[HOUSE OF LORDS.]

H. L. (E.)* 1914 *June* 19.

NOCTON . . . . . APPELLANT;

AND

LORD ASHBURTON . . . . . RESPONDENT.

ET E CONTRA.

Solicitor and Client—Claim for Indemnity—Misrepresentation — Improper Advice—Fraud—Negligence—Breach of Fiduciary Obligation—Pleading—Cause of Action.

Per Viscount Haldane L.C.: *Derry* v. *Peek* (1889) 14 App. Cas. 337, which establishes that proof of a fraudulent intention is necessary to sustain an action of deceit, whether the claim is dealt with by a Court of Law or by a Court of Equity in the exercise of its concurrent jurisdiction, does not narrow the scope of the remedy in actions within the exclusive jurisdiction of a Court of Equity, which, though classed under the head of fraud, do not necessarily involve the existence of a fraudulent intention, as, for example, an action for indemnity for loss arising from a misrepresentation made in breach of a special duty imposed by the Court by reason of the relationship of the parties.

A mortgagee brought an action against his solicitor, claiming to be indemnified against the loss which he had sustained by having been improperly advised and induced by the defendant, acting as his confidential solicitor, to release a part of a mortgage security, whereby the security had become insufficient. The statement of claim alleged that the defendant, when he gave the advice, well knew that the security would be thereby rendered insufficient and that the advice was not given in good faith, but in the defendant's own interest.

Neville J. found that the charge of fraud was not proved and dismissed the action. The Court of Appeal reversed this finding and granted relief on the footing of fraud:—

Held, (1.) that in the circumstances the Court of Appeal was not justified in reversing the finding of fact of the judge of first instance; but (2.) that the plaintiff was not precluded by the form of his pleadings from claiming relief on the footing of breach of duty arising from fiduciary relationship and that he was entitled to relief on that footing.

Decision of the Court of Appeal affirmed on different grounds.

APPEAL and cross-appeal from an order of the Court of Appeal reversing a judgment of Neville J. in an action brought in the

* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

Chancery Division by Lord Ashburton, the respondent in the original appeal, against Nocton, the appellant in the original appeal, and others.

Nocton practised as a solicitor first as a member of the firm of Broughton, Nocton & Broughton and afterwards, on the dissolution of the firm in 1905, on his own account.

Lord Ashburton, who succeeded to the barony in 1889, being then twenty-three years of age, employed Broughton, Nocton & Broughton, who were the family solicitors, as his solicitors, Nocton being the particular member of the firm who had the conduct of his business, and on the dissolution of the firm he employed Nocton until November, 1910, when he withdrew his retainer. He had consulted Nocton in various financial transactions and until shortly before the withdrawal of his retainer he reposed implicit confidence in his judgment and integrity.

By the action Lord Ashburton claimed, in effect, to be indemnified by Nocton in respect of a mortgage dated September 26, 1904, and, incidentally, in respect of a release of part of the mortgage security dated December 28, 1905, upon the ground that he had been induced to enter into both these transactions by the improper advice of Nocton; and the action was founded upon fraud.

On January 15, 1903, the Honourable Alexander Baring, who was a brother of Lord Ashburton, agreed to purchase certain freehold property in Church Street, Kensington, at the price of 60,000*l.* with a view to developing it as a building estate. The contract was entered into by Baring on behalf of himself and Nocton and on the terms that all profit and loss in connection with the purchase should be divided between them in equal shares. The purchase was completed on June 24, 1903, and the purchase-money was provided by Parr's Bank and was secured by a mortgage of the purchased property and of certain other property belonging to Baring.

Lord Ashburton had been invited by Nocton to join in this purchase, but had declined this invitation.

On February 10, 1904, Baring agreed to sell the Church Street property to Thomas Holloway and John Douglas, who were speculating builders, for 80,000*l.*, but the agreement was conditional upon

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(1.) the purchasers obtaining a loan of 60,000*l.* at 4 per cent. upon the security of the property; (2.) the vendor lending to the purchasers 20,000*l.* upon a second mortgage of the property with interest at 5 per cent.; (3.) the purchasers obtaining from the vendor or other persons a loan, subject to the previous loans, of 47,500*l.* at 6 per cent., as to 40,000*l.* for the purpose of erecting flats, shops, and buildings upon the land, and as to 7500*l.* for the purpose of paying solicitors' and other incidental costs and interest upon the loans during construction.

By a supplemental agreement dated June 15, 1904, the loan of 60,000*l.* was increased to 65,000*l.* and the interest increased from 4 to 5 per cent. and the loan of 20,000*l.* was reduced to 15,000*l.*

In the meantime Nocton by a letter dated May 3, 1904, proposed to Lord Ashburton that he should advance to Douglas and Holloway the sum of 65,000*l.* The letter was in the following terms :—

"Dear Lord Ashburton,—You will perhaps recollect some time ago your brother Alick and I purchased land at Church Street, Kensington, and we have since sold it to Messrs. Holloway and Douglas for 80,000*l.* Mr. Holloway is a well-known builder in London, as he enjoyed the confidence of the late Sir Blundell Maple, and there are several records to his credit standing in the country, such as the Hotel Great Central and the Metropole at Brighton and the Majestic at Harrogate, &c. Mr. Douglas has had considerable experience down at Kensington, and between them they will, I think, do very well.

"I merely mention this to show that we are not dealing with men of straw, and at the same time it shows their idea of the value of this site. They now seek to borrow on the property about 65,000*l.* at 5 or 5½ per cent., paying a bonus of 500*l.* on obtaining the money. They are prepared to put up the interest for two years, so that there will be no mistake about its payment, as in that time, of course, there will be buildings on the property, all of which will go to the credit of this security. As a matter of fact, they have already received an offer of 7500*l.* a year ground rent for the whole of the property, but I question whether they will accept it. It has occurred to me that if we

could get the money at 4 per cent. from Parr's or somewhere, and they, Holloway and Douglas, pay you 5½ per cent., you would be netting a clear 1½ per cent., or about 800*l.* per annum; even on a clear 1 per cent. you would make 650*l.* together with a bonus down of 500*l.*, which is always very useful.

"I should mention that arrangements have been made to finance the scheme up to 40,000*l.* or 50,000*l.*, and this, of course, all goes to the benefit of the first mortgage, because every brick which is laid goes to the credit of the first security. Now let us look at the worst aspects of the business. You might be landed with this property for 65,000*l.*; at the same time you would have buildings on it to the tune of the amounts spent thereon; you have the personal covenant to exhaust of Messrs. Douglas and Holloway, likewise the personal covenant of any one that they sub-let land to, which they will do no doubt. In my opinion none of these things are likely to occur, but if they do I should not at all mind you stepping in for 65,000*l.*, plus the buildings thereon.

"If you would like a valuer to give you any idea by all means appoint one, but the figures speak for themselves, and Messrs. Douglas and Holloway are shrewd men of business and not likely to buy 'a pig in a poke.'

"If your lordship is not likely to be in town, and would like to see me, I will run down with pleasure, but this has got to be done and I have much pleasure in offering you the first chance, as there is no particular risk but a little bit to be made.

"Do you mind sending me a wire to-morrow to the office?

"Very faithfully yours,

"(Signed) W. Nocton."

Lord Ashburton replied that he had no objection to lending the money provided the valuation was satisfactory and the terms equally so. Nocton then instructed Messrs. Hamnett & Co., surveyors, of London, through whose agency the Church Street property had been sold to Baring, to report upon the property, but whether they were instructed to report on behalf of Lord Ashburton as an intending mortgagee was disputed. The report was made on May 17 and was of an inconclusive character, but in the view taken by the Courts of this part of the case it is not

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necessary to refer to it further. On May 18 Nocton applied on behalf of Lord Ashburton to the Economic Life Assurance Society for a loan of 78,000*l.*, ultimately reduced to 75,000*l.*, the balance over and above the 65,000*l.* being required to pay off a debt due from Lord Ashburton to his brother. The society agreed to lend the money upon the security of a sub-mortgage of the proposed mortgage of the Church Street property and a first mortgage of other properties in Kensington belonging to Lord Ashburton, subject to a valuation by their own surveyor of the latter properties. These properties were valued by Mr. Robert Vigers on behalf of the society at 52,400*l.*

In July Nocton's partners entered into a correspondence with Lord Ashburton in the course of which they warned him against the risk he was incurring in proposing to advance 65,000*l.* on the Church Street property and the inadequacy of the profit offered in view of the risk to be run, reminded him that Nocton had a large financial interest in the property, and strongly urged him before further committing himself to obtain independent advice on the matter. Lord Ashburton, however, disregarded their warnings.

The transactions with regard to the Church Street property above referred to were carried into effect by a series of contemporaneous deeds executed on September 26, 1904, namely—(1.) a conveyance of the Church Street property to Douglas and Holloway expressed to be in consideration of 80,000*l.*; (2.) a mortgage by Douglas and Holloway to Lord Ashburton of the Church Street property to secure 65,000*l.*; (3.) a second mortgage by Douglas and Holloway to Baring to secure 15,000*l.*; (4.) a mortgage by Lord Ashburton to the Economic Life Assurance Society of his lordship's said Kensington properties to secure 75,000*l.*; (5.) a sub-mortgage by Lord Ashburton to the Economic Society of the mortgage for 65,000*l.* as collateral security for the 75,000*l.* On various subsequent occasions Baring made further advances on the security of the Church Street property.

