 8 R. R. 36; *Brooke* v. *Rounthwaite*, 5 Ha. 306; 15 L. J. Ch. 332; 71 R. R. 115; *Clarke* v. *Mackintosh*, 4 Giff. 134; *Nene Valley* v. *Dunkley*, 4 C. D. p. 4

(*g*) *Clarke* v. *Mackintosh*, 4 Giff. 134.

sentations which have been made are vague in their terms, and merely amount to a statement of value or opinion (*h*). And specific performance will not be refused merely because the vendor has done something, unknown to the purchaser, which renders his position different from the normal position of a vendor (*i*).

It seems that where it is in the vendor's power to make good the description of the property, but not by way of money compensation, he can enforce the contract on condition of doing so (*k*), and that there may be specific performance of a contract if the representation at the time of completion be accurate, although at the time of sale the representation was not correct. When, accordingly, several cottages let to weekly tenants were put up for sale and described as "producing £73 a year," which was not correct at the time the particulars of sale were issued, but before the day fixed for completion the repairs were done and the rents were raised, so that on the day of completion the particulars were quite accurate, it was held there was not such a misrepresentation as to entitle the purchaser to resist specific performance (*l*). Indeed in an action for specific performance a vendor is not confined to showing such title as he had at the date of the decree, much less to such title as he had at the date of the contract, but may perfect his title at any time before certificate (*m*).

A representation of intention as to future acts upon faith in which the contract is made may be a ground for refusing specific performance; as where a vendor announced at the sale his intention of making improvements in the neighbourhood and approaches which would materially enhance the value of the property sold, the Court refused to give specific performance, unless he fulfilled the expectation held out to the purchaser (*n*). So, also, specific performance of an agree-

(*h*) *Scott* v. *Hanson*, 1 R. & M. 128; 27 R. R. 141; *Johnson* v. *Smart*, 2 Giff. 151; 128 R. R. 68; *ante*, pp. 51, 52.

(*i*) *Greenhalgh* v. *Brindley*, 1901, 2 Ch. 324; 70 L. J. Ch. 740.

(*k*) *Bascomb* v. *Beckwith*, 8 Eq. 100; 38 L. J. Ch. 536; Pollock (6th ed.), 523.

(*l*) *Goddard* v. *Jeffryes*, 51 L. J. Ch. 67.

(*m*) *Halkett* v. *Dudley*, 1907, 1 Ch. 590; 76 L. J. Ch. 330.

(*n*) *Beaumont* v. *Dukes*, Jac. 422; 23 R. R. 110; *Myers* v. *Watson*, 1 Sim. N. S. 523; 89 R. R. 173.

ment to take a lease was refused, although the lessee had taken possession and occupied for two years, on the ground that the lessor had not fulfilled promises made to improve the premises (*o*).

There cannot be specific performance if the price to be paid is uncertain (*p*), or if the description of the property is of so ambiguous a nature that it cannot with certainty be known what it was the purchaser imagined that he was contracting for (*q*). A vendor of property who makes statements respecting the property is bound to make them free from all ambiguity; and the purchaser is not bound to take upon himself the peril of ascertaining the true meaning of the statements (*r*). A definite representation upon a fact affecting the value of the subject of sale will entitle the purchaser, if the representation be untrue, to resist specific performance (*s*). It is the duty of every vendor to state all the circumstances connected with the property he is selling, and the incidents to which it is subject, in such a manner that they can be understood by a person of ordinary intelligence, and not merely in such a way that only a skilled lawyer would be able to ascertain the nature of the title under which he is purchasing (*t*). And he must not omit to mention what it is essential for the purchaser to know (*u*).

An agent empowered by a vendor to find a purchaser has authority to describe the property, and to state any fact or circumstance which may affect the value, so as to bind the vendor. If the agent makes a false statement as to the description or value (though not instructed so to do) which the purchaser is led to believe and upon which he relies, the vendor cannot have specific performance (*x*).

(*o*) *Lamare* v. *Dixon*, L. R. 6 H. L. 414; 43 L J. Ch. 203.

(*p*) *Douglas* v. *Baynes*, 1908, A. C. 477; 78 L. J. P. C. 13.

(*q*) *Stewart* v. *Alliston*, 1 Mer. 26; 15 R. R. 81; *Leyland* v. *Illingworth*, 2 D. F. & J. 253; 29 L. J. Ch. 611; 129 R. R. 88.

(*r*) *Drysdale* v. *Mace*, 5 D. M. & G. 107; 23 L. J. Ch. 518; 97 R. R. 184; *Swaisland* v. *Dearsley*, 29 Beav. 430; 30 L. J. Ch. 652; 131 R. R. 656.

(*s*) *Brooke* v. *Rounthwaite*, 5 Ha. 304; 15 L. J. Ch. 332; 71 R. R. 115.

(*t*) *Sheard* v. *Venables*, 36 L. J. Ch. 922.

(*u*) *Brewer* v. *Brown*, 28 C. D. 309; 54 L. J. Ch. 605.

(*x*) *Mullens* v. *Miller*, 22 C. D. 194; 52 L. J. Ch. 380.

Mere silence as regards a material fact which the one party is not bound to disclose to the other is not a ground for rescission or a defence to specific performance (*y*). But where there are unusual covenants in a lease, and the seller is silent as to their existence, he will not be able to enforce specific performance against a purchaser buying in ignorance of the covenants (*z*).

It was said by Jessel, M.R., that although, according to the decided cases, a vendor who contracts for the sale of leasehold property described as held under a lease cannot, if nothing further is said, make a good title, unless it is held under an original lease, yet in a case where the particulars and conditions of sale of property so described contain enough to give notice to a purchaser that the property was held under a derivative lease, the purchaser cannot on that account refuse to complete or claim compensation on the ground of misdescription (*a*). This ruling, however, has not been followed, and it seems now settled that a representation that property is held by lease when it is in fact held by underlease is a fatal mistake (*b*).

In sales by the Court, the Court ought to treat the purchaser more liberally than in the case of ordinary sales (*c*).

Specific performance with compensation.

A purchaser cannot, however, on the application for specific performance, take advantage of small circumstances of variation in the description of the thing contracted for (*d*). Although the description of the property, the subject-matter of the contract, may be inaccurate in some particulars, or may be different in some respects and in certain incidents from what it was represented to be, specific performance will be decreed if the property is not different in substance from what it was represented to be, and the misrepresentation has been made innocently or through mistake, and not wilfully, upon

(*y*) *Turner* v. *Green*, 1895, 2 Ch. 205; 64 L. J. Ch. 539; *Greenhalgh* v. *Brindley*, 1901, 2 Ch. 324; 70 L. J. Ch. 740; but see *Brewer* v. *Brown*, *supra*.

(*z*) *Reeve* v. *Berridge*, 20 Q. B. D. 523; 57 L. J. Q. B. 265.

(*a*) *Camberwell Building Society* v. *Holloway*, 13 C. D. 754; 49 L. J. Ch. 361.

(*b*) *Re Beyfus and Masters*, 39 C. D. 110.

(*c*) *Arnold* v. *Arnold*, 14 C. D. 279.

(*d*) *Stewart* v. *Alliston*, 1 Mer. 26; 15 R. R. 81.

the terms of the vendor making good his representation or allowing or giving compensation (*e*). If, for instance, the property be subject to incumbrances concealed from the purchaser, the seller may have specific performance on making good his assertion and redeeming those charges. So, also, if the property is subject to a small rent not stated, or the rental is somewhat less than it was represented to be (*f*), or if the property is smaller than it was represented to be (*g*), or if the vendor not having the minerals under a house sells the house without excepting the minerals (*h*), or if the property is not in the state and condition in which it was represented to be (*i*), there may be specific performance on the terms of the vendor allowing a sufficient deduction or abatement from the purchase-money (*k*). The principle on which the Court proceeds in such cases is, that if the purchaser gets substantially that for which he has contracted, a slight variation or deficiency will not entitle him to recede from his contract when compensation can be made in money for the difference (*l*). The right to specific performance with compensation however only applies where there is deficiency in the subject-matter described in the contract. It does not apply to a claim based upon a representation made not in the contract, but collaterally to it. In the latter case the remedy is rescission or a claim for damages for deceit where there is fraud or for breach of a collateral contract if there has been such a contract (*m*).

A purchaser cannot, however, be compelled, upon the principle of compensation, to take something substantially or

(*e*) *Pulsford* v. *Richards*, 17 Beav. 87, 96; 22 L. J. Ch. 559; 99 R. R. 48; *Price* v. *Macaulay*, 2 D. M. & G. 344.

(*f*) *Pulsford* v. *Richards*, *supra*; *Hughes* v. *Jones*, 3 D. F. & J. 307; 31 L. J. Ch. 83; 130 R. R. 145.

(*g*) *Portman* v. *Mill*, 2 Russ. 570; 26 R. R. 175; *King* v. *Wilson*, 6 Beav. 124; 60 R. R. 32; *Ayles* v. *Cox*, 16 Beav. 23; 96 R. R. 13; *Arnold* v. *Arnold*, 14 C. D. 279.

(*h*) *Jackson and Haden*, 1906, 1 Ch. 412; 75 L. J. Ch. 226.

(*i*) *Dyer* v. *Hargrave*, 10 Ves. 508; 8 R. R. 36; *Grant* v. *Munt*, Coop. 173; 14 R. R. 231; *Scott* v. *Hanson*, 1 R. & M. 131; 27 R. R. 141.

(*k*) Dart, V. & P. 1187.

(*l*) *Howland* v. *Norris*, 1 Cox, 61; *Dyer* v. *Hargrave*, *supra*.

(*m*) *Rutherford* v. *Acton Adams*, 1915, A. C. 866; 84 L. J. P. C. 238; see *Schmidt* v. *Greenwood*, 32 N. Z. L. R. 241.

materially different from that for which he contracted (*n*), or to take property which defeats his object in buying if the vendor knew of that object (*o*). There can be no specific performance if the description be inaccurate, and the Court feels that it cannot measure the difference between that which was promised and the actual fact, so as to found a proper basis for compensation (*p*). If, for example, a man has contracted for the purchase of a freehold, he will not be compelled to take a leasehold (though held for a very long term) (*q*) unless held for a long term without payment of rent (*r*), or a copyhold (*s*); nor can a man who has contracted for a copyhold be compelled to take a freehold (*t*); nor will a man be compelled to take property held in a different manner from that which is expressed or implied in the contract, as in the assignment of an underlease instead of an original lease (*u*), or of a redeemable instead of an absolute interest (*x*), or of an improved instead of a ground rent (*y*). Nor can a man who has contracted for an estate in possession be compelled to take a reversion expectant on a life estate (*z*). Nor where the vendor has contracted to show a marketable title, will the purchaser be forced to complete, if the lease is subject to restrictive covenants (*a*). Nor will the Court, even at the instance of the purchaser under an open contract, decree specific performance with compensation for restrictive covenants (*b*). Nor will a man, who has been led by the repre-

(*n*) *Drewe* v. *Corp*, 9 Ves. 368; *Flight* v. *Booth*, 1 Bing. N. C. 377; 41 R. R. 599; *Arnold* v. *Arnold*, 14 C. D. 279; *Puckett and Smith*, 1902, 2 Ch. 258; 71 L. J. Ch. 666.

(*o*) *Puckett* v. *Smith*, *supra*, *ante*, p. 80.

(*p*) *Brooke* v. *Rounthwaite*, 5 Ha. 298; 15 L. J. Ch. 332; 71 R. R. 115; *Cox* v *Coventon*, 31 Beav. 388; 135 R. R. 474.

(*q*) *Drewe* v. *Corp*, 9 Ves. 668.

(*r*) *Blaiberg* v. *Keeves*, 1906, 2 Ch. 175; 75 L. J. Ch. 464.

(*s*) *Bellamy* v. *Debenham*, 1891, 1 Ch. 41; 60 L. J. Ch. 166.

(*t*) *Ayles* v. *Cox*, 16 Beav. 23; 96 R. R. 13.

(*u*) *Re Beyfus and Masters*, 39 C. D. 110; *ante*, p. 441.

(*x*) Sug. V. & P. 299; Dart, V. & P. 131.

(*y*) *Stewart* v. *Alliston*, 1 Mer. 26; 15 R. R. 81.

(*z*) *Collier* v. *Jenkins*, You. 298; 34 R. R. 268.

(*a*) *Cato* v. *Thompson*, 9 Q. B. D. 618; *Haedicke and Lipski*, 1901, 2 Ch. 666; 70 L. J. Ch. 811.

(*b*) *Rudd* v. *Lascelles*, 1900, 1 Ch. 815; 69 L. J. Ch. 396.

sentations of the vendor to believe that the property, the subject of the sale, was in the possession of a tenant of the vendor, be compelled to take a mere right of entry (*c*). Nor can a man be compelled to take an estate where liabilities exist which would materially affect its enjoyment (*d*), or where a part of the property to which a title cannot be made, though small in quantity, is important for the enjoyment of the whole (*e*). The Court will not compel a man to take compensation for that which can hardly be estimated by pecuniary value (*f*). And where there is extreme difficulty in assessing the compensation, that will influence the Court in refusing such relief (*g*).

When upon the sale of land, represented to consist of a certain specified number of acres, there proves to be a deficiency in quantity, such deficiency is properly the subject for compensation if the deficiency be not too great. If the difference be great, there is no case for compensation. The party prejudiced by the error may, if he pleases, avoid the contract; but he cannot have specific performance unless he is willing to perform the contract without compensation (*h*). But his case must be treated as an exception to the general rule (*i*).

Conditions of sale providing for compensation in cases of error or mistake apply only to innocent errors or accidental slips, and not to cases where the subject-matter of the contract is materially different in substance from what it was represented to be (*k*), nor to cases where the error amounts to a misrepresentation in law. The function of such conditions is

(*c*) *Lachlan* v. *Reynolds*, Kay, 54; 101 R. R. 523.

(*d*) *Hope* v. *Walter*, 1900, 1 Ch. 257; 69 L. J. Ch. 166.

(*e*) *Arnold* v. *Arnold*, 14 C. D. 279; cf. *Jackson and Haden*, 1906, 1 Ch. 412; 75 L. J. Ch. 226.

(*f*) *Dyer* v. *Hargrave*, 10 Ves. 507; 8 R. R. 36; *Cato* v. *Thompson*, 9 Q. B. D. 618; *Brewer* v. *Brown*, 28 C. D. 309; 54 L. J. Ch. 605.

(*g*) *Rudd* v. *Lascelles*, 1900, 1 Ch. 815; 69 L. J. Ch. 396.

(*h*) *Durham* v. *Legard*, 34 Beav. 612; 34 L. J. Ch. 589; 145 R. R. 698; *ante*, p. 117.

(*i*) *Connor* v. *Potts*, 1897, 1 Ir. R. 534.

(*k*) *Madeley* v. *Booth*, 2 De G. & S. 722; 79 R. R. 343; *Ayles* v. *Cox*, 16 Beav. 23; 96 R. R. 13; *Dimmock* v. *Hallett*, 2 Ch. 29; 36 L. J. Ch. 146; *Brewer* v. *Brown*, *supra*; *Lee* v. *Rayson*, *ante*, p. 120.

to prevent such errors from either vitiating the contract altogether, or causing loss to the purchaser by holding him bound by a contract which through accident or inaccuracy it is not possible for the vendor literally to perform (*l*). A condition providing that an error in the description of the property shall not annul the sale applies only to an error in the description of the physical property, and not to a mistake in the description of the title (*m*). Such a condition does not apply to a defect in title (*n*).

Condition giving vendor right to rescind.

A condition giving a vendor the right to rescind if unwilling to comply with an objection to the title does not give him an arbitrary power to annul the contract; some reasonable ground must be shown. He must satisfy the Court that he entered into the contract in ignorance of some material fact or document or under some mistaken notion that he could make a title; there must be no failure of duty and he must have omitted nothing which a prudent man is bound to do. In every case where a vendor has been allowed to avail himself of the stipulation there was always absent that element of shortcoming on his part which, though falling short of fraud or dishonesty, might be described as recklessness (*o*). And where a vendor is entitled to rescind he may rescind after action brought by the purchaser, although the condition does not contain the words "notwithstanding any intermediate litigation" (*p*).

Specific performance not ordered on ground of false representations as to value, &c.

A false representation as to the value of property may be enough to induce the Court to withhold specific performance (*q*).

If a vendor affirm that the estate was valued by persons of competent judgment at a greater price than it was worth, and the purchaser acts on that representation (*r*), or if he falsely affirms that the estate had not been already in the market at a much lower price, and the purchaser acts on the representa-

(*l*) *Phelps* v. *White*, 7 L. R. I. 160.

(*m*) *Re Beyfus and Masters*, 39 C. D. 110; cf. *Re Hare and O'More*, 70 L. J. Ch. 45.

(*n*) *Debenham* v. *Sawbridge*, 1901, 2 Ch. 98; 70 L. J. Ch. 325.

(*o*) *Jackson and Haden*, 1906, 1 Ch. 412, 422; 75 L. J. Ch. 226.

(*p*) *Isaacs* v. *Towell*, 1898, 2 Ch. 285; 67 L. J. Ch. 508.

(*q*) *Shirley* v. *Stratton*, 1 Bro. C. C. 440; *Wall* v. *Stubbs*, 1 Madd. 81; 15 R. R. 210.

(*r*) Sug. V. & P. 2.

tion and agrees to give him what he demands (*s*), the vendor cannot have specific performance.

In *Mullens* v. *Miller* (*t*), when an agent commissioned by a vendor to sell property made a false statement as to its value (though not instructed so to do) which the purchaser was led to believe and on which he relied, it was held that the vendor could not have specific performance.

Mere inadequacy of consideration is not a ground for resisting specific performance, unless the inadequacy is such as shocks the conscience and amounts in itself to sufficient evidence of fraud (*u*). The weight of authority seems to be in favour of this view, though the authorities are very conflicting (*x*).

It is no defence to an action for specific performance by the vendor that during the treaty he falsely assumed the character of agent for another, when in fact he was dealing on his own behalf, and that he thereby deceived the purchaser as to the party with whom he was dealing, provided the purchaser does not show that the deception induced him to enter into the contract, or occasioned any loss or inconvenience to him otherwise (*y*).

Specific performance with a variation proved by parol evidence.

Though a written agreement, if there be no fraud or mistake, binds according to its terms, although verbally a provision was agreed on which has not been inserted in the document, either of the parties, if sued in equity for a specific performance of the agreement, is entitled to ask the Court to remain neutral, unless the party suing him will consent to the performance of the omitted term (*z*). As, for instance, when the vendor refused to perform his agent's engagement that improvements should be executed on the adjoining property (*a*);

(*s*) *Roots* v. *Snelling*, 48 L. T. 216.

(*t*) 22 C. D. 194; 52 L. J. Ch. 380.

(*u*) *Abbott* v. *Sworder*, 4 De G. & S. 456; 22 L. J. Ch. 235; 87 R. R. 439; *Borell* v. *Dann*, 2 Ha. 440; *Haywood* v. *Cope*, 25 Beav. 140; 27 L. J. Ch. 468; 119 R. R. 360; but see *Falcke* v. *Gray*, 4 Drew. 659; 29 L. J. Ch. 28; 113 R. R. 493.

(*x*) Pollock on Contracts, 620; Fry, p. 195.

(*y*) *Fellowes* v. *Lord Gwydyr*, 1 R. & M. 83; 32 R. R. 148; but see Pollock on Contracts, 107; *ante*, p. 101.

(*z*) *Winch* v. *Winchester*, 1 V. & B. 378; 12 R. R. 238; *Martin* v. *Pycroft*, 2 D. M. & G. 785, 795; 22 L. J. Ch. 94; 95 R. R. 324; *post*, pp. 526, 527.

(*a*) *Myers* v. *Watson*, 1 Sim. N. S. 523, 529; 89 R. R. 173.

or when the lessor of a house verbally promised the lessee before he executed the lease to put the house into complete repair (*b*). But if the vendor offer to perform the agreement with, if the defendant so desire, the parol variation or addition, this is sufficient, and the defendant cannot set up the want of a perfect written contract (*c*). Specific performance will not, however, be decreed with the parol agreement superinduced upon it, unless the party praying for the specific performance has conducted himself with perfect good faith (*d*). Parol evidence is admissible when there is a case for specific performance with compensation, but an express bargain to make a good title cannot be modified by parol evidence (*e*).

Specific performance at suit of purchaser with compensation.

As on the one hand a Court of equity will not, at the suit of a vendor of property, enforce specific performance of a contract for the sale thereof, if the property is different in some material particulars from what it was represented to be, unless upon the terms of his allowing compensation, so, on the other hand, specific performance of a contract for the sale of property which has been inaccurately described through innocent mistake, will not be enforced at the suit of the purchaser, unless upon the terms of his submitting to allow compensation to the vendor (*f*).

But specific performance with compensation will not be decreed at the instance of a purchaser, where owing to a mistake on the part of the vendor injustice would be done to him by a judgment for that purpose (*g*).

No specific performance of an agreement in fraud of the public.

There can be no specific performance of an agreement, the subject-matter and contents of which amount to a fraud on the public (*h*).

(*b*) *Chappell* v. *Gregory*, 34 Beav. 250.

(*c*) *Martin* v. *Pycroft*, 2 D. M. & G. 785; *supra*.

(*d*) *Walters* v. *Morgan*, 3 D. F. & J. 725; 130 R. R. 309.

(*e*) *Cato* v. *Thompson*, 9 Q. B. D. 619; *May* v. *Platt*, 1900, 1 Ch. 616; 69 L. J. Ch. 357.

(*f*) *Leslie* v. *Thompson*, 9 Ha. 268; 20 L. J. Ch. 561; 89 R. R. 439; *Painter* v. *Newby*, 11 Ha. 30; 22 L. J. Ch. 871; 90 R. R. 552.

(*g*) *Hare and O'More*, 1901, 1 Ch. 93; 70 L. J. Ch. 45.

(*h*) *Post* v. *Marsh*, 16 C. D. 395; 50 L. J. Ch. 287.

CHAPTER VIII.

PLEADING.

In actions brought for the purpose of impeaching transactions on the ground of fraud, it is essential that the nature of the case should be distinctly and accurately stated. The facts must be so stated as to show distinctly that fraud is charged (*a*). Any charge of fraud or misrepresentation must be pleaded with the utmost particularity (*b*); it will not be inferred from the circumstances pleaded, at all events if those circumstances be consistent with innocence (*c*). A general charge of fraud, however strong, without alleging specific facts, is not sufficient to sustain the action. It must be shown in what the fraud consists, and how it has been effected. The fraud alleged must be set forth specifically in particular and in detail, so that the person against whom it is charged may have the opportunity of knowing what he has to meet, and of shaping his defence accordingly (*d*). A charge of fraud must be proved as laid, and where one kind of fraud has been charged another kind of fraud cannot be substituted for it (*e*). Where, accordingly, on appeal, charges of fraud failed, the appellant was not allowed to contend, for the first time, that the pleading and evidence disclosed a case of negligence (*f*).

(*a*) *Davy* v. *Garrett*, 7 C. D. 489, *per* Thesiger, L. J.; 47 L. J. Ch. 218.

(*b*) *Redgrave* v. *Hurd*, 20 C. D. p. 6; 51 L. J. Ch. 113; and see *Clydesdale Bank* v. *Paton*, 1896, A. C. 381; 65 L. J. P. C. 73.

(*c*) *Ibid.*; *Bullivant* v. *Att.-Gen. for Victoria*, 1901, A. C. 196; 70 L. J. P. C. 645.

(*d*) *Wallingford* v. *Mutual Society*, 5 App. Ca. pp. 697, 701, 709; 50 L. J. Q. B. 49; *Lawrence* v. *Norreys*, 15 App. Ca. p. 221; 59 L. J. Ch. 681; *Willis* v. *Lord Howe*, 1893, 2 Ch. 545; 62 L. J. Ch. 690.

(*e*) *Abdool Hoosein Abadin* v. *Turner*, 14 Ind. App. 111.

(*f*) *Connecticut Ins. Co.* v. *Kavanagh*, 1892, A. C. 473; 61 L. J. P. C. 50; but see *post*, 457.

Fraud is a conclusion of law; and it is wholly immaterial and insufficient to allege that an instrument has been obtained by fraud, unless the things done constituting the fraud are stated on the face of the statement of claim (*g*). But although particulars of fraud must be specially pleaded, otherwise evidence in proof of them will not be admissible (*h*), yet where the party is unable to plead except in general terms, he may be entitled to discovery before giving particulars so as to enable him to plead in detail (*i*), and in such a case the defendant's application for particulars may be ordered to stand over until the defence has been put in (*j*).

In civil proceedings it is in general sufficient to allege the misrepresentation relied on, and the facts and circumstances that render it fraudulent, without specifically alleging a fraudulent intent, which is a legal inference from the facts. If the facts create a fraud it is not necessary to allege the fraudulent intention, nor will the word "fraud" create a fraud if the facts themselves do not establish it (*k*). The statement of claim should state whether the alleged representations were oral or in writing, and when and where each of them was made (*l*); but the motive in making them is immaterial and need not be stated (*m*). The acts alleged to be fraudulent must be set out, and then it should be stated that these acts were done fraudulently; but from these acts fraudulent intent may be inferred (*n*).

Where a plaintiff alleged that certain entries in certain books were false, he was ordered to give particulars of such entries; and after having given them, he was ordered, on an application for further particulars, to state in a general way

(*g*) *Gilbert* v. *Lewis*, 1 D. J. & S. 38, 49, *per* Lord Westbury; 32 L. J. Ch. 347; 137 R. R. 138.

(*h*) *Symonds* v. *City Bank*, 34 W. R. 364; *Re Rica Gold Washing, Co.*, 11 C. D. 36.

(*i*) *Leitch* v. *Abbott*, 31 C. D. 374; 55 L. J. Ch. 460.

(*j*) *Sachs* v. *Spielman*, 37 C. D. 295; 57 L. J. Ch. 658.

(*k*) *Thom* v. *Bigland*, 8 Exch. 725, *per* Lord Wensleydale; 22 L. J. Ex. 243; 91 R. R. 730; *Davy* v. *Garrett*, 7 C. D. 489; *Johnson* v. *Barnes*, 1883, W. N. 32.

(*l*) *Seligmann* v. *Young*, 1884, W. N. 93.

(*m*) *Herring* v. *Bischoffsheim*, 1876, W. N. 77.

(*n*) *Ibid.*; *Johnson* v. *Barnes*, 1883, W. N. 32.

the nature of the falsehood or fraud alleged against each item (*o*).

If the facts alleged do not necessarily amount to a fraud, but only *may* amount to fraud, there should be an averment of fraud (*p*). If the acts are innocent in themselves it is not to be presumed that they were done with a fraudulent intention. So an allegation of an intent to evade a statute is not a specific allegation of fraud (*q*).

It is not necessary to aver and prove fraud in order to obtain protection for a trade mark (*r*).

Nor is it necessary to aver and prove fraud in a passing off case or that any person has been deceived (*s*).

If the transaction sought to be impeached be between solicitor and client or principal and agent, the statement of claim should allege that the defendant was the solicitor or agent at the time of the transaction, if such be the ground on which relief is sought. If the case is not so stated in the pleadings, evidence to prove it cannot be admitted (*t*).

If a party seeks rescission of a contract, it is not necessary that there should be a declaration of his intention to rescind before plea (*u*), nor need he aver that he can restore the property, this being presumed as a usual if not a necessary consequence when he applies to have the contract rescinded and everything placed *in statu quo*.

If a statement of claim charges notice, it is sufficient to allege such notice as a fact, without averring facts as evidence of the charge (*x*). It is not, however, necessary to charge notice in a statement of claim to which a plea for valuable

(*o*) *Newport, &c., Co.* v. *Paynter*, 34 C. D. 38; 56 L. J. Ch. 1021; *Harbord* v. *Monk*, 38 L. T. 411.

(*p*) *Davy* v. *Garrett*, 7 C. D. p. 489, *per* Thesiger, L. J.; 47 L. J. Ch. 218; *Salomon* v. *S.*, 1897, A. C. p. 35; 65 L. J. Ch. 35; *Betjemann* v. *B.*, 1895, 2 Ch. 474; 64 L. J. Ch. 641.

(*q*) *Bullivant* v. *Att.-Gen. for Victoria*, 1901, A. C. 196; 70 L. J. P. C. 645.

(*r*) *Singer Machine Manufacturing Co.* v. *Wilson*, 3 App. Ca. 391, 396; 47 L. J. Ch. 481; *ante*, p 435.

(*s*) *Bourne* v. *Swan & Edgar*, 1903, 1 Ch. 211; 72 L. J. Ch. 168.

(*t*) *Williams* v. *Llewellyn*, 2 Y. & J. 68. See *Montesquieu* v. *Sandys*, 18 Ves. 301; 11 R. R. 197.

(*u*) *Clough* v. *L. & N. W. Rly. Co.*, L. R. 7 Ex. p. 35; 41 L. J. Ex. 17.

(*x*) Ord. XIX. r. 23.

consideration without notice might be pleaded (*y*). An allegation that the defendant was aware, and had notice of, &c., is sufficiently specific to let in evidence that he had notice through his solicitor (*z*). But the doctrine of imputed notice cannot be applied in support of a direct personal charge of fraud against the client (*a*).

When a party seeks to avoid the Statute of Limitations on the ground of fraud, the statement of claim should set forth specifically by distinct averments the particular acts which constitute the fraud, as well as the time when it was discovered, in order to enable the defendant to meet the fraud and the alleged time of its discovery, so that the Court may see whether by the exercise of ordinary diligence the discovery might not have been made before (*b*).

The rule that the Court will only grant such relief as the plaintiff is entitled to upon the case made by his pleadings is strictly enforced where the plaintiff relies upon fraud (*c*), and where his case rests solely on the ground of fraud, he cannot pick out from the allegations in his pleadings facts which might, if not put forward as proofs of fraud, have warranted the Court in granting relief (*d*). But if other matters be alleged which give the Court jurisdiction, the Court may give so much relief as under the circumstances the plaintiff may be entitled to (*e*). The plaintiff may claim that certain transactions may be deemed fraudulent, and also alternative relief upon the supposition of such transactions not being set aside for fraud (*f*).

Where on the trial of an action the plaintiff's case discloses that the transaction which is the basis of the claim is illegal,

(*y*) *Hughes* v. *Garner*, 2 Y. & J. 328.

(*z*) *M'Mahon* v. *M'Elroy*, I. R. 5 Eq. 1.

(*a*) *Wilde* v. *Gibson*, 1 H. L. C. 605; 73 R. R. 191; *Re Tetley*, 3 Manson, 321.

(*b*) See *Gibbs* v. *Guild*, 9 Q. B. D. 59; 51 L. J. Q. B. 313; *infra*, p. 455.

(*c*) *Wilde* v. *Gibson*, 1 H. L. C. 605; 73 R. R. 191.

(*d*) *Hickson* v. *Lombard*, L. R. 1 H. L. 324; *post*, p. 457.

(*e*) *Harrison* v. *Guest*, 6 D. M. & G. 424, 438; 25 L. J. Ch. 544; 106 R. R. 129; *Hilliard* v. *Eiffe*, L. R. 7 H. L. 39; *Nocton* v. *Ashburton*, *post*, p. 457; but see *ante*, p. 448, n. (*f*).

(*f*) *Bowen* v. *Evans*, 2 H. L. C. 280; 81 R. R. 136.

the Court cannot ignore the illegality and give effect to the claim, even though the defendant has not pleaded the illegality (*g*).

A trustee in bankruptcy cannot at the hearing insist on a case of fraudulent preference, unless he has raised it in the pleadings (*h*).

When the same person has been induced to part with his property at an undervalue at two different times, through the misrepresentations of two different agents of the same principal, one action may be brought to set aside both transactions, although in themselves wholly distinct, and the same cannot be objected to for multifariousness (*i*).

A shareholder who seeks to be relieved from his shares on the ground of misrepresentation in the prospectus of the company, must allege the misrepresentation on which he relies, and must allege that it was made to the plaintiff with the view of inducing him to act thereon, and that he acted in reliance upon such representation. It is not, however, for the plaintiff to explain with exact precision what was the mental process by which he was induced to act (*k*), nor to prove that if the misrepresentation had not been made he would not have taken the shares (*l*). But in an action under section 38 of the Companies Act, 1867, for non-disclosure of a contract in a prospectus, the plaintiff must prove that if he had known of the contract, he would not have taken the shares and that he has suffered damages by the non-disclosure (*m*). Where, however, a shareholder claims to be relieved of his shares on the ground of non-disclosure of a fact it is not enough for him to say that if he had known the fact he would not have applied for shares; he must put his finger on the statements which he relies upon as being inconsistent with the fact not disclosed (*n*).

(*g*) *Gedge* v. *Royal Exchange Ass.* 1900, 2 Q. B. 214; 69 L. J. Q. B. 506.
(*h*) *Holderness* v. *Rankin*, 2 D. F. & J. 258; 29 L. J. Ch. 753; 129 R. R. 94.
(*i*) *Walsham* v. *Stainton*, 1 D. J. & S. 678; 137 R. R. 342.
(*k*) *Aarons Reefs* v. *Twiss*, 1896, A. C. 273, 280; 65 L. J. P. C. 54.
(*l*) *Carling* v. *London and Leeds Bank*, 56 L. J. Ch. 321; *Smith* v. *Chadwick*, 20 C. D. p. 44; *Arnison* v. *Smith*, 41 C. D. p. 369.
(*m*) *Macleay* v. *Tait*, 1906, A. C. 24; 75 L. J. Ch. 90.
(*n*) *Re Christineville Rubber Estates*, 81 L. J. Ch. 63.

If a case of fraud is alleged in respect of the formation of a company, it must be set up by an action, and not by proceedings under the winding-up order (*o*).

To support an action of deceit there must be the assertion of that which the party making it knew to be false. The *scienter* must be either expressly alleged, or there must be an allegation that is tantamount to the *scienter* of the fraudulent representation (*p*). In actions of deceit the plaintiff should aver that the representation of the defendant was false to his knowledge, that it was made under circumstances on which the plaintiff might reasonably rely, that the plaintiff acted in consequence of the defendant's false representation, and has suffered actual loss thereby (*q*). In actions of deceit, whether against a person or a company, the fraud of the agent may be treated, for the purpose of pleading, as that of the principal who is sought to be made answerable in the action (*r*).

Where the consideration has been obtained by means of a contract, although induced by fraud, the plaintiff cannot assert any other contract than that in fact made. If he treats the transaction as a contract, he must take the contract altogether and be bound by the specified terms. He cannot avail himself of defendant's fraud so as to rescind the contract and substitute a new contract on different terms. But he may, if he disaffirm the contract, recover his property, or damages for the fraud as a substantive wrong (*s*). When, for example, a man has sold goods on credit, although he has been defrauded into selling them, he cannot by reason of the fraud sue for the price before the credit has expired, but he may treat the sale as a nullity and claim a return of the goods. By suing for the price he affirms the contract. If he

(*o*) *Leifchild's Case*, 1 Eq. 231, *ante*, p. 337.

(*p*) *Wilde* v. *Gibson*, 1 H. L. C. p. 633; 73 R. R. 191; *Angus* v. *Clifford*, 1891, 2 Ch. 449; 60 L. J. Ch. 443.

(*q*) *Hyde* v. *Bulmer*, 18 L. T. 293.

(*r*) *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 265; 36 L. J. Ex. 147; *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; 43 L. J. P. C. 31.

(*s*) *Ferguson* v. *Carrington*, 9 B. & C. 59; 7 L. J. K. B. 139; *Strutt* v. *Smith*, 1 Cr. M. & R. 312; 3 L. J. Ex. 357.

treats the contract as a fraud he should claim a return of the goods (*t*). If a contract is altogether rescinded there is no sale. The defrauding party is not a purchaser, but a person who has tortiously got possession of goods (*u*). A plaintiff who comes to the Court with the contract as an existing contract cannot have the relief to which he would be entitled if the contract had been rescinded. He cannot recover the money, which, if the contract stands, is not repayable (*x*).

Defence.

The defence of fraud must be specially pleaded (*y*), and where the party pleading relies upon any misrepresentation, fraud or undue influence, particulars must be stated in the pleading (*z*). A plea to an action on a contract by a defendant that he had been induced to enter into the contract by the fraudulent representations of the plaintiff should aver that he had repudiated the contract by giving up the benefit under it (*a*).

Under the rules of pleading, the plea of fraud imports an allegation that the defendant on discovering the fraud disaffirms the contract. But if the evidence shows or the jury find that the defendant has not disaffirmed the contract, the plea is bad, for only part of it is proved (*b*). In an action to enforce a contract in which the defendant sets up a plea that he was induced by fraud to enter into the contract, it is not necessary for the defendant expressly to repudiate the contract. In order to rebut the plea, it is for the plaintiff to show that the defendant adhered to the contract notwithstanding the discovery of the fraud (*c*).

Where a plaintiff who was assignee of the unpaid balance of the purchase money of a newspaper sold to the defendants the sale of which had been induced by the fraud of the vendor

(*t*) *Ibid.*

(*u*) *Selway* v. *Fogg*, 5 M. & W. 86; 8 L. J. Ex. 199; 52 R. R. 650.

(*x*) *Cargill* v. *Bower*, 10 C. D. 517; 47 L. J. Ch. 649; *Goldrei & Co.* v. *Sinclair*, 1918, 1 K. B. 180; 87 L. J. K. B. 261.

(*y*) *Ord.* XIX. r. 15.

(*z*) Ord. XIX. r. 6.

(*a*) *Bwlch-y-Plwm Lead Mining Co.* v. *Baynes*, L. R. 2 Ex. 324; 36 L. J. Ex 183.

(*b*) *Dawes* v. *Harness*, L. R. 10 C. P. 166; 44 L. J. C. P. 194.

(*c*) *Aarons Reefs* v. *Twiss*, 1896, A. C. 273; 65 L. J. P. C. 54.

by which the defendants had sustained damage equal to the sum sued for, it was held that the defendants could not set up a claim for damages for the fraud of the vendor by way of defence against the plaintiff's claim (*d*).

A plea that a general reference to contracts is notice of their contents is no answer to a charge of fraudulent misrepresentation (*e*).

A defendant to an action on a contract, if he seeks for damages on the ground of fraud, must, in his counterclaim, plead knowledge on the part of the plaintiff that the allegations made by him were untrue (*f*).

Plea of acquiescence.

Where a defendant to an action relies upon the acquiescence of the plaintiff, he must aver that the plaintiff knew that the defendant was acting in reliance on the acquiescence of the plaintiff, or that the acts relied on were such as to induce a reasonable man to believe that the plaintiff had acquiesced (*g*).

Plea of Statute of Limitations.

The Statute of Limitations must now always be raised by an express plea, except in actions for the recovery of land, in which a defendant in possession is allowed to plead generally that he is in possession and may yet rely on the statute (*h*).

On the other hand, where the pleader seeks to avoid the Statute of Limitations by pleading concealed fraud, he must state his case with the utmost particularity, or the pleading may be struck out (*i*). In such a case the plaintiff should state in his reply that he did not discover and had not reasonable means of discovering the fraud within six years, and that the existence of such fraud was fraudulently concealed by the defendants (*k*).

(*d*) *Stoddart* v. *Union Trust*, 1912, 1 K. B. 181; 81 L. J. K. B. 140.

(*e*) *Aarons Reefs* v. *Twiss*, *supra*, at p. 287. See 1907, A. C. 351.

(*f*) *Redgrave* v. *Hurd*, 20 C. D. 1; 51 L. J. Ch. 113.

(*g*) *Smith* v. *Hayes*, I. R. 1 C. L. 333.

(*h*) Ord. XIX. r. 15; *Lindsey Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221; *Dawkins* v. *Penrhyn*, 4 App. Ca. 51; 48 L. J. Ch. 304.

(*i*) *Lawrance* v. *Norreys*, 15 App. Ca. 210; 59 L. J. Ch. 681; *Bulli Coal Mining Co.* v. *Osborne*, 1899, A. C. 351; 68 L. J. P. 49; *Re McCallum*, 1901, 1 Ch. 143; 70 L. J. Ch. 206.

(*k*) *Gibbs* v. *Guild*, 9 Q. B. D. 59; 51 L. J. Q. B. 313; but see *ante*, p. 16.