Douglas and Holloway then proceeded to develop the property. They divided it into six plots and entered into an agreement with one Harry Johnson, a builder, whereby Johnson agreed to erect blocks of flats on the several plots and Douglas and Holloway agreed thereupon to grant leases thereof to Johnson

for a term of ninety-nine years at agreed rents. In the autumn of 1905 Block A was practically completed and a lease thereof was granted to Johnson at 1300*l.* a year. Block B was almost completed and a lease of that block also was granted at the same rent. Johnson became bankrupt before completing the building agreement and no buildings were erected on any of the other plots. On November 16, 1905, Nocton, in the name of his firm, wrote a letter to the secretary of the Economic Life Assurance Society wherein he stated that a further sum of 20,000*l.* was required by Douglas and Holloway to finance Johnson, the builder who had taken a building agreement, and submitted proposals to the society that they should either advance a further 20,000*l.* on their existing security or should release from their security Block A, and the letter contained the following dassage. "We have no doubt that Lord Ashburton will agree to the proposals, but before communicating with him upon the subject we desire to know whether your society will agree to them." The society then instructed their surveyor Vigers to report and advise them whether they could safely release Block A from their security. On December 4 the secretary of the society informed Nocton by letter that he had received a satisfactory report from Vigers and that the society consented to release Block A from their security.

On December 9, 1905, Nocton wrote to Lord Ashburton as follows :—

"Dear Lord Ashburton,—For the purpose of financing the building upon the Church Street, Kensington, site, which will be known as 'York House,' it is necessary that the first lot of flats, which are known as Block A, should be released from the mortgage. The Economic Life Assurance Society have agreed to release it from their mortgage, and I am now writing to ask you to release it from your mortgage. The necessary deed is being prepared in anticipation of your consent, and will be ready for signature very shortly. The Economic Society sent their surveyor, Mr. Robert Vigers, to look at the property with a view to testing the security before they consented to release it. This, I think you will agree with me, is very satisfactory.

"Yours very faithfully,

"(Signed) W. Nocton."

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Nocton did not see Vigers' report until shortly before this action was commenced. The report was founded to a large extent upon the margin of security upon Lord Ashburton's Kensington properties. The release was effected by a deed dated December 28, 1905, whereby the Economic Life Assurance Society and Lord Ashburton released Block A to Baring free and discharged from their respective mortgage debts of 75,000*l.* and 65,000*l.* The effect of the release was to make the mortgage of September 26, 1904, to Baring to secure 15,000*l.*, in which Nocton was interested to the extent of one moiety, a first charge on Block A.

Default was made in payment of the interest upon the 65,000*l.* mortgage debt which fell due upon September 26, 1909, and it then appeared that the Church Street property was a wholly inadequate security for that sum.

On March 10, 1911, Lord Ashburton commenced this action against Nocton and the various persons interested in the equity of redemption in the Church Street property and against the Economic Life Assurance Society.

By his statement of claim the plaintiff alleged (paragraph 13) with regard to the mortgage for 65,000*l.* that in advising the plaintiff to borrow the 75,000*l.* and to make the advance of 65,000*l.* the advice of the defendant Nocton was not that of a solicitor advising his client in good faith, but was given for his own private ends. The release of Block A from the plaintiff's mortgage was dealt with in paragraphs 31 to 33 of the statement of claim.

The two earlier paragraphs narrated the facts relating to the release. Paragraph 33 was as follows: "The said Block A was in fact the most valuable part of the plaintiff's said security and when the same was so released as aforesaid the property remaining subject to the plaintiff's said mortgage was wholly insufficient as a security for the said sum of 65,000*l.* The defendant Nocton well knew when he advised the plaintiff to execute the said release that thereby the plaintiff's security would be rendered insufficient and his said advice was not independent advice and was not given in good faith but was given in his own personal interest without regard to the interest of

the plaintiff to the intent that thereby he might get the benefit of a first charge upon the said Block A for the sum of 15,000*l.* secured by the said second mortgage of the 26th day of September 1904 to one moiety whereof he was entitled as aforesaid. The defendant Nocton in advising the plaintiff to execute the said release allowed the plaintiff to believe that he was advising the plaintiff independently and in good faith and in the plaintiff's interest. The plaintiff in executing the said release had no independent advice and acted entirely upon the advice of the defendant Nocton and with full confidence in him."

By the claim the plaintiff claimed (inter alia) (1.) a declaration that he was improperly advised and induced by the defendant Nocton whilst acting as the plaintiff's confidential solicitor to advance the sum of 65,000*l.* to Douglas and Holloway and with a view thereto to borrow the sum of 75,000*l.* upon the securities above referred to, and (2.) a declaration that the defendant Nocton was liable to indemnify the plaintiff in respect of the said transactions and to make good and repay to the plaintiff the 65,000*l.* with interest and all sums paid by the plaintiff to him or his firm for costs, charges, and expenses in respect of the several mortgages of September 26, 1904, with consequential relief. The plaintiff, however, did not claim any specific relief in respect of the release of December 28, 1905.

The defendant Nocton by his defence denied all the allegations of fraud and pleaded the Statute of Limitations.

Neville J. found that, although the defendant Nocton fell far short of the duty which he owed to his client as a solicitor, the plaintiff had failed to make out a charge of fraud against him, and he held that as the action was based solely upon fraud it was not maintainable. He accordingly dismissed the action as against the defendant Nocton with costs.

The Court of Appeal, while agreeing with Neville J. that it would be wrong to allow a charge of fraud to be converted into a charge of negligence, differed from him on the facts. So far as regards the claim in respect of the 65,000*l.* they held that, in view of the warnings given to the plaintiff by the defendant Nocton's partners, the plaintiff had failed to establish any case of concealed fraud against the defendant Nocton, and that the Statute

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of Limitations was therefore a complete answer to the claim. But with regard to the release they found that the defendant Nocton had been guilty of fraud, and granted relief on that footing.

The order of the Court of Appeal ordered that the plaintiff do recover against the defendant Nocton the sum of 3789*l.* odd (being the sum of 1300*l.* per annum less income tax from September 26, 1909, when the default first occurred in payment of the interest on the mortgage for 65,000*l.* in the statement of claim mentioned to the date of this order) in part payment of the damages to be ascertained under the inquiry thereby directed, and directed an inquiry to be made before an official referee what damages (if any) had been sustained by the plaintiff by reason of the release of Block A from the security referred to in paragraphs 31 to 33 of the statement of claim.

The defendant Nocton appealed against this order, and there was also a cross-appeal by the plaintiff on the ground that the relief granted was not sufficiently extensive. The plaintiff, however, did not propose to proceed with his cross-appeal except in the event of a decision against him on the main appeal.

1914. April 23, 24, 27; May 1, 8. *P. O. Lawrence, K.C.*, and *Peterson, K.C.* (with them *J. W. Manning*), for the appellant. No fraud is proved against the appellant, and, as the action rested on fraud, it was rightly dismissed by Neville J. This claim is based wholly on fraud, and if the charge of fraud fails it cannot be converted into a charge of negligence: *Wilde* v. *Gibson* (1); *Glascott* v. *Lang* (2); *Archbold* v. *Commissioners of Charitable Bequests for Ireland* (3); *Thom* v. *Bigland* (4); *Hickson* v. *Lombard* (5); *Swinfen* v. *Lord Chelmsford* (6); *London Chartered Bank of Australia* v. *Lemprière* (7); *Connecticut Fire Insurance Co.* v. *Kavanagh.* (8) These authorities shew further that if the statement of claim, apart from the allegations of fraud, discloses a good cause of action the plaintiff may recover. But here the

(1) (1848) 1 H. L. C. 605.
(2) (1847) 2 Ph. 310.
(3) (1849) 2 H. L. C. 440.
(4) (1853) 8 Ex. 725.
(5) (1866) L. R. 1 H. L. 324.
(6) (1860) 5 H. & N. 890.
(7) (1873) L. R. 4 P. C. 572.
(8) [1892] A. C. 473.

only two grounds of relief against the appellant are fraud and negligence, and negligence is not pleaded. Where an action is based solely on fraud the Court will not allow the pleadings to be amended so as to raise a new cause of action, and in this case the Statute of Limitations would be an answer to any application to amend. It is further to be noted that the claim asks no relief in respect of the 1905 transaction, which is the subject of this appeal. The sole question is whether the appellant fraudulently represented that the security was sufficient. In *Dick* v. *Alston* (1) the present Lord Chancellor gives an exhaustive enumeration of the several heads of relief (apart from fraud) which may be granted against a solicitor at the suit of his client. Those are, first, damages for negligence, where the solicitor does not give proper advice or exercise proper skill; secondly, accountability, where the solicitor during the continuance of his employment takes a benefit from his client; and thirdly, rescission, where the solicitor, acting as such, makes a bargain with his client. This case falls under the first head of relief, and the second and third heads have no application. The decision of this House in *Derry* v. *Peek* (2) finally established that to maintain an action of deceit proof of moral fraud was necessary. That decision, however, did not purport to lay down any new law or to touch any action for misrepresentation in which there was a remedy independently of fraud. Those actions fall under four heads: (1.) Actions on a warranty; (2.) actions where there exists a legal obligation to give correct information, e.g., cases of marine and life assurance; (3.) actions where there is a negligent misrepresentation by a person who has contracted to be careful; and (4.) actions where the defendant is estopped from denying the truth of the representation: see *Low* v. *Bouverie* (3) and *Fry* v. *Smellie*. (4) It may be suggested that there is an equitable jurisdiction to grant relief in this case on the footing of a breach of fiduciary obligation, but there is no concurrent or other jurisdiction in equity to grant relief in cases of misrepresentation except in (1.) cases of fraud, (2.) cases of rescission, and (3.) cases

(1) 1913 S. C. (H. L.) 57.
(2) 14 App. Cas. 337.
(3) [1891] 3 Ch. 82.
(4) [1912] 3 K. B. 282, at p. 295.

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of estoppel. The law upon this point is correctly stated by Sir Roundell Palmer in his argument in *Peek* v. *Gurney*: (1) The Court exercises an equitable jurisdiction over persons standing in a fiduciary relation in cases to which that doctrine applies, as for example in cases of undue influence, but that is a different head of jurisdiction. Whatever duty may exist by reason of fiduciary relationship a person standing in that relationship is not thereby put under any special liability in regard to misrepresentation, and a trustee or solicitor is no more liable for an innocent misrepresentation than any other person. Fraud being out of the way, apart from the special cases above mentioned, there is no remedy against a solicitor either for misrepresentation or for wrong advice except on the ground of negligence. The only two cases opposed to this contention are *Slim* v. *Croucher* (2) and *Re Ward* (3), and those cases are inconsistent with *Derry* v. *Peek* (4): see *Low* v. *Bouverie*. (5) *Burrowes* v. *Lock* (6) was there explained on the ground of estoppel. *Evans* v. *Bicknell* (7) was put by Lord Eldon on fraud. If the old Court of Chancery had an independent jurisdiction to compel a man to make good his representations of fact, that jurisdiction must have been preserved by the provision of the Judicature Act that in cases of conflict the equitable doctrine should prevail. Therefore on that hypothesis *Derry* v. *Peek* (4) must have been wrongly decided. It follows that the only liability of the solicitor in this case is for breach of the obligation to be careful; but the form of the action precludes the respondent from claiming relief on that head.

The following cases were also referred to: *Gillespie & Sons* v. *Gardner* (8); *Brownlie* v. *Campbell* (9); *Barley* v. *Walford* (10); *Edgington* v. *Fitzmaurice* (11); *Maddison* v. *Alderson* (12); *Rawlins* v. *Wickham* (13); *McPherson's Trustees* v. *Watt* (14); *Torrance* v.

(1) (1871) L. R. 13 Eq. 79, at p. 97.
(2) (1860) 1 D. F. & J. 518.
(3) (1862) 31 Beav. 1.
(4) 14 App. Cas. 337.
(5) [1891] Ch. 82, at pp. 106, 109.
(6) (1805) 10 Ves. 470.
(7) (1801) 6 Ves. 174, at p. 182.
(8) 1909 S. C. 1053.
(9) (1880) 5 App. Cas. 925.
(10) (1846) 9 Q. B. 197.
(11) (1885) 29 Ch. D. 459.
(12) (1883) 8 App. Cas. 467.
(13) (1858) 3 De G. & J. 304.
(14) (1877) 5 R. (H. L.) 9.

Bolton (1); *Central Ry. Co. of Venezuela* v. *Kisch* (2); *Bank of Montreal* v. *Stuart*. (3)

Jenkins, K.C. (*Sir R. Finlay, K.C.*, and *A. à B. Terrell* with him), for the respondent.

[VISCOUNT HALDANE L.C. Subject to anything you may say I am not prepared to differ from the judgment of Neville J. on the question whether Nocton had a fraudulent intent.]

If the judgment of the Court of Appeal can be supported on the footing of negligence or on the analogy of negligence the plaintiff does not desire to proceed with his cross-appeal. As regards the Statute of Limitations the plaintiff's case on the original transaction was put not on concealed fraud but on property, i.e., on the ground that the money was held by the solicitor in trust for his principal. Assuming that fraud is out of the question, the allegations in the statement of claim are wide enough to found a claim for dereliction of duty by a person occupying a fiduciary relation. In the old cases in equity the term "fraud" was frequently applied to cases of a breach of fiduciary obligation.

[He was stopped.]

The House took time for consideration.

June 19. VISCOUNT HALDANE L.C. My Lords, in the judgment I am about to read, my noble and learned friend Lord Atkinson desires me to say that he concurs.

My Lords, owing to the mode in which this case has been treated both by the learned judge who tried it and by the Court of Appeal, the question to be decided has been the subject of some uncertainty and much argument. But when the real character of the litigation has been made plain the difficulties which have attended the giving of relief appear to have been concerned with form and not with substance.

The action was brought by the respondent, Lord Ashburton, against the appellant, who had acted as his solicitor, for a declaration that the solicitor had improperly advised and induced him to advance 65,000*l.* upon a mortgage made in 1904 by other

(1) (1872) L. R. 8 Ch. 118. (2) (1867) L. R. 2 H. L. 99.
(3) [1911] A. C. 120.

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clients of the solicitor, a transaction out of which the solicitor was said to have got an advantage for himself, and for an order for indemnity against loss of interest and for replacement of the sum advanced. This was the prominent head of the relief sought. But by the statement of claim a further case was made which was really covered by the main relief asked for, and which only arose if, as happened, the claim for replacement of the amount of the mortgage was barred by acquiescence or by the Statute of Limitations.

It was alleged that subsequently, in December, 1905, a date within six years from the issue of the writ, the solicitor had improperly and in bad faith advised and induced Lord Ashburton to release from the latter's mortgage a valuable part of the security, knowing that the security would thereby be rendered insufficient, and that this was done by the solicitor in order that he might benefit in respect of a charge for 15,000*l.* in which he was interested, by rendering it a first charge. He was alleged to have represented untruly that the remaining security would be sufficient, and it was further alleged that it was insufficient, and that loss both of security for the principal sum of 65,000*l.* and of interest had occurred in consequence of the release. The defence was knowledge of the facts and of the position of the appellant on the part of Lord Ashburton, as well as a denial of the material allegations in the statement of claim, and a plea of the Statute of Limitations.

My Lords, I do not propose to enter into an examination of the evidence. The action was tried before Neville J., who had the appellant and the respondent before him in the witness-box. He treated the case as one of fraud simply, as, indeed, according to the statement of claim, in one sense it was. Fraud, he said, must be clearly and unmistakably proved, and it was not enough to prove the mere fact that a solicitor, in advising his client, was actuated by the belief that some advantage would accrue to himself. He found that, although the respondent "fell far short of the duty which he was under as solicitor" to the appellant, he did not intend to defraud him, but that he would probably have given different advice had he not been personally interested in the result. The learned judge was no doubt influenced by the fact

that Lord Ashburton had previously embarked, to the knowledge and with the co-operation of the appellant, in other speculative transactions of large amounts, and that the release of the particular security in question might have enabled the mortgagors to raise more money and develop the value of Lord Ashburton's remaining security. At all events, he held that, while the appellant had failed in his duty and given bad advice, the case as launched was one in which charges of actual fraud had been made as its foundation, and that these charges having, as he thought, failed, the action ought to be dismissed.

The Court of Appeal took a different view. They held that the solicitor had, on the evidence, been guilty of actual fraud, so that an action of deceit would lie. If the action had been one of negligence they thought it would have been undefended, but the Master of the Rolls, in agreement with Neville J., said that " it would be wrong to allow a case based solely on serious charges of fraud to be turned into a comparatively harmless case based on negligence." As, however, they came to the conclusion that the solicitor had been guilty of actual deceit, this point was not important. The Court of Appeal therefore gave judgment for Lord Ashburton, and directed an inquiry as to damages to be held before the official referee.

My Lords, I think that to reverse the finding of the judge who tried the case and saw the appellant in the witness-box was, in the circumstances of this case, a rash proceeding on the part of the Court of Appeal. I have read the evidence of the appellant, and, although it is obviously unreliable evidence, it leaves on my mind the same impression that it left on that of the learned judge who heard it, that the solicitor did not consciously intend to defraud his client, but, largely owing to a confused state of mind, believed that he was properly joining with him and guiding him in a good speculation.

I cannot, therefore, treat the case, so far as based on intention to deceive, as made out. But where I differ from the learned judges in the Courts below is as to their view that, if they did not regard deceit as proved, the only alternative was to treat the action as one of mere negligence at law unconnected with misconduct. This alternative they thought was precluded by the

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way the case had been conducted. I am not sure that, on the pleadings and on the facts proved, they were right even in this. The question might well have been treated as in their discretion and as properly one of costs only, having regard to the unsatisfactory evidence of the appellant. But I do not take the view that they were shut up within the dilemma they supposed. There is a third form of procedure to which the statement of claim approximated very closely, and that is the old bill in Chancery to enforce compensation for breach of a fiduciary obligation. There appears to have been 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. For the reasons which I am about to offer to your Lordships, I do not think that this is so.

My Lords, much of the argument at the Bar turned on the interpretation of what was laid down by this House in *Derry* v. *Peek*. (1) It is of importance to be sure of what really was decided in that case. It has been the subject of much comment, both on what is expressly decided and on what has been considered to be implied in the judgments. The facts were these: A special Act incorporating a tramway company provided that the carriages might be moved by animal power and, with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by the Act the company had the right to use steam power. The plaintiff took shares on the faith of this statement. The Board of Trade afterwards refused their consent to the use of steam power, and the company was wound up. The plaintiff then brought an action of deceit against the directors, based on the untrue statement. The case was tried in the Chancery Division, before Stirling J. He came to the conclusion that the defendants thought that what they had stated was true, inasmuch as they took the consent of the Board of Trade to be a matter of course, and he dismissed the action on the ground that there was no intention to deceive.

The Court of Appeal held that the directors ought to have taken care that they had reasonable grounds for their statement,

(1) 14 App. Cas. 337.

and that as they had no reasonable grounds for making it, they were liable, notwithstanding that they had not intended to deceive. This House reversed that judgment and held that, the action being one of deceit, it was necessary to prove actual fraud. Fraud must be proved by shewing that the false representation had been made knowingly or without belief in its truth, or recklessly without caring whether it was true or false. Mere carelessness or absence of reasonable ground for believing the statement to be true might be evidence of fraud, but the inference could be displaced by shewing that it was made under an honest impression that it was true.

My Lords, the discussion of the case by the noble and learned Lords who took part in the decision appears to me to exclude the hypothesis that they considered any other question to be before them than what was the necessary foundation of an ordinary action for deceit. They must indeed be taken to have thought that the facts proved as to the relationship of the parties in *Derry* v. *Peek* (1) were not enough to establish any special duty arising out of that relationship other than the general duty of honesty. But they do not say that where a different sort of relationship ought to be inferred from the circumstances the case is to be concluded by asking whether an action for deceit will lie. I think that the authorities subsequent to the decision of the House of Lords shew a tendency to assume that it was intended to mean more than it did. In reality the judgment covered only a part of the field in which liabilities may arise. There are other obligations besides that of honesty the breach of which may give a right to damages. These obligations depend on principles which the judges have worked out in the fashion that is characteristic of a system where much of the law has always been judge-made and unwritten.