Pleading purchase for value without notice.

The defence of purchase for value without notice must be specifically alleged and proved by those who rely on it (*l*); but if it is a just inference from the facts alleged, that, it seems, will be sufficient (*m*).

Where a party relies upon the plea, he must, in his plea, aver expressly that the person who conveyed was seised, or pretended to be seised, when he executed the conveyance, and that he was in possession, if the conveyance purported an immediate transfer of the possession at the time when he executed the deed (*n*). It must aver the consideration, and actual payment of it. A consideration secured to be paid is not sufficient (*o*). The plea must also deny notice of the plaintiff's title or claim previous to the execution of the deeds and payment of the consideration (*p*); and the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title (*q*).

There seems to be no case where replication of purchase for value without notice has been held a good answer to a plea of fraud (*r*), and *quære* whether a vendor who is estopped from denying his conveyance can successfully plead that it was obtained by the fraud of a third party (*s*).

The defence of the Statute of Frauds must always be distinctly raised on the pleadings (*t*). The defendant need not specify upon which section he relies, but if he does, he cannot alter it by amendment (*u*). The statute cannot be

(*l*) *Att.-Gen.* v. *Biphosphated Guano Co.*, 11 C. D. 327; 49 L. J. Ch. 68; *Re Nisbet and Potts*, 1905, 1 Ch. 391; 75 L. J. Ch. 238.

(*m*) *Taylor* v. *Blakelock*, 32 C. D. p. 564; 56 L. J. Ch. 390.

(*n*) *Jackson* v. *Rowe*, 4 Russ. 514; 4 L. J. Ch. 119; 25 R. R. 250. See as to case where purchase is of a reversion, *Hughes* v. *Garth*, Amhl. 421.

(*o*) *Hardingham* v. *Nicholls*, 3 Atk. 304; *Molony* v. *Kernan*, 2 Dr. & War. 31; 59 R. R. 625.

(*p*) *Tourville* v. *Naish*, 3 P. Wms. 307.

(*q*) *Kelsall* v. *Bennett*, 1 Atk. 522.

(*r*) *Onward Building Society* v. *Smithson*, 1893, 1 Ch. 1, *per* Lindley, L.J., 62 L. J. Ch. 138.

(*s*) *Ibid.*

(*t*) Ord. XIX. r. 16; cf. r. 20.

(*u*) *James* v. *Smith*, 1891, 1 Ch. 384.

pleaded as a defence to an action for rectification of a marriage settlement (*x*).

Wilful default must be pleaded, though the rule is not now so strict as was the case before the Judicature Acts (*y*).

All estoppels must now be specially pleaded (*z*), unless there is no opportunity to plead them (*a*). There must be a precise and specific averment of a particular fact to create estoppel (*b*).

The statute 13 Eliz. c. 5 should be specially pleaded (*c*).

Amendment.

It is the universal practice, except in the most exceptional circumstances, not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance (*d*); but under special circumstances such an amendment has been allowed at the trial (*e*).

It would be wrong to allow a case based solely on serious charges of fraud to be turned into a comparatively harmless case based upon negligence (*f*). But if on striking out the allegations of fraud a cause of action still remains, the action may proceed (*g*).

(*x*) *Johnson* v. *Bragge*, 1901, 1 Ch. 28; 70 L. J. Ch. 41.
(*y*) *Re Barclay*, 1899, 1 Ch. p. 681; 68 L. J. Ch. 383.
(*z*) See Ord. XIX. r. 15.
(*a*) *Coppinger* v. *Norton*, 1902, 2 Ir. R. 241.
(*b*) *Onward Building Society* v. *Smithson*, 1893, 1 Ch. p. 11; 62 L. J. Ch. 138.
(*c*) *Tuck* v. *Southern Counties, &c.*, 42 C. D. 471.
(*d*) *Bentley* v. *Black*, 9 Times L. R. 580, *per* Esher, M.R.
(*e*) *Riding* v. *Hawkins*, 14 P. D. 56; 58 L. J. P. 48.
(*f*) *Nocton* v. *Ashburton*, 1914, A. C., at p. 963; 83 L. J. Ch., at 799.
(*g*) *Ibid.*

CHAPTER IX.

PARTIES.

Who may sue.

INASMUCH as the right to set aside or rescind a voidable transaction is alternative and co-extensive with the right of affirming it, it follows that a voidable contract may be avoided by or against the personal representatives of the contracting parties (*a*). And as, subject to the Land Transfer Act, 1897, a contract or settlement of land is enforceable by or against the heir or devisees of the parties, so it may be avoided by or against them where grounds of avoidance exist (*b*).

So, also, may a remainderman, under a settlement, bring an action to set aside a transaction, into which his predecessor in title, under the settlement, has been induced by fraud to enter (*c*). If fraud has been practised on a tenant in tail, and has been carried into effect by barring the entail, and he dies without issue, and without confirming the transaction, the next remainderman may bring an action to set it aside; but not, if there were an independent intention to bar the entail, and the fraud applies only to some part of the transaction, distinct from that object (*d*).

The right of action to recover the value of shares on the ground of misrepresentation in a prospectus is not capable of transmission on the plaintiff's death to his representatives (*e*). And if a party entitled to avoid a transaction has precluded himself by his own acts or acquiescence from disputing it in

(*a*) Including trustees in bankruptcy.

(*b*) *Bellamy* v. *Sabine*, 2 Ph. 425; 17 L. J. Ch. 105; 78 R. R. 132; *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714; 65 R. R. 305; *Gresley* v. *Mousley*, 4 D. & J. 78; 28 L. J. Ch. 620; *Clark* v. *Malpas*, 31 Beav. 88; 4 D. F. & J. 401; 135 R. R. 212; *Longmate* v. *Ledger*, 2 Giff. 157; 128 R. R. 72.

(*c*) *Brydges* v. *Branfill*, 12 Sim. 369; 11 L. J. Ch. 12; 56 R. R. 71.

(*d*) *Bellamy* v. *Sabine*, *supra*.

(*e*) *Peek* v. *Gurney*, *post*, 468.

his lifetime, his representatives cannot come forward to dispute it afterwards (*f*).

In an action for misrepresentation and therefore in an action under s. 84 of the Companies Act, 1908, a person ought not to sue on behalf of himself and the other members of the class to which he belongs, as his claim is purely personal (*g*). But a number of persons may join as plaintiffs in actions for misrepresentation although their claims are separate (*h*). Thus where several persons separately apply for debentures on the faith of a prospectus containing misrepresentations they may jointly sue the directors, as they have a claim for relief arising out of the same transaction (*i*). And there is no objection under the new practice to joining a claim against the company for rescission, and a claim against the directors for deceit or compensation under s. 84 (*k*).

The general rule is that the company itself should be plaintiff in an action against the promoters and directors of the company to set aside a contract of sale or purchase upon the ground that it was obtained by means of fraudulent representations in the prospectus and for the recovery and repayment of the purchase money (*l*), but where the acts complained of are acts which a majority of the shareholders cannot sanction so as to bind the minority, and it is impossible through the improper conduct of the directors to get the company to impeach these acts, a shareholder may bring an action on behalf of himself and all the other shareholders (*m*).

If the directors of a company have misrepresented the state of the company, the whole body of the shareholders cannot maintain an action to recover the money which they have lost

(*f*) *Skottowe* v. *Williams*, 3 D. F. & J. 535, 541; 130 R. R. 243.

(*g*) *Hallows* v. *Fernie*, 3 Ch. 471; 36 L. J. Ch. 267.

(*h*) R. S. C. Ord. XVI. r. 1; *Arnison* v. *Smith*, 41 C. D. 348.

(*i*) *Drincqbier* v. *Wood*, 1899, 1 Ch. 393; 68 L. J. Ch. 181.

(*k*) *Frankenberg* v. *Great Horseless Carriage Co.*, 1900, 1 Q. B. 504, 69 L. J. Q. B. 147.

(*l*) *Foss* v. *Harbottle*, 2 Ha. 461; 62 R. R. 185; *MacDougall* v. *Gardiner*, 1 C. D. 13; 45 L. J. Ch. 27; *Duckett* v. *Gover*, 6 C. D. 83; 46 L. J. Ch. 407.

(*m*) *Mason* v. *Harris*, 11 C. D. 108; 48 L. J. Ch. 589; *Spokes* v. *Grosvenor Hotel Co.*, 1897, 2 Q. B. 124; 66 L. J. Q. B. 572; *Alexander* v. *Automatic Telephone Co.*, 1900, 2 Ch. 56; 69 L. J. Ch. 428.

from the directors; nor can the shareholders as a body, though the directors by misrepresenting the state of the company have caused larger dividends to be paid than ought to have been paid, make the directors liable to repay the dividends (*n*); but the company can sue them for a breach of trust as in a winding-up (*o*).

The right to bring an action of deceit, or to have relief, on the ground of misrepresentation, is not confined to the person to whom the false representation has been made, but extends to third persons, provided it appear that the representation was made with the intent that it should be acted on by such third persons, or by the class of persons to whom they may be supposed to belong, in the manner that occasions the loss or injury (*p*). It is sufficient if the representation be made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made by advertisement to the public generally with a view to its being acted on, and the plaintiff as one of the public acts on it and suffers damage thereby (*q*). But if the misrepresentation does not itself cause damage to the third party but is merely incidental to some lawful act which does cause damage it is not actionable (*r*).

Where, accordingly, a representation was made to the plaintiff's father with a view to being acted on by the plaintiff, it was held that by acting on it the plaintiff had a right of redress (*s*). So, also, a party may make inquiry where such is the custom through his bankers (instead of personally) concerning the standing of a third person, and it is no objection to a claim for redress for a fraudulent answer given to the plaintiff's banker that the representation was not made

(*n*) *Turquand* v. *Marshall*, 4 Ch. 376; 38 L. J. Ch. 639.

(*o*) *Oxford Building Society*, 35 C. D. 502; 56 L. J. Ch. 98.

(*p*) *Barry* v. *Crosskey*, 2 J. & H. 1; *Peek* v. *Gurney*, L. R. 6 H. L. 412; 43 L. J. Ch. 19; and see *ante*, pp. 338, 339.

(*q*) *Swift* v. *Winterbotham*, L. R. 8 Q. B. 253; 43 L. J. Q. B. 56; *Richardson* v. *Sylvester*, L. R. 9 Q. B. 34; 43 L. J. Q. B. 1; *Hosegood* v. *Bull*, 36 L. T. 618; *Carlill* v. *Carbolic Smoke Ball Co.*, 1893, 1 Q. B. 256; 62 L. J. Q. B. 257; and see *ante*, p. 338.

(*r*) *Ajello* v. *Worsley*, 1898, 1 Ch. 274; 67 L. J. Ch. 172.

(*s*) *Langridge* v. *Levy*, 4 M. & W. 337.

to the plaintiff (*t*). So, also, where directors of a company put forth a prospectus containing false representations for the purpose of selling shares of the company, the false representations are deemed to have been made to all who read the prospectus and become purchasers of shares from the company in reliance upon the statements there made (*u*).

The right of an allottee of shares in a company, who has been induced to apply for them on the faith of fraudulent statements in the prospectus, to bring an action of deceit against the directors does not extend to a purchaser of shares in the market, though he may have purchased the shares upon the faith of statements contained in the prospectus. The prospectus is not addressed to purchasers; it is exhausted when the shares have been allotted. The responsibility of directors who issue a prospectus misrepresenting actual or material facts or concealing facts material to be known does not, as of course, follow the shares on their transfer from an allottee to a purchaser from him. In order that the purchaser should be enabled to maintain an action of deceit against the directors in respect of losses occasioned by his belief in the prospectus and his consequent purchase of shares, he must show some direct connection between them and himself in the communication of the prospectus and its influence upon his conduct in becoming a purchaser (*w*). There must be something to connect the directors making the representation with the purchaser as in *Scott* v. *Dixon* (*x*), by issuing and selling a report containing the misrepresentation complained of to a person who afterwards purchases shares upon the faith of it. Where, therefore, the object with which the prospectus is issued is not merely to induce applications for allotment but also to induce persons to whom it is sent to purchase shares in the market, its function is not exhausted on allotment, and the person issuing the prospectus is responsible to any person to whom the prospectus has been sent who is induced by the

(*t*) *Swift* v. *Winterbotham*, supra.

(*u*) *Barry* v. *Crosskey*, 2 J. & H. 21: *Peek* v. *Gurney*, L. R. 6 H. L. 378; 43 L. J. Ch. 19.

(*w*) *Peek* v. *Gurney*, *supra*.

(*x*) 29 L. J. Ex. 62 n; 121 R. R. 873; app. L. R. 6 H. L., at p. 397.

false representation to purchase shares and thereby sustains loss (*y*).

A party partially interested in an estate may maintain an action to set aside a conveyance of such interest fraudulently obtained from him, without making the other persons interested in the estate parties (*z*).

But one joint contractor cannot set aside the contract on the ground of fraud unless all the other joint contractors are also seeking rescission (*a*).

Applications under the Companies Act, 1908, s. 32, to have a name removed from the list of shareholders must be made by the person aggrieved or any member of the company or the company itself. When a winding-up order has been made, the application must be made in the name of the company and not of the liquidator (*b*).

Plaintiff *particeps criminis.*

It is a general rule that a Court of Justice will not interpose actively in favour of a man who is *particeps criminis* in an illegal or fraudulent transaction (*c*). The Court will take the objection as to the illegality of the transaction, even although the defendant himself does not (*d*). Where both parties are equally offenders against the law, the maxim *potior est conditio possidentis* prevails, not because the defendant is more favoured, where both are equally criminal, but because on the principle of public policy the Court will not assist a plaintiff, who has paid over money or handed over property in pursuance of an allegal or immoral contract, to recover it back (*e*). If, accordingly, a deed has been executed, or a conveyance made, to enable a party to contravene the provisions of an Act of Parliament, no suit in equity will lie to set aside the deed or recover the estate. The party execut-

(*y*) *Andrews* v. *Mockford*, 1896, 1 Q. B. 372; 65 L. J. Q. B. 302.

(*z*) *Henley* v. *Stone*, 3 Beav. 355; 52 R. R. 153.

(*a*) *McLaren* v. *McMillan*, 5 W. L. R. 336; 16 Man. L. R. 604.

(*b*) *Kintrea's Case*, 5 Ch. 95; 39 L. J. Ch. 193.

(*c*) *Cecil* v. *Butcher*, 2 J. & W. 572; 22 L. J. Ch. 213; *Doe v. Roberts*, 2 B. & Ald. 369; 20 R. R. 477; *Williams* v. *Williams*, 20 C. D. 659.

(*d*) *Hamilton* v. *Ball*, 2 Ir. Eq. 191, 194; *Gedge* v. *Royal Exchange Ass. Corp.*, 1900, 2 Q. B. 214; 69 L. J. Q. B. 506.

(*e*) *Taylor* v. *Chester*, L. R. 4 Q. B. 312; 38 L. J. Q. B. 225; *Scheuerman* v. *S.*, 52 Can. S. C. R. 625; *post*, pp. 464, 465.

ing it cannot be heard to allege his own fraudulent purpose. He is estopped from confining the operation of his deed within the limits of his intended fraud (*f*). In a case where a husband took a lease in his wife's name and with her connivance in order to protect the property from his creditors, it was held that he could not set up his own fraudulent design to rebut the presumption that it was a gift, and that the wife was entitled to retain the property notwithstanding that she was a party to the fraud (*g*). So where a man, in order to give his brother a colourable qualification to kill game, conveyed some land to him, it was held that his widow could not avoid the conveyance in an action of ejectment against her by the brother (*h*). So, also, money paid in furtherance of a fraud or other unlawful purpose cannot be recovered back (*i*), except in the case of marriage brokage contracts (*j*).

A distinction has been taken between cases where a deed executed, or a conveyance made, for an illegal purpose, has performed its office, and been accompanied by the completion of the purpose, and cases where the deed or conveyance has not been used for the purpose for which it was executed (*k*). But the distinction does not seem sound. If a grantor, so far as he can, completes the transaction for an illegal purpose, and leaves it in the power of the grantee to make at his pleasure the illegal use of the instrument originally intended, he merits the consequences attached to the illegality of his act (*l*). It is difficult to see upon what principle it can be contended that a man, who intends to commit a fraud, shall not have relief if he succeed in his attempt, but shall be

(*f*) *Brackenbury* v. *Brackenbury*, 2 J. & W. 391; 22 R. R. 180; *Cecil* v. *Butcher*, *supra*; *Groves* v. *Groves*, 3 Y. & J. 163; 32 R. R. 782; cf. *Childers* v. *Childers*, 1 D. & J. 482.

(*g*) *Gascoigne* v. *Gascoigne*, 1918, 1 K. B. 223.

(*h*) *Doe* v. *Roberts*, 2 B. & Ald. 369; 20 R. R. 477; *Bowes* v. *Foster*, 2 H. & N. 785; 27 L. J Ex. 262.

(*i*) *Begbie* v. *Phosphate Sewage Co.*, L. R., 10 Q. B. 499; *Harse* v. *Pearl Life Ass. Co.*, 1904, 1 K. B. 558; 73 L. J. K. B. 373; *post*, pp. 465, 466.

(*j*) *Hermann* v. *Charlesworth*, 1905, 2 K. B. 123; 74 L. J. K. B. 620.

(*k*) *Platamone* v. *Staple*, Coop. 251.

(*l*) *Cecil* v. *Butcher*, 2 J. & W. 578; 22 L. J. Ch. 213; *Doe* v. *Roberts*, *supra*; *Roberts* v. *Roberts*, Dan. 143; 18 R. R. 733; *Groves* v. *Groves*, 3 Y. & J. 163; 32 R. R. 782.

relieved if he fails or hesitates to proceed, because he fears a failure. His intention is as fraudulent in the one case as in the other (*m*).

A distinction has also been taken between cases where the conveyance has been made with the privity of, or the deed has been delivered to, the grantee, and cases where the conveyance has not been communicated to the grantee, nor the deed parted with by the grantor (*n*). But there is a preponderance of authority in support of the proposition that, although a voluntary deed is made without the knowledge of the grantee, and has been kept in the hands of the grantor, a Court of equity will not relieve against it (*o*). Inasmuch as it is well-established law that a man who executes a voluntary settlement passes the estate out of himself, though he retains the deed in his own possession (*p*), it is impossible to contend that the distinction attempted to be made is a sound one.

The rule that the Court will not actively interpose in favour of a man who is *particeps criminis* in a fraudulent transaction, like most other general rules, admits of exceptions. An exception to the rule takes place where the party seeking relief, although *particeps criminis*, is not *in pari delicto* with his associate. There may be, and often are, very different degrees of guilt of parties who concur in an illegal act. One party may act under circumstances of oppression, imposition, undue influence, of great inequality of age or condition, so that his guilt may be far less in degree than that of the other party (*q*).

Accordingly an innocent person who has by fraudulent misrepresentations been induced to take part in the commission of a criminal offence can maintain an action against

(*m*) *Bateman* v. *Ramsay*, Sau. & Sc. 478.

(*n*) *Birch* v. *Blagrave*, Amb. 264; *Groves* v. *Groves*, *supra*; cf. *Pattle* v. *Hornibrook*, 1897, 1 Ch. 25; 66 L. J. Ch. 144.

(*o*) *Cecil* v. *Butcher*, *supra*; *Brackenbury* v. *B.*, 2 J. & W. 391; 22 R. R. 180.

(*p*) *Roberts* v. *Williams*, 3 Ha. 130; 11 L. J. Ch. 65; 67 R. R. 25.

(*q*) *Osborne* v. *Williams*, 18 Ves. 379; 11 R. R. 218; *Reynell* v. *Sprye*, 1 D. M. & G. 678, 679; 21 L. J. Ch. 633; 91 R. R. 228; *Bowes* v. *Foster*, 2 H. & N. 785; 27 L. J. Ex. 262.

those by whose false statements he was led to commit it, and recover damages from them for losses he has sustained (*r*).

Illegalities resulting from a fraudulent misrepresentation, or from pressure or from an attempt to stifle a prosecution, do not fall within that class of illegalities in which the Court stays its hand, but are of a class in which the Court will actively give its assistance in favour of the oppressed party, by directing monies to be repaid (*s*).

Other cases which form an exception to the general rule are cases where the act or deed in which the parties concur is against the principles of morality or public policy. In such cases there may be on the part of the Court itself a necessity of supporting the public interest or policy, however reprehensible the conduct of the parties themselves may be (*t*). So, the purchase of a bankrupt's estate secretly, by a person for the benefit of the solicitor to the assignees, was set aside at the suit of the bankrupt, after his bankruptcy had been annulled, though there was evidence to show that the bankrupt had been privy to the transaction (*u*).

If money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before any illegal purpose is carried out; but if he wait till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action. The law will not allow that to be done. In permitting a man to recover before the illegal purpose is carried out, the law does not carry out the illegal transaction. The effect is to put the parties in the same situation as they were in before the illegal transaction was determined upon and before the parties took any steps to

(*r*) *Burrows* v. *Rhodes*, 1899, 1 Q. B. 816; 68 L. J. Q. B. 545.

(*s*) *Davies* v. *London and Provincial Ins. Co.*, 8 C. D. 477; 47 L. J. Ch. 511; *Burrows* v. *Rhodes*, *supra*.

(*t*) *Law* v. *Law*, Ca. t. Talb. 140; *St. John* v. *St. John*, 11 Ves. 535.

(*u*) *Adams* v. *Sworder*, 2 D. J. & S. 44; 139 R. R. 23.

carry it out (*x*). But this does not apply to marriage brokage contracts (*y*).

There is great difficulty in applying the maxim *potior est conditio possidentis* to a case where money has been placed *in medio*, and where the Court must do something with it or leave it to be locked up for ever (*z*).

When a party to an illegal or immoral contract comes himself to be relieved from that contract, or its obligations, he must distinctly and conclusively state such grounds of relief as the Court can legally attend to. He should not accompany his claims to relief, which may be legitimate, with claims and complaints, which are contaminated with the original immoral purpose (*a*). A distinction will be taken between cases where a party has actually accomplished the bad purpose to which a deed was auxiliary, and cases in which he had not participated in the bad purpose which it was the very object of the deed to procure (*b*).

A distinction is taken in equity between enforcing illegal contracts, and asserting title to monies arising from an illegal contract. If the transaction alleged to be illegal is completed and closed, so that it will not be in any manner affected by what the Court is asked to do, the party to the transaction, who has possessed himself of the monies arising out of the transaction, cannot be permitted to set up the illegality of the transaction against the otherwise clear title of the other. One of two partners, or joint adventurers, therefore, who has possessed himself of the property, common to both, cannot be permitted to retain it, by merely showing that in realising it

(*x*) *Taylor* v. *Bowers*, 1 Q. B. D. 300; 46 L. J. Q. B. 39; *Re Great Berlin Steamboat Co.*, 26 C. D 616; 54 L. J. Ch. 68; but see *Hermann* v. *Charlesworth*, 1905, 2 K. B. 123; 74 L. J. K. B. 620, where *Taylor* v. *Bowers* was questioned, *ante*, p. 462.

(*y*) *Hermann* v. *Charlesworth*, *supra*.

(*z*) *Davies* v. *London and Provincial Ins. Co.*, 8 C. D. 477; 47 L. J. Ch. 511.

(*a*) *Batty* v. *Chester*, 5 Beav. 103.

(*b*) *Benyon* v. *Nettlefold*, 17 Sim. 56; *Sismey* v. *Eley*, 17 Sim. 1; 18 L. J. Ch. 350; 83 R. R. 276. See 16 Eq. 282 and *Phillips* v. *Probyn*, 1899, 1 Ch. 812; 68 L. J. Ch. 401.

some provisions in an Act of Parliament, or in the fiscal law of a foreign state, may have been violated (*c*).

Contribution.

So, also, and upon a similar principle, notwithstanding the rule that as between tort-feasors there is no equity, if two trustees are equally guilty of a breach of trust, but one has received the monies, the other may maintain an action against him to recover the trust property (*d*). So, also, a director who has incurred liability by reason of untrue statements in a prospectus may have a right to contribution against his co-directors (*e*).

In *Sykes* v. *Beadon* (*f*), Jessel, M.R., said the notion that because an illegal transaction was closed a Court of Equity would interfere in dividing the proceeds of the illegal transaction was opposed to principle and authority. He was of opinion that no Court would lend its assistance in any way towards carrying out an illegal contract; that such a contract cannot be enforced by one party to it against the other, either directly by asking the Court to carry it into effect or indirectly by claiming damages or compensation for breach of it; though there might be cases in which a party to such a contract might recover from a third person money paid over to that person in pursuance of the contract, and other cases in which a person might recover from the parties to such a contract monies obtained by them from him on the representation that the contract was legal.

Parties defendants.

In all cases of fraud the hand of the Court is not arrested by the death of the wrong-doer. An action survives against his executor when the wrong complained of has benefited the estate of the deceased (*g*). But if no benefit accrued to the

(*c*) *Sharp* v. *Taylor*, 2 Ph. 801; 78 R. R. 298; *Sheppard* v. *Oxenford*, 1 K. & J. 496; 103 R. R. 203. See 11 C. D. 194.

(*d*) *Baynard* v. *Woolley*, 20 Beav. 583; 109 R. R. 548.

(*e*) *Gerson* v. *Simpson*, 1903, 2 K. B. 197; 72 L. J. K. B. 603; *Shepheard* v. *Bray*, 1906, 2 Ch. 235; 75 L. J. Ch. 633.

(*f*) 11 C. D. 170; 48 L. J. Ch. 522; and see *Great Berlin Steamboat Co.*, 26 C. D. 616; 54 L. J. Ch. 68; *Burrows* v. *Rhodes*, 1899, 1 Q. B. 816; 68 L. J. Ch. 545; *ante*, p. 438.

(*g*) *Rawlins* v. *Wickham*, 3 D. & J. 304; 28 L. J. Ch. 188; *Gresley* v. *Mousley*, 4 D. & J. 78; 28 L. J. Ch. 620; 124 R. R. 164; *Walsham* v. *Stainton*, 1 D. J. & S. 690; 137 R. R. 342; *New Sombrero Phosphate Co.* v. *Erlanger*, 5 C. D. 74; 46 L. J. Ch. 425.

estate of the deceased from the wrong complained of, an action will not survive against his executor (*h*), unless in cases where the executor can be said to have taken the estate with the liability to make good his testator's representations out of it (*i*).

As a rule an action of deceit falls within the maxim *actio personalis moritur cum persona*, and is not maintainable (*k*). But such an action may be maintained against the personal representative of the wrong-doer if it can be shown that property belonging to the plaintiff has been appropriated by the deceased and added to his estate (*l*). The fact that the deceased in his lifetime profited by his wrong is not enough to make his personal representative liable to be sued after his death. The benefit must consist in the acquisition of property or its proceeds or value. If the damages are unliquidated and uncertain the executors of a wrong-doer cannot be sued, though he may have reaped an indirect benefit from the act complained of (*m*). But the estate of a deceased director may be rendered liable in respect of any claim in the nature of a breach of trust (*n*).

It seems clear that apart from the estate having benefited by the deceased's conduct an action against a director under section 84 of the Companies (Consolidation) Act, 1908, does not survive against the director's executors (*o*). But a right of action under section 38 of the Companies Act, 1867, survived on the plaintiff's death, and might be prosecuted by his legal personal representatives (*p*).

All persons who lend themselves to a fraud and receive money from the defrauded party may be made parties to an action to set aside the transaction, and to recover the monies which they have received. If trustees lend themselves to a fraud, by their *cestui que trust*, the liability is a joint and

(*h*) *Peek* v. *Gurney*, L. R. 6 H. L. 392; 43 L. J. Ch. 19.
(*i*) *Ingram* v. *Thorpe*, 7 Ha. 67; 82 R. R. 25.
(*k*) *Peek* v. *Gurney*, *supra*; *Davoren* v. *Wootton*, 1900, 1 I. R. 273.
(*l*) *Phillips* v. *Homfray*, 24 C. D. at p. 454; *Geipel* v. *Peach*, *infra*.
(*m*) *Ibid.*; *Re Duncan*, *Terry* v. *Sweeting*, 1899, 1 Ch. 387; 68 L. J. Ch. 253
(*n*) *Masonic Co.* v. *Sharpe*, 1892, 1 Ch. 154; 61 L. J. Ch. 193.
(*o*) *Geipel* v. *Peach*, 1917, 2 Ch. 108; 86 L. J. Ch. 745.
(*p*) *Twycross* v. *Grant*, 4 C. P. D. 40; 46 L. J. C. P. 636.

several one of all the accomplices (*q*). So, also, a man who has been guilty of a fraud, in concert with one of several trustees, may be joined in an action against the trustees generally (*r*).

All persons concerned in the commission of a fraud are to be treated as principals: no person can be permitted to excuse himself as the agent or servant of another (*s*). If an agent in the course of his employment commits a fraud upon another party, whereby damage ensues to the party injured, he will be liable to the party injured, though his principal would be so likewise (*t*).

The right of action is given to the party injured by the fraud against all persons who have joined in committing it, although the concurrence of some of these persons might be unknown to the party injured at the time of the injury (*u*).

If a man has abetted a fraud, the absence of a personal benefit resulting from it is no excuse; he may be justly made responsible for its results, and even if no other relief can be had against him, he may be compelled to pay the costs of the action (*x*). Solicitors who have abetted their clients in a fraud, or have prepared deeds to carry it out, may be made parties to an action to set aside the fraudulent transaction, and are liable to pay the costs, even though they may have derived no personal benefit therefrom (*y*).

If solicitors deliberately deal with trust property so as to make themselves trustees *de son tort*, or assist with knowledge in a fraudulent design, they may be made liable as

(*q*) *Phosphate Sewage Co.* v. *Hartmont*, 5 C. D. 456; 46 L. J. Ch. 661; and see *Danby* v. *Coutts*, 29 C. D. 500; 54 L. J. Ch. 577, as to complicity.

(*r*) *Att.-Gen.* v. *Cradock*, 3 M. & C. 85.

(*s*) *Cullen* v. *Thompson's Trustees*, 4 Macq. 424, *per* Lord Westbury.

(*t*) *Weir* v. *Bell*, 3 Ex. D. 248; 47 L. J. Ex. 704, *per* Cockburn, C.J.; *Sibley* v. *Grosvenor*, 1916, V. L. R. 307; *Goldrei* v. *Sinclair*, 1918, 1 K. B. 180; 87 L. J. K. B. 261.

(*u*) *Cullen* v. *Thompson's Trustees*, 4 Macq. 432.

(*x*) *Seddon* v. *Connell*, 10 Sim. 85; 9 L. J. Ch. 341; 51 R. R. 209; *Clark* v. *Girdwood*, 7 C. D. 18. See *Marnham* v. *Weaver*, 80 L. T. 412.

(*y*) *Bowles* v. *Stewart*, 1 Sch. & Lef. 227; *Beadles* v. *Burch*, 10 Sim. 332; *Berry* v. *Armitstead*, 2 Keen, 227; 5 L. J. Ch. 370; *Prosphate Sewage Co.* v. *Hartmont*, 5 C. D. 444; 46 L. J. Ch. 661.

principals (*z*); but they must be shown to have actual notice of the fraud or trust, and will not be liable on the mere ground of constructive notice (*a*).

In an action, however, founded on alleged misrepresentation, it is improper to make as party to the action an attorney, agent, or arbitrator who has taken no active part in making the statement out of which the action arises, and who has been connected with it in such a way as to have made no profit out of it, merely with a view to making him liable for costs in case the principal defendant should fail (*b*).

A solicitor, like any other agent, may be liable for the costs of an action where he is properly chargeable with any of the relief sought against the principal. But it is wrong to make a solicitor a party to an action without seeking any relief against him, except payment of costs or discovery (*c*).

The liability of a principal may be incurred by the solicitor of a company towards the shareholders (*d*). But where the object of the action is not to set aside the transaction but to recover profits unfairly made by persons in a fiduciary character, a solicitor *quâ* solicitor who has not shared in the profits is not a proper party (*e*). Nor is a solicitor who has drawn up an instrument which is set aside or rectified on the ground of fraud, a proper party to the action, if he has only committed a blunder in the matter and not abetted the fraud (*f*).

Where one by power of attorney appoints another to be his agent to deal with property, and that agent is guilty of fraud in dealing with third parties in respect of such property, the principal cannot render such third parties liable where they have had no complicity in the fraud nor were able to gather from the power of attorney that the agent was going beyond his powers (*g*).

(*z*) Cordery, 147.

(*a*) *Williams* v. *W.*, 17 C. D. 437.

(*b*) *Mathias* v. *Yetts*, 46 L. T. 497; cf. *Heatley* v. *Newton*, 19 C. D. 326; 51 L. J. Ch. 225, where an auctioneer was held to be rightly made a party.

(*c*) *Burstall* v. *Beyfus*, 26 C. D. 35; 53 L. J. Ch. 565; *post*, p. 492.

(*d*) *Phosphate Sewage Co.* v. *Hartmont*, 5 C. D. 394, 443; 46 L. J. Ch. 661.

(*e*) *Bagnal* v. *Carlton*, 6 C. D. 372; 47 L. J. Ch. 30.

(*f*) *Clark* v. *Girdwood*, 7 C. D. 18; 47 L. J. Ch. 116.

(*g*) *Danby* v. *Coutts*, 29 C. D. 500; 54 L. J. Ch. 577.

A person filling a position of a fiduciary character, as an agent, is liable for a breach of duty, though he may have derived no benefit from it. Where two agents concur in a fraud, and one of them only derives benefit from the fraud, the other is also liable in equity for the benefit so derived (*h*). Those who, having a duty to perform, represent to others, who are interested in the performance of it, that it has been performed, make themselves responsible for all the consequences of the non-performance (*i*).

If a man has been induced by the false representations, or fraud, of a particular shareholder in a company to purchase shares, the only necessary party to an action for the return of the purchase-money, and for an indemnity, is the person who sold the shares (*k*).

If A. induce B. by misrepresentation to buy, and B. sell without misrepresentation to C., an action will not lie by B. and C. against A. to rescind (*l*).

It is not necessary that all the parties charged with fraud should be made parties. Where there are several partners, some of whom have committed fraud, any of the persons jointly and severally liable may be sued without making the others parties (*m*).

A man who has released the principal actor in a fraud, cannot go on against the other parties who would have been liable only in a secondary degree (*n*).

A partner being liable for the fraud of his co-partner, when acting within the proper scope of the partnership business, a firm of bankers or solicitors is liable for fraud practised upon a client by a member of the firm (*o*). The client, or principal, is entitled to relief against the other partners, not only if the

(*h*) *Walsham* v. *Stainton*, 1 D. J. & S. 678; 137 R. R. 342. See *Peek* v. *Gurney*, L. R. 6 H. L. 393; 43 L. J. Ch. 19.

(*i*) *Blair* v. *Bromley*, 2 Ph. 360; 16 L. J. Ch. 495.

(*k*) *Turner* v. *Hill*, 11 Sim. 1, 16.

(*l*) *Edinburgh Breweries* v. *Molleson*, 1894, A. C. 96; *ante*, p. 415.

(*m*) *Plumer* v. *Gregory*, 18 Eq. 627; 43 L. J. Ch. 616.

(*n*) *Thompson* v. *Harrison*, 2 Bro. C. C. 164; 1 Cox, 346.

(*o*) *Brydges* v. *Branfill*, 12 Sim. 369; 11 L. J. Ch. 12; 56 R. R. 71; *Blair* v. *Bromley*, 5 Ha. 542; 2 Ph. 354; 16 L. J. Ch. 495; *St. Aubyn* v. *Smart*, 3 Ch. 646; *ante*, p. 101.

case is one in which he might have recovered against such other partners, but also if the remedy at law against the other partners is barred by lapse of time (*p*). The original liability of one partner for the fraud of a co-partner is continued as well after as before the dissolution of the partnership (*q*). A fraud, however, committed by a partner whilst acting on his own separate account, is not imputable to the firm, although, had he not been connected with it, he might not have been in a position to commit the fraud (*r*).

But if the firm has derived benefit from the fraudulent transaction, the other partners are jointly and severally liable with the partner who has committed the fraud to make good the money which has been fraudulently received by the firm, though the other partners have not committed any violation of duty (*s*).

Inasmuch as one partner has no authority to bind the other partners by borrowing money, unless it is borrowed in the usual course of business and for business purposes, if a client advances money to one of a firm of solicitors on the representation that it was to be lent to a client, and the solicitor fraudulently appropriates the money, his partner, if he had no knowledge of the fraud, is not liable to make it good, for it is not the business of a solicitor to act as a scrivener (*t*).

Where a syndicate has been formed for promoting a company and fraud has been practised in the matter, the members of the syndicate are jointly and severally liable (*u*). The

(*p*) *Blair* v. *Bromley*, *supra*; *Moore* v. *Knight*, 1891, 1 Ch. 547; 60 L. J. Ch. 271.

(*q*) *Ibid.*

(*r*) *Ex p. Eyre*, 1 Ph. 227; *Coomer* v. *Bromley*, 5 De G. & Sm. 532; 90 R. R. 131; *Bishop* v. *Countess of Jersey*, 2 Drew, 143; 23 L. J. Ch. 483. See *British Homes Ass. Corp.* v. *Paterson*, 1902, 2 Ch. 404; 71 L. J. Ch. 872.

(*s*) *Imperial Mercantile Credit Association* v. *Coleman*, L. R. 6 H. L. 189; 40 L. J. Ch. 262; *Moore* v. *Knight*, 1891, 1 Ch. 547; 60 L. J. Ch. 271.

(*t*) *Plumer* v. *Gregory*, 18 Eq. 621; 43 L. J. Ch. 616; *Cleather* v. *Twisden*, 28 C. D. 340; 54 L. J. Ch. 408; cf. *Rhodes* v. *Moules*, 1895, 1 Ch. 236; 64 L. J. Ch. 122.

(*u*) *New Sombrero Co.* v. *Erlanger*, 5 C. D. 74; 46 L. J. Ch. 425; *Phosphate Sewage Co.* v. *Hartmont*, 5 C. D. 394; 46 L. J. Ch. 661; *Lagunas Co.* v. *Lagunas Syn.*, 1899, 2 Ch. 420, 441; 68 L. J. Ch. 699.

estate of a deceased member of the syndicate is liable to the extent that it may have been benefited by the fraud (*x*).

The infancy of the defrauding party will not exempt him, for though the law protects him from binding himself by contract, it gives him no authority to cheat others (*y*).

A bankrupt is not a proper party to an action brought by the trustee under his bankruptcy to set aside a conveyance executed by the bankrupt with intent to delay or defeat his creditors (*z*).

(*x*) *New Sombrero Co.* v. *Erlanger*, *supra*; *Peek* v. *Gurney*, L. R. 6 H. L. 377; 43 L. J. Ch. 19.

(*y*) *Ante*, p. 152.

(*z*) *Weise* v. *Wardle*, 19 Eq. 171.

CHAPTER X.

PROOF.

A MAN who alleges fraud must clearly and distinctly prove the fraud he alleges. The *onus probandi* is upon him to prove his case as it is alleged in the statement of claim (*a*), or in his particulars (*b*). Every material step in the evidence which makes out a case of fraud must be proved by sufficient evidence (*c*). If he complains of fraud in the prospectus of a company, it is for him to prove that it was false, and false to the knowledge of the defendant, or at all events that he did not believe it, and that he was misled by it to his prejudice (*d*). If the fraud is not strictly and clearly proved, as it is alleged, relief cannot be had, although the party against whom relief is sought may not have been perfectly clear in his dealings (*e*). Fraud will not be carried by way of relief one tittle beyond the manner in which it is proved to the satisfaction of the Court (*f*). But proof of a substantial part of a misrepresentation is sufficient (*g*).

Money obtained or retained by fraud can be recovered with interest, but the fraud must be proved in the proceedings by which the money is recovered, otherwise no interest will be

(*a*) *Bellamy* v. *Sabine*, 2 Ph. 425, 448; 17 L. J. Ch. 105; 78 R. R. 132; *Blair* v. *Bromley*, 5 Ha. 559; 16 L. J. Ch. 495; *Jennings* v. *Broughton*, 17 Beav. 239; 23 L. J. Ch. 999; 104 R. R. 58; *Smith* v. *Kay*, 7 H. L. C. 750; 30 L. J. Ch. 35; 115 R. R. 367; *Moxon* v. *Payne*, 8 Ch. 881; 43 L. J. Ch. 240; *Craig* v. *Phillips*, 3 C. D. 733; 46 L. J. Ch. 49.

(*b*) *Sachs* v. *Spielman*, 37 C. D. 295; 57 L. J. Ch. 658.

(*c*) *Angus* v. *Clifford*, 1891, 2 Ch. at p. 479; 60 L. J. Ch. 443.

(*d*) *Smith* v. *Chadwick*, 9 App. Ca. 187; 53 L. J. Ch. 873; *Glasier* v. *Rolls*, 42 C. D. 436; 58 L. J. Ch. 820.

(*e*) *Mowatt* v. *Blake*, 31 L. T. 387.

(*f*) 11 Jur. N. S. p. 52, *per* Lord Westbury,

(*g*) *Lamb* v. *Johnson*, 15 N. S. W. St. R. 65.

allowed, and it is not enough that the fraud has been proved in other proceedings in a criminal court (*h*).

If a case of actual fraud is alleged, relief cannot be had by proving only a case of constructive fraud (*i*). But where material allegations of fraud are proved, the plaintiff will obtain relief, though other allegations are not proved (*j*).

When a statement in a prospectus is clearly capable of two meanings, the plaintiff must swear that he understood it in the false sense, and was deceived (*k*). If he is uncertain, he must make inquiries or consult the memorandum and articles, for if he does not do so he cannot fairly say that he has been deceived (*l*). But except in the contract to take shares, he is not, even when invited to do so, called upon to prosecute inquiries (*m*). It is not sufficient that the party deceived made some investigation into the facts, or that he had the means of discovering the truth. In the case of false representation negligence or laches affords no answer unless there is such delay as to bring in the Statute of Limitations (*n*).

If the statement of claim alleges a case of fraud, and the title to relief rests upon that fraud only, the action will be dismissed, if the fraud as alleged is not proved. It cannot be allowed to be used for any secondary purpose. But if the case does not entirely rest upon the proof of fraud, but rests also upon other matters, which are sufficient to give the Court jurisdiction, and are separable from the case of fraud, and the case of fraud is not proved, but the other matters are proved, relief will be given in respect of so much of the statement of claim as is proved (*o*).

(*h*) *Johnson* v. *Rex*, 1904, A. C. 817; 73 L. J. P. C. 113.

(*i*) *Wilde* v. *Gibson*, 1 H. L. C. 605; 73 R. R. 191.

(*j*) *Moxon* v. *Payne*, 8 Ch. 881; 43 L. J. Ch. 240.

(*k*) *Arkwright* v. *Newbold*, 17 C. D. p. 324; 50 L. J. Ch. 372; *Smith* v. *Chadwick*, *supra*.

(*l*) *Hallows* v. *Fernie*, 3 Ch. 475; 36 L. J. Ch. 267; and see *ante*, p. 452.

(*m*) *Caballero* v. *Henty*, 9 Ch. 447; 42 L. J. Ch. 635; *Redgrave* v. *Hurd*, 20 C. D. at p. 13; 51 L. J. Ch. 113.

(*n*) *Redgrave* v. *Hurd*, 20 C. D. 1, 13, 22, 24; 51 L. J. Ch. 113; *Oelkers* v. *Ellis*, 1914, 2 K. B. 139; 83 L. J. K. B. 658.

(*o*) *Hilliard* v. *Eiffe*, L. R. 7 H. L. 39; *Chartered Bank of Australia* v. *Lempriere*, L. R. 4 C. P. p. 597; 42 L. J. C. P. 49; *Thompson* v. *Eastwood*, 2 App. Ca. p. 243; and see *ante*, pp. 448, 451.

If a party alleges that a contract was obtained from him by fraud, the burden of proving the fraud lies on him (*p*). Thus to make out a case of promotion money it is not enough to show that all the consideration did not reach the vendor's pocket, but you must show that the price was swollen fraudulently for the purpose of making the company pay promotion money in addition to what was understood to be the real purchase-money (*q*). So, also, if fraud is established against a party, it is for him, if he alleges acquiescence in the other party, to show when the latter acquired a knowledge of the truth and prove that he knowingly forebore to assert his rights (*r*). So in an action to enforce a contract in which the defendant sets up the plea that he was induced by fraud to enter into it, it is not for the defendant to repudiate the contract, but for the plaintiff to show that the defendant adhered to the contract notwithstanding the discovery of the fraud (*s*). So, also, where a man makes a false representation to another, the *onus probandi* is on him to show that the other party waived it and relied on his own knowledge (*t*).

It is not enough to show that the plaintiff had the means of knowledge and might have found out the truth (*u*). Mere means of knowledge is not the same thing as knowledge (*x*); it is only evidence of a want of *bonâ fide* belief. Where knowledge is relied upon as a defence, the truth must be brought clearly home to the deceived (*y*).

Evidence.

The rules of evidence are the same in equity as at law (*z*). Whether certain facts, as proved, amount to a fraud, is a question for the Court as well at law as in equity. The facts to constitute a fraud must be found at law by the jury (*a*).

(*p*) *Glasier* v. *Rolls*, 42 C. D. 436; 58 L. J. Ch. 820. See *ante*, p. 452, as to proof of fraud in a prospectus.

(*q*) *Arkwright* v. *Newbold*, 17 C. D. 301, 319; 50 L. J. Ch. 372.

(*r*) *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221.

(*s*) *Aarons Reefs* v. *Twiss*, 1896, A. C. 273; 65 L. J. P. C. 54.

(*t*) *Redgrave* v. *Hurd*, 20 C. D. p. 13; 51 L. J. Ch. 113.

(*u*) *Redgrave* v. *Hurd*, 20 C. D. p. 21; 51 L. J. Ch. 113.

(*x*) *Brownlie* v. *Campbell*, 5 App. Ca. 925, 952.

(*y*) *Arnison* v. *Smith*, 41 C. D. 369, 371.

(*z*) *Glyn* v. *Bank of England*, 2 Ves. 41.

(*a*) *Murray* v. *Mann*, 2 Exch. 539; 17 L. J. Ch. 256; 76 R. R. 686.

In equity they are found by the Court; but a Court of Equity is not justified in finding such facts upon any less or different kind of proof than would be required to satisfy a jury. The law in no case presumes fraud. The presumption is always in favour of innocence, and not of guilt. In no doubtful matter does the Court lean to the conclusion of fraud. Fraud is not to be assumed on doubtful evidence. The facts constituting fraud must be clearly and conclusively established (*b*). Circumstances of mere suspicion will not warrant the conclusion of fraud (*c*). The proof must be such as to create belief, and not merely suspicion. If the case made out is consistent with fair dealing and honesty, a charge of fraud fails (*d*). But if suspicion is aroused and no inquiries are made for fear of learning the truth fraud may be presumed (*e*).

In an action of deceit brought on the ground that a particular article used by the defendant is a colourable imitation of the plaintiff's, the conclusion of a judge on a view by him of the two articles that the defendant's article is calculated to deceive is not sufficient; the judge must be satisfied by independent evidence that there is at least a reasonable probability of deception (*f*).

But in a passing-off case the plaintiff need not prove fraud on the part of the defendant, or give evidence that any single person has been deceived (*g*).

It is not, however, necessary, in order to establish fraud, that direct affirmative or positive proof of fraud be given (*h*). Circumstantial evidence is not only sufficient, but in many cases it is the only proof that can be adduced. In matters that regard the conduct of men the certainty of

(*b*) *Bowen* v. *Evans*, 2 H. L. C. 257; 81 R. R. 136; *M'Cormick* v. *Grogan*, L. R. 4 H. L. 97; *ante*, p. 448.

(*c*) *Parfit* v. *Lawless*, 2 P. & D. 471; 41 L. J. P. 68; *M'Cormick* v *Grogan*, L. R. 4 H. L. 97; *Thomson* v. *Eastwood*, 2 App. Ca. 233.

(*d*) *Hamilton* v. *Kirwan*, 2 J. & L. 401; 69 R. R. 322; *Pares* v. *Pares*, 33 L. J. Ch. 218; 143 R. R. 325; *ante*, p. 448.

(*e*) *Butler* v. *Fairclough*, 1917, V. L. R. 175.

(*f*) *London General Omnibus Co.* v. *Lavell*, 1901, 1 Ch. 135; 70 L. J. Ch. 17.

(*g*) *Bourne* v. *Swan & Edgar*, 1903, 1 Ch. 211; 72 L. J. Ch. 168.

(*h*) *Stikeman* v. *Dawson*, 1 De G. & Sm. 105; 16 L. J. Ch. 205; 75 R. R. 47; *Pickles* v. *Pickles*, 31 L. J. Ch. 146; 136 R. R. 366.

mathematical demonstration cannot be expected or required. Like much of human knowledge on all subjects, fraud may be inferred from facts that are established. Care must be taken not to draw the conclusion hastily from premises that will not warrant it; but a rational belief should not be discarded because it is not conclusively made out. If the facts established afford a sufficient and reasonable ground for drawing the inference of fraud, the conclusion to which the proof tends must, in the absence of explanation, or contradiction, be adopted (*i*). It is enough if from the conduct of a party the Court is satisfied that it can draw a reasonable inference of fraud (*j*), or if facts be established, from which it would be impossible, upon a fair and reasonable conclusion, to conclude but that there must have been fraud (*k*). So a voluntary settlement may be set aside under 13 Eliz. c. 5, without proof of actual intention to defeat creditors, if, under the circumstances, it will necessarily have that effect (*l*).

The *onus* of proving that one of several misrepresentations which led to a contract was not a material inducement to enter into it is on the party who has made the misrepresentation (*m*). It is not for the applicant to explain with exact precision what was the mental process by which he was induced to act (*n*). Nor need he show that the misrepresentation was the sole cause of his acting as he did; he may recover though he was also induced by other things, as for instance, his own mistake (*o*).

A misrepresentation may be of such a character as to be clearly material and such as to induce the contract, in which case no evidence of materiality or of its having been an

(*i*) *Stikeman* v. *Dawson*, *supra*; *Humphrey* v. *Olver*, 28 L. J. Ch. 406; *Parfit* v. *Lawless*, 2 P. & D. 472; 41 L. J. P. 68; *Johnson* v. *Barnes*, 1883, W. N. 32; *ante*, p. 449.

(*j*) 10 Ch. 530; *per* Mellish, L.J.

(*k*) *Pickles* v. *Pickles*, 31 L. J. Ch. 146; 136 R. R. 366; *Re Marsden's Trust*, 4 Drew. 599; 28 L. J. Ch. 906; 113 R. R. 474.

(*l*) *Freeman* v. *Pope*, 5 Ch. 538; 39 L. J. Ch. 689; but see *Ex. p. Mercer*, *ante*, p. 216.

(*m*) *Nicol's Case*, 3 D. & J. 387; 28 L. J. Ch. 257; 121 R. R. 169.

(*n*) *Aarons Reefs* v. *Twiss*, 1896, A. C. 273, 280; *ante*, p. 452.

(*o*) *Arnison* v. *Smith*, 41 C. D. 348, 359, 369.

inducement is wanted (*p*). It is not sufficient to prove that the party deceived made some investigation or had the means of discovering the truth (*q*). But if the misrepresentation is not obviously material or is ambiguous, the party deceived must in the former case prove it to be material, and in the latter prove the sense in which he understood it, and must in either case prove that he was induced by it (*r*).

Fraud may be proved from the acts and conduct of a party as well as from his written declaration (*s*). The motives with which an act is done may be, and often are, ascertained and determined by circumstances connected with the transaction, and the parties to it. Various facts and circumstances evince sometimes with unerring certainty the hidden purposes of the mind. "A deduction of fraud," says Kent (*t*), "may be made, not only from deceptive assertions and false representations, but from facts, incidents, and circumstances, which may be trivial in themselves, but may, in a given case, be often decisive of a fraudulent design" (*u*).

Similar frauds.

Evidence of similar frauds on the part of the defendant committed on other parties in the same manner are admissible in evidence, if they tend to prove the motive or intention which actuated the defendant in the transaction under investigation. In a vast number of cases such evidence is the only means of establishing fraud. Many fraudulent transactions are apparently fair until the fraud is shown by proving virtually what has happened—the real facts underlying the evident ones—and one great element of fraud is the intent of the parties.

Intent, motive, design, complicity, together with other acts, may show fraud. If evidence of this kind were inadmissible, fraud would frequently never be proved. It is no doubt true that in order to prove that A. has committed fraud on B., it is neither sufficient nor relevant to prove that A. has committed

(*p*) *Aarons Reefs* v. *Twiss*, 1896, A. C. 273, 280; 65 L. J. P. C. 54.
(*q*) *Redgrave* v. *Hurd*, 20 C. D. 13, 22, 24; 51 L. J. Ch. 113.
(*r*) *Smith* v. *Chadwick*, 20 C. D. 45, 64; 9 A. C. 187; 53 L. J. Ch. 873.
(*s*) *Walters* v. *Morgan*, 3 D. F. & J. 718; 130 R. R. 309.
(*t*) 2 Comm. p. 484.
(*u*) See *Owen* v. *Homan*, 4 H. L. C. 1033; 20 L. J. Ch. 314; 94 R. R. 516.

fraud on C., D., and E. But the case is different if it can be shown that the fraud on B. is one of a class of other transactions, having common features, the features being the false pretence and the knowledge of that false pretence on the part of the defendant (*x*). So evidence of similar frauds was admitted where the statement of claim alleged that the fraud was part of a system (*y*). So where fraudulent preference is alleged other acts of preference in favour of other creditors committed shortly before or after the transaction impugned is admissible to show the debtor's intent (*z*).

In an action against a vendor for misrepresentation in the sale of goods, if it is shown that a material representation has been made by the vendor to induce the purchaser to buy, and that such representation is not true in fact, and it is proved that it was not true to the vendor's knowledge, the question cannot be asked him as to whether he did or did not entertain some other belief as to its truth, as the Court cannot enter into any question as to the state of a man's mind when the representation was made (*a*).

Where the fraud on a vendor is effected by means of assurances given by a third person of the buyer's solvency and ability to pay, the proof that such assurances were made must be in writing signed by the party to be charged therewith as required by s. 6 of Lord Tenterden's Act (*b*). The application of s. 6 is confined to fraudulent representations or representations such as would support an action of deceit (*c*).

Burden of proof may be shifted.

Though the proof of fraud rests on the party who alleges it, and in the absence of any special relation from which influence is presumed the burden of proof is on the person impeaching the transaction (*d*), yet circumstances may exist to shift the burden of proof from the party impeaching a transaction on

(*x*) *Blake* v. *Albion Life Ass. Soc.*, 4 C. P. D. 101, 106; 48 L. J. C. P. 169. See *Staffordshire Financial Co.* v. *Hill*, 53 Sol. J. 446; *Parker* v. *Wachner*, 1917, N. Z. L. R. 440.

(*y*) *Edinburgh Life Ass.* v. *Y.*, 1911, 1 Ir. R. 308.

(*z*) *Re Ramsay*, 1913, 2 K. B. 80; 82 L. J. K. B. 526.

(*a*) *Hinc* v. *Champion*, 7 C. D. 334, *per* Jessel, M. R.

(*b*) *Haslock* v. *Ferguson*, 7 A. & E. 86; 6 L. J. Q. B. 247; *ante*, p. 426.

(*c*) *Banbury* v. *Bank of Montreal*, 1918, A. C. 626; 87 L. J. K. B. 1158.

(*d*) *Toker* v. *Toker*, 3 D. J. & S. 487; 32 L. J. Ch. 322; 142 R. R. 135.

the party upholding it. If the evidence establishes a *primâ facie* case of fraud, or shows that an instrument is false in any material part, the burden of showing that the transaction was fair lies upon the party who seeks to uphold it (*e*). If, for example, it appear that the donee of a power of appointment had at any time before the exercise of the power, the intention to derive a personal benefit from its exercise, or to make an appointment in fraud of the power, the burden rests on those who support the appointment to show that the intention had been abandoned at the time of the execution of the appointment (*f*). So, also, where conditions of sale are misleading, the *onus* is on the vendor to show not only that the purchaser had the means of information, but that he relied on his own information or judgment and was not in fact misled by the misrepresentation (*g*). So, also, where within a few months after making a voluntary settlement the settlor calls a meeting of his creditors and lays before them a statement showing himself to be insolvent, the burden is on him to show solvency at the date of the settlement (*h*). So, also, if a man fraudulently mingles monies belonging to another with monies of his own, it lies on him to sever the portion which is affected by the fraud from that which is not affected by the fraud (*i*).

Where the contract for sale of a chattel is voidable by the seller on account of fraud and before any election to avoid the sale by the seller, the buyer pledges the chattel to secure an advance, the *onus* lies on the seller of proving that the pledgee took with notice of the fraud or otherwise than in good faith (*k*).

(*e*) *Watt* v. *Grove*, 2 Sch. & Lef. 502; *Russell* v. *Jackson*, 10 Ha. 213; 90 R. R. 336; *Cottam* v. *Eastern Counties Ry. Co.*, 1 J. & H. 243; 30 L. J. Ch. 217; 128 R. R. 346; *Dowle* v. *Saunders*, 2 H. & M. 250; 34 L. J. Ch. 87; 144 R. R. 140; *Prees* v. *Coke*, 6 Ch. 648.

(*f*) *Humphrey* v. *Olver*, 28 L. J. Ch. 406; *Topham* v. *Duke of Portland*, 5 Ch. 61; 32 L. J. Ch. 606; *Bainbrigge* v. *Browne*, 18 C. D. 188; 50 L. J. Ch. 522.

(*g*) *Torrance* v. *Bolton*, 8 Ch. 118; 42 L. J. Ch. 177; See *Blaiberg* v. *Keeves*, 1906, 2 Ch. 175; 75 L. J. Ch. 464.

(*h*) *Crossley* v. *Elworthy*, 12 Eq. 158; 40 L. J. Ch. 480; *Mackay* v. *Douglas*, 14 Eq. 106; 41 L. J. Ch. 539.

(*i*) *Russell* v. *Jackson*, 10 Ha. 213; 90 R. R. 336.

(*k*) *Whitehorn* v. *Davison*, 1911, 1 K. B. 463; 80 L. J. K. B. 425.

The Bills of Exchange Act, 1882, s. 30 (2), shifts the *onus* and throws on the holder of a bill affected with fraud the *onus* of proving that he took it in good faith and for value. But this does not apply where the holder seeking to enforce the bill is the person to whom it was originally delivered and in whose hands it remains (*l*).

Notwithstanding the maxim *omnia presumuntur rite esse acta*, whenever any person by donation derives a benefit under a deed to the prejudice of another person—and more especially if any confidential relation exists between them—the Courts so far presume against the validity of the instrument as to require some proof (varying in amount according to circumstances) of the absence of anything approaching imposition, overreaching, undue influence, or unconscionable advantage. If, therefore, it appear that a fiduciary, or confidential relation exist between the parties to a transaction (*m*), or if it be established by evidence that one of the parties possessed a power of influence over the other (*n*), or was in a position to exercise dominion over the other (*o*), the burden of proof lies upon the party filling the position of active confidence, or possessing the power of influence, or dominion, as the case may be, to establish, beyond all reasonable doubt, the perfect fairness and honesty of the transaction, and he is bound to preserve evidence to show that all was rightly done (*p*). So the poverty and ignorance of a vendor throw upon the purchaser the *onus* of proving that the transaction was fair, just, and reasonable (*q*).

Parol evidence is admissible in such cases to prove the

(*l*) *Talbot* v. *Von Boris*, 1911, 1 K. B. 854; 80 L. J. K. B. 661.

(*m*) *Benson* v. *Heathorn*, 1 Y. & C. C. C. 340; 57 R. R. 351; *Allfrey* v. *Allfrey*, 1 Mac. & G. 99; 84 R. R. 15; *Billage* v. *Southee*, 9 Ha. 540; 21 L. J. Ch. 472; *Moore* v. *Prance*, 9 Ha. 303; 20 L. J. Ch. 468; *ante*, p. 155.

(*n*) *Cooke* v. *Lamotte*, 15 Beav. 240; 21 L. J. Ch. 371; 92 R. R. 397; *Smith* v. *Kay*, 7 H. L. C. 750; 30 L. J. Ch. 35; 115 R. R. 367; *Topham v. Duke of Portland*, *supra*; *Bainbrigge* v. *Browne*, 18 C. D. 188; 50 L. J. Ch. 522; *ante*, pp. 193, 196.

(*o*) *Lord Aylesford* v. *Morris*, 8 Ch. 498; 42 L. J. Ch. 546; *O'Rorke* v. *Bolingbroke*, 2 App. Ca. 834.

(*p*) *King* v. *Anderson*, I. R. 8 Eq. 637.

(*q*) *Fry* v. *Lane*, 40 C. D. 312; 58 L. J. Ch. 113.

fairness of the transaction, but it is to be received and weighed with the most scrupulous accuracy, and to be dealt with as having its weight affected by the circumstances under which the parties stood (*r*). If an agent for sale purchases the estate, or an interest in the estate, which he is employed to sell, the burden of proving that a full disclosure was made to his principal of the exact nature of his interest lies on him, and is not discharged merely by swearing that he did so if his evidence is contradicted by the principal, and is not corroborated (*s*). So, also, and upon the same principle, those who take a benefit under a will, and have been instrumental in preparing and obtaining it, have thrown upon them the burden of showing the righteousness of the transaction (*t*). So, also, a man who takes advantage of a deed of gift or voluntary settlement, and sets it up against the donor or author of the settlement must, as a general rule, be able to show that the donor or author thoroughly understood the contents of the deed, knew what he was doing, or at all events was protected by independent advice, and was not acting under the pressure of undue influence. If there are any unusual provisions in the deed, he must be able to show that they were brought to the notice of and were understood and approved of by the donor or author of the settlement (*u*). If, for example, the gift be not subject to a power of revocation, the party taking the benefit may have thrown upon him the burden of proving that the donor meant the gift to be irrevocable (*w*). But where a voluntary deed is impeached, the *onus* of supporting it does not necessarily rest upon those who set it up. A man of full age and sound mind, who has executed a voluntary deed by which he has denuded himself of his property is bound by his own act, and if he comes to have the deed set aside, he

(*r*) *Re Holmes's Estate*, 3 Giff. 347; 133 R. R. 119; *Walker* v. *Smith*, 29 Beav. 394; 131 R. R. 637.

(*s*) *Dunne* v. *English*, 18 Eq. 524. See *Stubbs* v. *Slater*, 1910, 1 Ch. 195; 79 L. J. Ch. 420.

(*t*) *Fulton* v. *Andrew*, L. R. 7 H. L. 449; 44 L. J. P. 17; *ante*, pp. 312, 314. As to "righteousness" see *Clark* v. *Loftus*, 26 Ont. L. R. 204.

(*u*) *Philipps* v. *Mullings*, 7 Ch. 246; 41 L. J. Ch. 211; *Turner* v. *Collins*, 7 Ch 329; 41 L. J. Ch. 558.

(*w*) *Wollaston* v. *Tribe*, 9 Eq. 44.

must prove some substantial reason why it should be set aside (*x*).

There is no general presumption against the validity of gifts as such (*y*), and in the absence of any special relation from which influence is presumed the burden of proof is on the person impeaching the transaction, and he must show affirmatively that pressure or undue influence was employed (*z*).

When a party is under the obligation of showing that an unprofessional person understood the contents of a deed or instrument which he executed, the mere proof of its having been read over to him unaccompanied with proper explanations is not sufficient (*a*). It must be proved that the nature, effect, and contents of the deed were explained to and perfectly understood by him (*b*). It is not sufficient for a solicitor, employed to prepare a marriage settlement for a lady, to say in general terms that he explained it to her. He ought to say what was the explanation he gave, and what was the meaning and effect of the limitations as stated by him to her (*c*), and further, he should satisfy himself that the transaction is one which it is right and proper under the circumstances to carry out (*d*).

The intervention of an independent third party, or adviser, is an important ingredient in showing the fairness of a transaction (*e*). If a solicitor be employed, there is always strong *primâ facie* evidence that the party for whom he was acting

(*x*) *Henry* v. *Armstrong*, 18 C. D. 668; *Ogilvie* v. *Littleboy*, 1897, W. N. 53; *Rake* v. *Hooper*, 83 L. T. 669.

(*y*) See *Allcard* v. *Skinner*, 36 C. D. 145; 56 L. J. Ch. 1052.

(*z*) *Toker* v. *Toker*, 3 D. J. & S. 487; 32 L. J. Ch. 322; 142 R. R. 135; Pollock on Contracts, 604.

(*a*) *Hoghton* v. *Hoghton*, 15 Beav. 311; 21 L. J. Ch. 482; 92 R. R. 421. See *Sharp* v. *Leach*, 31 Beav. 503; *Fulton* v. *Andrew*, L. R. 7 H. L. 449; 44 L. J. P. 17.

(*b*) *Moore* v. *Prance*, 9 Ha. 304; 20 L. J. Ch. 468; *Anderson* v. *Ellsworth*, 3 Giff. 154; 30 L. J. Ch. 922; 133 R. R. 60; *Davies* v. *Davies*, 4 Giff. 417; *Toker* v. *Toker*, *supra*; *Hall* v. *Hall*, 8 Ch. 430; 42 L. J. Ch. 444.

(*c*) *Maunsell* v. *Maunsell*, 1 L. R. I. 549.

(*d*) *Powell* v. *Powell*, 1900, 1 Ch. 243; 69 L. J. Ch. 164; *Wright* v. *Carter*, 1903, 1 Ch. 27; 72 L. J. Ch. 138.

(*e*) *Cooke* v. *Lamotte*, 15 Beav. 240; 21 L. J. Ch. 371; 92 R. R. 397; *Bainbrigge* v. *Browne*, 18 C. D. 188; 50 L. J. Ch. 522; *ante*, p. 174.

knew the nature of the transaction (*f*): in all cases, indeed, where an independent legal adviser or solicitor is employed, the evidence that everything which was necessary to be known had been brought to the knowledge of his employer, would be conclusive (*g*). The intervention, however, of another solicitor goes for nothing unless it be shown that he had sufficient information and took sufficient pains to make his intervention of value (*h*). Nor is the intervention of a solicitor sufficient to support a transaction, if that one of the parties for whom the solicitor is acting is under the influence of the other party (*i*), or the solicitor is acting in the interests of the other party (*k*).

Admission of extrinsic evidence to avoid a deed.

A party is not estopped from avoiding his deed by proving that it was executed for a fraudulent, illegal, or immoral purpose (*l*). Notwithstanding the solemnity and force which the law ascribes to deeds, and all the strictness with which it in general prohibits the introduction of extrinsic evidence, to prove that an instrument goes beyond, or does not fully contain, or incorrectly exhibits, the terms of the contract which it was written and signed for the purpose of expressing and recording, the rule is settled that a deed—on its face just and righteous—may be vitiated and avoided, by alleging and adducing extrinsic evidence to prove that it was founded on a consideration; or had a view or purpose contrary to law or public policy (*m*). Although a party may thus, in certain cases, be enabled to take advantage of his own wrong, this evil is of a trifling nature in comparison with the flagrant evasions that would, in many cases, result from the adoption of a different rule (*n*).

(*f*) *Denton* v. *Donner*, 23 Beav. 291; 113 R. R. 143; *Miller* v. *Cook*, 10 Eq. 641; 40 L. J. Ch. 11.

(*g*) *De Montmorency* v. *Devereux*, 7 Cl. & Fin. 188.

(*h*) *Luddy's Trustee* v. *Peard*, 33 C. D. 500; 55 L. J. Ch. 884; *Powell* v. *Powell*, *supra*; Gordery, 187.

(*i*) *Moxon* v. *Payne*, 8 Ch. 881; 43 L. J. Ch. 240.

(*k*) *Slator* v. *Nolan*, I. R. 11 Eq. 407.

(*l*) *Collins* v. *Blantern*, 2 Wils. 341, 1 Smith, L. C. 355.

(*m*) *Reynell* v. *Sprye*, 1 D. M. & G. 672, *per* Knight Bruce, L. J.; 21 L. J. Ch. 633; 91 R. R. 228.

(*n*) *Benyon* v. *Nettlefold*, 3 Mac. & G. 102; 20 L. J. Ch. 186; 87 R. R. 25; See *Mallalieu* v. *Hodgson*, 16 Q. B. 689; 20 L. J. Q. B. 339; 83 R. R. 679; *Bowes* v. *Foster*, 2 H. & N. 779; 27 L. J. Ex. 262.

If a person be induced by fraudulent statements to enter into a written contract, it is competent for him to prove fraud by evidence *aliunde*, although the written contract, or the deed of conveyance, is silent on the subject to which the fraudulent representation refers (*o*). So, also, fraud, whether in a record, or deed, or writing under seal, may be proved by parol evidence (*p*). So, also, if it appear from the written evidence, that the agreement really made between the parties is not stated by the deed, parol evidence is admissible to explain it (*q*). So, also, where an alleged contract in writing is sued on, the defendant may show by parol evidence that, notwithstanding the writing, there was no contract (*r*).

Testimony of single witness.

The testimony of a single witness, though uncorroborated, may be sufficient for the Court to conclude that there has been fraud (*s*). There is no rule that the Court must necessarily reject a claim against a deceased person's estate merely because it is supported only by the uncorroborated evidence of the claimant (*t*). The Court, however, will hesitate to rectify a settlement on the unsupported evidence of the settlor as to his intention (*u*). Nor can the testimony of one single witness, unless supported by corroborating circumstances, be allowed to prevail against a positive denial by the answer. If a defendant positively denies the assertion, and one witness only proves it as positively, and there is no corroborating circumstance attaching to the assertion, the Court will not act upon the testimony of that witness, without some circumstance attaching a superior degree of credit to the latter (*x*).

(*o*) *Dobell* v. *Stevens*, 3 B. & C. 623; 3 L. J. K. B. 89; 27 R. R. 441; *Hotson* v. *Browne*, 9 C. B. (N. S.) 442; 30 L. J. C. P. 106; 127 R. R. 713.

(*p*) *Filmer* v. *Gott*, 4 Bro. P. C. 230; *Robinson* v. *Lord Vernon*, 7 C. B. (N. S.) 231; 29 L. J. C. P. 135; 121 R. R. 472; *Rogers* v. *Hadley*, 2 H. & C. 227; 32 L. J. Ex. 211; 133 R. R. 652.

(*q*) *Cripps* v. *Jee*, 4 Bro. C. C. 472.

(*r*) *Pattle* v. *Hornibrook*, 1897, 1 Ch. 25; 66 L. J. Ch. 144.

(*s*) *Smith* v. *Iliffe*, 20 Eq. 666; 44 L. J. Ch. 755; *Clark* v. *Girdwood*, 7 C. D. 18.

(*t*) *Rawlinson* v. *Scholes*, 79 L. T. 350; *Re Griffin*, 1899, 1 Ch. at p. 43; 68 L J. Ch. 220.

(*u*) *Bonhote* v. *Henderson*, 1895, 2 Ch. 202; *Rake* v. *Hooper*, 83 L. T. 669.

(*x*) *Evans* v. *Bicknell*, 6 Ves. 183, *per* Lord Eldon, 5 R. R. 245; *East India Co.* v. *Donald*, 9 Ves. 275; *Pilling* v. *Armitage*, 12 Ves. 80; 8 R. R. 295.

Where the Court has to depend solely on the evidence of the party himself to prove that there was false representation made to him as to the contents of a deed at the time he executed it, the evidence must be looked at with very considerable care before it will act upon it, so as to set aside a deed as against the person, who *bonâ fide* acted on the faith of the deed being genuine (*y*).

Where fraud is alleged against a defendant, communications between himself and his solicitor as to the subject-matter of the alleged fraud are not privileged from production, and it is immaterial for this purpose whether the solicitor is or is not a party to the alleged fraud (*z*). But in order to displace the privilege there must be a specific allegation of fraud (*a*). A mere suggestion or suspicion is not sufficient (*b*). Privilege.

(*y*) 7 Ch. 88, *per* Mellish, L.J.
(*z*) *Williams* v. *Quebrada Co.*, 1895, 2 Ch. 751; 65 L. J. Ch. 68.
(*a*) *Bullivant* v. *Att.-Gen. for Victoria*, 1901, A. C. 196; 70 L. J. K. B. 645.
(*b*) *Re Whitworth*, 1919, 1 Ch. 320.

CHAPTER XI.

COSTS.

COSTS being in the discretion of the Court, it would be of little practical use to attempt a classification of the very numerous decisions on the subject. A few, however, of the more important and more recent cases may be usefully referred to.

The Courts are anxious to discover and discourage fraud in every shape, and therefore there is no rule more general with respect to costs than that where relief is claimed on the ground of fraud, the relief, if granted, will be granted with costs, even against an infant (*a*). But the Courts are no less anxious to discourage loose and unfounded charges of fraud, and therefore a party introducing them will be made to pay the costs occasioned thereby, though he may be successful in the action (*b*).

Though the general rule is that, *primâ facie*, he who succeeds ought to have the costs, costs do not always follow the event. Where an unconscionable bargain is set aside the usual course is not to give the plaintiff his costs, on the principle that he ought to pay for the relief which is granted to him against the consequences of his own folly. If, however, the defendant has refused reasonable terms before action, or has been guilty of fraud or misconduct, the plaintiff may be allowed costs (*c*). In *Fry* v. *Lane* (*d*), Kay, J., said, "No absolute rule has been laid down by the Court in these cases. Sometimes where the only ground was undervalue the plaintiff has

(*a*) *Woolf* v. *Woolf*, 1899, 1 Ch. 343; 68 L. J. Ch. 82.

(*b*) See *post*, p. 491, n. (*r*).

(*c*) *Beynon* v. *Cook*, 10 Ch. 391, n.; *Nevill* v. *Snelling*, 15 C. D. 679; 47 L. J. Ch. 777; *Chapman* v. *Michaelson*, 1909, 1 Ch. 238; 78 L. J. Ch. 272.

(*d*) 40 C. D. 322; 58 L. J. Ch. 113.

been relieved on payment of costs, as in *Twistleton* v. *Griffith*. In some cases no costs are given, as in *Bromley* v. *Smith*; sometimes the costs are thrown upon the defendant, as in *Nevill* v. *Snelling*."

There may be other circumstances of an equitable nature to exempt the unsuccessful party from the payment of costs. When, for instance, an action for rescission of a transaction on the ground of misrepresentation was dismissed, the dismissal was without costs, the Court being satisfied, although the charges as to misrepresentation had failed, that the property had not been correctly described (*e*). So, also, where an action for the rescission of a transaction, on the ground of undue influence, or of advantage taken of a fiduciary position, was dismissed on the ground of acquiescence, or delay in instituting the suit, or even on the merits, the dismissal was without costs, the Court being satisfied that the plaintiff had a reasonable cause of suit, or that the conduct of the defendant had rendered an investigation not unreasonable (*f*). So where a settlement is made under circumstances which make it right for the trustee in bankruptcy to investigate the transaction, the costs of an unsuccessful attempt to upset it ought not to be given against the trustee (*g*), unless his application is wrong in form and unsupported by evidence (*h*). So, also, if there has been negligence or misplaced confidence on the part of the plaintiff, he will not have his costs, although he succeed in the suit (*i*). So, also, although a transaction is set aside, the rescission may be without costs, if the defendant is free from moral blame (*j*); or if the plaintiff is not free from

(*e*) *Bartlett* v. *Salmon*, 6 D. M. & G. 40; *Hallows* v. *Fernie*, 3 Eq. 520; 36 L. J. Ch. 267.

(*f*) *Clegg* v. *Edmondson*, 8 D. M. & G. 806; 114 R. R. 336; *Clanricarde* v. *Henning*, 30 Beav. 175; 30 L. J. Ch. 865; 132 R. R. 227; *Toker* v. *Toker*, 3 D. J. & S. 487; 32 L. J. Ch. 322; 142 R. R. 135.

(*g*) *Re Tetley*, 3 Manson, 226, 321; 66 L. J. Q. B. 111.

(*h*) *Re Lane-Fox*, 1900, 2 Q. B. 508; 69 L. J. Q. B. 722.

(*i*) *Allen* v. *Knight*, 5 Ha. 280; 16 L. J. Ch. 370; 71 R. R. 100; *Johnston* v. *Renton*, 9 Eq. 181; 39 L. J. Ch. 390.

(*j*) *Stanton* v. *Tattersall*, 1 Sm. & G. 536; 96 R. R. 471; *Phosphate Sewage Co.* v. *Hartmont*, 5 C. D. 394; 46 L. J. Ch. 661. In particular cases the plaintiff may have to pay the costs, although the transaction is set aside, if the defendant be free from moral blame. *Davies* v. *Otty*, 35 Beav. 208.

moral blame (*k*). So, also, costs were allowed to the trustees of a voluntary settlement, though it was set aside, as they seemed to have acted *bonâ fide*, and really with the desire to benefit the plaintiff (*l*); and they were entitled to retain their costs as between solicitor and client out of the monies in their hands before paying over the balance, but beneficiaries will not receive their costs (*m*). So, also, where a settlement is set aside as against creditors under 13 Eliz. c. 5, the trustees may have their costs of defending the action out of the trust funds (*n*). So, also, where the plaintiff is *particeps criminis*, and seeks to set aside a security on the ground of public policy, judgment will be without costs (*o*). So, also, although specific performance be decreed, the decree will be without costs, if the party resisting performance had a fair and reasonable ground for doing so (*p*). The Court always exercises its discretion in dismissing an action for specific performance, with costs, on the ground of circumstances which would not be sufficient to cancel the agreement on the ground of fraud. If, on the other hand, the defendant has been to blame in the matter, or has by conduct contributed to the litigation, the dismissal will be without costs (*q*).

As a general rule, where costs have been occasioned by the conduct of either party, the party who occasioned the costs must bear them; and where by the misconduct of both parties, neither has his costs; and where a suit has been rendered necessary by the misconduct of either party, still a part of the costs may have been rendered necessary by the other party. If, accordingly, a man succeeds in obtaining the relief prayed for, and has the costs of the suit generally, but fails to establish allegations of fraud, he must pay the

(*k*) *Aylesford* v. *Morris*, 8 Ch. 498; 42 L. J. Ch. 546; *Lyon* v. *Home*, 6 Eq. 655; 37 L. J. Ch. 674.

(*l*) *Everitt* v. *Everitt*, 10 Eq. 410; 39 L. J. Ch. 777.

(*m*) *Merry* v. *Pownall*, 1898, 1 Ch. 306; 67 L. J. Ch. 162.

(*n*) *Ideal Bedding Co.* v. *Holland*, 1907, 2 Ch. 157; 76 L. J. Ch. 441; distinguishing *Elsey* v. *Cox*, 26 Beav. 95; 122 R. R. 41.

(*o*) *Debenham* v. *Ox*, 1 Ves. 276; but see *Jackman* v. *Mitchell*, 13 Ves. 581; 9 R. R. 229; Dan. Ch. Pr. 1038.

(*p*) *Fenton* v. *Browne*, 14 Ves. 150; 9 R. R. 255.

(*q*) *Walters* v. *Morgan*, 3 D. F. & J. 718; 130 R. R. 309.

costs occasioned by such allegations being introduced (*r*), or, for the sake of simplicity, no costs will be given to either side when, but for the allegations of fraud, the plaintiff would have been entitled to the costs (*s*). In *Parker* v. *M'Kenna* (*t*), where the plaintiff made elaborate charges of fraud which proved to be unfounded, the Court not only made him pay the costs of that part of the case, but refused to allow him the costs even of the part on which he succeeded. It was held that he had so mixed up unfounded and reckless aspersions upon character with the rest of the suit as to forfeit his title to the costs which he otherwise would have been entitled to receive (*u*). In *Rhodes* v. *Bate* (*x*), the defendant was not ordered to pay costs, though the transaction was set aside, inasmuch as the case of the plaintiff failed to a considerable extent, and inasmuch as in so far as it succeeded, it was by force of the law of the Court, and not by any merits of his own, the evidence adduced by him being also irrelevant and overcharged. An action containing unproven charges of fraud was dismissed without costs, because the defendants, by mixing up their personal interests in the transactions in question, had rendered an investigation not unreasonable (*y*). In like manner, charges of fraud made by defendants will, if unsubstantiated, be visited with costs, even though the defendant gets the costs of the suit generally (*z*). So, also, the introduction of charges of fraud which are irrelevant and cannot be tried is improper. The plaintiff must in such a case pay all defendant's costs incurred by reason of such charges as between solicitor and client (*a*).