Even the action on the case for deceit was itself evolved by the judges, as is shewn by the dissenting judgment of Grose J. in *Pasley* v. *Freeman* (2) so comparatively recently as 1789. Up to that date it was at least doubtful whether the action lay in the absence of a special duty. The doctrines of obligation to exercise care by persons in particular situations, who are doing acts which

(1) 14 App. Cas. 337. (2) (1789) 3 T. R. 51.

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may injure the property or persons of others; of implied contract, as shewn in the evolution of the action of assumpsit and its development from case; of the liability of the agent, who came at last to be treated as warranting the authority which he asserted; of the right to an injunction and an account in equity in cases of passing off goods, as explained and contrasted with claims based on deceit in Lord Westbury's judgment in *Edelsten* v. *Edelsten* (1), and in such later authorities as the judgment of Farwell J. in *Bourne* v. *Swan & Edgar* (2); these doctrines and the like illustrate the freedom which has been exercised by the judges in making new applications of recognized principles. Although liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act, it is none the less true that a man may come under a special duty to exercise care in giving information or advice. I should accordingly be sorry to be thought to lend countenance to the idea that recent decisions have been intended to stereotype the cases in which people can be held to have assumed such a special duty. Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many cases in which that relationship may be properly treated as giving rise to a special duty of care in statement.

The decision of the House of Lords in *Derry* v. *Peek* (3) was applied by the Court of Appeal in another case relating to a prospectus, a case which, like *Derry* v. *Peek* (3), has given rise to comment. In *Angus* v. *Clifford* (4) the directors had affirmed in their prospectus that the reports of certain mining engineers "were prepared for the directors" when they were really prepared for the promoters. The judge who tried the case thought that the directors had not taken proper care as to what they stated, and held them liable. But he did not find that they had made the untrue statements fraudulently as distinguished from carelessly. The Court of Appeal applied the law as laid down in *Derry* v. *Peek*. (3) As the judge who tried the case had not found fraud they considered that they could not properly do so,

(1) (1863) 1 D. J. & S. 185.
(2) [1903] 1 Ch. 211.
(3) 14 App. Cas. 337.
(4) [1891] 2 Ch. 449.

and treated the words used as having been simply passed over by the directors without seeing their importance. This they thought amounted to gross and culpable carelessness in the use of language, but not to dishonesty, and they took the view that *Derry* v. *Peek* (1) had decided that there was no legal duty cast upon persons in such a position to take reasonable care in forming their belief. Bowen L.J. observed that while there was nothing new in deciding, as had been done by the House of Lords, that proof of an actually fraudulent mind was necessary to found an action for deceit at common law, the really important step taken was the decision, which he seems to have taken to be of very general application, that there was no duty to be careful in such cases. An honest blunder in the use of language is not dishonest, and unless there is such a duty is not actionable.

My Lords, it is plain that between the grossly careless use of language and the reckless use which will still give a right to succeed in an action for deceit the line of demarcation may seem to plain persons to be very fine. I do not wonder that the decisions in *Derry* v. *Peek* (1) and *Angus* v. *Clifford* (2) have on this point given rise to some heartburning. But the principle laid down that a mens rea is essential, in the absence of a duty to be careful, was no new one, nor is it now open to question. The difficulty as regards the principle lies in its application to individual cases. It is to the view taken of the facts by the judge of first instance, who has tried the question of fact and decided on which side of the line of demarcation the case lies, that comment should be generally directed. For, though not impossible, it is difficult for a Court of Appeal to review his finding after seeing the witnesses, especially in cases of this class. What requires closer consideration is the generality of the language used in some of the judgments of this House in *Derry* v. *Peek* (1), to the effect that in such cases there is no legal as distinguished from moral duty to be careful. Soon after the decision the Legislature, in the Directors' Liability Act of 1890, imposed a statutory obligation on those who issue prospectuses. But in other cases the decision remains binding as to what is really established, and its principle stands.

(1) 14 App. Cas. 337. (2) [1891] 2 Ch. 449.

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To what cases, then, does that principle extend? In his judgment Lord Herschell (at p. 360) carefully excluded from it "those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course." In such cases he thought, following what Lord Selborne had said in *Brownlie* v. *Campbell* (1), that honest belief in the truth of the answer was no defence.

This exception was considered by the Court of Appeal, consisting of Lindley, Bowen, and Kay L.JJ., the Court that had decided *Angus* v. *Clifford* (2), in *Low* v. *Bouverie*. (3) There the defendant, who was trustee of a fund, had replied to the inquiry of a person who contemplated making a loan to a beneficiary on the security of the fund, that the interest of the latter was subject to certain incumbrances which he mentioned, but he did not say there were no others. In fact there were others which he had forgotten. That the defendant was not liable for deceit was clear, but it was contended that as a trustee he was liable for breach of duty to give correct information. But the Court of Appeal held, as I think rightly, that the duty of a trustee did not extend to furnishing answers to inquiries such as were made in the case.

Lindley L.J. said that in the absence of such a duty the trustee could not be made liable. Before *Derry* v. *Peek* (4) he observed that it had been generally supposed to have been settled in equity that a person who carelessly, although honestly, made a false representation as to matters within his special knowledge to another about to deal in a matter of business on the faith of the representation was liable. *Burrowes* v. *Lock* (5) and *Slim* v. *Croucher* (6) were regarded as having laid this down. But *Burrowes* v. *Lock* (5) could be supported on the quite different ground of estoppel, that is to say, on the ground that the trustee in that case was precluded from denying that the share in question was unencumbered, as he had asserted this in unambiguous

(1) 5 App. Cas. 925, at p. 935.
(2) [1891] 2 Ch. 449.
(3) [1891] 3 Ch. 82.
(4) 14 App. Cas. 337.
(5) 10 Ves. 470.
(6) 1 D. F. & J. 518.

words on the faith of which the plaintiff in the suit had changed his position. It could not be supported on the wider ground. *Slim* v. *Croucher* (1), in which the assertion was that a valid lease would be granted in the future, could not be supported on the ground of estoppel, and, as he thought, probably could not be on that of warranty. It must therefore, in his opinion, be taken to be no longer law. In the case before him, *Low* v. *Bouverie* (2), there was no such precision of statement about the absence of incumbrances as could give rise to estoppel. Lindley and Bowen L.JJ. concurred in holding that if there had been a duty to be careful the case would have been untouched by *Derry* v. *Peek*. (3) But they held that as such a breach of duty did not exist, and as fraud, warranty, and estoppel were all negatived, there was no liability.

My Lords, in *Slim* v. *Croucher* (1) the circumstances were unusual, and it may be that the decision can be supported on the ground that the defendant warranted by implication that he had power to grant a valid lease. It is not, however, necessary to express an opinion on the point. But in the appeal before us I do not think that any question of warranty or estoppel arises, and if moral fraud has not been established the only question which remains is whether there has been such a breach of duty as gives rise to liability. Now such a duty might arise either at law or in equity. And I do not understand Lord Herschell, who mentioned the case of a legal as distinguished from merely a moral duty, to have intended in any way to exclude duty of which only a Court of Equity took cognizance. If among the great common lawyers who decided *Derry* v. *Peek* (3) there had been present some versed in the practice of the Court of Chancery, it may well be that the decision would not have been different, but that more and explicit attention would have been directed to the wide range of the class of cases in which, on the ground of a fiduciary duty, Courts of Equity gave a remedy.

My Lords, it is known that in cases of actual fraud the Courts of Chancery and of Common Law exercised a concurrent jurisdiction from the earliest times. For some of these cases the

(1) 1 D. F. & J. 518. (2) [1891] 3 Ch. 82.
(3) 14 App. Cas. 337.

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greater freedom which, in early days, the Court of Chancery exercised in admitting the testimony of parties to the proceedings made it a more suitable tribunal. Moreover, its remedies were more elastic. Operating in personam as a Court of conscience it could order the defendant, not, indeed, in those days, to pay damages as such, but to make restitution, or to compensate the plaintiff by putting him in as good a position pecuniarily as that in which he was before the injury.

But in addition to this concurrent jurisdiction, the Court of Chancery exercised an exclusive jurisdiction in cases which, although classified in that Court as cases of fraud, yet did not necessarily import the element of dolus malus. The Court took upon itself to prevent a man from acting against the dictates of conscience as defined by the Court, and to grant injunctions in anticipation of injury, as well as relief where injury had been done. Common instances of this exclusive jurisdiction are cases arising out of breach of duty by persons standing in a fiduciary relation, such as the solicitor to the client, illustrated by Lord Hardwicke's judgment in *Chesterfield* v. *Janssen*. (1) I can hardly imagine that those who took part in the decision of *Derry* v. *Peek* (2) imagined that they could be supposed to have cast doubt on the principle of any cases arising under the exclusive jurisdiction of the Court of Chancery. No such case was before the House, which was dealing only with a case of actual fraud as to which the jurisdiction in equity was concurrent.

The judgment in *Evans* v. *Bicknell* (3) of Lord Eldon, who not only possessed wide experience of Chancery procedure but had been Chief Justice of the Common Pleas, is instructive as to the character of the equity jurisdiction, especially so far as it is concurrent, and another great judge, Sir William Grant, confirmed his view in *Burrowes* v. *Lock*. (4) The latter case can probably be now supported only on the ground of estoppel, but the exposition of the principle of the concurrent jurisdiction remains intact.

A similar observation applies to *Slim* v. *Croucher* (5), to which

(1) (1750) 2 Ves. Sen. 125.
(2) 14 App. Cas. 337.
(3) 6 Ves. 174.
(4) 10 Ves. 470.
(5) 1 D. F. & J. 518.

I have already referred. It was not expressly found that there was a duty in breach of which the misrepresentation alleged was made, and there was neither fraud nor estoppel. But the case remains valuable, whatever view may be taken of its result, on account of the exposition of the equity jurisdiction given by Lord Campbell L.C. and Knight Bruce and Turner L.JJ., judges of great experience. So far as the equity jurisdiction in cases of what is called fraud is concurrent only and exercised in actions for mere deceit apart from breach of special duty, an actual intention to cheat has now to be proved. But there are cases of other classes to which, as I have already said, the Court of Chancery undoubtedly did apply the term fraud, although I think unfortunately.

Fraud in such cases is, as James L.J. said in *Torrance* v. *Bolton* (1), "nomen generalissimum, and it must not be construed so as to mislead persons into the notion that contracts for the sale and purchase of lands are in any respect privileged, so as to be free from the ordinary jurisdiction of the Court to deal with them as it deals with any instrument, or any other transactions, in which the Court is of opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained. Indeed, the books are full of cases in which the Court has dealt with contracts of that kind —contracts obtained by persons from others over whom they have dominion, contracts obtained by persons in a fiduciary position, contracts for the sale of shares obtained by directors through misrepresentation contained in the prospectus, in respect of which it was never necessary to allege or prove that the directors were wilfully guilty of moral fraud in what they had done." In Chancery the term "fraud" thus came to be used to describe what fell short of deceit, but imported breach of a duty to which equity had attached its sanction. What was laid down by Lord Eldon in this House in *Bulkley* v. *Wilford* (2) explains the nature of the duty.

My Lords, I have dealt thus fully with this distinction because I think that confusion has arisen from overlooking it. It must now be taken to be settled that nothing short of proof of a fraudulent

(1) (1872) L. R. 8 Ch. 118, at p. 124. (2) (1834) 2 Cl. & F. 102, at p. 177.

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intention in the strict sense will suffice for an action of deceit. This is so whether a Court of Law or a Court of Equity, in the exercise of concurrent jurisdiction, is dealing with the claim, and in this strict sense it was quite natural that Lord Bramwell and Lord Herschell should say that there was no such thing as legal as distinguished from moral fraud. But when fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, 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 on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court 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. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience.

Derry v. *Peek* (1) simply illustrates the principle that honesty in the stricter sense is by our law a duty of universal obligation. This obligation exists independently of contract or of special obligation. If a man intervenes in the affairs of another he must do so honestly, whatever be the character of that intervention. If he does so fraudulently, and through that fraud damage arises, he is liable to make good the damage. A common form of dishonesty is a false representation fraudulently made, and it was laid down that it was fraudulently made if the defendant made it knowing it to be false, or recklessly, neither knowing nor caring whether it was false or true. That is fraud in the strict sense.

The Courts had also power to rescind contracts of many kinds

(1) 14 App. Cas. 337.

obtained by an innocent misrepresentation, so long at least as the contract had not been superseded by being carried into effect. The condition attached to the plaintiff's right was that he should be able and willing to make restitution in integrum. If so, however free the defendant might have been from any intention to deceive, he was not allowed to retain what he had obtained from the plaintiff by a material misstatement on which the latter was entitled to rely as being true. This, like the obligation to be honest, was a principle of general application, which did not depend on any special relationship of the parties or duty arising from it.

But side by side with the enforcement of the duty of universal obligation to be honest and the principle which gave the right to rescission, the Courts, and especially the Court of Chancery, had to deal with the other cases to which I have referred, cases raising claims of an essentially different character, which have often been mistaken for actions of deceit. Such claims raise the question whether the circumstances and relations of the parties are such as to give rise to duties of particular obligation which have not been fulfilled. Prior to *Derry* v. *Peek* (1) the distinction between the different classes of case had not been sharply drawn, and there was some confusion between fraud as descriptive of the dishonest mind of a person who knowingly deceives, and fraud as the term was employed by the Court of Chancery and applied to breach of special duty by a person who erred, not necessarily morally but at all events intellectually, from ignorance of a special duty of which the Courts would not allow him to say that he was ignorant.

Such a special duty may arise from the circumstances and relations of the parties. These may give rise to an implied contract at law or to a fiduciary obligation in equity. If such a duty can be inferred in a particular case of a person issuing a prospectus, as, for instance, in the case of directors issuing to the shareholders of the company which they direct a prospectus inviting the subscription by them of further capital, I do not find in *Derry* v. *Peek* (1) an authority for the suggestion that an action for damages for misrepresentation without an actual

(1) 14 App. Cas. 337.

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intention to deceive may not lie. What was decided there was that from the facts proved in that case no such special duty to be careful in statement could be inferred, and that mere want of care therefore gave rise to no cause of action. In other words, it was decided that the directors stood in no fiduciary relation and therefore were under no fiduciary duty to the public to whom they had addressed the invitation to subscribe. I have only to add that the special relationship must, whenever it is alleged, be clearly shewn to exist.

My Lords, the solicitor contracts with his client to be skilful and careful. For failure to perform his obligation he may be made liable at law in contract or even in tort, for negligence in breach of a duty imposed on him. In the early history of the action of assumpsit this liability was indeed treated as one for tort. There was a time when in cases of liability for breach of a legal duty of this kind the Court of Chancery appears to have exercised a concurrent jurisdiction. That was not remarkable, having regard to the defective character of legal remedies in those days. But later on, after the action of assumpsit had become fully developed, I think it probable that a demurrer for want of equity would always have lain to a bill which did no more than seek to enforce a claim for damages for negligence against a solicitor. The judgment of Hall V.-C. in *British Mutual Investment Co.* v. *Cobbold* (1) is in accordance with this view.

This, however, does not end the matter. When, as in the case before us, a solicitor has had financial transactions with his client, and has handled his money to the extent of using it to pay off a mortgage made to himself, or of getting the client to release from his mortgage a property over which the solicitor by such release has obtained further security for a mortgage of his own, a Court of Equity has always assumed jurisdiction to scrutinize his action. It did not matter that the client would have had a remedy in damages for breach of contract. Courts of Equity had jurisdiction to direct accounts to be taken, and in proper cases to order the solicitor to replace property improperly acquired from the client, or to make compensation if he had lost it by acting in breach of

(1) (1875) L. R. 19 Eq. 627.

a duty which arose out of his confidential relationship to the man who had trusted him. This jurisdiction, which really belonged to the exclusive jurisdiction of the Court of Chancery, had for the client the additional advantage that, as is illustrated by the judgment of Lord Hatherley L.C. in *Burdick* v. *Garrick* (1), the Statute of Limitations would not apply when the person in a confidential relationship had got the property into his hands.

My Lords, since the Judicature Act any branch of the Court may give both kinds of relief, and can treat what is alleged either as a case of negligence at common law or as one of breach of fiduciary duty. The judgment of Jessel M.R. in *Cockburn* v. *Edwards* (2) may, I think, really be regarded as an illustration of the latter jurisdiction. In the case with which we are dealing the statement of claim was framed mainly on the lines of breach of fiduciary duty. This was probably deliberately done in order to endeavour to get over the difficulty occasioned by the Statute of Limitations as regards any mere case of negligence in the original mortgage transaction of 1904. As a consequence fraud has been charged in the peculiar sense in which it was the practice to charge it in Chancery procedure in cases of this kind. But the facts alleged would none the less, if proved, have afforded ground for an action for mere negligence.

I think that Neville J. was wrong in treating this case as if it were based in substance only on deceit and intention to cheat. No doubt a good deal was said both in argument and in cross-examination which, if established, would have afforded proof of actual fraud. But that was no reason for treating the action as launched wholly on this foundation. It was really an action based on the exclusive jurisdiction of a Court of Equity over a defendant in a fiduciary position in respect of matters which at law would also have given a right to damages for negligence.

The judges of the Court of Appeal appear to have taken some such view, with this difference, that they found actual fraud. I think, as I have already said, that it is only in exceptional circumstances that judges of appeal, who have not seen the witness in the box, ought to differ from the finding of fact of the judge who tried the case as to the state of mind of the witness. A

(1) (1870) L. R. 5 Ch. 233. (2) (1881) 18 Ch. D. 449

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study of the evidence of the appellant has brought me to the conclusion that Neville J. was probably right in the conclusion he reached. I think the appellant was negligent and rash and regardless of the obligations of his position. I think his evidence utterly untrustworthy. But I cannot agree in holding that Neville J. has been shewn to be wrong in refusing to draw the inference that he intended to cheat.

My Lords, the conclusion at which I have arrived is that this action ought properly to have been treated as one in which the plaintiff had made out a claim for compensation either for loss arising from misrepresentation made in breach of fiduciary duty or for breach of contract to exercise due care and skill. The main head of claim, that relating to the mortgage of 1904, is barred in equity by the acquiescence of the plaintiff, and at law by the Statute of Limitations.

The second head of claim, which is quite sufficiently stated in the pleadings, is not so barred. I am of opinion that Lord Ashburton was entitled to succeed on this second claim. The proper mode of giving relief might have been to order Mr. Nocton to restore to the mortgage security what he had procured to be taken out of it, in addition to making good the amount of interest lost by what he did. The measure of damages may not always be the same as in an action of deceit or for negligence. But in this case the question is of form only, and is not one which it is necessary to decide. I am not sure that such an order would have been more merciful to Mr. Nocton than the order for an inquiry as to damages which was actually made. At all events, Mr. Nocton's advisers did not at any time object and ask for the other alternative, and it is too late to ask for it now.

There was before us a cross-appeal by the respondent from the decision against him that he could not now complain of the transaction in 1904 relative to his mortgage for 65,000*l*. I think that, on the ground assigned by the Court of Appeal, that claim fails. For the reasons I have given, and, having regard to the unsatisfactory way in which Mr. Nocton gave his evidence, I think that no injustice has been done by any part of the order under review, and I move that this appeal and the cross-appeal be each dismissed with costs.