A plaintiff who fails to substantiate charges of undue

(*r*) *Hilliard* v. *Eiffe*, L. R. 7 H. L. 39, 51; *Clinch* v. *Financial Corporation*, 5 Eq. 450, 483; 37 L. J. Ch. 281; *Thomson* v. *Eastwood*, 2 App. Ca. 236, 243.

(*s*) *Rawlins* v. *Wickham*, 1 Giff. 355; 28 L. J. Ch. 188; 121 R. R. 134; *Tyler* v. *Yates*, 6 Ch. 665; 40 L. J. Ch. 768.

(*t*) 10 Ch. 96, 123, 125; 44 L. J. Ch. 425.

(*u*) 10 Ch. 125.

(*x*) 1 Ch. 622; 35 L. J. Ch. 267; 148 R. R. 255.

(*y*) *Fyler* v. *Fyler*, 3 Beav. 550; 52 R. R. 217.

(*z*) *Thomson* v. *Eastwood*, 2 App. Ca. 215; *Thomas* v. *Atherton*, 10 C. D. 185; 48 L. J. Ch. 370.

(*a*) *Forester* v. *Read*, 6 Ch. 40.

influence against a trustee defendant cannot escape from liability to pay the costs of the defendant in defending himself against such charges by abstaining from claiming any relief against that defendant (*b*).

Where an action, though ostensibly for specific performance, was in the opinion of the Court collusively brought for a different object, it was dismissed, with all costs, charges, and expenses properly incurred by the defendant in the action (*c*).

Solicitors and others who are not chargeable with any of the relief claimed should not be made parties to an action for the purpose of making them pay costs (*d*).

Where a solicitor has not been guilty of participation in a fraud, but at most only of a blunder, for which the remedy is an action for professional negligence, there is no jurisdiction to order him to pay the costs of the suit (*e*).

Though a receiver is generally entitled to be indemnified against costs, he is not entitled to be indemnified against the costs of successfully defending an action charging him with personal fraud while acting as receiver but otherwise having no relation to the estate (*f*).

(*b*) *Bruty* v. *Edmundson*, 1918, 1 Ch. 112; 87 L. J. Ch. 108.
(*c*) *Simpson* v. *Malherbe*, 4 Giff. 707; 141 R. R. 334; Dan. Ch. Pr. 1086.
(*d*) *Burstall* v. *Beyfus*, 26 C. D. 35; *ante*, p. 470.
(*e*) *Clark* v. *Girdwood*, 7 C. D. 9.
(*f*) *Re Dunn*, 1904, 1 Ch. 648; 73 L. J. Ch. 425.

PART II.—MISTAKE.

CHAPTER I.

MISTAKE has been said to be some unintentional act, omission, or error arising from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence (*a*). The definition, however, obviously fails to clearly make the distinction between mistake and fraud; and since little practical advantage is to be gained by any such definition, none is here attempted.

Mistake may be either in matter of law or in matter of fact. It is often said that relief is given against mistake of fact but not against mistake of law. But as we shall presently see, neither branch of the statement is quite accurate, since each requires a great deal of limitation and explanation.

The general jurisdiction of the Court to rectify instruments of all kinds on the ground of mistake does not apply to instruments, like articles of association, which have only a statutory effect (*b*).

Mistake of law.

A mistake of law happens when a party having full knowledge of the facts comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference arising from an imperfect or incorrect exercise of the judgment upon facts as they really are (*c*). Mistake as to foreign law is a mistake of fact (*d*).

The rule that mistake in matter of law cannot be admitted as a valid excuse either for doing an act prohibited by the law, or for the omission of a duty which it imposes, is common

(*a*) Story, Eq. Jur. 110.
(*b*) *Evans* v. *Chapman*, 1902, W. N. 78.
(*c*) *Burkhauser* v. *Schmitt*, 30 Amer. Rep. 743.
(*d*) *Leslie* v. *Baillie*, 2 Y. & C. C. C. 91; 12 L. J. Ch. 153; 60 R. R. 51.

to all systems of law. *Ignorantia juris non excusat*, is the maxim of the common law. There is, however, no presumption of law in this country, that every one knows the law. The rule is that ignorance of law shall not excuse a man or relieve him from the consequences of a crime or from liability on a contract (*e*). The rule is not only expedient, but is absolutely necessary. If ignorance of law were admitted as a ground of exemption, the Court would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable, for in almost every case ignorance of law would be alleged, and the Court would, for the purpose of determining the point, be often compelled to enter upon questions of fact, insoluble and interminable (*f*).

The maxim, *ignorantia juris non excusat*, is not, however, universally applicable in equity (*g*). "If," said Lord Westbury in *Cooper* v. *Phibbs* (*h*), "the word *jus* is used in the sense of denoting *general* law, the ordinary law of the country, no exception can be admitted to the general application of the maxim; but it is otherwise when the word *jus* is used in the sense of denoting a private right. Private right of ownership is a matter of fact; it may also be the result of a matter of law, but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded on a common mistake." "Ignorance of a matter of law," said Lord Chelmsford in *Beauchamp* v. *Winn* (*i*), "arising upon the doubtful condition of a grant is very different from ignorance of a rule of law. Therefore, although where a certain construction has been put by a Court of law on a deed, it must be taken that the legal construction was clear,

(*e*) *Reg.* v. *Mayor of Tewkesbury*, L. R. 3 Q. B. 635, *per* Lord Blackburn; 37 L. J. Q. B. 288.

(*f*) Austin, Jur. vol. 2, p. 172.

(*g*) *Watson* v. *Marston*, 4 D. M. & G. 230, 236; 102 R. R. 100; *Stone* v. *Godfrey*, 5 D. M. & G. 76, 90; 23 L. J. Ch. 769; 104 R. R. 32; *Rogers* v. *Ingham*, 3 C. D. 351; 46 L. J. Ch. 322.

(*h*) L. R. 2 H. L. p. 170.

(*i*) L. R. 6 H. L. p. 234.

yet the ignorance before the decision of what was the true construction cannot be pressed to the extent of depriving a person of relief, on the ground that he was bound himself to have known beforehand how the grant must be construed." When, therefore, a man, through misapprehension or mistake of the law, parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a Court of equity may grant relief if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired (*k*).

The construction of a contract is clearly matter of law, and if a party acts on a mistaken view of his rights under a contract he is not entitled to relief (*l*). A man who acts on a wrong construction of his own duties under a contract does not thereby entitle himself, though the acts so done be for the benefit of the other party, to have the contract performed according to his construction (*m*). On the other hand, one who takes a wider view of his rights than the other is willing to admit is free to waive the dispute and enforce the contract to the limited extent which the other admits (*n*).

The whole subject, however, is far from being clear, and there is an apparent conflict of decisions which has given rise to much doubt and discussion. The difficulty has, moreover, been increased by the fact that no clear and sharp line has

(*k*) See *Cann* v. *Cann*, 1 P. Wms. 727; *Pusey* v. *Desbouvrie*, 3 P. Wms. 320; *Cocking* v. *Pratt*, 1 Ves. 400; *Naylor* v. *Winch*, 1 Sim. & St. 555; 24 R. R. 227; *Macarthy* v. *Decaix*, 2 R. & M. 614; *Clifton* v. *Cockburn*, 3 M. & K. 99; 41 R. R. 21; *Sturge* v. *Sturge*, 12 Beav. 229; 19 L. J. Ch. 17; 85 R. R. 77; *Davis* v. *Morier*, 2 Coll. 308; 70 R. R. 234; *Reynell* v. *Sprye*, 8 Ha. 222, 255; 21 L. J. Ch. 633; 91 R. R. 228; *Cox* v. *Bruton*, 5 W. R. 544; *Stone* v. *Godfrey*, *supra*; *Rogers* v. *Ingham*, *supra*. The misapprehension of rights under a deed, not arising from the misconstruction of the deed, is, it has been said, a mistake in fact, and is consequently relievable in equity. *Denys* v. *Shuckburgh*, 4 Y. & C. 42; 54 R. R. 446.

(*l*) *Midland Ry. &c. Co.* v. *Johnson*, 6 H. L. C. 798, 811; 108 R. R. 313; *Stewart* v. *Kennedy*, 15 App. Ca. 108; but see *Daniell* v. *Sinclair*, 6 App. Ca. at p. 190; 50 L. J. P. C. 50.

(*m*) *Ibid.*

(*n*) *Preston* v. *Luck*, 27 C. D. 497.

been drawn between mistakes of fact and mistakes of law (*o*). Indeed it has been said that recent decisions have lessened, if not destroyed, the importance of the distinction between the two (*p*). The following propositions may, however, perhaps be laid down:—(1) A mistake as to a general rule of law is not a ground for relief, though even here it is conceivable that a common mistake of law might so go to the root of the matter as to prevent any real agreement from being formed. (2) A mistake in the construction of an instrument, or at least of a contract, is a mistake of law, so far as the question of relief is concerned. (3) A mistake as to private rights, such as rights of ownership, is generally a mistake of fact and law, and is apparently assumed to be the former until the latter is proved (*q*); and a mistake of fact which involves a mistake of law is still a mistake of fact (*r*).

Mistake in law, to be a ground for relief in equity, must be of a material nature, and a determining ground of the transaction (*s*). If a man has been made aware of the question of law on which his title depends, and deliberately determines to give up the matter, he cannot afterwards have relief on the ground of a mistake in matter of law (*t*).

Mistake of law may be a misapprehension of the law, or of their private rights to property by both parties to a transaction, both of them making substantially the same mistake; or it may be a misapprehension of the law or of his private right by one of the parties alone.

Mutual mistake of parties as to their rights.

If an agreement be entered into between two parties in mutual mistake as to their relative and respective rights, either of them is entitled to have it set aside (*u*). Where, for instance, a party entered into an agreement with another to take a lease of what in fact was his own property, both parties being under a common mistake as to their respective

(*o*) 6 App. Ca. at p. 190.
(*p*) Fry on Spec. Perf. p. 347.
(*q*) 3 My. & K. at p. 99.
(*r*) 4 C. D. at p. 702.
(*s*) *Stone* v. *Godfrey*, 5 D. M. & G. 76, *supra*.
(*t*) *Ibid.*; *Rogers* v. *Ingram*, 3 C. D. 351; 46 L. J. Ch. 322.
(*u*) *Cooper* v. *Phibbs*, L. R. 2 H. L. 149; *Beauchamp* v. *Winn*, 6 *ibid.* 233; *Butler* v. *Fairclough*, 1917, V. L. R. 175.

rights, the transaction was set aside (*x*). So, also, where a man had sold another an estate which in truth belonged to him, and the conveyance was completed, the Court rescinded the transaction, and ordered the purchase-monies to be refunded (*y*). So also where the second of three brothers having died, the eldest, who had entered upon his deceased brother's share, agreed to divide it with his youngest brother upon the representation of a third party whom the two brothers had consulted, that, as land could not ascend, the youngest brother was heir to the second, and executed a conveyance accordingly, the Court relieved the eldest brother against the instrument (*z*).

Mistake as to his right by one party alone.

If the mistake as to his private right be that of one party only to a transaction, and the other party was not aware of the mistake, the Court may, under the peculiar circumstances, grant relief. But if it appear that the mistake was induced or encouraged by the misrepresentation of the other party to the transaction (*a*), or was perceived by him and taken advantage of, the Court will be more disposed to grant relief than in cases where it does not appear that he was aware of the mistake (*b*). In *Broughton* v. *Hutt* (*c*), where the heir-at-law of a shareholder in a company, the shares in which were personal estate, supposing himself, through ignorance of law, to be liable in respect of the shares, had executed a deed taking the liability on himself, it was held that he was entitled to have the deed cancelled. So also where a creditor of a company having a legal security gave it up in exchange for another security, upon the faith that the right which he gave up would be secured to him by the substituted security,

(*x*) *Cooper* v. *Phibbs*, *supra*; *Jones* v. *Clifford*, 3 C. D. 779; 45 L. J. Ch. 809.

(*y*) *Bingham* v. *Bingham*, 1 Ves. 126; *Jones* v. *Clifford*, 3 C. D. 792; 5 L. J. Ch. 809. See *Debenham* v. *Sawbridge*, 1901, 2 Ch. at p. 109; *post*, p. 556.

(*z*) *Lansdowne* v. *Lansdowne*, Mose. 364, cit. 2 J. & W. 205.

(*a*) *Scholfield* v. *Templer*, John. 166; 124 R. R. 324; *Cooper* v. *Phibbs*, L. R. 2 H. L. 149, *ante*, p. 62.

(*b*) *Cocking* v. *Pratt*, 1 Ves. 400; *Sturge* v. *Sturge*, 12 Beav. 229; 19 L. J. Ch. 17; *Broughton* v. *Hutt*, 3 D. & J. 501; 28 L. J. Ch. 167; *Powell* v. *Smith*, 14 Eq. 90; 41 L. J. Ch. 734; *Beauchamp* v. *Winn*, L. R. 6 H. L. 233; *Redgrave* v. *Hurd*, *post*, p. 519.

(*c*) 3 D. & J. 501; 28 L. J. Ch. 167.

but the substituted security proved to be a mere nullity in law, relief was given (*d*). So also where a woman renewed a note, believing that she was liable on the original note, relief was given (*e*). So also where a sister, being ignorant of her rights under a settlement, released her rights to a brother, the release was held not binding on her (*f*). So a release executed on the footing of accounts assumed to be correct, will be set aside if those accounts turn out afterwards to contain serious errors, and this, in a grave case, even after many years (*g*).

If there is no evidence to show that the mistake of law was known to or perceived by the other party to the transaction, the Court will not, except under very exceptional circumstances, interfere. Parties are understood to contract upon the common basis of the general law equally known to both, so that a mistake of general law can never be alleged by one party in his dealings with another (*h*). So it is no answer to an action for specific performance for defendant to say that though he understood what the words of the agreement were, he was under a mistake as to their legal effect (*i*). But if a mistake by one of the parties as to the meaning of the words used is induced by the other party, however innocently, the above principle does not apply (*k*).

It seems to follow that, at least as a defence to specific performance, common error of law of both parties, or even the sole error of the defendant when resulting in mistake important to both parties, as to some of the matters dealt with by the contract would be sufficient. But it is submitted that neither the common error of both parties nor the sole error of the defendant as to the operation and effect of the contract can be a ground for resisting specific performance (*l*).

(*d*) *Re Saxon Life Ass. Co.*, 2 J. & H. 408; 1 D. J. & S. 29; 32 L. J. Ch. 206; 134 R. R. 271; and see *Mildmay* v. *Hungerford*, 2 Vern. 243.

(*e*) *Coward* v. *Hughes*, 1 K. & J. 443; 103 R. R. 172.

(*f*) *Ramsden* v. *Hylton*, 2 Ves. 304; and see *Pusey* v. *Desbouverie*, 3 P. W. 315.

(*g*) *Gandy* v. *Macaulay*, 31 C. D. 1.

(*h*) *Powell* v. *Smith*, 14 Eq. 85; *supra*; *Stewart* v. *Kennedy*, 15 App. Ca. 108; *Harse* v. *Pearl Life Ass. Co.*, 1904, 1 K. B. 558; 73 L. J. K. B. 373.

(*i*) *Hart* v. *Hart*, 18 C. D. 670; 50 L. J. Ch. 697.

(*k*) *Wilding* v. *Sanderson*, 1897, 2 Ch. 534, 550; 66 L. J. Ch. 684.

(*l*) Fry, Spec. Perf. 348; *Stewart* v. *Kennedy*, 15 App. Ca. 108, 121.

Payment of money under mistake of law.

As a general rule it is well established in equity as well as at law, that money paid under a mistake of law, with full knowledge of the facts, is not recoverable, and that even a promise to pay, upon a supposed liability, and in ignorance of the law, will bind the party (*m*). So where an increased rent was not recoverable by the landlord, but the tenant paid it under a mistake of law, he was not entitled to recover it from the landlord in any shape or form (*n*). So where the plaintiff had paid taxes by mistake upon the assumption that he was liable, both parties being ignorant of a change in the law, it was held that he could not recover (*o*). But the rule is liable to a qualification, if the person seeking to recover did not make the payment and was not bound by the person making it (*p*), or if the man to whom money has been paid has been accessory to the error of the other party, or has got some one to misinform him of the law (*q*).

"If," said James, L.J., in *Rogers* v. *Ingram* (*r*), "the proposition were true that in every case where money has been paid under a mistake as to legal rights, it could be recovered back, it would open a fearful amount of litigation and evil in cases of distribution of estates, and it would be difficult to say what limit could be placed to this kind of claim, if it could be made after a trustee has distributed the whole estate among the persons supposed to be entitled, every one of them having knowledge of all the facts and having

(*m*) *Bilbie* v. *Lumley*, 2 East, 469; 6 R. R. 479; *Brisbane* v. *Dacres*, 5 Taunt. 143; 14 R. R. 718; *Drewry* v. *Barnes*, 3 Russ. 94; *Bate* v. *Hooper*, 5 D. M. & G. 338; *Stafford* v. *Stafford*, 1 D. & J. 197; 118 R. R. 86; *Saltmarsh* v. *Barrett*, 31 L. J. Ch. 783; *Rogers* v. *Ingram*, 3 C. D. 351; 46 L. J. Ch. 322; *Re Hulkes*, 33 C. D. 552; 55 L. J. Ch. 846. Where money had been paid for many years without deducting the land-tax, no deduction was afterwards allowed out of the subsequent payments. *Nicholls* v. *Leeson*, 3 Atk. 573. So, also, where an executor had paid interest for seventeen years without deducting the property-tax, it was held he could not afterwards deduct out of the future interest due the amount of property-tax on such precedent payments. *Currie* v. *Goold*, 2 Madd. 163; 53 R. R. 33.

(*n*) *Sharp Bros.* v. *Chant*, 1917, 1 K. B. 771; 86 L. J. K. B. 608.

(*o*) *O'Grady* v. *Toronto City*, 37 Ont. L. R. 139; cf. *Meadows* v. *Grand Junction Waterworks*, 3 L. G. R. 910.

(*p*) *Blackburn Soc.* v. *Brooks*, 29 C. D. at p. 910; 54 L. J. Ch. 1091. See *Re West*, 1909, 2 Ch. 180; 78 L. J. Ch. 559.

(*q*) *Dixons* v. *Monkland Canal*, 5 Wills. & Sh. Sc. Ap. 445.

(*r*) 3 C. D. 356; 46 L. J. Ch. 322.

given a release. The thing has never been done, and it is not a thing which, in my opinion, should be encouraged. When people have knowledge of all the facts and take advice, and whether they get proper advice or not, and the business is settled, it is not for the good of mankind that the matter should be reopened" (*s*). Where accordingly an executor under the advice of counsel on the construction of a will, proposed to divide in certain proportions a fund between two legatees, but one of the legatees being dissatisfied took the opinion of counsel, which agreed with the former opinion, and two years afterwards the dissatisfied legatee filed a bill against the executor and the other legatee, alleging that the will had been wrongly construed and claiming repayment from the other legatee, it was held that the suit could not be maintained (*t*). So also where there had been a payment and acceptance of money between two parties under a mutual mistake of law, and it appeared under the circumstances of the case that the party who received the money received it as a composition in lieu of a larger sum, it was held that he could not afterwards sue for the balance (*u*).

Where tolls were paid by mistake, it was held that they could not be recovered unless the mistake went not merely to the liability but to the fact on which the liability depended (*w*), but on appeal the Court without deciding whether the mistake was one of law or of fact, held that the money could be recovered (*x*). Where a landlord by mistake paid inhabited house duty which the tenant was bound to pay, he was entitled to recover as upon an implied promise to refund the amount (*y*). Where since 1838 a rent-charge had been paid without making the statutory deduction for poor rate, it was held that the mistake was a reasonable explanation and that the deduction could be made (*z*).

(*s*) See *Hilliard* v. *Fulford*, 4 C. D. 390; 46 L. J. Ch. 43.
(*t*) *Rogers* v. *Ingram*, 3 C. D. 351; 46 L. J. Ch. 322
(*u*) *Kitchin* v. *Hawkins*, L. R. 2 C. P. 28.
(*w*) *Maskell* v. *Horner*, 78 J. P. 167.
(*x*) *Ibid.*, 1915, 3 K. B. 106; 84 L. J. K. B. 1752.
(*y*) *Eastwood* v. *McNab*, 1914, 2 K. B. 361; 83 L. J. K. B. 941.
(*z*) *Corcoran* v. *Wade*, 1913, 1 Ir. R. 25.

In administration proceedings the Court will adjust the accounts between the parties entitled, and set right an overpayment made by mistake out of the share of the party who has benefited by it, and this would seem to be so whether the mistake was one of law or of fact (*a*). But as a rule an executor or trustee who pays away money by mistake to the wrong person must replace the fund (*b*), even though he has acted on legal advice (*c*).

Mistake of Court.

An erroneous decision of a Court which is subsequently reversed on appeal is no ground for the recovery back of money paid under it (*d*). Nor does such decision exempt a person from liability to pay interest or damage (*e*).

Payment by mistake of law.

A Court of equity has, however, power to relieve against payment of money in mistake of law, if there is any equitable ground which makes it under the particular facts of the case inequitable that the party who received the money should retain it (*f*). Thus money will be ordered to be repaid where it has by mistake of law been paid to an officer of the Court, as, for instance, to a trustee in bankruptcy, or to a receiver (*g*), provided that no injustice is done to any one by the order (*h*). So where a liquidator, acting on the decision of the Court, paid certain shareholders 20s. in the £, and subsequently it was held on appeal that they were only entitled to 16s., the money overpaid was ordered to be returned (*i*). So also an executrix who, under a mistake as to the construction of a will, had

(*a*) *Re Ainsworth*, 1915, 2 Ch. 96; 84 L. J. Ch. 701; *Re Robinson*, 1911, 1 Ch. 502.

(*b*) *Re Hulkes*, *supra*; *Re Horne*, 1905, 1 Ch. 76; *Re Hatch*, 1919, 1 Ch. 351.

(*c*) *National Trustees &c.* v. *General Finance Agency*, 1905, A. C. 373; 74 L. J. P. C. 73.

(*d*) *Henderson* v. *Folkestone Waterworks*, 1 T. L. R. 329; but see *Re Birkbeck Bldg. Soc.*, *infra*.

(*e*) *Bayley-Worthington and Cohen*, 1909, 1 Ch. 648; 78 L. J. Ch. 351; *Hunt* v. *Hunt*, 54 L. J. Ch. 289.

(*f*) *Rogers* v. *Ingram*, 3 C. D. 357, *per* Mellish, L.J.

(*g*) *Ex p. James*, 9 Ch. 614; *Dixon* v. *Brown*, 32 C. D. 597; 55 L. J. Ch. 556; *Re Rhoades*, 1899, 2 Q. B. 347; 68 L. J. Q. B. 804; *Re Tyler*, 1907, 1 K. B. 865; 76 L. J. K. B. 541; cf. *Re Hall*, *ibid.*, 875; *Tapster* v. *Ward*, 101 L. T. 25: *Re Thellusson*, 1919, W. N. 235.

(*h*) *Ex p. Simmonds*, 16 Q. B. D. 308; 55 L. J. Q. B. 74; *Re Opera, Ltd.*, 1891, 2 Ch. 154; 60 L. J. Ch. 839.

(*i*) *Re Birkbeck Bldg. Soc.*, 1915, 1 Ch. 91; 84 L. J. Ch. 189.

overpaid an annuitant, was permitted to deduct the amount overpaid from subsequent payments (*k*). So, also, where accounts were drawn up and assented to under a common mistake of law as to their respective rights and interests by the parties, certain sums having been wrongly credited, the accounts, though settled, were reopened (*l*).

A voluntary payment made under a supposed legal obligation creates in law no obligation at all, and therefore a voluntary payment for many years under a supposed legal obligation to pay rent does not estop the person making such payment from setting up his true title (*m*).

Money not claimed by reason of a mistake of law is not the same as money paid, and may be recovered (*n*). But money allowed in account under a mistake of law cannot be recovered back (*o*).

Payment out.

Where money is paid out of Court to the wrong person, then except perhaps where the order was obtained by fraud, the person really entitled though not before the Court has no claim on the Consolidated Fund (*p*).

Mistake of law not a ground for setting aside a compromise.

Mistake in law is not a ground for setting aside a compromise, if the parties to the transaction were in difficulty and doubt, and wished to put an end to disputes, and to terminate or avoid litigation. If one or more parties, having, or supposing they have, claims upon a given subject-matter, or claims against each other, agree to compromise these claims, and the knowledge, or means of knowledge, of each of them with respect to the mode in which, and the circumstances under which, his claim arises, stand upon an equal

(*k*) *Livesey* v. *Livesey*, 3 Russ. 287; 6 L. J. Ch. 13; *Dibbs* v. *Green*, 11 Beav. 483. See *Re Horne*, 1905, 1 Ch. 76; 74 L. J. Ch. 25; *Re Allsop*, 1914, 1 Ch. 1; 83 L. J. Ch. 42.

(*l*) *Daniel* v. *Sinclair*, 6 App. Ca. 181; 50 L. J. P. C. 50.

(*m*) *Batten-Poole* v. *Kennedy*, 1907, 1 Ch. 256; 76 L. J. Ch. 162; *O'Grady* v. *City of Toronto*, 37 O. L. R. 139.

(*n*) *R.* v. *Blenkinsop*, 1892, 1 Q. B. 43; 61 L. J. M. C. 45; *Davis* v. *Morier*, 2 Coll. 303; 70 R. R. 234.

(*o*) *Skyring* v. *Greenwood*, 4 B. & C. 281; 28 R. R. 264. See 1892, 1 Q. B. at p. 46.

(*p*) *Re Williams' Settled Estates*, 1910, 2 Ch. 481; 80 L. J. Ch. 8. As to mistake in payment in, see *G. W. Ry.* v. *Cripps*, 5 Ha. 91; *Re Stamford*, 53 L. T. 511.

footing, and there is an absence of fraud or misrepresentation, the transaction is binding, although the conclusion at which the parties may have arrived is not that which a Court of Justice would have arrived at had its decision been sought. The real consideration which each party receives under a compromise being, not the sacrifice of the right, but the settlement of the dispute, and the abandonment of the claim, it is no objection to the validity of the transaction that the right was really in one of the parties only, and the others had no right whatever. If, for instance, two parties claim adversely to each other the inheritance of a deceased person, and, in order to avoid litigation, agree to divide the inheritance, it is no ground for setting aside the agreement that only one was heir, and that the other gave up the right which he really possessed. The fact that the one may have had no claim is immaterial, if he was honestly mistaken as to his claim. It is enough if at the time of the compromise he may have believed he had a claim, and that the parties have, by the transaction, avoided the necessity of going to law (*q*). To render valid the compromise of a litigation, it is not even necessary that the question in dispute should really be doubtful, if the parties *bonâ fide* consider it to be so. It is enough to render a compromise valid, that there is a question to be decided between them (*r*). A compromise of doubtful rights will not be set aside except on the ground of fraud (*s*) or misrepresentation as to rights (*t*). In dealing with a compromise all that a Court of Justice has to do is to ascertain that the

(*q*) *Stapilton* v. *Stapilton*, 1 Atk. 10; *Gordon* v. *Gordon*, 3 Sw. 463; 19 R. R. 230; *Naylor* v. *Winch*, 1 Sim. & St. 555; 24 R. R. 227; *Harvey* v. *Cooke*, 4 Russ. 34; 6 L. J. Ch. 84; *Attwood* v. ——, 5 Russ. 149; 29 R. R. 15; *Stewart* v. *Stewart*, 6 Cl. & Fin. 969; 49 R. R. 267; *Pickering* v. *Pickering*, 2 Beav. 56; 8 L. J. Ch. 336; *Reynell* v. *Sprye*, 8 Ha. 222, 254; 21 L. J. Ch. 633; *Lawton* v. *Campion*, 18 Beav. 87; 23 L. J. Ch. 505; *Trigge* v. *Lavallée*, 15 Moo. P. C. 270; *Bullock* v. *Downes*, 9 H. L. 1; 131 R. R. 1; *Belhaven's Case*, 3 D. J. & S. 41; 34 L. J. Ch. 503; *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 450; 39 L. J. Q. B. 181; *Re Roberts*, 1905, 1 Ch. 704; 74 L. J. Ch. 483.

(*r*) *Ex p. Lucy*, 4 D. M. & G. 356; 22 L. J. Ch. 732; 102 R. R. 163; *Miles* v. *New Zealand Co.*, 32 C. D. 266; 54 L. J. Ch. 1035.

(*s*) *Brooke* v. *Mostyn*, 2 D. J. & S. 373; 34 L. J. Ch. 65; 139 R. R. 134; *ante*, pp. 110, 111.

(*t*) *Re Roberts*, 1905, 1 Ch. 704; *post*, p. 546.

claim or the representation on the one side is *bonâ fide* and truly made, and that on the other side the answer or defence or counterclaim is also *bonâ fide* and truly made. All that the parties contemplate and desire to effect and deal with, is whether the claim on the one side, or the defence on the other, shall be admitted or not, or whether, if both things are *bonâ fide* brought forward, there may not be some concession on the one side and some concession on the other side, so as to arrive at terms of agreement which, if honestly made, is an honest settlement of an existing dispute. If so made, a Court of Justice will respect it and not allow it to be questioned (*u*).

Mistake of fact.

The jurisdiction of equity over mistake is exercised much more liberally where the mistake is in matter of fact, than where it is in matter of law. The admission of ignorance of fact as a ground of relief, is not attended with those inconveniences which seem to be the reason for rejecting ignorance of law as a valid excuse. Whether the ignorance really existed, and whether it was imputable or not to the inadvertence of the party, is a question which may be solved by looking at the circumstances of the case. The inquiry is limited to a given incident, and to the circumstances attending that incident, and is, therefore, not interminable (*w*).

Opinion of Savigny as to distinction between mistake of law and mistake of fact.

According to Savigny, whose principles appear to be in the main applicable to English law, ignorance has not, as such, any effect upon the legal consequences of an act or transaction in which it occurs. The effect generally attributed to ignorance is properly attributable to the negligence which is the cause of it. Ignorance which is not the effect of gross negligence is not prejudicial to the ignorant party, but ignorance which is the effect of such negligence is prejudicial to him. Whether ignorance be or be not the result of gross negligence depends on circumstances; it is presumed to be so when a man is ignorant of the general laws of his country, or of his own affairs, but it is not so presumed when he is ignorant of other matters. The presumption which arises in each of these cases is rebuttable, but is conclusive if not

(*u*) *Dixon* v. *Evans*, L. R. 5 H. L. 606.
(*w*) Austin, Jur. vol. 2, p. 172.

rebutted by the person against whom it arises. Ignorance of matters of law and ignorance of matters of fact, are thus placed on the same footing; both are prejudicial when the result of gross negligence; both are harmless when not so (*x*).

Definition of mistake of fact.

Mistake of fact is a mistake not caused by the neglect of legal duty on the part of the person making the mistake (*y*), and consisting in an unconsciousness (*z*), ignorance not caused by the other party (*a*), or forgetfulness (*b*) of a fact past or present material to the transaction; or in the belief in the present existence of a thing not material to the transaction, which does not exist, or in the past existence of a thing which has not existed (*c*).

Mistake as distinguished from fraud.

In "fraud," is distinguished from "mistake," there is, necessarily, a misapprehension or mistake in the party defrauded, which alone would not vitiate his dealings with others; but there is the additional circumstance that the party with whom he deals intentionally causes the mistake for the purpose of effecting the dealing, and this precludes the party so occasioning the mistake from holding the other bound to it.

Mistake as distinguished from negligence.

What is the nature or degree of mistake which is relievable in equity, as distinguished from mistake which is due to negligence (*d*), and therefore not relievable, cannot well be defined so as to establish a general rule, and must, in a great measure, depend on the discretion of the Court under all the circumstances of the case. Though the Court will relieve against mistake, it will not assist a man whose condition is

(*x*) Lindley on Jur. App. p. 19.

(*y*) New York Civil Code, Art. 762.

(*z*) See *Kelly* v. *Solari*, 9 M. & W. 54; 11 L. J. Ex. 10; 60 R. R. 666.

(*a*) See *Cocking* v. *Pratt*, 1 Ves. 400; *East India Co.* v. *Donald*, 9 Ves. 275; *Hore* v. *Becher*, 12 Sim. 465; 11 L. J. Ch. 153; *Bell* v. *Gardiner*, 4 M. & G. 11; 61 R. R. 443.

(*b*) *Kelly* v. *Solari*, *supra*; *Lucas* v. *Worswick*, 1 Moo. & R. 293; 42 R. R. 798; *Hood* v. *Mackinnon*, 1909, 1 Ch. 476; 78 L. J. Ch. 300; cf. *Barrow* v. *Isaacs*, 1891, 1 Q. B. 417; 60 L. J. Q. B. 179.

(*c*) See *Colyer* v. *Clay*, 7 Beav. 188; 64 R. R. 58; *Strickland* v. *Turner*, 7 Exch. 208; 22 L. J. Ex. 115; *Cochrane* v. *Willis*, 1 Ch. 58; 35 L. J. Ch. 36.

(*d*) *Ante*, pp. 133 *et seq.* Facti ignorantia ita demum cuique non nocet, si non ei summa negligentia objiciatur. Quid enim si omnes in civitate sciant quod ille solus ignorat. Dig. Lib. 22, tit. 6, l. 9.

attributable only to that want of due diligence which may be fairly expected from a reasonable person (*e*). Parties, for instance, who, having a good defence, or plain and complete remedy at law, neglected to avail themselves of it there, could not come to equity for relief (*f*). Nor has a purchaser who is evicted by reason of a defect in title, which his legal adviser has overlooked, an equity to recover his purchase-money (*g*). Nor can relief be had against a forfeiture, where a man who is charged with a legal obligation forgets to perform it (*h*).

Mistake caused by negligence of third parties.

A mistake amounting to a breach of contract will not as a general rule be a cause of action for a stranger. Thus where a message is incorrectly transmitted by a telegraph company and the person to whom it is delivered sustains damage, that person has no remedy against the company. For the duty to deliver the message arises out of a contract with the sender and not with the receiver. Wilful alteration might be a ground for an action of deceit, but a mere mistake cannot be so treated (*i*).

Mistake as ground of relief must be material, &c.

Mistake, to be a ground for relief, must be of a material nature, and must be the determining ground of the transaction. Mistake in matters which are only incidental to and are not of the essence of a transaction, and in the absence of which it is reasonable to infer that the transaction would nevertheless have taken place, goes for nothing (*k*). Nor does the circumstance that the mistake may be in a material matter and induced the contract entitle a man to rescind, unless the error goes to the root of the matter (*l*). In the

(*e*) *Duke of Beaufort* v. *Neeld*, 12 Cl. & Fin. 248, 286; *Campbell* v. *Ingilby*, 1 D. & J. 403; 118 R. R. 145; *Leuty* v. *Hillas*, 2 D. & J. 110; 27 L. J. Ch. 534; 119 R. R. 46; *Rogers* v. *Ingham*, 3 C. D. 351; 46 L. J. Ch. 322; *Re Hulkes*, 33 C. D. 552, 561; 55 L. J. Ch. 846.

(*f*) *Drewry* v. *Barnes*, 3 Russ. 94; 5 L. J. Ch. 47; 27 R. R. 20.

(*g*) *Urmston* v. *Pate*, 3 Ves. 235, n. See *Thomas* v. *Powell*, 2 Cox, 394; 2 R. R. 86.

(*h*) *Gregory* v. *Wilson*, 9 Ha. 683, 689; 89 R. R. 625; *Barrow* v. *Isaacs*, 1891, 1 Q. B. 417; 60 L. J. Q. B. 179; and see *post*, p. 554.

(*i*) *Dickson* v. *Reuter's Telegraph Co.*, 3 C. P. D. 1; 47 L. J. C. P. 1.

(*k*) *Stone* v. *Godfrey*, 5 D. M. & G. 76; 23 L. J. Ch. 769; 104 R. R. 32; *Carpmael* v. *Powis*, 10 Beav. 39; 16 L. J. Ch. 31; *Trigge* v. *Lavallée*, 15 Moo. P. C. 276; 137 R. R. 61; but see *post*, p. 519.

(*l*) *Stewart* v. *Kennedy*, 15 A. C. 118.

case of fraud a misrepresentation of any material fact gives a right to rescission, but mistake to be a ground for such relief must be a fundamental error, an error which affects the substance of the whole consideration (*m*).

Mistake of fact is not the less a ground for relief because the person who made the mistake had the means of knowledge (*n*), and still less where there is misrepresentation (*o*).

Mistake of fact either on the part of one party to the transaction, or mutual to both.

Mistake of fact may be the mistake of one party only to a contract, or there may be a mistake of both parties respecting the same matter; and thus there arise two different conditions of the question, which are governed by considerations of a different character.

Mistake of one party only, not known to the other.

The mistake of one party only is attended by different consequences, accordingly as the other party is or is not cognizant of the mistake.

The law judges of an agreement between two persons exclusively from the mutual communications which take place between them. If the terms of the proposal of the one are unambiguous and unmistakeable, and the answer of the other is an unequivocal and unconditional acceptance, the latter is bound, in the absence of fraud or warranty, however clearly he may afterwards make it appear that he was labouring under a mistake in his acceptance of the proposal. He cannot be allowed to escape from the effect of his agreement by merely showing that he understood the terms in a different sense from that which they bear in their legal effect. If a man will not take reasonable care to ascertain what he is doing, he must bear the consequences (*p*).

Nor indeed is it sufficient to resist specific performance for the purchaser to say that he has made a mistake, if the terms of the contract are not ambiguous, and the property has been described in a manner which could not mislead anybody who

(*m*) *Kennedy* v. *Panama Co.*, L. R. 2 Q. B. 580; 36 L. J. Q. B. 260; but see *post*, p. 519.

(*n*) *Willmott* v. *Barber*, 15 C. D. 97; 44 L. J. Ch. 792; but see 9 H. L. C. at p. 742.

(*o*) *Redgrave* v. *Hurd*, 20 C. D. 1; 51 L. J. Ch. 113.

(*p*) *Ante*, p. 498; *Stewart* v. *Kennedy*, 15 App. Ca. p. 121.

took reasonable care (*q*). In a case before Lord Romilly, where the defendant alleged that he had misunderstood the particulars of sale, he said that "If there appears on the particulars no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then I do not think it is sufficient for the purchaser to swear that he did make a mistake, or that he did not understand what he was about" (*r*). Where, accordingly, an inn together with a saddler's shop were put up for sale, and at the back of the inn and saddler's shop were two pieces of garden ground not belonging to the vendor, one of which had been for many years occupied with the inn, and the other with the saddler's shop, and which were hardly at all fenced from the premises with which they were occupied, and the purchaser, who was acquainted with the property and knew the gardens to be occupied along with the inn and saddler's shop, did not look at the plan, but bought in the belief that he was buying the whole of the property in the occupation of the tenants, it was held that he could not resist specific performance, as the description of the property was accurate and free from ambiguity (*s*). So, also, on the other hand, where a purchaser believed he was buying and intended to buy the whole of the premises comprised in the particulars of sale, and there was no ambiguity in the particulars of the property sold, it is not competent to the vendor to say merely that he has made a mistake, and did not intend to sell a portion of the property (*t*). So where a purchaser by mistake bids for a different lot from that which he meant to buy, he will not be relieved from the contract (*u*).

The Court may, however, refuse to enforce specific performance of a contract on the ground of mistake, even in cases

(*q*) *Tamplin* v. *James*, 15 C. D. 217; *May* v. *Platt*, 1900, 1 Ch. 616; 69 L. J. Ch. 357.

(*r*) *Swaisland* v. *Dearsley*, 29 Beav. 430; 30 L. J. Ch. 652; 131 R. R. 656; approved by Baggallay, L.J., 15 C. D. 218.

(*s*) *Tamplin* v. *James*, 15 C. D. 217; cf. *Brewer* v. *Brown*, 28 C. D. 309; 54 L J. Ch. 605.

(*t*) *Dyas* v. *Stafford*, 7 L. R. I. 606.