LORD DUNEDIN. My Lords, this action as originally brought by the respondent, Lord Ashburton, against his quondam solicitor, the appellant, asked for relief in respect of a sum of 65,000*l.* which he had on his advice advanced on mortgage over certain property in Church Street, Kensington. This property, which consisted of land available for building, had been acquired by the appellant from the then owners as a joint speculation on behalf of himself and the Hon. A. Baring, the brother of the respondent, for the sum of 60,000*l.* The purchase-money had been obtained by means of a temporary advance from Parr's Bank. The co-adventurers had then made a sub-sale to the firm of Messrs. Douglas and Holloway, builders, at the price of 80,000*l.* The sub-sale, however, was only valid if certain conditions were fulfilled, the material ones to mention being (1.) that the purchasers should be able to obtain a loan of 65,000*l.* on the property; (2.) that they should obtain a loan of 15,000*l.* from the vendors on mortgage postponed to the 65,000*l.*; and (3.) that they should obtain another loan again postponed of 47,000*l.* The scheme was that on these sums being advanced the land should be covered by blocks of residential buildings, which should then be let at a ground rent, and the sale of the ground rents would realize sums sufficient to pay off the series of mortgages. It is evident that on the success of the whole scheme depended the chance of the appellant securing his half-share of the 20,000*l.* profit made by the sale to Douglas and Holloway. The appellant accordingly approached his client, Lord Ashburton, to lend the 65,000*l.* on mortgage on the Church Street property, which he did. Out of the money so received the temporary advance to Parr's Bank was paid off. It should here be explained that as Lord Ashburton had not at the moment 65,000*l.* available, the form the transaction took was this. He borrowed 75,000*l.* from the Economic Assurance Company, and as security therefor gave the mortgage aforesaid of 65,000*l.*, and also a mortgage over other property of his own, which was valued by Mr. Vigers on behalf of the Economic at 52,400*l.*

The ground on which relief was sought was that the appellant had fraudulently induced the respondent to lend the 65,000*l.* by misrepresentations as to the true value of the security. Neville J.,

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by whom the action was tried, found that the respondent had failed to prove fraud. The Court of Appeal on this main question found that it was unnecessary to consider whether this was right or not. They found that in any case a subsequent communication had been made to Lord Ashburton by the partners of Nocton, with whom he had come to have differences, which communication either disclosed the whole true state of the facts, or at least put Lord Ashburton on his inquiry; that Lord Ashburton refused to take any steps, and that since that communication the years prescribed by the Statute of Limitations expired before action was brought, and that consequently the action was barred. A cross-appeal was taken by Lord Ashburton against this judgment, but was abandoned at your Lordships' Bar. The main question in the action as raised is therefore out of the case.

There was, however, a second point in respect of which relief was sought, which necessitates a continuance of the story. The various sums of money above mentioned were all raised, and Douglas and Holloway proceeded to build by means of a sub-contract with a Mr. Johnson, a practical builder. There were to be six blocks of buildings, numbered A to F. Block A was practically completed, and was let at a ground rent of 1300*l.* per annum, Block B was very nearly completed, the others had not been begun when Douglas and Holloway, and Johnson, ran short of money. In the state of the title above mentioned it was obviously impossible to raise any more money by postponed mortgages. It therefore occurred to Nocton that the best way to get more money would be, if possible, to get the mortgagees of the 65,000*l.* to release Block A from their security. Block A being covered with buildings, and let at a ground rent of 1300*l.* per annum, would then be an efficient source of credit.

Now, as already stated, the legal holder of the 65,000*l.* was the Economic Assurance Company. But the person really most affected by the transaction would be Lord Ashburton, because he had become personally liable to the Economic for 75,000*l.*, and had given 52,000*l.* worth of other property in mortgage. Nocton approached the Economic before he approached Lord Ashburton. He did so by a letter of November 16, 1905, in which he set out the state of matters, and proposed that the

society should release Block A. The letter contained the following sentence: "We have no doubt that Lord Ashburton will agree to the proposals, but before communicating with him upon the subject we desire to know whether your society will agree to them." The society replied that any agreement on their part must be subject to their receiving a favourable report from their own surveyor, Mr. Vigers, and stipulated that Nocton's clients should pay Vigers' fee. To this Nocton assented, and the society instructed Vigers to report. The result was that on December 4 Nocton received a letter from the secretary of the society in the following terms: "I have now received a satisfactory report from Mr. Vigers and I have to inform you that we consent to the release of Block A from our security." On December 9, 1905, Nocton sent the following letter to Lord Ashburton:—

"Dear Lord Ashburton,

"For the purpose of financing the building upon the Church Street Kensington site which will be known as 'York House' it is necessary that the first lot of flats which are known as 'Block A' should be released from the mortgage.

"The Economic Life Assurance Society have agreed to release it from their mortgage and I am now writing to ask you to release it from your mortgage.

"The necessary deed is being prepared in anticipation of your consent and will be ready for signature very shortly.

"The Economic Society sent their surveyor Mr. Robert Vigers to look at the property with a view to testing the security before they consented to release it. This I think you will agree with me is very satisfactory.

"Yours very faithfully,

"W. Nocton."

On January 1, 1906, Nocton sent the release to Lord Ashburton, who signed it.

It is not denied that the only information given to Lord Ashburton at this time was that contained in the said letter of December 9, 1905.

My Lords, I pause for a moment before examining what the relief actually claimed was, to consider the facts as they stand at this point. I have no hesitation in saying that the letter of

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December 9 was grossly misleading. It assumes that the question of release for the Economic is identical with the question for Lord Ashburton, and it refers to the report of Mr. Vigers in such terms as to clearly convey the idea that Vigers, if employed for Lord Ashburton, would have said that the remanent security after the release of Block A was sufficient. Now, Nocton knew perfectly well that the question for the Economic was a perfectly different one from that for Lord Ashburton, because the Economic, so far as their debt was concerned, had the additional security of 52,000*l.* worth of Lord Ashburton's other property. It will not do to say that if Lord Ashburton had remembered each of the individual facts of which he was cognizant at the time of the original transaction more than eighteen months before he could have pieced out for himself the true state of matters.

No one is entitled to make a statement which on the face of it conveys a false impression and then excuse himself on the ground that the person to whom he made it had available the means of correction. But besides that Nocton was in a fiduciary position. He was Lord Ashburton's solicitor, advising him as to the very transaction which he was himself proposing, and his position was, so to speak, aggravated by the fact that he himself was interested in the transaction going through, and that in a double sense; first, because the direct effect of the release of Block A from the 65,000*l.* mortgage was to raise the position of the 15,000*l.* mortgage held by Nocton and Baring to that of a first mortgage quoad that block; and, secondly, because, as already said, the ultimate success of the whole scheme was essential to the realization of the 20,000*l.* profit by Nocton and Baring.

In such a state of facts, I think it is not doubtful that the plaintiff ought to have a remedy, nor in any system in which law and equity were not separated would there, I think, any difficulty arise. I will venture to go further and say that, in my opinion, one of the objects of the legislation of 1873 was to prevent such difficulties arising in the law of England. Viewing the matter as I must do, as under the rules of the law of England, the question that at once arises is, Was the remedy of the plaintiff at law or in equity, or had he a remedy in both?

Now, as I understand the matter, if the action had been brought at law, under the old system it could have been based either (1.) on fraud, or (2.) on negligence, and the relief in either case would have been damages. But if based on fraud, then, in accordance with the decision in *Derry* v. *Peek* (1), the fraud proved must be actual fraud, a mens rea, an intention to deceive. It is an action of deceit.

Now, it is the case that the plaintiff here did aver fraud—he said that the things done and omitted to be done by the defendant in the part which he took in advising the release were fraudulently done and omitted to be done. Neville J. held that the mens rea had not been proved, and fraud being in the forefront of the pleadings, he held himself not entitled to treat the action as one for negligence. Further, fraud in the sense of mens rea not being proved, he held that the doctrine of *Derry* v. *Peek* (1) was as fully applicable to relief in equity as it was to relief at law. The Court of Appeal held that the behaviour of the appellant in this matter of the release was fraudulent, and granted relief in the shape of damages accordingly. They found on the facts that there was negligence, but assumed that, fraud being in the forefront of the pleadings, mere negligence could not be made the ground of relief. In the words of the Master of the Rolls, "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." Holding fraud proved, it became unnecessary for them to consider whether there was in default of law any equitable remedy to meet the situation.

Turning now to equity, here again, as I understand the situation, there was a jurisdiction in equity to keep persons in a fiduciary capacity up to their duty. The matter has been exhaustively dealt with by my noble friend on the woolsack, and I do not propose to examine the cases. I will only make a few remarks. In the first place, it will be found that the word "fraud" in the older cases in Chancery is often used where the thing so characterized is a wrongful breach of duty, without a consideration of whether there is such a mens rea as would

(1) 14 App. Cas. 337.

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found an action for deceit. In the second place, all the cases are based upon the existence of a fiduciary relationship, and subsequently the breach of duty arising.

Now, whenever we come to the idea of breach of duty we see how nearly the domains of law and equity approach, or perhaps, more strictly speaking, overlap. Take the word negligence—the culpa of the Roman jurists. There can be no negligence unless there is a duty. That duty may arise in many ways. There are certain duties which all owe to the world at large; alterum non lædere is one. So the man who leaves the loaded gun in a public place is liable for the accident ensuing, though it is not he that pulls the trigger. The common law gives a remedy. Then there are duties which arise from contract, of which the solicitor's position gives an example—spondet peritiam artis—he contracts to be professionally qualified and to be careful. Here again the common law will give an action for negligence. And then there are the duties which arise from a relationship without the intervention of contract in the ordinary sense of the term, such as the duties of a trustee to his cestui que trust or of a guardian to his ward. It is in this latter class of cases that equity has been peculiarly dominant, not, I take it, from any scientific distinction between the classes of duty existing and the breaches thereof, but simply because in certain cases where common justice demanded a remedy, the common law had none forthcoming, and the common law (though there is no harder lesson for the stranger jurist to learn) began with the remedy and ended with the right.

If, then, we turn to the solicitor's position we may look at it in two aspects, which is not to look at two different things, but to look at the same thing from two different points of view. He has contracted to be diligent; he is negligent. Law will give a remedy. It may well be that if a bill had been filed with a bald statement to the effect above, there might have been a demurrer for want of equity. He has not contracted that all representations made by him, if not negligently made, shall be true; and consequently, fraud apart, he cannot, on the law of *Derry* v. *Peek* (1), be made answerable at law for his representation. But from the

(1) 14 App. Cas. 337.

other point of view he may have put himself in a fiduciary position, and that fiduciary position imposes on him the duty of making a full and not a misleading disclosure of facts known to him when advising his client. He fails to do so. Equity will give a remedy to the client. This it does quite apart from the doctrine of *Derry* v. *Peek* (1), for in that case there was no fiduciary relationship, and the action had to be based on the representation alone.