(*u*) *Van Praagh* v. *Everidge*, 1902, 2 Ch. 266; 72 L. J. Ch. 260; reversed on another point, 1903, 1 Ch. 434; *post*, p. 518.

where the mistake is purely the mistake of the person against whom relief is sought, and has not been contributed to in any way by the other party to the contract, if in the opinion of the Court a hardship amounting to injustice would be inflicted on the party against whom relief is sought by holding him to his bargain (*x*). Thus specific performance was refused against a vendor who had contracted to sell an estate under the mistake that he was entitled to the purchase-money absolutely, whereas, in fact, he was bound to reinvest it in the purchase of other land (*y*). So, also, where a vendor had offered property for sale by a letter, in which the price was stated to be 1,250*l*., instead of 2,250*l*., and the purchaser accepted the offer by letter, the Court refused to enforce the contract at the price mentioned in the letter, the vendor having given notice of the mistake immediately on discovering it (*z*). So, also, where a man entered into a contract for the purchase of land under the belief that he would be able to build over the whole site, but he subsequently discovered that he would not be able to do so by reason of certain provisions in an Act of Parliament, the Court would not enforce specific performance against him (*a*). So, also, where a man who was employed to bid for one or two distinct estates kept bidding in a hasty and inconsiderate manner, and ultimately purchased the lot, which, by his own gross mistake, he thought to be the lot for which he was to bid, the Court refused specifically to carry out the sale (*b*). So, also, where a vendor had revoked the authority of the auctioneer as to part of the property, the auctioneer inadvertently sold the whole, the Court refused specific performance, although the purchaser was

(*x*) *Tamplin* v. *James*, 15 C. D. 220; *Burrow* v. *Scammell*, 19 C. D. 182; 51 L. J. Ch. 296; *Goddard* v. *Jeffryes*, 51 L. J. Ch. 67; *Re Hare and O'More*, 1901, 1 Ch. 93; 70 L. J. Ch. 45.

(*y*) *Howell* v. *George*, 1 Madd. 1; 15 R. R. 203; *Hood* v. *Oglander*, 34 Beav. 513; 34 L. J. Ch. 538; 145 R. R. 639.

(*z*) *Webster* v. *Cecil*, 30 Beav. 62; 132 R. R. 185. Such a mistake will not be ground for open biddings, which can now only be opened for fraud: *Griffiths* v. *Jones*, 15 Eq. 279; 42 L. J. Ch. 468.

(*a*) *Bray* v. *Briggs*, 20 W. R. 962.

(*b*) *Malins* v. *Freeman*, 2 Keen, 25; 6 L. J. Ch. 133; 44 R. R. 178; but see *Van Praagh* v. *Everidge*, *supra*.

justified in believing that he purchased all he claimed in his action (*c*). So if a mistake in the particulars is corrected by the auctioneer at the sale, the purchaser is not entitled to specific performance with compensation, even though he did not hear the auctioneer's statement, and the vendor is entitled to rescind (*d*).

Where the subject of sale was the reversionary estate in land under a lease, and the price was fixed in the contract without any mention of the rent payable under the lease, and the vendor proved his understanding of the contract to have been that the rent was to be paid to him during the term, besides the contract price, it was held that the purchaser could not have specific performance upon any other construction of the contract, and his action was dismissed, but without prejudice to his legal rights (*e*). So, also, where a mortgagee, having obtained a foreclosure, contracted to sell, subject to a clause in the contract stating the vendor to be a mortgagee with power of sale, and that the covenants would be restricted accordingly, and the purchaser insisted upon a conveyance under the power of sale in the mortgage, which might have the effect of opening the foreclosure, it was held that the vendor might resist a specific performance in the form claimed, upon the ground that the clause referring to the power of sale was inserted by mistake (*f*).

So, also, a defendant charged with the performance of an agreement to give a lease may show that the stipulation for the tenant to pay the rent, "free from taxes," was omitted from the agreement by mistake (*g*). So where the subject of the lease was a malt-house, and by mistake the condition was omitted that the lessees should covenant as to the quantity of malt to be made (*h*), and where in offering an agreement

(*c*) *Manser* v. *Back*, 6 Ha. 443; 77 R. R. 187.

(*d*) *Re Hare and O'More*, 1901, 1 Ch. 93; 70 L. J. Ch. 45.

(*e*) *Wycombe Ry. Co.* v. *Donnington Hospital*, 1 Ch. 268; cf. *Powell* v. *Smith*, *ante*, p. 498.

(*f*) *Watson* v. *Marston*, 4 D. M. & G. 230; 102 R. R. 100. See 1903, 1 Ch. 862.

(*g*) *Joynes* v. *Statham*, 3 Atk. 388.

(*h*) *Garrard* v. *Grinling*, 2 Sw. 244.

for a lease on certain terms, which were accepted, the lessor had omitted by mistake to insert the term that he required a certain sum for a premium (*i*).

So, also, where a description of parcels was prepared by the vendor's solicitor from a previous description, and the description turned out to be erroneous as to quantity, and materially in excess of the contract, the Court would not enforce the sale on the vendor unless the case were one for compensation, and the purchaser would submit to it (*k*). So, also, where a contract for sale includes, by mistake in drawing up the particulars of sale, property not intended to be sold, the Court will refuse to enforce the contract, unless the purchaser consent to take only the property intended to be sold (*l*).

So, also, the Court would not enforce specific performance against a vendor who had contracted to sell at an inadequate price, in ignorance of the report of his agent upon the value, which the agent had neglected to present (*m*); nor against a vendor who had reserved a bidding for the protection of the sale, but his agent had by mistake omitted to bid (*n*). So it seems that specific performance might be successfully resisted by a purchaser who supposed a certain property to be included in his purchase that formed a material inducement for him to make the contract, and which proves, in fact, not to be included (*o*). Nor will the Court compel a man specifically to perform an agreement where the result would be to compel him to commit a breach of a prior agreement with another person (*p*).

When, on the other hand, an estate was put up to auction and bought upon the terms of the purchaser taking the timber

(*i*) *Wood* v. *Scarth*, 2 K. & J. 33; 110 R. R. 88.

(*k*) *Leslie* v. *Thompson*, 9 Ha. 268; 20 L. J. Ch. 561; 89 R. R. 439. See 54 L. J. Ch. 590.

(*l*) *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1; 13 L. J. Ch. 65; 86 R. R. 1; but see *ante*, p. 508, n. (*t*); and 7 C. D. 680.

(*m*) *Mortlock* v. *Buller*, 10 Ves. 292; 7 R. R. 417. See *Rudd* v. *Lascelles*, 1900, 1 Ch. 815; 69 L. J. Ch. 396.

(*n*) *Ibid.*; *Mason* v. *Armitage*, 13 Ves. 25; 9 R. R. 131.

(*o*) See *Stapylton* v. *Scott*, 13 Ves. 426, *per* Lord Erskine.

(*p*) *Willmott* v. *Barber*, 15 C. D. 96; Fry, par. 407; 44 L. J. Ch. 792

at a fixed price, it was held that a mistake of the vendor in valuing the timber was no ground for relief in equity, and that the contract was binding (*q*). So, also, where a man agreed to take a mining lease entitling him to search for and take coal, &c., &c., at a fixed annual rent, upon the supposition that a certain vein of coal existed under the surface; it was held that he was bound to take the lease and pay the rent, although he was unsuccessful in finding the supposed vein of coal, as he had in fact obtained all that he had bargained for, and there had been no representation by the lessor as to the existence of the coal (*r*). So, also, where a man, being desirous of becoming a freeholder in Essex, contracted to purchase a house on the north side of the river Thames, which he supposed to be in that county, but which proved to be in Kent, the contract was held binding, and he was compelled to complete the purchase specifically (*s*).

If the mistake cannot be established without evidence, the Court will allow a defendant in an action for specific performance to support a defence founded on this ground by evidence *dehors* the agreement (*t*).

Though the Court may refuse to grant specific performance in the case of mistake where the exercise of the jurisdiction would have the effect of imposing too great a burden on the party who had made the mistake, no case can be found in which the mistaking party has sought for or could derive any advantage beyond the relief from the burden (*u*). In a case where a defendant had agreed to let and the plaintiff had agreed to take premises on a lease, and the plaintiff had gone into possession under the agreement, and laid out money on the premises, and on the title of the defendant being investigated, it was found that he had only a title to the moiety of the premises, he was decreed specifically to perform as much

(*q*) *Griffiths* v. *Jones*, 15 Eq. 279; 42 L. J. Ch. 468.
(*r*) *Jeffreys* v. *Fairs*, 4 C. D. 448; 46 L. J. Ch. 113.
(*s*) *Shirley* v. *Davis*, cited 6 Ves. 678, 7 Ves. 270.
(*t*) *Manser* v. *Back*, 6 Ha. 448; 77 R. R. 187; *Wood* v. *Scarth*, 2 K. & J. 33; 110 R. R. 88; *post*, p. 496.
(*u*) *Burrow* v. *Scammell*, 19 C. D. 181; 51 L. J. Ch. 296.

of the contract as he was able to perform with an abatement of one moiety of the rent (*w*).

Mistake of one party in motive.

When a party is mistaken in his motive for entering into a contract, or in his expectations respecting it, such mistake does not affect the validity of the contract, unless he informs the vendor of his object in buying (*x*). If a man purchases a specific article, believing that it will answer a particular purpose to which he intends to put it, and it fails to do so, he is not the less on that account bound to pay for it. A mistake by the buyer in supposing that the article bought by him will answer a certain purpose for which it turns out to be unavailable is not a mistake as to the subject-matter of the contract, but is only a mistake as to a collateral fact, and affords him no ground for pretending that he did not assent to the bargain whatever may be his right afterwards to rescind, if the vendor warranted its adaptability to the intended purpose (*y*). His mistake, unless induced by the seller, is immaterial to the validity of the contract. Such is the case of a person buying a horse without a warranty, believing it to be sound or useful for some special purpose, and the horse turns out to be unsound or not equal to the expectation; and such is the case generally of the sale of a specific chattel in its then state and condition without warranty, which is found to have a latent defect (*z*). Thus, when a sale of oats was made by a sample which the buyer, a trainer of horses, supposed to be old oats, and therefore suitable for his purpose, new oats being unsuitable; and nothing was said at the time about the quality of the oats, it was held that unless the seller understood the buyer to stipulate as to the quality of the oats, the sale was good, although the oats were in fact new, and not suitable for the purpose of the

(*w*) *Bailey* v. *Piper*, 18 Eq. 683; 43 L. J. Ch. 704; *Horrocks* v. *Rigby*, 9 C. D. 180; 47 L. J. Ch. 800.

(*x*) *Ante*, pp. 80, 291.

(*y*) *Chanter* v. *Hopkins*, 4 M. & W. 399; 51 R. R. 650; *Ollivant* v. *Bayley*, 5 Q. B. 288; cf. *Johnson* v. *Raylton*, 7 Q. B. D. 438; 50 L. J. Q. B. 753; and see *post*, p. 549.

(*z*) *Sutton* v. *Temple*, 12 M. & W. 64, *per* Lord Wensleydale; 13 L. J. Ex. 17; 67 R. R. 255. See 1905, 2 Ir. R. 463.

buyer (*a*). So, also, on the other hand, where a sale was made of 100 chests of tea out of a specific cargo warranted to be equal to a sample shown at the time of sale, which the seller then believed to be, but which was not, in fact, a sample of the cargo; it was held that he had no right to avoid the contract by giving notice to the buyer of the mistake respecting the sample (*b*).

Mistake as to person with whom the contract is made.

A mistake as to the person with whom the contract is made may or may not avoid the contract, according to the circumstances of the case. Where the consideration of the person with whom a man thinks he is contracting does not at all enter into the contract, and he would have been equally willing to make the contract with any person whatever as with him with whom he thought he was dealing, a mistake of identity will not prevent the formation of the contract. But when the consideration of the person with whom a man is willing to contract enters as an important element in the contract, as if it be a sale on credit where the solvency of the buyer is the chief motive which influences the assent of the vendor, or where a purchaser buys from one whom he supposes to be his debtor and against whom he would have the right of set off, a mistake as to the person dealt with prevents the contract from coming into existence for want of assent (*c*).

Where a person passes himself off as another (*d*), or falsely represents himself as agent for another for whom he professes to buy, and thus obtains the vendor's assent to a sale and even a delivery of goods, the whole contract is void; it has never come into existence, for the vendor never assented to sell to the person thus deceiving him (*e*).

(*a*) *Smith* v. *Hughes*, L. R. 6 Q. B. 597; 40 L. J. Q. B. 221.

(*b*) *Scott* v. *Littledale*, 8 E. & B. 815; 27 L. J. Q. B. 201; 112 R. R. 791.

(*c*) *Boulton* v. *Jones*, 2 H. & N. 564; 27 L. J. Ex. 117; *Smith* v. *Wheatcroft*, 9 C. D. 230; 47 L. J. Ch. 745; *Archer* v. *Stone*, 78 L. T. 34; *Nash* v. *Dix*, 78 L. T. p. 448.

(*d*) *Hardman* v. *Booth*, 1 H. & C. 803; 32 L. J. Ex. 105; 130 R. R. 784; *Cundy* v. *Lindsay*, 3 App. Ca. 468; 47 L. J. Q. B. 481; *Gordon* v. *Street*, 1899, 2 Q. B. 641; 69 L. J. Q. B. 45; *Baillie's Case*, 1898, 1 Ch. 110; 67 L. J. Ch. 81.

(*e*) *Ante*, pp. 10, 11.

Disclaiming responsibility for mistakes.

A clause in a contract by which an employer disclaims responsibility for the statements therein made and as to which the contractor is to satisfy himself, will protect the employer against mistakes but not against statements fraudulently or recklessly made (*f*).

Party may so conduct himself as to appear to accede to the terms of the other party.

When the mistake is that of one party alone, it must be borne in mind that the general rule of law is that whatever a man's *real* intention may be, if he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party, in that belief, enters into a contract with him, the party thus conducting himself would be equally bound as if he had intended to agree to the other party's terms (*g*).

Mistake of one party known to the other.

When the mistake of one party to a contract is known to the other, though it has not been in any way caused by him, there may be cases in which a contract between them founded on the mistake would be void. If, for example, the one party is ignorant of a fact materially affecting the transaction, and the other party is aware of his ignorance, and knew of his intention to contract only with reference to a supposed different state of facts, he is precluded from denying that he understood the contract in the same sense as the other, namely, as conditional on the existence of the supposed state of facts. So, also, if a contract be entered into between two parties for the sale of a ship, and the vendor knew that the purchaser had a different ship in his mind from that intended by the vendor, there would be no contract, for by the rule of law established in *Freeman* v. *Cooke* (*h*), the vendor would not be in a position to show that he had been induced to act by a manifestation of the buyer's intention different from his real intention. But as a general rule in sales the vendor and purchaser deal at arms' length, each relying on his own skill and knowledge, and each at liberty to impose conditions or exact warranties before giving assent, and each taking upon

(*f*) *Pearson* v. *Dublin Corporation*, 1907, A. C. 351; 77 L. J. P. C. 1.

(*g*) *Freeman* v. *Cooke*, 2 Exch. 663; 18 L. J. Ex. 114; 76 R. R. 711; *Smith* v. *Hughes*, L. R. 6 Q. B. 607, *per* Lord Blackburn; 40 L. J. Q. B. 221; *ante*, p. 120.

(*h*) 2 Exch. 654, *supra*; *ante*, p. 121.

himself all risks other than those arising from fraud or from the causes against which he has fortified himself by exacting conditions or warranties. So that even if the vendor should know that the buyer was purchasing, for instance, cotton goods submitted to his inspection in the mistaken belief that they were made of linen, or if the purchaser should know that the vendor was selling a valuable estate under the mistaken belief that a search for mines under it had proved unsuccessful, neither party could avoid the contract under the supposed error or mistake.

The exception to this rule exists only in cases where from the relation between the parties some special duty is incumbent on the one to make full and candid disclosure of all he knows on the subject to the other (*i*). Thus, when a man sold oats by sample without any other representation as to their quality, and the buyer in reliance on his own judgment bought them for old oats, which quality only would serve his purpose, and which in fact the seller knew them not to be, it was held that the more passive acquiescence of the seller in the self-deception of the buyer did not entitle the latter to avoid the contract, and that there was no legal obligation on the seller to inform the buyer that he was under a mistake not induced by the act of the seller, and that there was no common understanding that the sale was for old oats (*k*). But it was said (*l*) by Chief Justice Cockburn "that if the buyer had said anything which showed that he was not acting on his own inspection and judgment, but assumed as the foundation of the contract that the oats were old, the silence of the seller as a means of misleading him might have amounted to a fraudulent concealment, such as would have entitled the buyer to avoid the contract."

Where, however, on a sale of goods by sample, the purchaser is aware that the vendor is under a mistake as to the sample he was offering, the vendor would be entitled to say

(*i*) Benjamin on Sale, 4th ed., 392; Q. B. 597; *supra*.
(*k*) *Smith* v. *Hughes*, L. R. 6.
(*l*) *Ibid*.

that he had not intended to enter into the contract by which the purchaser sought to bind him (*m*).

When one of the parties to a transaction is aware of a mistake of the other in a matter materially inducing it, relief may be had in equity even though no fiduciary relation appear to subsist between the parties, where under the special circumstances of the case, it appears inequitable that the one party should hold the other to the engagement (*n*). Relief accordingly was given where an instrument had been delivered up under the ignorance of one party and with the knowledge of the other as to a fact upon which the rights attached (*o*).

Where by mistake a contract in writing fails to express the real meaning of the parties, the party interested in having the real agreement adhered to will have a good defence to specific performance if he can show that the written contract does not represent the real agreement even though the contract is of a kind required by law to be in writing (*p*). On the other hand, a party cannot, where the contract is required by law to be in writing, come forward as plaintiff to claim performance of the real agreement which is not completely expressed by the written contract (*q*).

Mistake in date of agreement.

Where the printed particulars, conditions and annexed form of contract were prepared for a sale on October 17 which was postponed to November 18, but by inadvertence the original date though altered in the particulars remained in the conditions and form of contract; it was held that there was no contract within the Statute of Frauds, nor, *semble*, any *consensus ad idem* to support an action by the vendor for specific performance (*r*).

Mistake in the expression of the agreement.

If the mistake is in the expression of the agreement, one of the parties cannot in equity hold the other bound to an expres-

(*m*) *Ibid.*, *per* Hannen, J.

(*n*) *East India Co.* v. *Donald*, 9 Ves. 275. See *Ward* v. *Wallis*, 1900, 1 Q. B 675; 69 L. J. Q. B. 423.

(*o*) *Ibid.*

(*p*) *Watson* v. *Marston*, 4 D. M. & G. 230, 240; 102 R. R. 100.

(*q*) *Post*, p. 526.

(*r*) *Van Praagh* v. *Everidge*, 1903, 1 Ch. 434; 72 L. J. Ch. 260.

sion of intention which he knew to be not in accordance with his real intention (*s*).

If the mistake of the one party in expressing the agreement be known to the other party at the time, it may be available even at common law in avoidance of the apparent contract, so long as the evidence remains open and is not excluded by a written contract, for, as a general rule, a party cannot hold the other to an expression of terms which he knows at the time are agreed to under a mistake and not in accordance with the real intention. The doctrine has been stated as follows in *Smith* v. *Hughes* (*t*): "The promisor is not bound to fulfil a promise in a sense in which the promisee knew at the time the promisor did not intend it; and in considering the question in what sense a promisee is entitled to enforce the promise, it matters not in what way the knowledge of the meaning in which the promisor made it is brought to the mind of the promisee, whether by express words, or by conduct, or by previous dealings, or by other circumstances. If by any means he knows that there was no real agreement between him and the promisor, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promisor did not assent."

Mistake caused by misrepresentation.

If the other party to the contract has caused the mistake, different considerations arise according to the circumstances of the case. If he has caused the mistake by misrepresentation intentionally and for the purpose of inducing the contract, it is a fraud, and the contract may be avoided on that ground (*u*).

In *Torrance* v. *Bolton* (*x*), it was held that where a bidder at an auction was misled by the particulars advertised, and being deaf did not hear the conditions read out at the sale in which the property was stated to be subject to mortgages, he was not bound by the contract made by mistake under such misleading particulars, which had induced him to believe he

(*s*) *Garrard* v. *Frankel*, 30 Beav. 445; 31 L. J. Ch. 604; 132 R. R. 352; *Harris* v. *Pepperell*, 5 Eq. 1. These cases, however, can only be supported on the ground of fraud; *May* v. *Platt*, 1900, 1 Ch. 616; 69 L. J. Ch. 357.

(*t*) L. R. 6 Q. B. p. 610; 40 L. J. Q. B. 221.

(*u*) *Ante*, pp. 18, 27.

(*x*) L. R. 8 Ch. 118; 42 L. J. Ch. 177.

was buying the absolute reversion of the freehold and not an equity of redemption. No fraud was shown, but the Court said that the description was "improper," and that a purchaser is not bound to look at the conditions to correct a statement in the particulars (*y*). So, also, in *Andrew* v. *Aitken* (*z*), when a vendor by his assent to the assumption of the purchaser that the property, the subject of the contract, was not subject to any restrictive agreement, whereas in fact it was so subject, the transaction was set aside on the ground of mistake induced by the vendor.

Where owing to a mistake induced by a mortgagor the deeds as framed did not express the true bargain between the parties, which was that the mortgagee should have a first mortgage, it was held that the deeds could be rectified (*a*).

Mistake caused unintentionally.

If he has caused the mistake unintentionally, and with an honest belief in the truth of his representation, the contract is in general absolute, and independent of any mistake or erroneous supposition respecting the qualities and accidents of the article, if the specific article be accurately identified in substance, and be not so different in substance from what it was represented to be as to constitute a failure of consideration (*b*).

For example, where new shares were offered by a company and accepted, under the supposition that the company had obtained a contract that required an extension of their business, and in fact the supposed contract proved to be invalid, it was held that the contract to take the shares was absolute and not conditional upon the validity of the supposed contract, for that the mistake did not affect the substance or validity of the shares actually contracted for and accepted, nor did it constitute a failure of consideration (*c*).

But where a person obtains a contract or other advantage

(*y*) See *Blaiberg* v. *Keeves*, 1906, 2 Ch. 175; 75 L. J. Ch. 464.

(*z*) 22 C. D. 218; 51 L. J. Ch. 784; *Re White and Smith*, 1896, 1 Ch. 637; 65 L. J. Ch. 481; *ante*, p. 274.

(*a*) *Whiteley* v. *Delaney*, 1914, A. C. 132; 83 L. J. Ch. 349.

(*b*) *Ante*, pp. 111—118.

(*c*) *Kennedy* v. *Panama, &c., Co.*, L. R. 2 Q. B. 587; 36 L. J. Q. B. 260; *ante*, p. 113.

by mistake or misstatements innocently made, he cannot retain the advantages he has gained when he discovers his mistake. If he does so his innocent misstatement becomes from that moment a deliberate misrepresentation, or in other words fraud (*d*).

No specific performance at suit of party who has caused the mistake.

If a party to the contract has caused the mistake of the other party to the contract by negligence of himself or his agent, or in any manner for which he may be responsible, although unintentionally and without any fraudulent intention, he cannot have specific performance (*e*). Where, for example, on a sale by auction the plan annexed to the particulars of the property showed a shrubbery on the western boundary, and the defendant, going to inspect the property before the sale with the plan in his hand, found on the western side a belt of shrubs with an iron fence outside enclosing three ornamental trees, and he then bought the property, believing that the fence was the boundary, but the real boundary was a line of shrubs within the shrubbery and did not enclose the trees, the Court held the mistake was increased at least by *crassa negligentia* on the part of the vendor, and dismissed the bill for specific performance (*f*). So, also, where land was put up for sale according to a plan annexed to the particulars of sale and subject to a condition that no public house should be built upon the estate; and a purchaser bought, supposing the plan to represent the whole estate, but it omitted to point out a plot reserved by the vendor for the building of a public house; it was held that as the plan contributed to the mistake of the purchaser, the vendor must either admit the restrictive condition to extend to the plot reserved, or must have his action for specific performance dismissed, and in either case must pay the costs of the purchaser (*g*). Nor will specific performance be enforced against a purchaser where the con-

(*d*) *Redgrave* v. *Hurd*, 20 C. D. 1, 12; 51 L. J. Ch. 113; *Scott* v. *Coulson*, 1903, 2 Ch. 249; 72 L. J. Ch. 600; and see *Re Glubb*, 1900, 1 Ch. 354; 69 L. J. Ch. 278.

(*e*) *Stewart* v. *Kennedy*, 15 App. Ca. p. 105.

(*f*) *Denny* v. *Hancock*, 6 Ch. 1; 40 L. J. Ch. 193.

(*g*) *Bascomb* v. *Beckwith*, 8 Eq. 100; 38 L. J. Ch. 536. See *Andrew* v. *Aitken*, *supra*.

ditions of sale are misleading and erroneous (*h*), even though it be the result of a perfectly innocent oversight on the part of the vendor or his solicitors (*i*). A special condition limiting the time for which title is to be shown must be perfectly fair and explicit (*k*).

Mistake becoming wilful default.

Payment of interest by a vendor or purchaser often depends upon whether the party is in default or wilful default, and the question arises whether there can be default or wilful default where there is an honest mistake. It seems to be now settled that there is "default" whenever there is a breach of duty towards the other party, however honestly and reasonably he may have acted; but it is not "wilful default" until a mistake honestly and reasonably made is persisted in after attention has been called to it. The rule is the same whether the mistake relates to title or evidence of title or conveyance. A purchaser who refuses to complete on the ground that the title is bad when it is perfectly good is guilty of "default," though he may have a judgment of the Court of first instance in his favour (*l*).

Parol evidence admissible in equity in cases of mistake.

By the general rule of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time it was in a state of preparation, so as to add or subtract from, or in any manner to vary or qualify the written contract. A Court of equity, however, admits such evidence when the purpose of the action is to rectify or rescind an agreement (*m*), or to show that a document purporting to be a contract is in fact no contract at all (*n*), or that the contract has been

(*h*) *Jones* v. *Rimmer*, 14 C. D. 592, *per* Jessel, M.R.; 49 L. J. Ch. 775; *Heywood* v. *Mallalieu*, 25 C. D. 357; 53 L. J. Ch. 392.

(*i*) *Broad* v. *Munton*, 12 C. D. p. 149; 18 L. J. Ch. 837; qu. whether this would be a ground for rescission, *ibid.* p. 142; *Nottingham Brick Co.* v. *Butler*, 16 Q. B. D. 778; 55 L. J. Q. B. 280.

(*k*) 24 C. D. p. 22.

(*l*) *London Corporation and Tubbs*, 1894, 2 Ch. 524; *Bennett* v. *Stone*, 1903, 1 Ch. 509; 72 L. J. Ch. 240; *Bayley-Worthington and Cohen*, 1909, 1 Ch. 648; 78 L. J. Ch. 351.

(*m*) *Bentley* v. *Mackay*, 4 D. F. & J. 279; 31 L. J. Ch. 697; 135 R. R. 145; *Garrard* v. *Frankel*, 30 Beav. 451; 31 L. J. Ch. 604; 132 R. R. 352.

(*n*) *Pattle* v. *Hornibrook*, 1897, 1 Ch. 25; 66 L. J. Ch. 144.

waived or rescinded (*o*). Parol evidence is admitted, not to contradict the form of the agreement, which cannot be allowed, but to prove a mistake therein which cannot otherwise be proved (*p*). But the Court will not act upon such evidence, unless the proof be clear and conclusive. In all cases where such evidence is given, great attention will be paid to what is stated by the other party to the instrument (*q*).

Mistake of fact common to both parties.

The mistake may be common to both parties to a transaction, and may consist either in the expression of their agreement, or in some matter inducing or influencing the agreement, or in some matter to which the agreement is to be applied.

The rule at law is that an agreement cannot be varied by external evidence, and that the parties are bound by the document, which they have signed and accepted as their agreement (*r*), unless there be error on the face of it so obvious as to leave no doubt of the intention of the parties, without the existence of external evidence.

In expression of agreement.

If the parties have expressed themselves in language so vague and unintelligible that the Court finds it impossible to affix a definite meaning to their agreement, it cannot take effect and is void (*s*). So, also, if there be on the face of the instrument a patent ambiguity, that is, a doubt or uncertainty appearing in the terms of the agreement as expressed by themselves, it cannot be altered or explained by extrinsic evidence; and if it is incapable of a rational interpretation, the agreement at least to the extent of the ambiguity is necessarily void (*t*). So where words in a proposal for a contract are understood and acted upon by the parties in different senses there is no contract, and it is for the plaintiff to show that the proposal made by him and accepted by the

(*o*) *Vezey* v. *Rashleigh*, 1904, 1 Ch. 634; 73 L. J. Ch. 422.

(*p*) *Baker* v. *Paine*, 1 Ves. 457.

(*q*) *Bentley* v. *Mackay*, *supra*; *M'Kenzie* v. *Coulson*, 8 Eq. 375; *Bloomer* v *Spittle*, 13 Eq. 429; 41 L. J. Ch. 369; *infra*, p. 529.

(*r*) *Hitchin* v. *Groom*, 5 C. B. 515; 17 L. J. C. P. 145.

(*s*) *Ex parte Baxter*, 1892, 2 Q. B. 478; 61 L. J. Q. B. 836.

(*t*) See *Coles* v. *Hulme*, 8 B. & C. 568; 7 L. J. K. B. 29; *Alder* v. *Boyle*, 4 C. B. 635; 16 L. J. C. P. 232.

defendant was so clear and unambiguous that the defendant cannot be heard to say that he misunderstood it. It is not for the Court to determine the true construction (*u*).

Where the mistake in the expression of a written contract is obvious upon the face of the instrument so as to leave no doubt of the intention of the parties without extrinsic evidence to explain it, the mistake is corrected as a mere matter of construction, and the contract is construed in accordance with the obvious intention, both at law and in equity (*x*). Where, for example, a bond was drawn binding the obligor in 7700, without adding any denomination, and the condition was for the payment of a sum of —— pounds sterling, the Court supplied the word "pounds" in the bond (*y*). So, also, a bond conditioned to pay instalments until the full sum of "one pounds" should be paid, was construed, according to the context, to mean "one hundred pounds" (*z*). So, also, where the condition of a bond was expressed to be that in the events specified "the condition" of this obligation, instead of "this obligation" to be void, the phrase was read as corrected (*a*). So where the condition of a bond was written that it should be void if the obligee did "not" pay, the Court read the bond without the word "not" (*b*). So, also, an obvious mistake in a date will be corrected (*c*). So, also, where in a series of deeds relating to the same transaction, 1,200*l.* was in one instance written instead of 1,400*l.*, the Court read it correctly without a suit to rectify the mistake (*d*). So where in a settlement the words "tail male" were used instead of "tail general," the Court treated the

(*u*) *Falck* v. *Williams*, 1900, A. C. 176; 69 L. J. P. C. 17.

(*x*) See 10 Co. 133 a.; *Bird's Trust*, 3 C. D. 214; *Burchell* v. *Clark*, 2 C. P. D. 88; 46 L. J. C. P. 115; *Fitzgerald* v. *F.*, 1902, 1 Ir. R. 477.

(*y*) *Coles* v. *Hulme*, 8 B. & C. 568; 7 L. J. K. B. 29.

(*z*) *Waugh* v. *Bussell*, 5 Taunt. 707; 15 R. R. 624.

(*a*) *Mauleverer* v. *Hawxby*, 2 Will. Saund. 78; the words might be rejected as surplusage; *ibid.*

(*b*) *Wilson* v. *Wilson*, 5 H. L. C. 67, *per* Lord St. Leonards; 23 L. J. Ch 697; 101 R. R. 25.

(*c*) *Fitch* v. *Jones*, 5 E. & B. 238; 24 L. J. Q. B. 293; 103 R. R. 455; *Lamb* v. *Bruce*, 45 L. J. Q. B. 538.

(*d*) *Scholefield* v. *Lockwood*, 32 Beav. 436; 138 R. R. 805.

word "male" as a misdescription and construed the settlement on that footing without rectification (*e*).

So, also, where in a submission to arbitration the words "shall appoint" were obviously omitted in giving time to enlarge the time for the award, these words were read as supplied (*f*); and in a marriage settlement of real estate, in which the word "heirs" had been obviously omitted throughout, the deed was rectified by supplying that word wherever it was necessary for the limitation of the intended estates (*g*). So, also, an omitted life estate (*h*), and a clause giving to children of one daughter an interest similar to that given to children of other daughters (*i*), has been supplied by reference to the context.

Where it is manifest upon the face of an instrument that one name has been written in mistake for another, the Court will read the instrument with the mistake corrected (*k*). So, where the name of the grantor was omitted in the operative part of a deed, or where the name of the obligee was omitted in a bond, it was supplied from the other parts of the instrument (*l*).

So the Court may presume from the mere inspection of a settlement that words which, though they make sense, give a result which is unreasonable and repugnant to the general intention and to the usual frame of such instruments, were inserted by mistake (*m*).

However general the words of a covenant may be, if standing alone, yet if, from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which

(*e*) *Re Alexander's Settlement*, 1910, 2 Ch. 225; 79 L. J. Ch. 656.

(*f*) *Kirk* v. *Unwin*, 20 L. J. Ex. 345.

(*g*) *Bird's Trust*, 3 C. D. 214.

(*h*) *Greenwood* v. *Greenwood*, 5 C. D. 955; 47 L. J. Ch. 298; cf. *Rake* v. *Hooper*, 83 L. T. 669.

(*i*) *Redfern* v. *Bryning*, 6 C. D. 133; 47 L. J. Ch. 17. See *Hood* v. *Mackinnon*, 1909, 1 Ch. 476; 78 L. J. Ch. 300.

(*k*) *Wilson* v. *Wilson*, 5 H. L. C. 66, *per* Lord St. Leonards, *supra*.

(*l*) *Lord Say and Sele's Case*, 10 Mod. 46; *Dent* v. *Clayton*, 33 L. J. Ch. 503.

(*m*) *De la Touche's Settlement*, 10 Eq. 603; 40 L. J. Ch. 85; *Re Alexander's Settlement*, *supra*.

they import, the Court will limit the operation of the general words (*n*).

Similarly the effect of general words of conveyance is confined to property of the same kind with that which has been specifically described and conveyed (*o*). Where there is a specific description of a particular kind of property followed by words which *primâ facie* would be sufficient to include other property of the same kind, it has been held that those words do not include the property not specifically described on the principle *expressio unius est exclusio alterius* (*p*).

A lease after covenants of the lessee to pay rent, and not to assign without licence, provided for a right of re-entry by the lessor, if any of the covenants "hereinafter contained" on the part of the lessee should be broken. There were no covenants thereinafter contained on the part of the lessee; the Court in construing the lease refused to reject the words "hereinafter contained" (*q*).

Upon this principle, where an obvious mistake appears in applying the contract to the facts, the instrument will be construed and applied according to the manifest intention of the parties; as where an agreement dated October 24, referred to a bill of exchange "payable at three months from this date," and it appeared that the only bill applicable was dated October 25, it was held that the bill was sufficiently identified and referred to (*r*).

So where a lease was executed for a term stated in the *habendum* to be for ninety-four years, and the *reddendum* stated the rent to be payable "during the said term of ninety-one years hereby demised," and the counterpart of the lease stated the term in the *habendum* to be ninety-one years; the

(*n*) *Hesse* v. *Stevenson*, 3 B. & P. 574; 44 R. R. 880.

(*o*) *Rooke* v. *Kensington*, 2 K. & J. 771; 25 L. J. Ch. 795; 110 R. R. 456; *Jenner* v. *Jenner*, L. R. 1 Eq. 361; 30 L. J. Ch. 201; 129 R. R. 110.

(*p*) *Denn* v. *Wilford*, 8 Dow. & Ry. 549; 4 L. J. K. B. 295.

(*q*) *Doe* v. *Godwin*, 4 M. & S. 265; 16 R. R. 463. Though it was plain there was a mistake somewhere, it was not certain whether it was in the insertion of these words, or in the omission of the subsequent covenants. *Ibid.*, *per* Bayley, J.

(*r*) *Way* v. *Hearn*, 13 C. B. (N.S.) 292; 32 L. J. C. P. 34; 134 R. R. 538.

Court construed the documents together as intending a lease for ninety-one years only, so as to entitle the lessor to recover possession against an assignee of the lessee, who claimed to hold under the lease for a term of ninety-four years (*s*).

So, also, in construing an Act of Parliament, a word that makes a passage unintelligible may be altogether struck out (*t*).

No specific performance of an agreement incorrectly drawn up except on terms.

The defence that the contract sought to be enforced is not in conformity with the real agreement between the parties, but has been drawn up incorrectly by mistake, may be set up by parol evidence in answer to an action for specific performance. If the defendant can show that the instrument does not represent the real agreement between the parties, the plaintiff cannot have specific performance, unless he consent to the variation as set up by the defendant. If the plaintiff will not accept specific performance with the variation as set up and proved by the defendant, his action will be dismissed (*u*); and specific performance of the agreement, with the variation proved, may be decreed at the instance of the defendant without a cross action (*w*). Although a defendant may show by parol that the written instrument does not represent the contract between the parties, a plaintiff cannot have a decree for specific performance of a written contract with a variation upon parol evidence, for the Statute of Frauds is a bar to the relief (*x*). Parol evidence is admissible on the part of the party resisting specific performance, not to vary the terms of the agreement, but to show that it is unconscientious in the plaintiff to seek specific performance,

(*s*) *Burchell* v. *Clarke*, 2 C. P. D. 88; 46 L. J. C. P. 115.

(*t*) *Stone* v. *Yeovil*, 1 C. P. D. 691; 46 L. J. C. P. 137.

(*u*) *Joynes* v. *Statham*, 3 Atk. 388; *Clarke* v. *Grant*, 14 Ves. 519; 9 R. R. 336; *Ramsbottom* v. *Gosden*, 1 V. & B. 165; 12 R. R. 207; *Martin* v. *Pycroft*, 2 D. M. & G. 785; 22 L. J. Ch. 94; *Smith* v. *Wheatcroft*, 9 C. D. 223; 47 L. J. Ch. 745; but see *post*, p. 530.

(*w*) *Fife* v. *Clayton*, 13 Ves. 546; 9 R. R. 220.

(*x*) *Woollam* v. *Hearn*, 7 Ves. 211; 6 R. R. 113; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22, 39; 9 R. R. 3; *Davies* v. *Fitton*, 2 D. & W. 225; 90 R. R. 885; *Manser* v. *Back*, 6 Ha. 443, 447; 77 R. R. 187; *May* v. *Platt*, 1900, 1 Ch. 616; 69 L. J. Ch. 357; *Thompson* v. *Hickman*, 1907, 1 Ch. 550; 76 L. J. Ch. 254; but see *Olley* v. *Fisher*, *infra*.

without submitting to the variation set up and proved by the other (*y*).

But since the passing of the Judicature Act, 1873, the Court has, at the suit of a plaintiff, rectified an agreement in part performed to which the statute was not and could not be pleaded, and decreed specific performance thereof as rectified (*z*). Hence the decision in *Woollam* v. *Hearn* would no longer be followed, at least in cases in which the Statute of Frauds does not create a bar (*a*).

A Court of Equity will not enforce in favour of a volunteer a title based upon deeds framed under a common mistake (*b*).

Rectification of instrument on the ground of mistake.

If parties enter into an agreement, but there is an error in the reduction of the agreement into writing, so that the written instrument fails through some mistake of the draftsman, either in matter of law (*c*) or of fact, to represent the real agreement of the parties, or omits or contains terms or stipulations contrary to the common intention of the parties, a Court of Equity will correct and reform the instrument, so as to make it conformable to the real intent of the parties (*d*). So, also, if a conveyance, executed for the purpose of giving effect to and executing an agreement, should by mistake give the purchaser less than the agreement entitled him to, he may call on the Court to rectify the defective conveyance, and give him all that the agreement comprehended (*e*). So where a conveyance is not in accord with the written contract it may be rectified on the ground of common mistake (*f*). But where a deed is in conformity with the written contract, the Court will

(*y*) *Clowes* v. *Higginson*, 1 V. & B. 524; 12 R. R. 284.