Returning now to the pleadings in the present case, the case as originally launched, seeking for relief as to the 65,000*l.*, was undoubtedly based on fraud; and that fact tinged the form of the pleadings. That part of the case is gone; but the Court of Appeal thought that it dominated the pleadings as to the relief in respect of the release of Block A. It was held by the cases of *Archbold* (2), *Thom* (3), and *Swinfen* (4) that if on striking out the allegations of fraud a cause of action still remains, the action may proceed. I should myself have been prepared so to read paragraphs 31 and 33 of the statement of claim as to shew an averment of negligence even when the averments of fraud are struck out. In that case, as Neville J. says, "I think that Mr. Nocton fell far short of the duty which he was under as a solicitor to the plaintiff," and as the Court of Appeal held that the action, if based on negligence, was practically undefended, it would have been unnecessary to consider, as the Court of Appeal did, whether the fraud which Neville J. had held not proved was proved.

But apart from that, for the reasons given by my noble friend the Lord Chancellor, I think there was here a remedy in equity for breach of duty. I agree that the form that remedy would have taken would not have been damages, but, looking to the course the case has taken, I do not think it is incumbent on us to alter the remedy to another which would practically come to much the same. I accordingly agree with the motion made by my noble and learned friend.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with the conclusion reached by the Lord Chancellor and with the judgment proposed.

(1) 14 App. Cas. 337.
(2) 2 H. L. C. 110.
(3) 8 Ex. 725.
(4) 5 H. & N. 890.

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It would have been satisfactory to my mind to have had the judgment of the Court of Appeal upon the merits of the question now being determined by this House. Owing to the view taken by that Court, however, upon the question of fraud it became unnecessary for their Lordships to deal with the case on any other footing. Fraud was negatived by Neville J., and the Court of Appeal has affirmed it. I humbly agree with Neville J. and with your Lordships that fraud was not established against the appellant.

I am of opinion that the facts as they appear from the evidence stand thus: The appellant and the respondent were both experienced and sanguine speculators in land. Lord Ashburton was as astute as the other. I still retain some doubt as to whether, if his co-speculator and solicitor, the appellant, had put all the then available facts correctly before him, he, the respondent, would not have taken the risk of going on with the speculation on the terms proposed. But I admit that that is in the realm of conjecture, and I am willing to assent to the view of your Lordships that the likelihood is the other way.

As, however, to the conduct of Mr. Nocton, his cardinal error is intelligible. He allowed the idea of his relations to Lord Ashburton as co-speculator to obscure the view which he ought steadily to have kept before him of Lord Ashburton as his client. The appellant was interested to the extent of a moiety of a mortgage of 15,000*l.* over the properties. For my own part, I do not believe that it ever occurred to him, in proposing the release of Block A, one of the mortgaged properties, that the effect of that transaction would be to give the 15,000*l.* a position of priority which it would not otherwise have obtained. I think further that upon the point of valuation Mr. Nocton was himself quite assured in his own mind that the valuation obtained from Messrs. Hamnett was sufficient and might be treated as equivalent to a separate valuation made up to date and for mortgagee's purpose. There are many other elements in the case which suggest to me that he did not intend on any occasion to defraud his client, but that most of his conduct now called in question arose from the fact that he was, with regard to these properties

and at the time of these transactions, in a confused, somewhat hustled, and very anxious state of mind.

I now turn to the pleadings. They do appear to me to contain averments sufficiently clear of the following facts: That Block A was the most valuable part of the respondent's security when the same was released; that the remainder was insufficient as a security for the existing mortgage of 65,000*l.*; that the respondent, Lord Ashburton, was approached by the appellant in order to have Block A released from his security; and I also read the averment as if none of the motive or inducement or suggestion of the transaction ever came from the respondent to the appellant, but on the contrary proceeded from the appellant to the respondent. The pleadings still further aver that the appellant advised the respondent that he would still have sufficient security, and that a valuation or valuations shewed this, whereas in point of fact this was not so. It is finally alleged that the respondent in executing the release had no independent advice, that he acted solely upon that proffered to him by the appellant, and that the appellant was himself interested in the property and in the obtaining of the release in the sense already mentioned.

My Lords, standing the averments thus, they appear to me to lay the basis of, and to give due notice of, a claim for liability upon a ground quite independent of fraud, namely, of misrepresentations and misstatements made by a person entrusted with a duty to another, and in failure of that duty. I have stated what is found in the pleadings, purposely deleting from them the allegations of fraud which they contain. I think that with those allegations of fraud deleted there was quite sufficient left in the pleadings for the determination of the case as it is now being settled by this House.

I incline to the view that prior to the passing of the Judicature Act this is a course which would have been taken in a Court of Equity. In *Hickson* v. *Lombard* (1) the Lord Chancellor, Lord Chelmsford, refers with approval to "the principle explained by Lord Cottenham in the case of *Archbold* v. *The Commissioners of Charitable Bequests in Ireland* (2), that where a bill alleges matters of fraud and all the subsequent considerations depend on

(1) (1866) L. R. 1 H. L. 324, at p. 331. (2) 2 H. L. C. 440, at p. 460.

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these matters which are not proved, the Court must necessarily dismiss the bill, 'but if fraud be imputed and other matters alleged which will give the Court jurisdiction as the foundation of a decree, then the proper course is to dismiss so much of the bill as is not proved, and to give so much relief as, under the circumstances, the plaintiff may be entitled to.'"

There is indeed in the present case a good deal to remind one of the observation of Pollock C.B. in *Swinfen* v. *Lord Chelmsford* (1): "If a declaration discloses a state of facts upon which an action may be maintained, although there be neither malice nor fraud, the plaintiff is not bound to prove either, *though both be alleged*, and may recover upon the liability which the facts disclose, though *fraud* and *malice* be *disproved*, and we cannot distinguish this from a case where a defendant is charged with doing an act wilfully, being responsible for the act and its consequences, whether done wilfully or not."

I need not pursue the later cases giving effect to the same view, but approaching the whole case as I do from an independent standpoint, I should have learned with surprise that, especially since the passing of the Judicature Act, this salutary rule of practice had been departed from, and I am relieved to think that the difficulty on the pleadings to which I have referred and which influenced the judgment of Neville J. does not seem serious to your Lordships.

Addressing myself to the merits of the case, I approach it, my Lords,—in this respect differing to some extent from the line along which some of your Lordships have advanced—by suggesting that the first consideration in these cases ought always to be, What was the relation in which the parties stood to each other at the time of the transaction in respect of which the claim for damage, compensation, or restitution is made? In the answer to that question, in my judgment, may be found a solution of not a few of the difficulties which arise in such actions.

Lindley L.J., in *Low* v. *Bouverie* (2), compendiously indicated the lines on which liability might be founded as fraud, breach of duty, warranty and estoppel. With regard to fraud, I do not believe it occurred in this case: the action is not founded on

(1) 5 H. & N. 890, at p. 920. (2) [1891] 3 Ch. 82.

warranty; and in the view that I take of it the safer and less complicated method of viewing this case is not as one of estoppel but as one of alleged breach of duty.

I accordingly repeat the question as to what were the relations of the parties here. Mr. Nocton was a solicitor; Lord Ashburton was his client. Mr. Nocton became responsible for statements that there had been a valuation and that there was sufficient margin in the remainder of the property to secure the existing debt, and that the release was accordingly a safe and sound transaction. (He was also, as a matter of fact, personally interested and he profited as a co-speculator by the transaction of release; and I am of opinion that the duty of Mr. Nocton was, in view of this fact, to decline to act professionally or as the adviser of his client and to insist that a separate solicitor should be obtained: *Bank of Montreal* v. *Stuart* (1).) In the whole circumstances mentioned every step taken by the solicitor which subsequent disclosures shew to have been out of accord with fact became for him a step of danger—a danger of liability if through the erroneous step the client is misled and loss accrues.

Once, my Lords, the relation of parties has been so placed, it becomes manifest that the liability of an adviser upon whom rests the duty of doing things or making statements by which the other is guided or upon which that other justly relies can and does arise irrespective of whether the information and advice given have been tendered innocently or with a fraudulent intent.

My Lords, I am well aware of the fact that the case of *Derry* v. *Peek* (2) is in some quarters thought to have introduced a far-reaching change into the law. But if the question be approached from the point of view which I have stated, namely, of first ascertaining the relations which the parties bore to each other, then much assistance may be derived on the point—which is a vital point—as to what are the conditions and restrictions under and within which the supposed new rule of *Derry* v. *Peek* (2) can be held to operate. Does, in short, *Derry* v. *Peek* (2) cover the ground? I do not go further for this caution than *Derry* v. *Peek* (2) itself. In the previous history

(1) [1911] A. C. 120. (2) 14 App. Cas. 337.

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of the law, as, for instance, in *Burrowes* v. *Lock* (1), and in certain expressions in *Brownlie* v. *Campbell* (2), the principle had been over and over again enunciated, but in *Derry* v. *Peek* (3) Lord Herschell gathers them together in these expressions: "There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. *Burrowes* v. *Lock* (1) may be cited as an example, where a trustee had been asked by an intended lender upon the security of a trust fund whether notice of any prior encumbrances upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action."