(*z*) *Olley* v. *Fisher*, 34 C. D. 367; 56 L. J. Ch. 208; *Shrewsbury* v. *Shaw*, 89 L. T. Jo. 274; but see 1900, 1 Ch. at p. 622.

(*a*) Fry, 353.

(*b*) *Whiteley* v. *Delaney*, 1914, A. C. 132; 83 L. J. Ch. 349.

(*c*) *Wake* v. *Harrop*, 1 H. & C. 202; 31 L. J. Ex. 451; 130 R. R. 461.

(*d*) *Ashhurst* v. *Mill*, 7 Ha. 502; 82 R. R. 214; *Murray* v. *Parker*, 19 Beav. 308; 105 R. R. 153; *Druiff* v. *Parker*, 5 Eq. 137; 37 L. J. Ch. 241; *De la Touche's Settlement*, 10 Eq. 600; 40 L. J. Ch. 85; *Cogan* v. *Duffield*, 20 Eq. 789; 45 L. J. Ch. 307; *Re Bird's Trust*, 3 C. D. 214; *Welman* v. *W.*, 15 C. D. 570; 49 L. J. Ch. 736.

(*e*) *Monro* v. *Taylor*, 3 Mac. & G. 718; 21 L. J. Ch. 525; 85 R. R. 194; *Leuty* v. *Hillas*, 2 D. & J. 120; 27 L. J. Ch. 534; 119 R. R. 46; *White* v. *White*, 15 Eq. 249; 42 L. J. Ch. 288. See *Ellis* v. *Hills*, 67 L. T. 287.

(*f*) *Beale* v. *Kyte*, 1907, 1 Ch. 564; 76 L. J. Ch. 294.

not rectify the deed on the ground that due effect has not been given to the intention of the parties (*g*). Where a deed showed on the face of it the intention of the parties, the Court rectified the mistake by introducing technical words of limitation so as to confer an estate tail (*h*). The principle upon which the Court acts in correcting instruments, is, that the parties are to be placed in the same situation as they would have stood in, if the error to be corrected had not been committed. When a deed as drawn up goes beyond the instructions and intention of the parties, it will be rectified (*i*). The fact that a provision inserted in a settlement (*e.g.*, a restraint on inticipation of the income of the wife's property) is in itself usual, and is generally considered proper, is not a ground for the Court to refuse to strike it out where its insertion is shown to have been contrary to the desire of the parties and the instructions given by them (*k*). Relief upon a defective instrument is the more readily afforded, when the party to be charged thereon is himself the person who prepared or perfected it (*l*). The fact, however, that the defective instrument may have been drawn up by the party seeking relief is immaterial, if a proper case be made out (*m*). It is, moreover, immaterial to the exercise of the jurisdiction that the instrument sought to be rectified was made under an order of the Court (*n*). But an agreement cannot be rectified after it has been adjudicated upon by a competent Court and performed under the direction of that Court (*o*).

The Fines and Recoveries Act, 1833, s. 47, does not preclude the Court from exercising its jurisdiction to rectify an error in a disentailing deed which prevents the deed from being the

(*g*) *Thompson* v. *Hickman*, 1907, 1 Ch. 550; 76 L. J. Ch. 254; *Matear* v. *Lyne*, 1918, Vict. L. R. 629. See *Ellis* v. *Hills*, 67 L. T. 287.

(*h*) *Fitzgerald* v. *F.*, 1902, 1 Ir. R. 477; *Re Alexander's Settlements*, *ante*, p. 524.

(*i*) *Walker* v. *Armstrong*, 8 D. M. & G. 544; 25 L. J. Ch. 738; 114 R. R. 234; *Tucker* v. *Bennett*, 38 C. D. 1, 14; 57 L. J. Ch. 507.

(*k*) *Torre* v. *Torre*, 1 Sm. & G. 518; 96 R. R. 464.

(*l*) *Ex p. Wright*, 19 Ves. 257; *Collett* v. *Morrison*, 9 Ha. 176; 21 L. J. Ch. 878; 89 R. R. 374.

(*m*) *Ball* v. *Storie*, 1 Sim. & St. 218; 1 L. J. Ch. 214; 24 R. R. 170.

(*n*) *Smith* v. *Iliffe*, 20 Eq. 666; 44 L. J. Ch. 755.

(*o*) *Caird* v. *Moss*, 33 C. D. 22; 55 L. J. Ch. 854.

deed of the parties, even though all the parties are dead (*p*); and the jurisdiction to rectify a resettlement is not excluded by reason of its being enrolled under the Act (*q*).

A person, however, who seeks to rectify an instrument, on the ground of mistake, must be able to prove not only that there has been a mistake, but must be able to show exactly and precisely the form to which the deed ought to be brought, in order that it may be set right, according to what was really intended, and must be able to establish in the clearest and most satisfactory manner, that the alleged intention of the parties to which he desires to make it conformable, continued concurrently in the minds of all parties down to the time of its execution. The evidence must be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties (*r*). If, upon a personal agreement for a life assurance, a policy be drawn up by the insurance office in a form which differs from the terms of the agreement, and varies the rights of the parties assured, equity will interfere and deal with the case on the footing of the agreement, and not on that of the policy (*s*). If it appear that there was a change of intention, by which the circumstance that the instrument does not follow the terms of the original contract might be explained, there can be no rectification (*t*); so, also, if it appear that the parties took different views of what was intended, there would be no contract between them which could be carried into effect by rectifying the instrument (*u*). There can be no rectification if the mistake be not mutual or common to all parties to the instrument (*w*),

(*p*) *Meeking* v. *Meeking*, 1917, 1 Ch. 77; 86 L. J. Ch. 97.

(*q*) *Hall Dare* v. *Hall Dare*, 31 C. D. 251; 55 L. J. Ch. 154.

(*r*) *Beaumont* v. *Bramley*, T. & R. 41, 50; *Rooke* v. *Kensington*, 2 K. & J. 764; 25 L. J. Ch. 795; 110 R. R. 456; *Fowler* v. *Fowler*, 4 D. & J. 265; *Sells* v. *Sells*, 1 Dr. & Sm. 42; 29 L. J. Ch. 500; 127 R. R. 20; *M'Kenzie* v. *Coulson*, 8 Eq. 375; *Falck* v. *Williams*, 1900, A. C. 176; 29 L. J. P. C. 17; *Re Hare and O'More*, 1901, 1 Ch. 93; 70 L. J. Ch. 45; *Rake* v. *Hooper*, 83 L. T. 669.

(*s*) *Collett* v. *Morrison*, 9 Ha. 162; 21 L. J. Ch. 778; 89 R. R. 374.

(*t*) *Breadalbane* v. *Chandos*, 2 M. & C. 740; 45 R. R. 172.

(*u*) *Bentley* v. *Mackay*, 4 D. F. & J. 279; 135 R. R. 145.

(*w*) *Rooke* v. *Kensington*, *supra*; *Fowler* v. *Fowler*, 4 D. & J. 265; *Sells* v. *Sells*, 1 Dr. & Sm. 42; 29 L. J. Ch. 500; 127 R. R. 20; *Re Walsh*, 15 W. R. 1117; *Bradford* v. *Romney*, 30 Beav. 431.

or if one of the parties knew of the mistake at the time he executed the deed. Where one party only has been under a mistake, while the other, without fraud, knew what the character of the deed was, and intended that it should be, the Court cannot interfere, for otherwise it would be forcing on the latter a contract he never entered into, or depriving him of a benefit he had *bonâ fide* acquired by an executed deed. Rectification can only be had where both parties have executed an instrument under a common mistake, and have done what neither of them intended (*x*). A mistake on one side may be a ground for rescinding, but not for correcting or rectifying an instrument (*y*).

There can be no rectification where there is not a prior actual contract by which to rectify the written instrument. So a policy cannot be rectified by the slip because the slip does not constitute a contract, and there is no contract till the policy is signed and the premium paid (*z*).

Nor can there be rectification if one of the contracting parties had never heard of that which is said to be the real agreement. So the Court refused to rectify a policy according to the intention of the insured as there was no mistake on the part of the company in granting it (*a*).

The mistake of one party to a contract can never be a ground for compulsory rectification so as to impose on the second party the erroneous conception of the first (*b*). The mistake of the plaintiff alone may, however, where there is fraud, be a ground for putting the defendant to elect between having the transaction annulled altogether or submitting to the rectifica-

(*x*) *Eaton* v. *Bennett*, 34 Beav. 196; 145 R. R. 476; *Paget* v. *Marshall*, 28 C. D. 261; 54 L. J. Ch. 575.

(*y*) *Mortimer* v. *Shortall*, 2 Dr. & War. 372; 59 R. R. 730; *Fowler* v. *Fowler*, 4 D. & J. 265; 124 R. R. 234; *Re Walsh*, 15 W. R. 1117; *Paget* v. *Marshall*, *supra*; *Ellis* v. *Hills*, 67 L. T. 287; *May* v. *Platt*, 1900, 1 Ch. 616; 69 L. J. Ch. 357.

(*z*) *M'Kenzie* v. *Coulson*, 8 Eq. 368.

(*a*) *Fowler* v. *Scottish Equitable Ins. Co.*, 28 L. J. Ch. 225. The Court, however, set aside the policy, and ordered a return of the premiums as having been paid by mistake.

(*b*) *Rooke* v. *Kensington*, *supra*; *Thompson* v. *Whitmore*, 1 J. & H. 268; 128 R. R. 353; *Bradford* v. *Romney*, 30 Beav. 431.

tion of the deed in accordance with the plaintiff's intention (*c*), but this can only be done where there is fraud or conduct equivalent to fraud (*d*).

In *Harris* v. *Pepperell* (*e*), Lord Romilly, M.R., said that the rule that the Court will not rectify an instrument on the ground of mistake, except the mistake be mutual, is liable to an exception in a case between vendor and purchaser. But the distinction is not supported by the authorities, and does not seem sound. *Garrard* v. *Frankel* (*f*), and *Harris* v. *Pepperell* (*g*), if correctly determined, might possibly be supported on the principle that the Court in these cases merely abstained from setting the agreement aside on the consent of the defendant to submit to the variation alleged by the plaintiff (*h*). But it seems that *Harris* v. *Pepperell*, *Garrard* v. *Frankel*, and *Paget* v. *Marshall* (*i*), can only be supported on the ground of fraud; and in the absence of fraud vendors or purchasers of land cannot be put to their election to rescind or accept rectification on the ground of unilateral mistake (*k*).

Although, however, the Court will not rectify a transaction between two or more parties, unless on the ground of mutual mistake, a deed poll by way of appointment may be rectified on the ground of mistake, if the mistake is clearly proved on the part of the person making it (*l*).

Parol evidence is admissible on the application to rectify an instrument to show what the intention of the parties really was (*m*), even although the contract be one required by the

(*c*) *Garrard* v. *Frankel*, *infra*; *Harris* v. *Pepperell*, *infra*; *Bloomer* v. *Spittle*, *infra*; *Paget* v. *Marshall*, *infra*.

(*d*) *May* v. *Platt*, 1900, 1 Ch. 616; 69 L. J. Ch. 357.

(*e*) 5 Eq. 1.

(*f*) 30 Beav. 451; 31 L. J. Ch. 604; 132 R. R. 352.

(*g*) 5 *Eq.* 1.

(*h*) See *Bloomer* v. *Spittle*, 13 Eq. 429; 41 L. J. Ch. 369.

(*i*) 28 C. D 261; 54 L. J. Ch. 575.

(*k*) *May* v. *Platt*, 1900, 1 Ch. 616; 69 L. J. Ch. 357.

(*l*) *Wright* v. *Goff*, 22 Beav. 214; 25 L. J. Ch. 803; 111 R. R. 330; *Killick* v. *Gray*, 46 L. T. 583; *Bonhote* v. *Henderson*, 1895, 2 Ch. 202; *Hood of Avalon* (*Lady*) v. *Mackinnon*, 1909, 1 Ch. 476; 78 L. J. Ch. 300.

(*m*) *Alexander* v. *Crosbie*, Ll. & G. temp. Sug. 145; 46 R. R. 183; *Mortimer* v. *Shortall*, 2 Dr. & War. 363; 59 R. R. 730; *Barrow* v. *Barrow*, 18 Beav. 532; 104 R. R. 514.

Statute of Frauds to be proved by writing (*n*), and can be admitted to prove rescission of such a contract (*o*). Mistake like fraud must be deemed an exception to the statute (*p*). In most, if not in all, the cases in which the Court has reformed an instrument, there has been something beyond the parol evidence, such, for instance, as a rough draft of the agreement, written instructions for preparing it or the like; but the Court will act where the mistake is clearly established by parol evidence, even though there is nothing in writing to which the parol evidence may attach (*q*). If, however, there is not anything in writing beyond the parol evidence to go by, and the defendant by his answer denies the case set up by the plaintiff, the plaintiff will often be without a remedy, though even in such cases the parol evidence may be so conclusive as to justify the Court in granting the relief prayed (*r*).

The Court may, though it will hesitate to do so, rectify a settlement on the ground of mistake upon the evidence of the plaintiff alone if no other evidence can be obtained (*s*). But the evidence must be clear and distinct that there was some different intention at the time the deed was executed (*t*).

If the original agreement is of doubtful construction, and the conveyance is definite and unequivocal, it is not easy to avoid the conclusion that the latter may be the best evidence of the terms of the actual agreement (*u*), but if ambiguous, parol evidence may be used to express it (*x*).

(*n*) *Re Boulter*, 4 C. D. 241; 46 L. J. B. 11; *Johnson* v. *Bragge*, 1901, 1 Ch. 28; 70 L. J. Ch. 41.

(*o*) *Vezey* v. *Rashleigh*, 1904, 1 Ch. 634; 73 L. J. Ch. 422.

(*p*) Fry Spec. Perf. p. 351; *Johnson* v. *Bragge*, *supra*.

(*q*) *Alexander* v. *Crosbie*, *supra*; *Mortimer* v. *Shortall*, *supra*; *Welman* v. *Welman*, 15 C. D. 570; 49 L. J. Ch. 736; *Cook* v. *Fearn*, 48 L. J. Ch. 63; *Johnson* v. *Bragge*, *supra*.

(*r*) *Ibid.*; *Beaumont* v. *Bramley*, T. & R. 52; *Fowler* v. *Fowler*, 4 D. & J. 273; 124 R. R. 234; *Bentley* v. *Mackay*, 4 D. F. & J. 279; 135 R. R. 145; *De la Touche's Settlement*, 10 Eq. 600; 40 L. J. Ch. 85; *Bloomer* v. *Spittle*, 13 Eq. 430; 41 L. J. Ch. 369.

(*s*) *Hanley* v. *Pearson*, 13 C. D. 545; *Bonhote* v. *Henderson*, 1895, 2 Ch. 202; *Hood of Avalon* (*Lady*) v. *Mackinnon*, 1909, 1 Ch. 476; 78 L. J. Ch. 300.

(*t*) *Tucker* v. *Bennett*, 38 C. D. 1, 15; 57 L. J. Ch. 507; and see *Re Daniel's Settlement*, 1 C. D. 375; where a provision was omitted by the engrossing clerk.

(*u*) *Humphries* v. *Horne*, 3 Ha. 277; 64 R. R. 293.

(*x*) *Murray* v. *Parker*, 19 Beav. 305, 308; 105 R. R. 153.

Where a document has been signed as an agreement under a common mistake as to its contents, and it appears that no real agreement was come to between the parties according to which it might be rectified, the Court will set it aside (*y*), or will at least refuse specific performance (*z*).

Courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified, and that such contract is inaccurately represented in the instrument. It is impossible for the Court to rescind or alter a contract with reference to the terms of the negotiation which preceded it (*a*). There can be no rectification, if one of the contracting parties never heard of that which is said to be the real agreement (*b*).

Where the instrument sought to be rectified on the ground of mistake was a marriage settlement the doctrine in the older cases was that where the articles and settlement were both before marriage, the Court would not interfere unless the settlement was expressed to be made in pursuance of the articles, for, without such a recital, the Court supposed that the parties had altered their intentions as regarded the terms of the contract (*c*). But a post-nuptial settlement would always be reformed in accordance with ante-nuptial articles (*c*). The later authorities have modified this as follows, so far as regards ante-nuptial settlements: (1) When the settlement purports to be in pursuance of articles and there is a variance, the variance will be presumed to have arisen from mistake. (2) When the settlement does not refer to articles it will not be presumed, but it may be proved that the settlement was meant to be in conformity with the articles, and that any variance arose from mistake. In the first case

(*y*) *Calverley* v. *Williams*, 1 Ves. Jr. 210; 1 R. R. 118; *Price* v. *Ley*, 4 Giff. 235, aff. 11 W. R. 475; 141 R. R. 186.

(*z*) *Douglas* v. *Baynes*, 1908, A. C. 477; 78 L. J. P. C. 13.

(*a*) 8 Eq. 375, *per* James, V.-C.

(*b*) *Fowler* v. *Scottish Equitable Life Ass. Soc.*, 28 L. J. Ch. 228.

(*c*) *Bold* v. *Hutchinson*, *infra*.

the Court will act on the presumption; in the second on clear and satisfactory evidence of the mistake (*d*).

A settlement may be rectified even against previous articles on clear and distinct evidence, evidence of departure from the real intention (*e*), but not on mere parol evidence uncontradicted because there was no one to contradict it (*f*).

The intent rather than the literal words of the articles will be followed. Accordingly, where the limitations in a post-nuptial settlement purporting to be made in pursuance of articles may agree with the words of the articles, if it does not carry out their intent, the Court will reform it, and will, so far as is consistent with the articles, construe them so as to make such a settlement as is generally approved by the Court, and will supplement the articles accordingly (*g*).

Where shares intended to be issued as fully paid up have been issued without registration of a contract, and the mistake was common to the directors and the allottee, the Court would rectify the register (*h*). So, also, where a transfer of certain shares was executed in which the shares were wrongly numbered by mistake, it was held that the transfer was substantially valid so as to render the transferee a shareholder, and that the numbers might afterwards be rectified (*i*).

So, also, where a man purchased land of a building society under an arrangement that he should mortgage it to the society to secure the purchase-money, but the deeds were drawn and executed in mistake as representing an advance of money to a member with covenants to make all payments in respect of his shares, it was held on the liquidation of the society that he could not be charged as a member

(*d*) *Bold* v. *Hutchinson*, 5 D. M. & G. 566, 568; 25 L. J. Ch. 598; *King* v. *King-Harman*, I. R. 7 Eq. 447; *Johnson* v. *Bragge*, 1901, 1 Ch. 28; 70 L. J. Ch. 41; *Viditz* v. *O'Hagan*, 1899, 2 Ch. 569; 68 L. J. Ch. 553.

(*e*) *Smith* v. *Iliffe*, 20 Eq. 666; 44 L. J. Ch. 755; *Hanley* v. *Pearson*, 13 C. D. 545.

(*f*) *Tucker* v. *Bennett*, 38 C. D. at p. 15; 57 L. J. Ch. 507.

(*g*) *Cogan* v. *Duffield*, 2 C. D. 49; 45 L. J. Ch 307. See 1905, 1 Ir. R. at p 471.

(*h*) Buckley, 200; but see now Companies Act, 1908, s. 88.

(*i*) *Ind's Case*, 7 Ch. 485; 41 L. J. Ch. 564; *post*, p. 543.

under the deeds, but must be charged according to the real transaction (*k*).

So, where a bill of exchange drawn in renewal of a former bill between an indorser, drawer, and indorsee had by mistake the name of the indorsee inserted in the place of the drawer, in which form the bill was accepted and indorsed to him, and in an action by the intended indorsee against the drawer, the latter relied in defence upon the apparent form of the bill, the Court entertained a bill for rectifying the instrument (*l*).

So, also, where an agreement was made for the insurance of a ship beginning the risk *at* and *from* a named port, and the policy was by mistake drawn out for the risk *from* the port only, the policy was corrected so as to entitle the assured to recover for a loss *at* the port (*m*). So, under an open policy of assurance upon goods to be declared as shipped in order of shipment, it was held that the insured might, according to the usage of merchants and underwriters, correct a mistake in the order of declaring the shipments after a loss had become known, so as to bring the goods within the insurance according to the true order (*n*).

Rectification in certain cases, though mistake is not shown by direct evidence.

In some cases where the fact of the mistake can be fairly implied from the nature of the transaction, relief will be given although the fact of the mistake is not established by direct evidence.

It was thought at one time that every contract for a joint loan was to be deemed in equity a joint and several contract, that being the presumed intention of the parties (*o*). There is, however, no such rule, and in equity as in law, the liability devolves exclusively on the survivors or survivor, and the representatives of a deceased obligor cannot be sued (*p*). Upon the same ground the Court will not reform a joint bond

(*k*) *Empson's Case*, 9 Eq. 597.

(*l*) *Druiff* v. *Parker*, 5 Eq. 131; 37 L. J. Ch. 241

(*m*) *Motteux* v. *London Ass. Co.*, 1 Atk. 545.

(*n*) *Stephens* v. *Australasian Ins. Co.*, L. R. 8 C. P. 18; 42 L. J. C. P. 12.

(*o*) See *Thorpe* v. *Jackson*, 2 Y. & C. 553.

(*p*) *Sumner* v. *Powell*, 2 Mer. 36; 16 R. R. 136; *Kendall* v. *Hamilton*, 4 A. C. 504; 48 L. J. C. P. 705.

against a surety so as to make it several on the presumption of a mistake from the nature of the transaction (*q*), nor will it treat joint covenants in a lease to joint lessees as several (*r*). But there may be equitable grounds for treating the liability as several, as where through fraud or mistake the bond is made joint only (*s*).

The equity for rectification on presumptive evidence is applied also to a mortgage by husband and wife of the wife's estate, which has limited the equity of redemption to the husband. If the instrument does not recite an intention to do more than make a mortgage, the presumption is that nothing more was intended; and the instrument will be reformed by restoring the equity of redemption to the wife (*t*). And, in like manner, it is held that if a lease be made by a tenant for life under a power created by a settlement, and a rent reserved to the lessor and his heirs, these words shall be interpreted by the prior title, and applied to the remainderman under the settlement, and not the heir of the lessor (*u*).

Cases in which there can be no rectification of an instrument.

The principle upon which the Court reforms and corrects an instrument on the ground of mistake will not apply in a case in which a matter has been completely overlooked on both sides; and the agreement is a substantial agreement which speaks in sufficiently clear terms for itself, and contains no reference to any other instrument or to any pre-existing relation (*x*), or in a case where the instrument is in accordance with the expressed intention of the parties, and has been prepared with full knowledge of their rights, but has failed only because the parties have been ill-advised as to the way of giving effect to their intention (*y*). Nor will the Court make a settlement conformable with what it is alleged it would

(*q*) *Other* v. *Iveson*, 3 Drew. 177; 24 L. J. Ch. 654; 106 R. R. 307.

(*r*) *Clarke* v. *Bickers*, 14 Sim. 639; 65 R. R. 657.

(*s*) *Simpson* v. *Vaughan*, 2 Atk. 31, 33. See *Rawstone* v. *Parr*, 3 Russ. 539.

(*t*) *Jackson* v. *Innes*, 1 Bligh, 104, 114; 20 R. R. 45; *Clark* v. *Burgh*, 2 Coll. 221; 14 L. J. Ch. 298; 70 R. R. 181; *Davis* v. *Whitehead*, 1894, 2 Ch. 133; 63 L. J. Ch. 471.

(*u*) 1 Bligh, at p. 115.

(*x*) *Parker* v. *Taswell*, 2 D. & J. 559; 27 L. J. Ch. 812; 119 R. R. 230

(*y*) *Farr* v. *Sheriffe*, 4 Ha. 513; 15 L. J. Ch. 89.

have been if all the material points had been present to the minds of the parties at the time they executed it (*z*). Nor will the Court, under the name of rectification, add to the agreement a term which had not been determined upon, or was not discussed between them. There can be no rectification of an agreement which is executed in accordance with the proposals (*a*), nor of a deed which is executed in pursuance of and in conformity with a previous agreement in writing (*b*). Nor can there be rectification, if it was by the intention of the parties that the written instrument did not comprise all the terms of the actual agreement (*c*). An agreement will not be specifically performed with a parol variation, and on the other hand the Court will not decree specific performance without such variation if it is relied on as a defence (*d*).

Though the Court will rectify an instrument which fails through some mistake of the draughtsman in point of law to carry out the real agreement between the parties (*e*), it is not sufficient in order to create an equity for rectification that there has been a mistake as to the legal construction or the legal consequences of an instrument (*f*). The proper question always is, not what the document was intended to mean, or how it was intended to operate, but what it must be construed to mean. For example, where an annuity had been sold by the plaintiff, and was intended to be redeemable, but it was agreed that a clause of redemption should not be inserted in the deed, because both parties erroneously supposed that its insertion would make the transaction usurious, it was held that the omission could not be supplied in equity, for the Court was not asked to make the deed what the parties intended, but to make it that which they did not intend, but

(*z*) *Barrow* v. *Barrow*, 18 Beav. 534; 104 R. R. 514. See *Hills* v. *Rowland*, 4 D. M. & G. 430; 102 R. R. 195.

(*a*) *Elwes* v. *Elwes*, 3 D. F. & J. 667; 130 R. R. 289.

(*b*) *Thompson* v. *Hickman*, 1907, 1 Ch. 550; 76 L. J. Ch. 254.

(*c*) *Townshend* v. *Stangroom*, 6 Ves. 332; 5 R. R. 312; *Harbidge* v. *Wogan*, 5 Ha. 258; 15 L. J. Ch. 281; 71 R. R. 90; *ante*, p. 527.

(*d*) *Wood* v. *Scarth*, 2 K. & J. at p. 42; 110 R. R. 88.

(*e*) *Wake* v. *Harrop*, 1 H. & C. 202; 31 L. J. Ex. 451; 130 R. R. 461.

(*f*) *Sutherland* v. *Heathcote*, 1892, 1 Ch. 475; 61 L. J. Ch. 248; *North Eastern Rly.* v. *Hastings*, 1900, A. C. 260; 69 L. J. Ch. 516.

which they would have intended had they been better informed (*g*). So, also, where a party making a voluntary deed supposes that he will have a power of subsequent revocation, though no such power is reserved, the deed cannot afterwards be rectified by inserting the power, the evidence merely showing that the power had been omitted under the erroneous belief that it was not necessary to insert it, not that the power was intended to be inserted, but was left out by mistake (*h*). So, too, where a voluntary settlement was made to provide for the plaintiff's wife and children in case of bankruptcy, and a life interest in favour of the plaintiff was intentionally omitted, the Court refused to rectify it (*i*).

Nor can there be rectification, although both parties may have been under a mistake, if the mistake be in respect of a matter materially inducing the agreement (*k*).

Rectification of voluntary deed.

It is not necessary that a person claiming to have a settlement rectified should be or should represent a party to the original contract, or should be within the consideration of it (*l*). But the Court will not rectify a voluntary deed unless all the parties assent. If any object, the deed must take its chance as it stands (*m*), the reason being that an agreement for the execution of a voluntary deed cannot be enforced (*n*).

A voluntary deed cannot be reformed, except with the consent of the settlor, if it fails to carry out the intention of the parties. If the case be that he has made a mistake, no amount of evidence, however conclusive, proving that he made a mistake, will justify the Court in compelling him to introduce a clause into the deed, which he does not choose to introduce

(*g*) *Irnham* v. *Child*, 1 Bro. C. C. 92; *Townshend* v. *Stangroom*, 6 Ves. 328; 5 R. R. 312.

(*h*) *Worrall* v. *Jacob*, 3 Mer. 270.

(*i*) *Rake* v. *Hooper*, 83 L. T. 669.

(*k*) *Carpmael* v. *Powis*, 10 Beav. 36; 16 L. J. Ch. 31; *post*, p. 542.

(*l*) *Thompson* v. *Whitmore*, 1 J. & H. 273; 128 R. R. 353; *Weir* v. *Van Tromp*, 16 T. L. R. 531.

(*m*) *Broun* v. *Kennedy*, 33 Beav. 133, 147; 33 L. J. Ch. 342; 140 R. R. 47. But the Court has power to set aside a voluntary deed in part only at the suit of the grantor, if he ia content that the rest ahould atand; *Turner* v. *Collins*, 7 Ch. 342; 41 L. J. Ch. 558.

(*n*) *Lister* v. *Hodgson*, 4 Eq. at p. 34.

although at the time of execution he might have wished to have done so (*o*). On the other hand, the Court will exercise caution in rectifying a voluntary settlement upon the evidence of the settlor alone (*p*). But if a man executes a voluntary deed declaring certain trusts and happens to die, and it is proved from the instructions or otherwise that the deed was not prepared in the exact manner which he intended, the deed may be reformed and those particular provisions necessary to carry his intention into effect may be introduced (*q*). So also a voluntary deed may be set aside after the death of both donor and donee, if there is evidence to show that the donor complained of the deed and took steps to annul it (*r*).

So also a voluntary deed may be set aside if it fail in substance to carry out the intention of the settlor (*s*). But mistakes which may be a ground for rectification may not be important and serious enough to enable a donor to set aside the whole deed as failing in substance to carry out his intention (*t*).

The Court refused to rectify a post-nuptial settlement on the settlor's wife and children where the object of the settlement was to provide for the plaintiff's wife and children in case of bankruptcy, and where the life interest in favour of the plaintiff was intentionally omitted (*u*).

Lapse of time a bar to rectification.

Lapse of time may be a bar to the rectification of an instrument (*x*). The time runs not from the date of the conveyance but from the date when the party seeking relief first became aware of the mistake (*y*). But in particular cases, if the mistake is clearly made out to the satisfaction of the Court, the lapse of a long period will not be a bar. In *Wolterbeck* v.

(*o*) *Ibid.*

(*p*) *Bonhote* v. *Henderson*, 1895, 2 Ch. 742; 1895, 2 Ch. 202, *ante*, p. 532.

(*q*) *Lister* v. *Hodgson*, 4 Eq. 34; but see *Henry* v. *Armstrong*, 18 C. D. 668; *Tucker* v. *Bennett*, 38 C. D. 1; 57 L. J. Ch. 507; *ante*, pp. 210, 418.

(*r*) *Philippson* v. *Kerry*, 32 Beav. 628; 138 R. R. 889.

(*s*) *Hughes* v. *Seanor*, 18 W. R. 1122; *Everitt* v. *E.*, 10 Eq. 409; 39 L. J. Ch. 777; and see *Re Glubb*, 1900, 1 Ch. 354.

(*t*) *Ogilvie* v. *Littleboy*, 1897, W. N. 53.

(*u*) *Rake* v. *Hooper*, 83 L. T. 669.

(*x*) *Bloomer* v. *Spittle*, 13 Eq. 429; 41 L. J. Ch. 369.

(*y*) *Beale* v. *Kyte*, 1907, 1 Ch. 564; 76 L. J. Ch. 294.

Barrow (*z*) a marriage settlement dated 1823 was reformed in 1857, after the death of the husband, upon proof that it was not in accordance with the written instructions. So also in *McCormack* v. *McCormack* (*a*), a marriage settlement drawn up in 1841 was rectified in 1874. So also a release to a trustee was set aside after the lapse of more than 20 years on the ground that it was executed in error (*b*).

Mode of application for rectification.

The Court will not rectify a deed or instrument upon petition except perhaps in cases under the Trustee Act (*c*), nor upon motion, but only in an action instituted for the purpose; and until a deed is reformed, the Court is bound to act upon it as it exists (*d*).

Actions for the rectification of instruments are assigned to the Chancery Division, but where a statement of defence to an action brought in another division is accompanied by a counter claim for rectification, this is not a sufficient reason for transferring the action (*e*).

Order of Court to rectify sufficient without deed.

Where a conveyance is rectified, the order of the Court is sufficient without a new deed. A copy of the order is indorsed on the deed which is to be rectified (*f*). Thus, where a deed was executed purporting by mistake to convey a moiety only of real estate instead of the whole, as the parties intended, the Court held that an order for rectifying the deed indorsed upon it was effectual to pass the legal estate in the whole without a conveyance of the other moiety (*g*). So, where in a memorandum of mortgage, the property, although specifically identified, was misdescribed, the Court held that the document must be treated as rectified and the security operate as intended (*h*).

Mutual mistake in material matters inducing an agreement.

If parties enter into an agreement with reference to a supposed state of things, and it turn out that, by the mutual

(*z*) 28 Beav. 430; 113 R. R. 209.
(*a*) 1 L. R. I. 119.
(*b*) *Gandy* v. *Macaulay*, 31 C. D. 1.
(*c*) *Bird's Trust*, 3 C. D. 214; *Re Hoffe*, 48 W. R. 507.
(*d*) *Re Malet*, 30 Beav. 407; 31 L. J. Ch. 455; 132 R. R. 332.
(*e*) *Storey* v. *Waddle*, 4 Q. B. D. 289.
(*f*) *Hood* (*Lady*) v. *Mackinnon*, 1909, 1 Ch. 476; 78 L. J. Ch. 300.
(*g*) *White* v. *White*, 15 Eq. 247; 42 L. J. Ch. 288.
(*h*) *Re Boulter*, 4 C. D. 241; 46 L. J. B. 11.

mistake of the parties, the supposed actual state of things does not in fact subsist, the consideration for the agreement fails, and the agreement is consequently void (*i*). A contract, for instance, for the sale of a cargo, supposed by both parties to be on board a particular ship, is at an end if the cargo had at the time ceased to exist (*k*). So a contract for the sale of a life interest after it has in fact, though without the knowledge of the parties, expired, is void, and the purchaser is entitled to recover back his money (*l*). So a contract for the sale of a freehold interest which is afterwards discovered to be in the purchaser (*m*). So also a grant of an annuity made upon the statement of the grantor as to the age of the nominee which is erroneous, although unintentionally so, is void, and the payments can be recovered back (*n*). So also where a policy of insurance was renewed, both parties being ignorant that the life insured had previously died, it was held that, the renewal being conditional upon the insured being then alive, it was void (*o*). So also where an agreement was made for the sale of a remainder in fee expectant on an estate tail, and a bond was given to secure the purchase-monies; but it appeared that at the time of the sale the tenant in tail had suffered a recovery and destroyed the remainder, of which both parties were ignorant, the agreement was held void (*p*). So also where rent was paid and received for the occupation of land after the expiration of a lease for lives under which it was supposed to be payable in ignorance of the death of the persons upon whose lives the lease depended, it was held that no implication of the creation of a new tenancy could arise from

(*i*) See *Stapylton* v. *Scott*, 13 Ves. 417; *Robinson* v. *Dickenson*, 3 Russ. 413; 7 L. J. Ch. 70; *Cooper* v. *Phibbs*, L. R. 2 H. L. 149; *ante*, p. 496.

(*k*) *Couturier* v. *Hastie*, 9 Exch. 102; 5 H. L. C. 673; 25 L. J. Ex. 253; 101 R. R. 329.

(*l*) *Strickland* v. *Turner*, 7 Exch. 208; 22 L. J. Ex. 115; 86 R. R. 619; *Cochrane* v. *Willis*, 1 Ch. 58; 35 L. J. Ch. 36.

(*m*) *Jones* v. *Clifford*, 3 C. D. 779; 45 L. J. Ch. 809.

(*n*) *Att.-Gen.* v. *Ray*, 9 Ch. 397; 43 L. J. Ch. 478.

(*o*) *Pritchard* v. *Merchants' Life Ins. Society*, 3 C. B. (N.S.) 622; 27 L. J. C. P. 169; 111 R. R. 777. See *Scott* v. *Coulson*, 1903, 2 Ch. 249; 72 L. J. Ch. 600.

(*p*) *Hitchcock* v. *Giddings*, 4 Pri. 135; 18 R. R. 725; *cf. Clare* v. *Lamb* L. R. 1 C. P. 340; 44 L. J. C. P. 177; *post*, p. 557.

such receipt of rent (*q*). So also where the plaintiff bought a bar of silver and by agreement it was sent to an expert to be assayed, and on his report of the quantity of silver contained in the bar, the plaintiff paid for it; but it was afterwards discovered that there was a mistake in the assay, and that the quantity of silver was much less than was stated in the report; it was held to be a common mistake, and that the plaintiff was entitled to recover what he had paid (*r*). So also where a fund was sold as a reversionary interest, but it turned out that at the time of the sale the interest, which was supposed to be a reversionary one, had become an interest in possession, and the fact was unknown to both parties, it was held that the sale could not stand (*s*). So also where a party had, upon a compromise, executed a general release in respect of partnership matters, it was held that he was entitled to relief, on the ground of a large item in which he was interested having been omitted by mistake in the account (*t*).

So also if the vendor, in fixing the price, has altogether relied on information furnished to him by the purchaser and such information turn out to have been (even unintentionally) incorrect, this may entitle the vendor, even after conveyance, to relief in equity (*u*).

But a contract may be unconditional, although the parties are under a mistake respecting some matter which induces the contract. Thus, if the contract be absolute, and not with reference to collateral circumstances, as, for instance, if a ship on a voyage be sold, and the ship, at the time of the contract, be seriously damaged, to the ignorance of both parties, still the contract is valid (*x*).

So, also, although there be a mutual mistake respecting the subject-matter of the agreement, yet if both parties are aware

(*q*) *Doe* v. *Crago*, 6 C. B. 90; 17 L. J. C. P. 263; 77 R. R. 283.

(*r*) *Cox* v. *Prentice*, 3 M. & S. 344; 16 R. R. 288.

(*s*) *Colyer* v. *Clay*, 7 Beav. 188; 64 R. R. 58.

(*t*) *Pritt* v. *Clay*, 6 Beav. 503; 63 R. R. 160.

(*u*) *Carpmael* v. *Powis*, 10 Beav. 36; 16 L. J. Ch. 31; *Haygarth* v. *Wearing*, 12 Eq. 320; 40 L. J. Ch. 577.

(*x*) *Barr* v. *Gibson*, 3 M. & W. 390; 49 R. R. 650; *Barker* v. *Janson*, L. R. 3 C. P. 303; 37 L. J. C. P. 105.

that the subject-matter is, from its nature, doubtful or uncertain, or is of a speculative or contingent character, the mistake goes for nothing. If a bargain depends on a contingent event, or the subject-matter of a contract be an uncertain thing, and the contingency or chance be known to both parties, neither of them can resist specific performance because the reality has turned out to be different from what he anticipated (*y*).

There is mutual mistake which will vitiate a contract, or which at least will render it incapable of being specifically enforced in equity, if the one party does not think he is selling what the other thinks he is buying (*z*). If, for instance, a transfer is filled up with shares which the transferor did not agree to transfer, or with shares which the transferee did not agree to accept, the transfer is a nullity; but an error in the distinguishing numbers of the shares is immaterial (*a*).

Care must, however, be taken in distinguishing cases, where the parties are under a mutual mistake as to the subject-matter of a contract, from cases where there is no doubt as to the subject-matter; but the one has, in fact, sold more than he thought he was selling, and the other has got more than he expected. In such cases relief cannot be had in equity, if there has been no unfairness on either side (*b*). Where, for instance, that which the vendor intended to sell, and the purchaser to buy, was a leasehold interest, erroneously supposed to have a shorter time to run than it in fact had to run, it was held that the vendor had, after conveyance, no equity for relief (*c*). So also where a man entitled to an interest in a residuary estate, assigns all his interest to a creditor, he is not entitled to relief if it afterwards appear that the residuary estate consisted partly of a fund, the existence of which was not known to either of the

(*y*) *Mortimer* v. *Capper*, 1 Bro. C. C. 156; *Ridgway* v. *Sneyd*, Kay, 627; 101 R. R. 776; *Baxendale* v. *Seale*, 19 Beav. 601; 24 L. J. Ch. 385; 105 R. R. 261.

(*z*) *Hitchcock* v. *Giddings*, 4 Pri. 135; *Cochrane* v. *Willis*, 1 Ch. 58; 35 L. J. Ch. 36; *Baxendale* v. *Seale*, *supra*.

(*a*) Buckley (9th ed.), 581.

(*b*) *Okill* v. *Whittaker*, 1 De G. & S. 83; 2 Ph. 338; 78 R. R. 104.

(*c*) *Ibid*.

parties at the time of the execution of the deed (*d*). So also where a lessor agreed to grant an underlease for the residue of his term, except the last ten days, and the lessor's solicitor drew up a lease for twenty-three years less ten days, and the lease was executed by the lessee, who did not inspect the original lease, and it was afterwards discovered that the original lease had only sixteen years to run, it was held on a claim by the underlessee for compensation that the rule *caveat emptor* applied, and that he had no claim to compensation (*e*). Apart from condition, compensation cannot be recovered after conveyance in respect of a defect of title (*f*).

Nor where several persons have joined in conveying an estate to a purchaser for a full consideration, can one of them be afterwards heard to say that he was under a misapprehension as to the extent of his interest in the property (*g*).

Mistake of fact in compromises.

The same considerations which apply to the case of agreements entered into under a mutual mistake of the parties as to fact, apply to the case of compromises. A compromise which is founded on a mutual mistake of fact cannot be supported (*h*). If, for instance, a compromise is founded on the genuineness of an instrument which turns out to be forged, or if a suit which it is the object of a compromise to determine turns out to have been already decided in favour of one of the parties, or if a compromise be founded on a will, which turns out to have been revoked by another will of which the parties are ignorant, the transaction cannot be supported (*i*). But the case is different if the fact in respect of which there is a mistake be included in the compromise and be not the very

(*d*) *Howkins* v. *Jackson*, 2 Mac. & G. 372; 19 L. J. Ch. 451; 86 R. R. 136; cf. *Turner* v. *Turner*, 14 C. D. 829.

(*e*) *Besley* v. *Besley*, 9 C. D. 103; *Clayton* v. *Leach*, 41 C. D. 103.

(*f*) *Debenham* v. *Sawbridge*, 1901, 2 Ch. 98; 70 L. J. Ch. 525.

(*g*) *Malden* v. *Menill*, 2 Atk. 8. See *Soper* v. *Arnold*, 14 App. Ca. 429, 433; 59 L. J. Ch. 214.

(*h*) *Hickman* v. *Berens*, 1895, 2 Ch. 638; 64 L. J. Ch. 785; *Huddersfield Banking Co.* v. *Lister & Son*, 1895, 2 Ch. 273; 64 L. J. Ch. 523.

(*i*) Toull. Cod. Civ. Liv. 3, tit. 3, c. 2. See *Ashurst* v. *Mill*, 7 Ha. 502; 82 R. R. 214; *Lawton* v. *Campion*, 18 Beav. 87; 23 L. J. Ch. 505; 104 R. R. 378; *Trigge* v. *Lavallée*, 15 Moo. P. C. 276.

foundation on which the compromise rests (*k*), as where a person compromises an action forgetting some matter already in evidence (*l*). If one or more parties having, or supposing they have, claims upon a given subject-matter, or claims upon each other, agree to compromise those claims, and to come to a general settlement of the matters in dispute between them without resorting to litigation, and they act with good faith, and stand on an equal footing, and have equal means of knowledge as to the facts, the compromise is binding in equity (*m*). It is not enough to invalidate the transaction that one of the parties may have been in error as to a fact included in it (*n*).

The principles which apply to the case of ordinary compromises between strangers do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced, if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend (*o*).

Generally the Court will support a compromise entered into after the parties have jointly consulted the family solicitor, even though the agreement may not be quite in accordance with their rights, the very object of the compromise being to avoid the necessity of having the exact relative rights determined by litigation. But the family solicitor is not entitled to keep his clients in the dark as to their rights, because he thinks it is to the advantage of all parties to the compromise,

(*k*) See *Trigge* v. *Lavalée*, 15 Moo. P. C. 276; 137 R. R. 61.

(*l*) *West Devon Consols*, 38 C. D. 51; 57 L. J. Ch. 850.

(*m*) *Attwood* v. ——, 1 Russ. 353; 5 Russ. 149; 29 R. R. 15; *Naylor* v. *Winch*, 1 Sim. & St. 555; 24 R. R. 227; *Pickering* v. *Pickering*, 2 Beav. 31, 56; 8 L. J. Ch. 336; *Pritt* v. *Clay*, 6 Beav. 503; 63 R. R. 160; *Stewart* v. *Stewart*, 6 Cl. & Fin. 911; 49 R. R. 267; *Trigge* v. *Lavalée*, 15 Moo. P. C. 270; *Stainton* v. *Carron Co.*, 30 L. J. Ch. 713; *Miles* v. *New Zealand Co.*, 32 C. D. 266; 54 L. J. Ch. 1035; *ante*, pp. 109, 502.

(*n*) *Scott* v *Scott*, 11 Ir. Eq. 75; *West Devon Consols*, *supra*.

(*o*) *Gordon* v. *Gordon*, 3 Sw. 400; 19 R. R. 230; *Westby* v. *Westby*, 2 Dr. & War. 502; 59 R. R. 795; *Stewart* v. *Stewart*, 6 Cl. & Fin. 911; 49 R. R. 267; *Persse* v. *Persse*, 7 Cl. & Fin. 279; 51 R. R. 22; *Williams* v. *Williams*, 2 Dr. & Sm. 378; 143 R. R. 170; *Hoblyn* v. *H.*, 41 C. D. 200.

and that if they knew their exact rights there would be no compromise (*p*).

But a family settlement will not be supported, if founded on a mistake of fact of either party to which the other party is accessory, although such mistake may have been innocently brought about by the other party (*q*). Where accordingly a resettlement of family estates was made by the father, tenant for life, and son, tenant in tail in remainder, upon the supposition that a charge for portions was within the power of the father to appoint or release, and not, as was the fact, a subsisting charge, it was set aside as being founded on a mistake (*r*).

Ambiguous terms of contract.

The instrument of contract may be correctly expressed according to the intention of each party, and yet there may be no real agreement by reason of a mistake between them as to the application of the expression to the facts. This may arise from the generality or ambiguity of the expression, admitting of two different constructions or meanings as applied to the facts or from a certain expression applying equally to two different things. In such a case the Court will not enforce the agreement on the ground that "it is against conscience for a man to take advantage of the plain mistake of another or at least that a Court of equity will not assist him in doing so" (*s*).

The expression of the contract may be sufficiently general or ambiguous to admit of different applications, and may be accepted by each party with a different application unknown to the other. In this case the written contract must be construed and applied, if possible, according to its terms, but it is open to either party to show his application of the contract so far as is consistent with the terms used, and if no reasonably certain construction can be adopted in the application to the facts, the contract would be void in law by reason of the uncertainty and impossibility of executing it. Thus, where the particulars of a sale by auction were ambiguous as to

(*p*) *Re Roberts*, *R.* v *R.*, 1905, 1 Ch. 704; 74 L. J. Ch. 483.
(*q*) *Fane* v. *Fane*, 20 Eq. 706.
(*r*) *Ibid.*
(*s*) *Manser* v. *Back*, 6 Ha. 443, 448; 77 R. R. 187; approved, *Douglas* v. *Baynes*, 1908, A. C. 477, 485; 78 L. J. P. C. 13.

including or excluding timber, and the vendor and purchaser accepted them with a different meaning, it was held that specific performance could not be decreed upon either construction (*t*). So where upon the sale of a reversion of an undivided moiety of an estate, the rent was stated upon the particulars of sale to be at a certain sum, leaving it ambiguous whether the half or the whole of the stated rent was the subject of sale, a bill for specific performance, charging the contract as for a purchase of half the rent mentioned, was dismissed upon the ground that the purchaser was induced by the particulars to believe that he purchased the whole rent (*u*).

So, also, where the terms of a contract were ambiguous and something different from what was claimed by the purchaser was intended to be sold by the vendor, the Court would not, at the suit of the purchaser, compel the vendor specifically to convey property not intended or believed by him to be included in the contract, though the vendor was the author of the ambiguity (*x*). So, too, where the price to be paid for land is uncertain, the Court will not enforce the agreement for sale, though the vendor may himself be responsible for the ambiguity (*y*).

Falsa demonstratio.

If, in the application of the contract to the facts and circumstances, it appears that a thing or matter referred to is sufficiently identified, but with some inaccurate description or addition, the latter may be rejected or corrected in the application as expressed in the maxim *falsa demonstratio non nocet cum de corpore constat*, the last words being of importance (*z*). Thus, where a tenant contracted to transfer his tenancy in certain premises, describing them as the premises he then occupied, and known by a certain name, and it appeared that he occupied a part only of the premises known

(*t*) *Higginson* v. *Clowes*, 15 Ves. 516; *Clowes* v. *Higginson*, 1 V. & B. 524; 12 R. R. 284.

(*u*) *Swaisland* v. *Dearsley*, 29 Beav. 430; 30 L. J. Ch. 652; 131 R. R. 656.

(*x*) *Manser* v. *Back*, 6 Ha. 443; 77 R. R. 187; *Baxendale* v. *Seale*, 19 Beav. 601; 24 L. J. Ch. 385; *Re Hare and O'More*, 1901, 1 Ch. 93; 70 L. J. Ch. 45.

(*y*) *Douglas* v. *Baynes*, 1908, A. C. 477; 78 L. J. P. C. 13.

(*z*) *Re Brocket*, 1908, 1 Ch. 185, *per* Joyce, J.; 77 L. J. Ch. 245.

by that name; it was held upon a construction of the contract as applied to the facts that the premises occupied were the essential description, and were alone included in the contract (*a*). So, also, where an insurance is effected upon a ship, or upon goods on board a ship, if the subject of insurance be sufficiently identified, a mere misnomer of the ship would be immaterial (*b*).

In the application of the doctrine *falsa demonstratio non nocet* it is immaterial in which part of the description the *falsa demonstratio* appears. It is not necessary that it should follow the true part and qualify what has gone before (*c*). *Quære*, whether the doctrine applies in a case where the Court can see what the document in question was really intended to mean (*d*).

Latent ambiguity.

A mistake in the application of the instrument of contract may arise from some expression therein sufficiently certain in itself, applying equally to two different things, one of which was intended by one party and the other by the other. This is called a *latent ambiguity*, and extrinsic evidence is admissible to prove the intention of the parties (*e*), and if it appear that each party mistook the meaning of the other, and that they intended different things by the same expression, the contract is void on account of the absence of a *consensus ad idem*, for each party was assenting to a different contract, notwithstanding the apparent mutual consent (*f*).

In *Thornton* v. *Kempster* (*g*), the sale was of ten tons of sound merchantable hemp, but it was intended by the vendor to sell Petersburg hemp, and by the buyer to purchase Riga hemp. The broker had made a mistake in describing the hemp to the buyer, and the Court held that there had been no

(*a*) *Magee* v. *Lavell*, L. R. 9 C. P. 107; 43 L. J. C. P. 131.
(*b*) *Ionides* v. *Pacific Ins. Co.*, L. R. 7 Q. B. 517; 41 L. J. Q. B. 190.
(*c*) *Cowen* v. *Truefitt*, 1899, 2 Ch. 309; 68 L. J. Ch. 563.
(*d*) *Ibid.*
(*e*) *Smith* v. *Jeffryes*, 15 M. & W. 562, *per* Alderson, B.; 15 L. J. Ex. 325; 71 R. R. 761.
(*f*) *Smith* v. *Hughes*, L. R. 6 Q. B. 597; 40 L. J. Q. B. 221; *Hodges* v. *Horsfall*, 1 R. & M. 116; 32 R. R. 157; *Marshall* v. *Berridge*, 19 C. D. 233; 51 L. J. Ch. 329.
(*g*) 5 Taunt. 786; 15 R. R. 658.

contract whatever, the assent of the parties not having really existed as to the same subject-matter of sale. So, also, in *Raffles* v. *Wichelhaus* (*h*), where A. and B. contracted for the sale of the cargo to arrive "*per* ship Peerless from Bombay," and it appeared that there were two ships of that name then arriving from Bombay, and that A. meant one ship and B. the other, it was held that there was no contract. So when the master of a ship having chartered it to a broker, who again chartered it in his own name, the latter placed a cargo on board for which the master signed bills of lading for delivery, "paying freight for the said goods, as *per* charter party," and the cargo was delivered and the shipper paid his charterer before either party had any notice or knowledge of the other charter; it was held that the master could not recover freight upon the bill of lading, because that document being equally applicable to either charter-party, there was in fact no agreement or contract between them, and it was further held that there could be no implied contract with the master to pay a reasonable freight for the carriage of the cargo because it was shipped in fulfilment of a contract expressly exclusive of such intention (*i*).

But one of the parties to an apparent contract may by his own fault be precluded from setting up that he entered into it in a different sense to that in which it was understood by the other. Thus, in the case of a sale by sample where the vendor exhibited by mistake a wrong sample, it was held that the contract was not avoided by this error of the vendor (*k*). But if the purchaser be aware that the vendor was under a mistake as to the sample he was offering, the vendor would be entitled to show that he had not intended to enter into the contract by which the purchaser sought to bind him (*l*).

Mistake as to collateral fact or motive.

Care must be taken not to confound a common mistake as to the subject-matter of sale or the price or the terms which prevent the sale from ever coming into existence by reason of

(*h*) 2 H. & C. 906; 33 L. J. Ex. 160; 133 R. R. 853.
(*i*) *Smidt* v. *Tiden*, L. R. 9 Q. B. 446; 43 L. J. Q. B. 199.
(*k*) *Scott* v. *Littledale*, 8 E. & B. 815; 27 L. J. Q. B. 201; 112 R. R. 791.
(*l*) *Smith* v. *Hughes*, L. R. 6 Q. B. 607; 40 L. J. Q. B. 221.

the absence of a *consensus ad idem*, with a mistake made by one of the parties as to a *collateral fact* or what may be termed a mistake in *motive*. If the buyer purchases the very article at the very price and on the very terms intended by him and by the vendor, the sale is complete by mutual assent, even though the buyer or the seller may be totally mistaken in the motive which induced the assent (*m*). If, for example, a man buy a horse without a warranty, believing him to be sound, and the horse turns out unsound, it is not open to him to say that, as he had intended to buy a sound horse and the seller to sell an unsound one, the contract is void because the seller must have known from the price the buyer was willing to give, or, from his general habits as a buyer of horses, that he thought the horse was sound (*n*). So, also, if a trainer of horses agree to buy a particular parcel of oats, believing them to be old oats, and therefore suitable for his purpose, new oats being unsuitable, but omits to make their age a condition of the contract, the sale is good although the oats are new and unsuitable for the purpose of the buyer (*o*). "All that can be said," said Chief Justice Cockburn (*p*), "is that the two minds were not *ad idem* as to the age of the oats. They certainly were *ad idem* as to the sale and purchase of them."

On a similar principle where a vendor of houses overlooking a recreation ground had, unknown to the purchaser, covenanted to pay a shilling yearly as an acknowledgment that no easement of light over the recreation ground attached to the houses, it was held that the vendor was entitled to specific performance without compensation (*q*).

But where the vendor is informed by the purchaser of his object in buying and the vendor knows of some thing which will defeat that object, mere silence is a fraudulent concealment (*r*).

(*m*) Benjamin on Sale, 105; *ante*, p. 513.
(*n*) *Ante*, p. 513.
(*o*) *Smith* v. *Hughes*, L. R. 6 Q. B. 597; 40 L. J. Q. B. 221.
(*p*) *Ibid.* 606.
(*q*) *Greenhalgh* v. *Brindley*, 1901, 2 Ch. 324; 70 L. J. Ch. 740.
(*r*) *Puckett and Smith*, 1902, 2 Ch. 258; *ante*, p. 80.

Specific performance with compensation in cases of mistake.

Where one of the parties to a contract having partial interests, but believing himself to be entitled to the entirety, enters into a contract with a purchaser to sell the estate in its entirety, it is not competent to him afterwards to say that because the purchaser cannot have the estate in its entirety he is not entitled to such an interest as the vendor can give. The vendor is bound by the assertion in his contract, and if the purchaser chooses to take as much as the vendor can give a title to, he is entitled to have specific performance of as much as the vendor can give a title to, with an abatement or compensation for the deficiency (*s*).

But a mistake in the description of property may be fatal if it is a mistake or misrepresentation as to title. The usual condition that an error in description shall not annul the sale but be a ground for compensation only applies to an error as to the physical state of the property and not to a mistake in the description of the title (*t*). Further the vendor may be entitled to rescind even where the mistake is made by himself (*u*).

Mistake is not an answer to an action for specific performance when the mistake is not as to the essential terms of a contract, but is a mistake as to the quantity of acres of land comprised in the contract. In such a case the mistake is a proper subject for compensation (*x*). Where accordingly the plaintiff offered to take a lease of a farm at a rent of 500*l*. per annum, specifying the closes which he wished to take with their acreage, amounting in the whole to 249 acres, and defendant's agent, who had in fact let one of the closes to another person and desired only to let 214 acres with the farm, accepted plaintiff's offer; it was held that the defendant must grant the plaintiff a lease of 214 acres at a rent reduced in proportion (*y*). And where the plaintiff purchased "36 acres

(*s*) *Mortlock* v. *Buller*, 10 Ves. 315; 7 R. R. 417; *Burrow* v. *Scammell*, 19 C. D. 175; 51 L. J. Ch. 296; *Rudd* v. *Lascelles*, 1900, 1 Ch. 815; 69 L. J. Ch. 396; but see *Lumley* v. *Ravenscroft*, 1895, 1 Q. B. 683; 64 L. J. Q. B. 441.

(*t*) *Re Beyfus and Masters*, 39 C. D. 110.

(*u*) *Re Hare and O'More*, 1901, 1 Ch. 93; 70 L. J. Ch. 45.

(*x*) *M'Kenzie* v. *Hesketh*, 7 C. D. 680; 47 L. J. Ch. 231.

(*y*) *Ibid.*

of land" at £100 per acre and the vendor afterwards discovered that the property contained 42 acres, it was held that there was no such mistake as entitled the vendor to rescission and that the purchaser was entitled to specific performance of the contract for sale of 36 acres only (*z*).

Money paid under mistake of fact.

Money paid voluntarily under mistake of fact is recoverable both at law and in equity where it is against justice and conscience that the receiver should retain it (*a*), and where the mistake has not induced the receiver to alter his position (*b*). Giving a negotiable instrument is for this purpose equivalent to the payment of money (*c*).

The mistake must be a mistake as to a fact which if true would make the person paying liable to pay the money, not where if true it would merely make it desirable that he should pay the money (*d*).

But money paid under compulsion of legal process cannot be recovered back, even though the process never terminated in a final order or judgment, and even though it may have been withdrawn before action brought for the recovery back (*e*), and this is so, although no payment has been made but credit has by mistake been given for a payment on account which has not in fact been made (*f*). But the rule does not apply where there has been an absence of *bonâ fides* on the part of the defendant (*g*). Money paid under compulsion of law either through a mistake of fact, or a mistake of law without protest cannot be recovered back (*h*).

(*z*) *North* v. *Percival*, 1898, 2 Ch. 128; 67 L. J. Ch. 321.

(*a*) *Freeman* v. *Jeffries*, L. R. 4 Ex. 198; 38 L. J. Ex. 118; *Kendall* v. *Wood*, L. R. 6 Ex. 252; 39 L. J. Ex. 167; *Colonial Bank* v. *Bank of Nova Scotia*, 11 App. Ca. 84; 55 L. J. P. C. 14.

(*b*) *Continental Caoutchouc, &c.* v. *Kleintwort*, 9 Com. Cas. 240; *Kleintwort* v. *Dunlop*, 97 L. T. 263.

(*c*) *Coward* v. *Hughes*, 1 K. & J. 443; 103 R. R. 172. See 11 C. B. at p. 492.

(*d*) *Aiken* v. *Short*, 1 H. & N. 215; 25 L. J. Ex. 324; *Re Bodega Co.*, 1904, 1 Ch. 276; 73 L. J. Ch. 198.

(*e*) *Moore* v. *Fulham (Vestry)* 1895, 1 Q. B. 629; 64 L. J. Q. B. 226; *Paget* v. *The King*, 7 Can. Ex. R. 50; and see *Slater* v. *Burnley (Mayor)*, 36 W. R. 831, as to what is a voluntary payment.

(*f*) *Ward* v. *Wallis*, 1900, 1 Q. B. 675; 69 L. J. Q. B. 423; *Daniel* v. *Sinclair*, 6 A. C. 131; 50 L. J. P. C. 50. (*g*) *Ward* v. *Wallis*, *supra*.

(*h*) *Halliday* v. *Southland Co.*, 25 N. Z. L. R. 939.

It is not sufficient to preclude a man from recovering money paid by him under a mistake of fact that he had the means of knowledge of the fact, or that he has been careless in omitting to use due diligence to inquire into the fact (*i*). Money, indeed, paid under a *bonâ fide* forgetfulness of facts which disentailed the receiver to receive it may be recovered back (*k*). If, however, money is intentionally paid without reference to the truth or falsehood of the fact, the party paying meaning that the person receiving it shall have the money at all events, whether the fact be true or false, the latter is entitled to retain it (*l*).

Money paid in ignorance of the facts is recoverable, provided there has been no *laches* in the party paying. There may be cases where on account of the mutual relation between the parties, the party paying the money, though under mistake of fact, is by breach of duty disentitled from recovering (*m*). Thus, a banker who paid money on a forged cheque and had not, as bankers are bound to do, given notice of the forgery of the cheque, was held not entitled to recover the money back (*n*). So when money has once been paid and received in good faith on a bill of exchange, if such an interval of time has elapsed that the position of the holder may have been altered, the money cannot be recovered from the holder, although the indorsements on the bill turn out to be forgeries (*o*). But if there is no duty cast on the party paying money which makes his delay in discovering the mistake *laches* on his part, he may recover back money paid by him under mistake of fact (*p*). So a company may recover directors fees paid under a mistake of fact (*q*).

(*i*) *Kelly* v. *Solari*, 9 M. & W. 54; 11 L. J. Ex. 10; 60 R. R. 666; approved, 1903, A. C. at p. 56; *Townsend* v. *Crowdy*, 8 C. B. (N.S.) 494; 29 L. J. C. P. 300; 125 R. R. 740.

(*k*) *Kelly* v. *Solari*, *supra*.

(*l*) *Ibid.*, *per* Lord Wensleydale.

(*m*) *Durrant* v. *Eccl. Commissioners*, 6 Q. B. D. 235; 50 L. J. Q. B. 30.

(*n*) *Cocks* v. *Masterman*, 9 B. & C. 902; 8 L. J. K. B. 77; 33 R. R. 365. See 1903, A. C. at p. 56.

(*o*) *London and River Plate Bank* v. *Bank of Liverpool*, 1896, 1 Q. B. 7; 65 L. J. Q. B. 80.

(*p*) *Durrant* v. *Eccl. Commissioners*, *supra*.

(*q*) *Re Bodega Co.*, 1904, 1 Ch. 276; 73 L. J. Ch. 198.

Where money has been paid to an agent under a mistake of fact and the agent has either paid it over or settled his account with his principal and is guilty of no fraud in the matter, he is not liable to refund the money. Recourse must be had to the principal (*r*). Whatever may in fact be the true position of the defendant in an action brought to recover money paid to him by mistake of fact he is liable to refund if he dealt as principal with the person who paid it (*s*). So tithe rent charge paid under a mistake of fact to the sequestrator of a benefice appointed by the bishop may be recovered from the bishop, even though in ignorance of the mistake he has duly applied it (*t*).

The position of a banker does not differ from that of any other recipient of money acting as agent, and money paid to a banker under a mistake of fact can be recovered by the person who paid it (*u*).

Where too high a rate of interest was paid under a mistake by a mortgagor to a trustee-mortgagee it was held that the trustee alone could be asked or required to repay it. The mortgagor was allowed to say that both parties had forgotten the contents of the mortgage deed before it was a year old (*x*).

Where in a mortgage there was a proviso for reduction of interest on punctual payment and the mortgagor by mistake paid the full interest, he was allowed to set off the sums so overpaid (*y*).

The principle that money paid under mistake of fact may be recovered back does not apply where the mistake was not made by the person who paid the money, but by another person on whose mistake he thought fit to act (*z*).

(*r*) *Holland* v. *Russell*, 1 B. & S. 432; 4 B. & S. 14; 32 L. J. Q. B. 297; 129 R. R. 635; *Newall* v. *Tomlinson*, L. R. 6 C. P. 405; *Baylis* v. *Bishop of London*, 1913, 1 Ch. 127; 82 L. J. Ch. 61.

(*s*) *Kleintwort* v. *Dunlop Rubber Co.*, 97 L. T. 263.

(*t*) *Baylis* v. *Bishop of London*, *supra*, explaining *Sadler* v. *Evans*, 4 Burr. 1984.

(*u*) *Kerrison* v. *Glyn Mills & Co.*, 81 L. J. K. B. 465.

(*x*) *King* v. *Stewart*, 66 L. T. 339.

(*y*) *Re Jones' Estate*, 1914, 1 Ir. R. 188.

(*z*) *Moss* v. *Mersey Docks, &c., Co.*, 20 W. R. 700. See *Kerrison* v. *Glyn Mills & Co.*, *supra*.

In cases in which the party receiving the money may have been ignorant of the mistake of the party paying it, a demand should be made before bringing an action to recover it (*a*). But where both parties were under the mistake when the payment was made the cause of action is complete on such payment, and no demand for repayment is necessary (*b*). In cases of fraud, however, the instant that money is paid under a misrepresentation of fact the right of action accrues (*c*).

A covenant to pay a sum which the covenantor wrongly supposes that he is liable to pay will not be relieved against if his mistake is due to his own negligence (*d*).

Errors in accounts.

Opening accounts.

Where accounts are impeached and it is shown that they contain errors of considerable extent, both in number and importance, the Court will order such accounts, though extending over a long period of years, to be opened, and will not merely give liberty to surcharge and falsify. If a fiduciary relation exists between the parties, the Court will make a similar order, if such accounts are shown to contain a less number of errors (*e*). So a release executed on the footing of accounts assumed to be correct, but which turn out afterwards to contain serious errors, will be set aside, and in a grave case, even after many years (*f*). A single important error in an account is sufficient to entitle the Court to open an account if it thinks fit to do so (*g*). But where a single item is complained of and the actions are of some years' standing, the Court will not, as a general rule, except in the case of fraud, order the whole account to be opened, but will order that the plaintiff be at liberty to surcharge and falsify (*h*).

(*a*) *Kelly* v. *Solari*, 9 M. & W. 58, *supra*; *Freeman* v. *Jeffries*, L. R. 4 Ex. 198; 38 L. J. Ex. 118.

(*b*) *Baker* v. *Courage*, 1910, 1 K. B. 56; 79 L. J. K. B. 313.

(*c*) *Pope* v. *Wray*, 4 M. & W. 453, *per* Lord Wensleydale.

(*d*) *Wason* v. *Wareing*, 15 Beav. 151; 92 R. R. 357.

(*e*) *Williamson* v. *Barbour*, 9 C. D. 529; 50 L. J. Ch. 147.

(*f*) *Gandy* v. *Macaulay*, 31 C. D. 1.

(*g*) *Coleman* v. *Mellersh*, 2 Mac. & G. 309; 86 R. R. 123; *Pritt* v. *Clay*, 6 Beav. 503; 63 R. R. 160; and see *Daniell* v. *Sinclair*, 6 App. Ca. 181; 50 L. J. P. C. 50.

(*h*) *Allfrey* v. *Allfrey*, 1 Mac. & G. 87; 84 R. R. 15; *Gething* v. *Keighley*, 9 C. D. 550; 48 L. J. Ch. 45.

How far the Court will open settled accounts upon proof of error appearing in some but not in all must depend upon the circumstances of each case. Where, however, the character of the errors lead to the inference that the errors proved in some cases are likely to appear in all, the Court will give relief in respect of all (*i*).

Errors discovered after execution of conveyance.

Rescission on the ground of mutual mistake may undoubtedly be granted in a proper case, that is, where there is a total failure of consideration, even after conveyance, although there has been nothing in the nature of fraud (*k*). But as a general rule a purchaser, after the conveyance is executed by all necessary parties, has no remedy in respect of any defects either in the title to or quantity or quality of the estate which are not covered by the vendor's covenants (*l*), or by a collateral warranty that the property sold answers a certain description (*m*). An executed lease therefore cannot be rescinded on the ground of innocent misrepresentation (*n*). In the case of *Legge* v. *Croker* (*o*) it was held that no compensation could be granted in a case where a lease had been deliberately executed making no mention of a right of way over the premises, though there was such a right of way and though the lessor had more than once represented to the lessee that there was no such right of way, and though the heads of the intended agreement between the parties, including the statement that there was no such right of way, had been reduced to writing, but not signed by the parties before the lease was prepared. So also in *Brett* v. *Clowser* (*p*) the Court held that a purchaser was not entitled to compensation after the completion of the purchase for the absence of a right of way which the auctioneer at the sale honestly, but under a mistake,

(*i*) *Cheese* v. *Keen*, 1908, 1 Ch. 245; 77 L. J. Ch. 163.

(*k*) *Debenham* v. *Sawbridge*, 1901, 2 Ch. 98; 70 L. J. Ch. 525; *Scott* v. *Coulson*, 1903, 2 Ch. 249; 72 L. J. Ch. 600; *ante*, p. 384.

(*l*) *Ibid.*; *Clare* v. *Lamb*, L. R. 10 C. P. 335; 44 L. J. C. P. 147; *Allen* v. *Richardson*, 13 C. D. 524; 49 L. J. Ch. 137; *Brownlie* v. *Campbell*, 5 App. Ca. pp. 937, 949; *Re Tyrell*, 82 L. T. 675.

(*m*) *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215; 70 L. J. K. B. 533.

(*n*) *Angel* v. *Jay*, 1911, 1 K. B. 666; 80 L. J. K. B. 458.

(*o*) 1 Ba. & Be. 506; 12 R. R. 49.

(*p*) 5 C. P. D. 388; cf. *Re Hare and O'More*, 1901, 1 Ch. 93.

represented to belong to the premises. So too a lessee cannot claim compensation in respect of a defect of title which he might have discovered before he took his lease (*q*). It is not, however, the law 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 misrepresentation (*r*).

But where in an agreement for the sale of land the conditions provide that if any error or misstatement should be found in the particulars of sale it should not annul the sale, but that compensation should be made in respect thereof, an error, although not discovered until after the completion of the conveyance, is a proper subject of compensation within the meaning of the condition. If no distinction is made in the conditions of sale between an error or mistake discovered before and one discovered after the execution of the conveyance, it will not be imported into the contract (*s*). Unless it is the clear intention that the condition should be merged in the deed, it is operative even after conveyance (*t*). But such a condition does not apply to a defect of title (*u*).

In a case where leasehold premises were sold by the executors of a deceased husband under a mistake that the property belonged to him, whereas it belonged to the wife, and the conveyance was completed, the property being afterwards recovered by the widow, it was held that the purchaser could not recover the purchase-monies as upon a failure of consideration (*x*).

A mistake in the name of the purchaser will not render a conveyance inoperative nor prevent the legal estate passing if it can be ascertained who is meant by the description (*y*).

(*q*) *Clayton* v. *Leach*, 41 C. D. 103.

(*r*) *Hansen* v. *Franz*, 57 Can. S. C. R. 57.

(*s*) *Bos* v. *Helsham*, L. R. 2 Ex. 76; 36 L. J. Ex. 20; *Re Turner and Skelton*, 13 C. D. 130; 49 L. J. Ch. 114; *Palmer* v. *Johnson*, 13 Q. B. D. 351; 53 L. J. Q. B. 348.

(*t*) *Ibid.*

(*u*) *Debenham* v. *Sawbridge*, 1901, 2 Ch. 98; 70 L. J. Ch. 525.

(*x*) *Clare* v. *Lamb*, L. R. 10 C. P. 340; 44 L. J. C. P. 147; but see Dart, V. & P. 816.

(*y*) *Wray* v. *Wray*, 1905, 2 Ch. 349; 74 L. J. Ch. 687.

Statutes of Limitation.

Where money has been paid under a mistake of fact, the Statute of Limitations begins to run from the time of payment and not from the date of the discovery of the mistake, except in cases where prior to the Judicature Act, 1873, equitable relief only could be obtained (*z*).

An action in the Chancery Division by one *cestui que trust* against another to recover money wrongly paid by the trustee to the latter under a common mistake of fact, is in the nature of a common law action for money had and received, and will be barred after the lapse of six years. *Secus* if the claim is made in an action in which the Court is administering the trust estate (*a*).

Where trustees acting on the mistaken view of their solicitor as to the construction of the will, paid income to the wrong person, it was held in an action against the trustees that the case fell within section 8 of the Trustee Act, 1888, but that time did not begin to run until the beneficiary's interest fell into possession. It was also held that the trustees were entitled to relief under the Judicial Trustees Act, 1896, s. 3 (*b*).

Acquiescence.

The application for relief on the ground of mistake must be made with due diligence (*c*); and in some cases of mistake, time runs from the discovery (*d*). Acquiescence will operate as an equitable estoppel (*e*). Where executors paid away funds, the income of which they ought to have paid to H., but paid H. a part of these funds and rendered him accounts and sent him a copy of the will, and all these payments were due to a mistake in construing the will, it was held that H. had made himself a party to this mistake, and could not therefore claim arrears of income after lying by for

(*z*) *Baker* v. *Courage*, 1910, 1 K. B. 56; 79 L. J. K. B. 313.

(*a*) *Re Robinson*, 1911, 1 Ch. 502; 80 L. J. Ch. 381.

(*b*) *Re Allsop*, 1914, 1 Ch. 1; 83 L. J. Ch. 42.

(*c*) *Stone* v. *Godfrey*, 5 D. M. & G. 76; 23 L. J. Ch. 769; 104 R. R. 32; *Bentley* v. *Mackay*, 31 Beav. 143; 4 D. F. & J. 279; 135 R. R. 145; *ante*, pp. 351 *et seq.*

(*d*) *Denys* v. *Shuckburgh*, 4 Y. & C. 42, 53; 54 R. R. 446; *Durrant* v. *Eccl. Commissioners*, 6 Q. B. D. 234; 50 L. J. Q. B. 30; but see *Cholmondeley* v. *Clinton*, 2 J. & W. pp. 168—172; *Baker* v. *Courage*, *supra*.

(*e*) *Rogers* v. *Ingham*, 3 C. D. 351; 46 L. J. Ch. 322.

two years (*f*). But where the parties to an agreement misconstrued it for more than forty years, the plaintiff was nevertheless held entitled to relief on the true construction (*g*).

Principles on which Court interposes on the ground of mistake.

Where there has been some common mistake as to some essential fact, forming an inducement to the contract, whether it be a mistake as to the subject-matter of the contract, or the price, or the terms, that is, where the circumstances justify the inference that no contract would have been made if the whole truth had been known to the parties, the contract is voidable at the election of either of the parties. If either party has performed his part of the contract during the continuance of the mistake, he may set aside the contract on discovering the truth, unless he has done something to render it impossible for him to restore the other party to the condition in which he was before the contract was made (*h*).

Transactions, although impeachable on the ground of mistake, are nevertheless subject to all real and just equities between the parties. The Court will not set aside a transaction without restoring the party against whom it interferes, as far as possible, to that which shall be a just situation with reference to the rights which he had antecedently to the transaction (*i*). If the Court sees that it can restore the parties to their former condition, or place them in the same situation in which they would have stood but for the mistake, without interfering with any new right acquired by others on the faith of the altered condition of the legal rights, the jurisdiction will be exercised.

The Court will not, however, relieve against a mistake, unless it is fully satisfied that it can make ample compensation (*k*). If the Court sees that the parties cannot be restored to that which shall be a just situation with reference to the

(*f*) *Re Hulkes, Powell* v. *Hulkes*, 33 C. D. 552; 55 L. J. Ch. 846.

(*g*) *North Eastern Rly.* v. *Hastings*, 1900, A. C. 260; 69 L. J. Ch. 516.

(*h*) *Cox* v. *Prentice*, 3 M. & S. 344; 16 R. R. 288; *Blackburn* v. *Smith*, 2 Exch. 783; *Strickland* v. *Turner*, 7 Exch. 208; 22 L. J. Ex. 115; *Clarke* v. *Dickson*, E. B. & E. 148; 27 L. J. Q. B. 223; 113 R. R. 583; *Freeman* v. *Jeffries*, L. R. 4 Ex. 195; 38 L. J. Ex. 116.

(*i*) *Ante*, p. 388.

(*k*) *Dacre* v. *Georges*, 2 Sim. & St. 454; 25 R. R. 246; *ante* pp. 391, 392.

rights which they had antecedently to the transaction, or that the mistake cannot be corrected without breaking in upon or affecting the rights of innocent parties, who were not aware of the existence of the mistake when their rights accrued, relief cannot be given (*l*).

But if a good case be made out, the Court will not hold its hand merely because, on account of circumstances which have intervened, it may be difficult to restore the parties exactly to their original condition (*m*). It is enough if the Court sees that it would not be difficult to adjust matters so as to place the parties in a position in which they would receive little or no prejudice from what has been done (*n*). As against *bonâ fide* purchasers for value without notice, no relief can be had in equity (*o*).

On setting aside a transaction on the ground of mistake, the Court may, with a view of putting the parties in the position in which they have an equity to stand, annex conditions to the judgment (*p*).

Acquiescence in what has been done will not be a bar to relief where the party alleged to have acquiesced has acted or abstained from acting through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed (*q*).

Measure of damages.

Upon a contract for the sale and purchase of real estate, if the vendor is incapable of making a good title, the proposing purchaser is not entitled to recover damages for the loss of his bargain. He can only recover the expenses he has incurred (*r*). The rule is based on the uncertainty of making a good title and does not depend upon the absence of

(*l*) *Malden* v. *Menill*, 2 Atk. 8; *Clifton* v. *Cockburn*, 3 M. & K. 76; 41 R. R. 21; *Blackie* v. *Clarke*, 15 Beav. 595; *Re Saxon Life Ins. Co.*, 2 J. & H. 408; 32 L. J. Ch. 206; 134 R. R. 271; *Bateman* v. *Boynton*, 1 Ch. 359; 35 L. J. Ch. 568; *ante*, pp. 355 *et seq.*

(*m*) *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 232.

(*n*) *Ibid.*

(*o*) *Ante*, pp. 370 *et seq.*

(*p*) *Garrard* v. *Frankel*, 30 Beav. 445; 31 L. J. Ch. 604; 132 R. R. 352; but see *May* v. *Platt*, 1900, 1 Ch. 616; 69 L. J. Ch. 357; *ante*, p. 531.

(*q*) *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 223; *supra*, pp. 351—354.

(*r*) *Bain* v. *Fothergill*, L. R. 7 H. L. 158; 43 L. J. Ex. 243; see *Holliwell* v. *Seacombe*, 1906, 1 Ch. 426; 75 L. J. Ch. 289; *Morgan* v. *Russell*, 53 Sol. J. 136.

fraud. It applies to cases where a vendor is unable to make a good title and not to cases where he will not, or will not do what he can and ought to do in order to obtain one (*s*). To entitle a plaintiff, in an action for specific performance, to recover damages other than his expenses in respect of a breach of contract by defendant, misrepresentation must be pleaded and established (*t*).

In an action for taking coal from plaintiff's land, in the absence of any wilful wrong, or other circumstances warranting punitive damages, the true rule of damages is the value of the coal at the pit's mouth, less the cost of labour in severing it from the freehold and raising it to the pit's mouth (*u*).

Where an action is brought for specific performance, and specific performance is refused on the ground of mistake, the Court ought to give the same damages as would, under the old practice, have been given in an action at law (*x*).

Defective execution of powers.

Courts of equity have jurisdiction on the ground of mistake to relieve against the defective execution of a power. If the formalities required by a power are not strictly complied with, an appointment under the power is invalid at law, and the property which is the subject of the power will go as in default of appointment. In equity, however, if an intention to execute the power be sufficiently declared, but, by reason of some informality, the act declaring the intention is not an execution of the power, the Court will, in favour of certain parties, aid the defective execution, by compelling the person seised of the legal estate to do that which was intended to be done (*y*). The supplying the surrender of a copyhold and the supplying the execution of a power which is defective in form go hand in hand. Wherever there is a decision that the Court

(*s*) *Day* v. *Singleton*, 1899, 2 Ch. 320; 68 L. J. Ch. 593.

(*t*) *Rock Portland Cement Co.* v. *Wilson*, 31 W. R. 193; *Royal Bristol, &c.* v. *Bomash*, 35 C. D. 390; 56 L. J. Ch. 840.

(*u*) *Jegon* v. *Vivian*, 6 Ch. 742; 40 L. J. Ch. 389; app. 5 A. C. 25.

(*x*) *Tamplin* v. *James*, 15 C. D. 220.

(*y*) *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 63; 9 R. R. 11; *Sayer* v. *Sayer*, 7 Ha. 377; 87 R. R. 217; *Johnson* v. *Bragge*, 1901, 1 Ch. 28; 70 L. J. Ch. 41.

will supply a surrender, it follows that the Court will also supply the defective execution of a power (*z*).

The equity, however, is confined to cases of execution formally defective, or of contract amounting to such defective execution (*a*). If there be no such execution or contract, the Court cannot interpose; for unless where the power is in the nature of a trust, the donee has his choice whether to execute it or not; and if he does not execute or attempt to execute, there is no equity to execute it for him or to do that for him which he did not think fit to do himself (*b*). Nor can an execution be aided in equity, if the defect be not formal, but in the substance of the power, for such aid would defeat the intention of the donor. Where, for example, a tenant for life had power to lease with the consent of trustees or others, an agreement by the tenant for life alone to lease would not be aided (*c*).

Persons in whose favour the defective execution of a power will be aided.

The only persons in whose favour equity will interpose to supply the defect in the execution of a power are, a *bonâ fide* purchaser for valuable consideration (*d*), a creditor (*e*), a charity (*f*), a wife or a legitimate child (*g*). To no other persons, except a wife and legitimate child, will the aid of the Court be granted upon the ground of a meritorious consideration (*h*). The equity does not extend to the case of a defective execution by a wife in favour of her husband (*i*); nor to a defective execution in favour of a natural child, a father, mother, brother, sister, nephew, or cousin: *à fortiori* it does

(*z*) *Sayer* v. *Sayer*, *supra*, *per* Wigram, V.-C.; *Chapman* v. *Gibson*, 3 Bro. C C. 229.

(*a*) *Johnson* v. *Bragge*, *supra*; Farwell, 330.

(*b*) *Tollet* v. *Tollet*, 2 P. Wms. 489; 2 Wh. & Tu. 289; *Re Weekes' Settlement*, 1897, 1 Ch. 289; 66 L. J. Ch. 179.

(*c*) *Lawrenson* v. *Butler*, 1 Sch. & Lef. 13.

(*d*) *Affleck* v. *Affleck*, 3 Sm. & G. 394; 26 L. J. Ch. 358; *Chetwynd* v. *Morgan*, 31 C. D. 596. See 1906, 2 Ch. at p. 527.

(*e*) *Chartered Bank of Australia* v. *Lempriere*, L. R. 4 P. C. 597; 42 L. J. P. C. 49.

(*f*) *Innes* v. *Sayer*, 7 Ha. 377; 21 L. J. Ch. 190; 87 R. R. 217.

(*g*) *Hervey* v. *Hervey*, 1 Atk. 567; Farwell, 342.

(*h*) *Moodie* v. *Reid*, 1 Madd. 516; 16 R. R. 257.

(*i*) *Ibid.*

not extend to a volunteer (*k*), even though he be the creator of the power himself (*l*).

The character of purchaser, creditor, wife, or child, must be borne by the party claiming relief in relation to the donee of the power and not to the person creating the power (*m*).

In *Wilkinson* v. *Nelson* (*n*), a deed of appointment in favour of some of the objects of a power was rectified by the insertion of a hotchpot clause, the Court being satisfied that the intention of the donee of the power was to produce equality, and that the clause had been omitted by mistake (*o*).

Intention to execute the power must appear.

It is not sufficient in order to constitute a case entitling a party to relief in equity on the ground of the defective execution of a power that there should be a mere intention on the part of the donee to execute the power, without some steps taken to give it a legal effect (*p*). A mere parol promise or agreement to execute the power is not sufficient (*q*). Nor is the mere expression of a wish contained in a memorandum sufficient (*r*). But if an intention to execute the power appear clearly by some paper or instrument in writing, equity will aid a defect which arises from the instrument itself being informal or inappropriate (*s*): as, for instance, where the donee of a power covenants (*t*), or merely enters into an agreement, not under seal, to execute the power (*u*), or when by his will he desires the remainderman to create the estate authorised by the power (*x*), or if he promises by letter to grant an estate which he could only do by the exercise of his power (*y*), or

(*k*) Sug. Pow. 535; Farwell, 342.
(*l*) *Chetwynd* v. *Morgan*, 31 C. D. 596.
(*m*) Sug. Pow. 537; Farwell, 335.
(*n*) 9 W. R. 393.
(*o*) See *Killick* v. *Gray*, 46 L. T. 583.
(*p*) *Garth* v. *Townsend*, 7 Eq. 223; *Bruce* v. *Bruce*, 11 Eq. 372; 40 L. J. Ch. 141.
(*q*) *Carter* v. *Carter*, Mose. 370; *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 72; 9 R. R. 11.
(*r*) *Garth* v. *Townsend*, 7 Eq. 220.
(*s*) *Sayer* v. *Sayer*, 7 Ha. 377; 87 R. R. 217.
(*t*) Sug. Pow. 550.
(*u*) *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52; 9 R. R. 11; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345; 12 L. J. Ch. 158; Sug. Pow. 550.
(*x*) *Vernon* v. *Vernon*, Amb. 3; Sug. Pow. 550; Farwell, 337.
(*y*) *Campbell* v. *Leach*, Amb. 740; Sug. Pow. 550; Farwell, 337.

if, having a power to appoint by an instrument sealed and delivered, he wrote and signed an unattested paper expressing his intention that a particular child shall have the property which is the subject of the power (*z*), or where a woman having a power to appoint a fund by deed or will gives a letter charging the fund in favour of a purchaser for value (*a*). In all these and the like cases equity will supply the defect. So also a recital by the donee of a power, in the marriage settlement of one of his daughters, who was one of the objects of the power, that she was entitled to a share of a sum to which she could only be entitled by his appointment, has been held sufficient evidence of his intention to execute the power, so as to be aided in equity (*b*), and even an answer to a bill in Chancery stating that the party did appoint and intended by writing in due form to appoint was held to be an execution of the power for this purpose (*c*); and a statement in a lease that certain persons were "the present trustees" of a will was held to operate as an appointment of new trustees (*d*). So, also, if the power ought to be executed by deed, but it is executed by will, the defective execution will be supplied (*e*), if there is nothing in the instrument creating the power to mark the intention of the creator of the power beyond the fact that he has pointed to a deed as the mode of executing the power. But it is competent to a settlor to make the nature and character of the instrument by which the power he creates shall be executed of the essence of the power, without observing which no execution of his power shall be valid. Equity in such a case will not uphold an act which will defeat what the person creating the power has declared by expression or necessary implication to be a material part of his inteition (*f*).

(*z*) *Kennard* v. *Kennard*, 8 Ch. 228; 42 L. J. Ch. 280. See 25 Ch. D. 373.

(*a*) *Chartered Bank of Australia* v. *Lempriere*, L. R. 4 P. C. 597; 42 L. J. P. C. 49.

(*b*) *Wilson* v. *Piggot*, 2 Ves. Jr. 351; 2 R. R. 246. See *Poulson* v. *Welling*, 2 P. Wms. 533.

(*c*) *Carter* v. *Carter*, Mose. 365.

(*d*) *Re Farnell*, 33 C. D. p. 599.

(*e*) *Tollet* v. *Tollet*, 2 P. Wms. 489; *Smith* v. *Adkins*, 14 Eq. 405; 41 L. J. Ch. 628.

(*f*) *Cooper* v. *Martin*, 3 Ch. 57.

The Court will supply the defect where there has been a defective execution of a power by a formal or appropriate instrument: as, for instance, if a deed be required by the power to be executed in the presence of a certain number of witnesses, and it be executed in the presence of a smaller number of witnesses: or if it is required to be signed and sealed, and sealing is omitted (*g*). The validity of an appointment by will, so far as regards execution and attestation, now wholly depends on the Statute Law (*h*); and a document, if testamentary, cannot be aided if it does not comply with the Wills Act (*i*), unless the testator is domiciled abroad and special formalities are prescribed (*k*).

The Court will also, in order to give effect to the intention of the donee of the power for that purpose, aid the execution of a power not especially referred to, though such power was not present to the mind of the donee at the time of execution (*l*).

No relief where no intention.

But of course there can be no intention to execute a power unless there is a knowledge of its existence (*m*), and where it was quite ambiguous which of two powers it was intended to exercise it was held that there had been no exercise of either (*n*).

No relief so as to defeat intention of author of power.

Equity will in no case aid a defective execution of a power, if the intention of the person creating the power would be thereby defeated. Although a power will be aided, if it has been executed by a will, when it ought strictly to have been executed by deed (*o*), the case is otherwise, if a power, re-

(*g*) *Kennard* v. *Kennard*, 8 Ch. 228; 42 L. J. Ch. 280. An appointment by deed is now rendered valid in many cases, although not executed or attested with all the solemnities required by the instrument creating the power: 22 & 23 Vict. c. 35, s. 12.

(*h*) Sug. Pow. p. 559.

(*i*) *Re Kirwan*, 25 C. D. 373, 381; 52 L. J. Ch. 952; *Re Barnett*, 1908, 1 Ch. 402; 77 L. J. Ch. 267. See *Re Simpson*, 1916, 1 Ch. 502.

(*k*) *Re Walker*, 1908, 1 Ch. 560; 77 L. J. Ch. 370.

(*l*) *Bruce* v. *Bruce*, 11 Eq. 377; 40 L. J. Ch. 141.

(*m*) *Griffith-Boscawen* v. *Scott*, 26 C. D. 358, 362; 53 L. J. Ch. 571; cf. *Re Sharland*, 1899, 2 Ch. 536; 68 L. J. Ch. 747; *Turnbull* v. *Hayes*, 1901, 2 Ch. 529; 70 L. J. Ch. 770.

(*n*) *Re Herdman*, 31 L. R. Ir. 87; cf. *Re Sharland*, *supra*.

(*o*) *Supra*, p. 564.

quired to be exercised by will, has been executed by deed (*p*). The intention of a power to appoint by will being to reserve to the donee of the power a certain control over the estate, until the moment of the death of the donee, if the donee of such a power should execute an appointment or a conveyance of the estate by an absolute deed, it will be invalid, because such an appointment or conveyance, if it avail to any purpose, must avail to the destruction of the power, since it would be no longer revocable, as a will would be. The distinction between this case and the case of a power executed by will, though required to be executed by deed, is marked and obvious. An act done not strictly according to the terms of the power, but consistent with its intent, may be upheld in equity. But an act which defeats the intention of the person creating the power, and determines the control over the property, which was meant to rest in the donee, is repugnant to it, and cannot be deemed in any just sense to be an execution of it (*q*).

As against whom equity will aid a defective execution.

In all cases, however, where the aid of the Court is sought for the purpose of aiding the defective execution of a power, the party seeking relief must stand upon some equity superior to that of the party against whom he seeks it (*r*). There can be no relief, if the aid of the defective execution would be inequitable to other parties, or if it is repelled by some counter-equity (*s*). As against a purchaser for valuable consideration without notice, equity will in no case aid the defective execution of a power. But as against a remainderman, who takes, although by purchase, subject to the power (*t*), and also in general as against an heir-at-law or customary heir (*u*), relief may be had against the defective execution of a power. Whether, however, equity will afford its aid as against

(*p*) *Reid* v. *Shergold*, 10 Ves. 378, 380; *Re Walsh*, 1 L. R. Ir. 373.
(*q*) *Ibid.*; Sug. Pow. 560, 561; Farwell, 332.
(*r*) Sug. Pow. 541.
(*s*) *Ante*, pp. 559, 560.
(*t*) *Tollet* v. *Tollet*, 2 P. Wms. 489; *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52; 9 R. R. 11.
(*u*) *Smith* v. *Ashton*, 1 Ch. Ca. 263, 264.

an heir totally unprovided for seems doubtful upon the authorities (*x*).

No relief against defective execution of statutory powers.

In cases of defective execution of powers a distinction exists between powers which are created by private persons and those which are specially created by, or come within, a statute. The latter are construed with more strictness, and whatever formalities are required by the statute must be strictly complied with. In the case of powers which are in their own nature statutable, equity must follow the law, be the consideration ever so meritorious. Thus the power of a tenant in tail to make leases under a statute, if not executed in the requisite form prescribed by the statute, will not be made available in equity, however meritorious the consideration may be (*y*).

Defective execution aided on ground of fraud, &c.

Although the Court will not in general aid the defective execution of a power in favour of a volunteer, except in particular cases (*z*), the defective execution of a power will be aided in favour of a volunteer, when a strict compliance with the power has been impossible, from circumstances beyond the control of the party, as when the prescribed witnesses could not be found; or where an interested party having possession of the deed creating the power has kept it from the sight of the party executing the power, so that he could not ascertain the formalities required (*a*).

So, also, although the Court will in no case aid the non-execution of a power, as distinguished from its defective execution (*b*), the case is otherwise, if the execution of a power has been prevented by fraud (*c*), as where the deed creating the power has been fraudulently retained by the person interested in its non-execution (*d*).

(*x*) *Braddick* v. *Mattock*, 6 Madd. 363; Sug. Pow. 545; Farwell, 343.
(*y*) *Darlington* v. *Pulteney*, Cowp. 267; Sug. Pow. 209; Farwell, 343.
(*z*) *Ante*, p 562.
(*a*) Farwell, 334; 2 Wh. & Tu. 307.
(*b*) *Tollet* v. *Tollet*, 2 P. Wms. 489; and see *Re Weeks' Settlement*, 1897, 1 Ch. 289; 66 L. J. Ch. 179.
(*c*) *Middleton* v. *M.*, 1 J. & W. 96; 20 R. R. 233.
(*d*) *Ante*, p. 331.

Mistake in judgments and judicial proceedings.

The Court will also interfere in cases of mistake in judgments. But where an order has been perfected and expresses the real decision of the Court, the Court has no jurisdiction to alter it (*e*).

A judgment by consent is binding, and after it has been passed and entered, it cannot be varied or set aside except upon some ground sufficient to set aside an agreement (*f*). Mistake as to the meaning of the words used, whether common to both parties or one party only but induced by the conduct of the other, is such a ground. So also is the fact that the parties were not *ad idem* as to the subject. The fact that the party complaining has, before he found out his mistake, sought to enforce the order, in the sense in which he understood it, does not prevent him from taking steps to have it set aside (*g*).

After a judgment has been passed and entered, even where it has been taken by consent and under a mistake, the Court cannot set it aside otherwise than in a fresh action brought for the purpose, unless (1) there has been a clerical mistake or an error arising from an accidental slip or omission within the meaning of Order XXVIII. r. 11, or (2) the judgment as drawn up does not correctly state what the Court actually decided and intended to decide—in either of which cases the application may be made by motion in the action (*h*).

It seems that different considerations apply to interlocutory orders, but that even if a judgment has not been passed and entered the Court will not always interfere on motion; for example, where from the nature of the ground relied on conflicting evidence is essential (*i*).

Where an interlocutory injunction has been wrongly granted through the Judge's mistake in law, the plaintiff can be compelled to pay damages under the undertaking as to

(*e*) *Preston Banking Co.* v. *Allsup*, 1895, 1 Ch. 141; 64 L. J. Ch. 196.

(*f*) *Att.-Gen.* v. *Tomline*, 7 C. D. 388; 47 L. J. Ch. 473; *Huddersfield Banking Co.* v. *Lister & Son*, 1895, 2 Ch. 273; 64 L. J. Ch. 523.

(*g*) *Wilding* v. *Sanderson*, 1897, 2 Ch. 534; 66 L. J. Ch. 684; *Hickman* v. *Berens*, 1895, 2 Ch. 638; 64 L. J. Ch. 785.

(*h*) *Ainsworth* v. *Wilding*, 1896, 1 Ch. 673; 65 L. J. Ch. 432.

(*i*) *Ibid.*

damages, though he has not been guilty of any misrepresentation or other default in obtaining the injunction (*k*).

Where a special case is stated in an action and a decision given upon it under a mistake of fact, the Court is not bound by that decision unless it has been adopted by subsequent orders, but may disregard it, direct the action to go on to trial, and direct inquiries to ascertain the real facts (*l*).

A foreign judgment of a Court of competent jurisdiction is conclusive and not open to examination by another Court unless the judgment impeached carries on the face of it manifest error, or it can be shown to have been obtained by fraud, or to be wanting in the conditions of natural justice (*m*). It cannot be impeached on its merits, nor can a man set up as a defence to an action on it that the tribunal mistook either the facts or the law. It makes no difference that the judgment proceeded on a mistake as to English law, and that the mistake appears on the face of the proceedings (*n*).

Mistake in not complying with order.

In a redemption action an order was made giving the plaintiff leave to lodge the mortgage money in Court and that in default of such lodgment within two months the action be dismissed. Under a *bonâ fide* mistake the plaintiff failed to lodge the money until after the time fixed: Held that the Court had jurisdiction to extend the time so as to include the actual date of lodgment (*o*).

A garnishee order absolute may be set aside on proof of a mistake under which the order was obtained (*p*). So where owing to a mistake no cause was shown against a conditional order, the order absolute was set aside (*q*).

(*k*) *Hunt* v. *H.*, 54 L. J. Ch. 289; *Griffith* v. *Blake*, 27 C. D. 474, 477; 53 L. J. Ch. 965.

(*l*) *Tomline* v. *Underhay*, 22 C. D. 496.

(*m*) *Messina* v. *Petrocchino*, L. R. 4 P. C. 144; 41 L. J. P. C. 27; *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 302; 52 L. J. Q. B. 309; *Robinson* v. *Fenner*, *ante*, p. 346.

(*n*) *Godard* v. *Gray*, L. R. 6 Q. B. 147; 40 L. J. Q. B. 62.

(*o*) *Collinson* v. *Jeffrey*, 1896, 1 Ch. 644; 65 L. J. Ch. 375.

(*p*) *Marshall* v. *James*, 1905, 1 Ch. 432; 74 L. J. Ch. 279.

(*q*) *O'Brien* v. *Killeen*, 1914, 2 Ir. R. 63.

Supply of defects in written instruments, &c.

In like manner, as equity will give relief against mistakes in written instruments, will it give effect to the real intention of the parties, as gathered from the objects of the instrument and the circumstances of the case, although the instrument may be drawn up in a very inartificial and untechnical manner. For, however just the general rule may be, *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est* (*r*), yet that rule shall not prevail to defeat the manifest intent and object of the parties where it is clearly discernible on the face of the instrument, and the ignorance or blunder or mistake of the parties has prevented them from expressing it in the appropriate language (*s*).

Mistake in awards.

In regard to mistake in awards, where there is a compulsory reference any party may appeal from the award on a question of law, and the Court may set the award aside on any ground on which it might set aside a verdict of a jury (*t*).

Where the reference is by consent out of Court, the Court will not relieve against an award on the ground of mistake either in matter of law or fact, if the award is within the submission, and contains the honest decision of the arbitrators after a full and fair hearing of the parties, and the mistake does not appear on the face of the award, or is not disclosed by some contemporaneous writing (*u*). Where an award is good on the face of it and the mistake is as to matter within the arbitrator's authority it cannot be remedied (*x*). In the absence of proof of the arbitrator's misconduct or excess of jurisdiction or disregard of some fundamental rule of administration of justice, or admitted mistake, the Court will not set aside an award which is good on the face of it. An award may be impeached on proof of actual excess of jurisdiction; but the fact that the arbitrator took evidence on matters outside his jurisdiction is not enough to vitiate the award (*y*). A

(*r*) Co. Litt. 147 a.
(*s*) Story, Eq. Jur. 168.
(*t*) Ord. LIX. r. 3; but see now Arbitration Act, 1889, s. 14.
(*u*) *Dinn* v. *Blake*, L. R. 10 C. P. 388; 44 L. J. C. P. 276.
(*x*) *Adams* v. *Great Northern, &c., Co.*, 1891, A. C. 31, 39.
(*y*) *Falkingham* v. *Victorian Rly. Commrs.*, 1900, A. C. 452; 69 L. J. P. C. 89.

party in whose favour a mistake had been made cannot avail himself of it to set aside the award (*z*). The Court may, however, give leave to revoke the submission where the arbitrator is going wrong in point of law even in a matter within his jurisdiction (*a*).

An arbitrator having signed his award is *functus officio*, and if his award does not embrace the matters in issue he cannot of his own motion treat it as no award and make another; but where the mistake is due to a misapprehension of the terms of the submission the Court has power to remit the matter to the arbitrator (*b*).

The decisions on the power of the Court to set aside awards for mistake are now of less importance than formerly, since the Court has now power in all cases to remit the award (*c*), and arbitrators have now power to correct clerical mistakes arising from any accidental slip or omission (*d*). But the Court will not remit the award on the sole ground that the arbitrator has made a mistake in law (*e*).

Mistakes in wills.

With regard to mistakes in wills, if words have been introduced into the will by mistake, the Court of Probate directs them to be omitted from the probate (*f*). The right words, however, cannot be substituted (*g*), though a clear mistake as to the name or residence of an executor may be corrected in order to avoid difficulties with banks or companies (*h*). A mistaken reference to a destroyed will may also be rectified (*i*).

A Court of Construction appears to have more latitude with regard to such mistakes and has jurisdiction to correct

(*z*) *Ward* v. *Dean*, 3 B. & Ad. 234; 37 R. R. 419.

(*a*) *East and West India Docks* v. *Kirk*, 12 App. Ca. 738; 57 L. J. Q. B. 295.

(*b*) *Stringer and Riley, Re*, 1901, 1 Q. B. 105; 70 L. J. Q. B. 19.

(*c*) Arb. Act, 1889, s. 10.

(*d*) Arb. Act, 1889, s. 7 (c).

(*e*) *Palmer and Hosken, Re*, 1898, 1 Q. B. 131; 67 L. J. Q. B. 1.

(*f*) *Farrelly* v. *Corrigan*, 1899, A. C. 563; 68 L. J. P. C. 133; *Brisco* v. *Baillie-Hamilton*, 1902, P. 234; 71 L. J. P. 1; *Karunaratne* v. *Ferdinandus*, 1902, A. C. 405; 71 L. J. P. C. 76.

(*g*) *Re Schott*, 1901, P. 190; 70 L. J. P. 46.

(*h*) *Re Cooper*, 1899, P. 193; 68 L. J. P. 65; *Re Honywood*, 1895, P. 341; 65 L. J. P. 9.

(*i*) *Re Reade*, 1902, P. 75; 71 L. J. P. 45.

them when they are apparent on the face of the will, or may be made out by a due construction of its terms. The true view, however, seems to be not that the words are corrected, but that the intention when clearly ascertained is carried out notwithstanding the apparent difficulty caused by the particular words (*k*). Strictly speaking there is no jurisdiction in any Court to rectify a will on the ground of mistake; and even the Probate Division has no power to remedy a mistake by modifying the language so as to make it express a *supposed* intention (*l*). But the Court in many cases does in effect correct mistakes in order to carry out the expressed intention of the testator. It follows that the mistake must be apparent on the face of the will, otherwise there can be no relief: for parol evidence or evidence *dehors* the will is not admissible to contradict, vary, or control the words of the will, although it is in certain cases admissible to explain the meaning of the words which the testator has used (*m*).

A mistake cannot be corrected or an omission supplied, unless it is perfectly clear by fair inference from the whole will that there is such a mistake or omission (*n*). The first thing to be proved in all cases is that there is a mistake. The mistake must be a clear mistake or a clear omission, demonstrable from the structure and scope of the will (*o*). Thus, if in a will there is a mistake in the computation of a legacy, it will be rectified in equity (*p*). So, also, words may be struck out which are manifestly inconsistent with the form of the will and the intention of the testator (*q*). So, also, on the other hand words will be supplied where the Court is satisfied that they have been omitted by mistake (*r*). So, if

(*k*) Pollock on Contracts, 712.

(*l*) *Harter* v. *H.*, 3 P. & D. 11, 21; 42 L. J. P. 1.

(*m*) *Farrer* v. *St. Katherine's College*, 16 Eq. 21; 42 L. J. Ch. 809; Jarm. on Wills, vol. 1, p. 484.

(*n*) *Philipps* v. *Chamberlaine*, 4 Ves. 57.

(*o*) *Ibid.*; *Holmes* v. *Custance*, 12 Ves. 279; *Mellor* v. *Daintree*, 33 C. D. 198; 56 L. J. Ch. 33.

(*p*) *Giles* v. *Giles*, 1 Keen, 692; 44 R. R. 134.

(*q*) *Smith* v. *Crabtree*, 6 C. D. 591; *Morrell* v. *Morrell*, 7 P. D. 70; 51 L. J. P. 49; *Re Cartledge*, 1919, Vict. L. R. 82.

(*r*) *Greenwood* v. *Greenwood*, 5 C. D. 954; 47 L. J. Ch. 298; *Re Redfern*, 6 C. D. 133; 47 L. J. Ch. 17.

there is a mistake in the name, description, or number of the legatees intended to take (*s*), or in the property intended to be bequeathed (*t*), and the mistake is clearly demonstrable from the structure and scope of the will, equity will correct it.

When a testator in a gift to children describes them as consisting of a specified number which is less than the number found to exist at the date of the will, the general rule of construction is to disregard the numerical restriction and to hold that the intention of the testator was that the whole of the children shall be included (*u*); but an intention to benefit the whole class must be shown by the will (*x*).

Where there is an error either in the name or the description of a legatee, there is no presumption in favour of the name more than the description. In order that the name should prevail against the description it must be shown that there is an error in the description (*y*). In some cases the name has prevailed over the description (*z*); in other cases the description has prevailed over the name (*a*).

Relief cannot, however, be had, unless the mistake be clearly made out (*b*). And so, if the words of the bequest are plain, evidence of a different intention is inadmissible to establish a mistake (*c*); nor will a mistake be rectified if it does not appear clearly what the testator would have done in

(*s*) *Newman* v. *Piercy*, 4 C. D. 41; 46 L. J. Ch. 36; 66 L. J. Ch. 778; *Booty* v. *Groom*, 1897, 2 Ch. 407; 66 L. J. Ch. 778; *Donaldson* v. *Bamber*, 1897, 1 Ch. 75; 66 L. J. Ch. 93; *Re Mayo*, *Chester* v. *Keirl*, 1901, 1 Ch. 404; 70 L. J. Ch. 261; *Re Sharp*, 1908, 2 Ch. 190; 77 L. J. Ch. 724.

(*t*) *Re Basset's Estate*, 14 Eq. 54; 41 L. J. Ch. 681; *Travers* v. *Blundell*, 6 C. D. 436; *Salt* v. *Pym*, 28 C. D. 153; 54 L. J. Ch. 273; *Re Jameson*, 1908, 2 Ch. 111; 77 L. P. Ch. 729.

(*u*) *M'Kechnie* v. *Vaughan*, 15 Eq. 289; *Re Basset's Estate*, *supra*; *Booty* v. *Groom*, *supra*.

(*x*) *Donaldson* v. *Bamber*, 1897, 1 Ch. 75; 66 L. J. Ch. 93.

(*y*) *Drake* v. *Drake*, 8 H. L. C. 179; 29 L. J. Ch. 850; 125 R. R. 94; *Charter* v. *Charter*, L. R. 7 H. L. 381; 43 L. J. P. 73.

(*z*) *Gillett* v. *Gane*, 10 Eq. 33; 39 L. J. Ch. 818; *Farrer* v. *St. Katherine's College*, 16 Eq. 21; 42 L. J. Ch. 809; *Garland* v. *Beverley*, 9 C. D. 219; 47 L. J. Ch. 711; *Re Brake*, 6 P. D. 217; 50 L. J. P. 58.

(*a*) *Re Nunn's Trust*, 19 Eq. 333; 44 L. J. Ch. 255; *Charter* v. *Charter*, *supra*.

(*b*) *Holmes* v. *Custance*, 12 Ves. 279.

(*c*) *Chambers* v. *Minchin*, 4 Ves. 676.

the case if there had been no mistake (*d*). But if the omission of some word or phrase is so palpable on the face of the will that no difficulty occurs in pronouncing the testator to have used an expression which does not accurately convey his meaning, and it is not only apparent that he has used the wrong word or phrase, but it is also apparent what is the right one, the Court will substitute the right one (*e*). Although the particulars which the testator has included in his description of the property the subject of the gift should be inaccurate, the gift will be upheld if there be enough of correspondence to afford the means of identification (*f*). If the property the subject of the gift be capable of being accurately identified, certain errors in the description will not vitiate the gift (*g*).

The same considerations apply when the particulars which the testator has included in his description of the object of the gift are inaccurate. If the devisee or legatee is so designated as to be distinguished from every other person, the inaptitude of some of the particulars introduced in the description is immaterial (*h*). If there is a person to answer the name given in the will, it is immaterial that any further description does not precisely apply (*i*). A gift by will to a person described as the husband, or wife, or widow of another, is not in general affected by the fact of the devisee or legatee not actually answering the description, by reason of the invalidity of the supposed marriage, or by reason of the second marriage of the supposed widow or otherwise (*k*). And on the same principle a legacy to a person described as the testator's intended wife has been held to be payable

(*d*) See *Smith* v. *Maitland*, 1 Ves. Jr. 363.

(*e*) *Taylor* v. *Richardson*, 2 Drew. 16; 23 L. J. Ch. 9; 100 R. R. 6; *Ives* v. *Dodgson*, 9 Eq. 401; 39 L. J. Ch. 693.

(*f*) Jarm. on Wills, vol. 1, pp. 503, 504.

(*g*) *Door* v. *Geary*, 1 Ves. 255; *Selwood* v. *Mildmay*, 3 Ves. 306; 4 R. R. 1; Jarm. on Wills, vol. 1, p. 504.

(*h*) Jarm. on Wills, vol. 1, p. 511.

(*i*) *Standen* v. *Standen*, 2 Ves. Jr. 589; *Del Mare* v. *Robello*, 3 Bro. C. C. 446; *Holmes* v. *Custance*, 12 Ves. 279.

(*k*) *Giles* v. *Giles*, 1 Keen, 685, 692, 693; 44 R. R. 134; *Rishton* v. *Cobb*, 5 M. & C. 145; 48 R. R. 256; *Re Petts*, 27 Beav. 576; 29 L. J. Ch. 168; 122 R. R. 533.

although the testator did not eventually marry her (*l*). A different rule, however, prevails where a fraud has been practised on a testator, the knowledge or discovery of which, there is reason to believe, would have destroyed or removed the motive for the gift. When, for example, a testatrix under a power of appointment bequeathed a legacy to a man whom she described and with whom she lived as her husband, but the marriage was invalid on account of his having a wife at the time, which fact was not known to the testatrix, the bequest was held void (*m*). The question in all such cases is, whether the mistake of the testator has been induced by the fraud of the object of his intended bounty. Though it is clear that a legacy given to a person in a character which the legatee does not fill, and by the fraudulent assumption of which character the testator has been deceived, will not take effect; yet, if the testator is not deceived, although a false character is in fact assumed, the legacy will be good. *A fortiori* it will be good, if both parties not only knew the actual facts, but were designedly parties to the assumption of the false character (*n*). A false reason, however, given for a legacy is not alone a sufficient ground to avoid the act or bequest in equity. To have such an effect, it must be clear that no other motive mingled in the legacy, and that it constituted the substantial ground for the act or bequest (*o*).

Parol evidence in certain cases admissible to explain the will.

If the language of a will is either capable of more than one meaning, or is incapable of any certain meaning, parol evidence cannot be admitted to show what the testator *intended* to have expressed. The Court is not entitled to inquire into the intention of the testator apart from the language he has used (*p*). Evidence is only admitted which in its nature and effect simply explains what the testator *has* written, but not to show what he *intended* to have written. In other

(*l*) *Schloss* v. *Stiebel*, 6 Sim. 1; 38 R. R. 67; *Re Brown*, 54 Sol. Jo. 251.

(*m*) *Kennell* v. *Abbott*, 4 Ves. 804; 4 R. R. 351; *Re Boddington*, 22 C. D. 602; 53 L. J. Ch. 475.

(*n*) *Giles* v. *Giles*, 1 Keen, 685, 692, 693; 44 R. R. 134.

(*o*) *Kennell* v. *Abbott*, 4 Ves. 802; 4 R. R. 351.

(*p*) *Re De Rosaz*, 2 P. D. 68.

words the question is what is the meaning of his words (*q*). Evidence of the declaration of the intention of a testator before the making of his will with respect to the disposition of his property, and also after the will was made as to the persons in whose favour he made it, cannot be admitted. It is only where the description of the person or thing intended is applicable with legal certainty to each of several objects that extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such objects was intended by the testator (*r*). But the Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be reasonably and with sufficient certainty applied (*s*). The Court in construing a will cannot shut its eyes to the state of facts under which the will was made (*t*). Where, accordingly, a testator has inaccurately or imperfectly described the thing meant to be given by his will, so as to make the interpretation of the words in their primary sense impossible, parol evidence is admissible to influence the construction of the will (*u*). The principle is exemplified in those cases in which a devise of land at a given place has been extended to property not strictly answering to the locality, because there is none which does precisely correspond to it (*x*); or in which an apparently specific bequest of stock in the public funds has been held to authorise payment of the legacy out of the general personal estate, the testator having no such stock

(*q*) *Re Mayo, Chester* v. *Keirl*, 1901, 1 Ch. 404; 70 L. J. Ch. 261.

(*r*) *Drake* v. *Drake*, 8 H. L. C. 179; 29 L. J. Ch. 850; 125 R. R. 94; *Charter* v. *Charter*, L. R. 7 H. L. 370; 43 L. J. P. 73.

(*s*) *Ibid.* 377, *per* Lord Cairns. See *Re De Rosaz*, 2 P. D. 68; *Re Brake*, 6 P. D. 217; 50 L. J. P. 58.

(*t*) Jarm. on Wills, vol. 1, p. 503.

(*u*) *Att.-Gen.* v. *Grote*, 3 Mer. 316; 34 R. R. 183; *Colpoys* v. *Colpoys*, Jac. 451; 53 R. R. 42.

(*x*) *Doe* v. *Roberts*, 1 B. & Ald. 407; 20 R. R. 477; *Re Brocket*, 1908, 1 Ch. 185; 77 L. J. Ch. 245; Jarm. on Wills, vol. 1, p. 504.

when he made the bequest (*y*). So, also, if the subject of devise is described by reference to some extrinsic fact, it is not merely competent but necessary to admit extrinsic evidence to ascertain the subject of devise (*z*).

The same considerations apply when the description or terms employed by the testator are insufficient to determine the person intended by the testator. If the object of the testator's bounty, or the person meant by him, is described in terms which are applicable indifferently to more than one person, parol evidence is admissible to prove which of the persons so described was intended by the testator (*a*). So, also, if it appear that the name inserted in the will is not the correct name of any one in existence, the Court may look at the circumstances surrounding the testator to ascertain who was meant by him (*b*).

If the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the meaning of the testator, evidence to prove the sense in which he intended to use them is, as a general proposition, inadmissible. Thus, evidence is inadmissible for the purpose of filling up a total blank in a will (*c*), or inserting a devise inadvertently omitted by the mistake of the person drawing, making, or copying the will (*d*), or of proving what was meant by an unintelligible word (*e*); or of proving that a thing in substance different

(*y*) *Selwood* v. *Mildmay*, 3 Ves. 306; 4 R. R. 1; Jarm. on Wills, vol. 1, p 504.

(*z*) *Sanford* v. *Raikes*, 1 Mer. 646, *per* Sir W. Grant; *Webb* v. *Byng*, 1 K. & J. 580; 103 R. R. 249; *Ricketts* v. *Turquand*, 1 H. L. C. 472; Jarm. on Wills, vol. 1, p. 509.

(*a*) *Grant* v. *Grant*, L. R. 5 C. P. 727; 39 L. J. C. P. 272; *Re Wolverton Mortgaged Estates*, 7 C. D. 199; 47 L. J. Ch. 127; *Cloak* v. *Hammond*, 34 C. D. 255; 56 L. J. Ch. 171; but see *Donaldson* v. *Bamber*, 1897, 1 Ch. 75; 66 L. J. Ch. 93.

(*b*) *Re Murphy*, 7 L. R. I. 562. See *Charter* v. *Charter*, L. R. 7 H. L. 382, *per* Lord Cairns; 43 L. J. P. 73.

(*c*) *Hunt* v. *Hort*, 3 Bro. C. C. 311; *Taylor* v. *Richardson*, 2 Drew. 16; 23 L. J. Ch. 9; *Re Harrison*, 30 C. D. 390; 55 L. J. Ch. 799.

(*d*) *Newburgh* v. *Newburgh*, 5 Madd. 364; 21 R. R. 310; Jarm. on Wills, vol. 1, p. 486. It would, however, seem that if a clause be inadvertently introdnced, there may be an issue to try whether it is part of the testator's will. *Ibid.*

(*e*) *Goblett* v. *Beechey*, 3 Sim. 24.

from that described in the will was intended (*f*); or of changing the person described (*g*); or of reconciling conflicting clauses in the will (*h*).

Revocation of will under mistake.

Where a testator by a codicil revokes a devise or bequest in his will or in a previous codicil, expressly grounding such revocation on the assumption of a fact which turns out to be false, the revocation does not take effect, being, it is considered, conditional, and dependent on a contingency which fails (*i*). So also if a will is cancelled by mistake, or on the presumption that a later will is good, which proves void, the heir is not let in, but the mistake may be relieved against (*k*). In such case equity does not alter the will; it merely relieves the party from the effect of the mistake, thus placing him in the same condition as if the mistake had not happened (*l*).

Document signed as will by mistake.

Where a document has been signed by a man and has been duly attested in mistake for his will, it was held not admissible to probate (*m*).

Election under mistake.

The doctrine of election is not merely applicable to a wilful but also to a mistaken disposal of the property of another (*n*). An election made by a party under a mistake of facts or a misconception as to his rights is not binding in equity (*o*). He must not only know the facts, but he must be acquainted with the rule of equity which obliges him to elect (*p*). In order to presume an election from the acts of any person, that person must be shown to have had a full knowledge of all the requisite circumstances, as to the amount of the different properties, his own rights in respect of them, &c. (*q*).

(*f*) *Selwood* v. *Mildmay*, 3 Ves. 306; 4 R. R. 1.
(*g*) *Del Mare* v. *Robello*, 1 Ves. Jr. 412; Jarm. on Wills, vol. 1, p. 527.
(*h*) *Ulrich* v. *Litchfield*, 2 Atk. 372, *per* Lord Hardwicke.
(*i*) *Campbell* v. *French*, 3 Ves. 321; 4 R. R. 5; Jarm. on Wills, vol. 1, p. 288.
(*k*) *Onions* v. *Tyrer*, 1 P. Wms. 345.
(*l*) *Ibid.*
(*m*) *Re Hunt*, 3 P. & D. 250; 44 L. J. P. 43. *In the Estate of Meyer*, 1908, P. 353.
(*n*) Serrell, 15.
(*o*) *Wintour* v. *Clifton*, 21 Beav. 468; 111 R. R. 159.
(*p*) *Spread* v. *Morgan*, 11 H. L. C. at p. 611; 145 R. R. 315.
(*q*) *Wake* v. *Wake*, 1 Ves. Jr. 335; and the other cases mentioned, 1 Sw. 381 n.

A person who has elected under a misconception is entitled to make a fresh election (*r*).

Condition imposed under mistake.

The Court will not inquire into the fact of whether a testator was mistaken or not with reference to his daughter's health and capacity assigned by his will as a condition for imposing a condition in restraint of marriage (*s*).

Cancellation by mistake.

In the case of bills and notes a cancellation by mistake does not affect the liability of the parties whose signatures are cancelled (*t*), nor does a cancellation by an agent without authority (*u*). It appears that a mistake annuls the cancellation of a deed (*x*).

(*r*) *Kidney* v. *Coussmaker*, 12 Ves. 136; 2 R. R. 118; Jarman on Wills, vol. 1, p. 555.

(*s*) *Morley* v. *Rennoldson*, 2 Ha. 584; 12 L. J. Ch. 372.

(*t*) Bills of Ex. Act, 1882, s. 63 (3).

(*u*) *Bank of Scotland* v. *Dominion Bank*, 1891, A. C. 592.

(*x*) *Perrott* v. *P.*, 14 East, 423; 12 R. R. 566. See 67 L. J. P. 36.

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