The fact that the principle here set out was not held to cover the case of a company director holding out representations to the investing public—this fact no doubt led to the acceptance of *Derry* v. *Peek* (4) in certain quarters under protest. When Lord Herschell said, "I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea," he may have seemed to be giving an apt illustration of the general rule of liability to make good an assurance given. But it appeared it was not so; the decision was the other way, and this position was only changed by Parliament in the Directors Liability Act. And it should not be forgotten that *Derry* v. *Peek* (5) was an action wholly and solely of deceit, founded wholly and solely on fraud, was treated by this House on that footing alone, and that—this being so—what was decided was that fraud must ex necessitate contain the

(1) 10 Ves. 470.
(2) 5 App. Cas. 925.
(3) 14 App. Cas. at p. 360.
(4) 14 App. Cas. at p. 376.
(5) 14 App. Cas. 337.

element of moral delinquency. Certain expressions by learned Lords may seem to have made incursions into the region of negligence, but *Derry* v. *Peek* (1) as a decision was directed to the single and specific point just set out.

But although the principle was not applied to the position of directors, the principle itself was not abandoned, but was, as has been mentioned, distinctly enunciated. And with regard to dicta subsequent to *Derry* v. *Peek* and bearing upon that case, I venture to repeat the observation of Lord Bowen in *Low* v. *Bouverie*. (2) "*Derry* v. *Peek* (2)," said he, "decides . . . . that in cases such as those of which that case was an instance, there is no duty enforceable at law to be careful in the representation which is made. Negligent misrepresentation does not certainly amount to deceit, and negligent misrepresentation can only amount to a cause of action if there exist a duty to be careful—not to give information except after careful inquiry. In *Derry* v. *Peek* (1), the House of Lords considered that the circumstances raised no such duty. It is hardly necessary to point out that, if the duty is assumed to exist, there must be a remedy for its non-performance, and that therefore the doctrine that negligent misrepresentation affords no cause of action is confined to cases in which there is no duty, such as the law recognises, to be careful."

There is a passage, my Lords, in an argument used by Sir Roundell Palmer in *Peek* v. *Gurney* (3) which may well afford guidance as to the antecedent state of the law of equity. "Equity will interfere only in the following cases: first, wherever a contract is to be rescinded; secondly, where fraud, in the proper sense of the word, is to be redressed; thirdly, where a representation has been made which binds the conscience of the party and estops and obliges him to make it good. In the last case the representation in equity is equivalent to a contract and very nearly coincides with a warranty at law; and in order that a person may avail himself of relief founded on it he must shew that there was such a proximate relation between himself and the person making the representation as to bring them virtually

(1) 14 App. Cas. 337. (2) [1891] 3 Ch. 82.
(3) L. R. 13 Eq. 79, at p. 97.

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into the position of parties contracting with each other." These principles still remain.

My Lords, I purposely avoid the term "estoppel," but the principle to be found running through this branch of the law is, in my opinion, this: That once the relations of parties have been ascertained to be those in which a duty is laid upon one person of giving information or advice to another upon which that other is entitled to rely as the basis of a transaction, responsibility for error amounting to misrepresentation in any statement made will attach to the adviser or informer, although the information and advice have been given not fraudulently but in good faith.

It is admitted in the present case that misrepresentations were made; that they were material; that they were the cause of loss; that they were made by a solicitor to his client in a situation in which the client was entitled to rely, and did rely, upon the information received. I accordingly think that that situation is plainly open for the application of the principle of liability to which I have referred, namely, liability for the consequences of a failure of duty in circumstances in which it was a matter equivalent to contract between the parties that that duty should be fulfilled.

LORD PARMOOR. My Lords, I should not have written a separate opinion had not a question of fraud been involved, and had I not come to the conclusion that such a charge cannot be maintained. The appellant was defendant in an action brought by the plaintiff charging him with fraud whilst acting as his confidential solicitor. Whether in addition the statement of claim would support an action for breach of duty in his employment as solicitor, apart from fraud, is a matter for subsequent consideration. Neville J. found that the charge of fraud had not been substantiated, and dismissed the action. It was held on appeal that, as to so much of the claim as was not barred by statutory limitation, the charge of fraud was established, and the defendant liable. Against this decision the appellant appealed, and a cross-appeal was lodged by the respondent, but not argued in your Lordships' House. The questions really are whether the

fraud charged against the defendant has been proved, and, if it has not been proved, whether the defendant is liable in negligence for breach of duty in his position as solicitor to the plaintiff.

On January 15, 1903, the Honourable Alexander Henry Baring, a brother of the respondent, entered into a contract for the purchase of certain freehold hereditaments in Church Street, Kensington, at the price of 60,000*l.* By an agreement of June 24, 1903, it was agreed between the said Alexander Henry Baring and the appellant that all profit and loss in connection with the purchase of the property should be divided in equal shares between them, and that the title deeds of the property should be lodged with Parr's Bank for the purpose of securing to them the repayment of an advance of 60,000*l.* and interest.

On February 10, 1904, a contract was entered into for the sale of the property to Thomas Holloway and John Douglas for the sum of 80,000*l.*, and the conveyance was completed on September 26, 1904, but it does not appear that Douglas and Holloway were in a position actually to find any of the purchase-money. After the contract had been entered into with Messrs. Douglas and Holloway, the appellant wrote to the respondent, on May 3, 1904, and suggested that the respondent should advance the sum of 65,000*l.* to Messrs. Douglas and Holloway on the security of the said property, and that he should receive a sum of 500*l.* from Messrs. Douglas and Holloway as a bonus, and borrow the amount required from his bank at a lower rate of interest than he was to receive. All the profit that the respondent could receive from the transaction would be the bonus of 500*l.* and the difference between the interest paid by him to his bank and the interest received by him from Messrs. Douglas and Holloway. The respondent arranged to borrow a sum of 75,000*l.* from the Economic Life Assurance Society on the security of certain freehold property in Kensington belonging to him, and of a sub-mortgage of the mortgage of 60,000*l.* on the said Church Street property created in his favour by Messrs. Douglas and Holloway. All necessary documents were prepared in connection with the above transactions, and arrangements were made with Harry Johnson, a builder, to erect residential flats in blocks on the property.

It is not necessary to consider at any greater length the

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transactions which took place up to this date, since any action which could be based thereon is barred by statutory limitation. It is, however, not unimportant, before considering the subsequent transactions on which the Court of Appeal held that the appellant was guilty of fraud, to note that the respondent was well aware that his solicitor, Mr. Nocton, was personally interested in the purchase of the property and in the building speculation. In other words, he employed the appellant as his solicitor although knowing that he was personally interested in the transactions on which he was giving advice. In addition, on July 26, 1904, Mr. Broughton, who was the senior partner of the firm of which the appellant was then a partner, wrote to the respondent calling his attention to the risky nature of the transaction and to the inadequacy of the profits in view of the risks run. The letter specifically stated: "Mr. Nocton has, as you know, a large financial interest in the property. We should accordingly strongly urge you before committing yourself definitely to anything further to obtain, in this particular matter, the advice of an entirely independent surveyor and independent solicitor." This advice the respondent did not entertain, and, after full warning and knowledge, continued to employ the appellant as his solicitor in subsequent transactions relating to the property.

In the autumn of the year 1905 the first block of the buildings, called Block A, was practically completed, and a lease was shortly afterwards granted to the builder at a ground rent of 1300*l.* per annum. A further block, Block B, was nearly finished, but the building of the remaining blocks had not been commenced. In order to complete Blocks A and B, and to erect buildings on the other blocks, it was necessary to raise further money. The appellant suggested that for this purpose Block A should be released from the mortgage to the respondent for 65,000*l.*, and by the Economic Life Assurance Society from the security on which they had advanced the sum of 75,000*l.* to the respondent. For this purpose negotiations were opened with the Economic Life Assurance Society, who instructed their surveyor, Mr. Robert Vigers, to inspect the property comprised in their security and report to the society. On December 1, 1905, Mr. Vigers

made his report, but this report was not seen by the appellant. On December 4, 1905, the following letter was written to the appellant's firm from the Economic Life Assurance Company:—

"Dear Sirs,

"*The Lord Ashburton.*

"I have now received a satisfactory report from Mr. Vigers, and I have to inform you, therefore, that we consent to the release of Block A from our security. I am accordingly advising our solicitors, and shall be glad if you will communicate with them.

"Yours faithfully,

"George Todd,

"Actuary and Secretary."

The release of Block A from the security of the Economic Life Assurance Society was accordingly carried through, but in order to make Block A available for raising further money it was also necessary that it should be released from the mortgage of 65,000*l.* held by the respondent. It is in respect of the release of this block from the mortgage of the respondent that the Court of Appeal have found that the charge of fraud against the appellant was established. On the other hand, Neville J. found that the conduct of the appellant throughout the whole transaction was not fraudulent, however foolish or lamentable. The charge of fraud against the appellant in connection with the release of Block A from the mortgage is mainly based on a letter written by him to the respondent on December 9, 1905. This letter states that for the purpose of financing the buildings upon the property it is necessary that Block A should be released from the mortgage, and that the Economic Life Assurance Society had agreed to release it from their mortgage. The letter contains the following passage: "The Economic Society sent their surveyor, Mr. Robert Vigers, to look at the property with a view to testing the security before they consented to release it. This I think you will agree with me, is very satisfactory."

It is not questioned that the release of the block from their security by the Economic Society depended on different considerations from the release of the block from the mortgage of the respondent. The Economic Society held, in addition to the

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mortgage on the property, other property of the respondent in Kensington, valued by Mr. Vigers at 52,400*l*. If the letter was intended to convey to the respondent that the report of Mr. Vigers to the Economic Life Assurance Society was a valuation that would justify the release by him of the block from the mortgage, it would be difficult to come to any other conclusion than that the appellant had made a fraudulent representation. In my opinion the letter does not necessarily amount to such a representation. It was written to the respondent, who was cognizant of the whole transaction, and was himself a joint speculator, although not expecting any greater profit than the difference in the rate of interest at which he borrowed and lent the sum of 65,000*l*., together with the bonus of 500*l*. The question of fraud cannot be determined apart from the oral evidence, and I am not prepared to differ from Neville J., who negatived the charge after hearing at length the evidence of both the appellant and the respondent, stating that, in his opinion, the evidence had fallen far short of proof of such a charge.

In coming to the conclusion, Neville J., in commenting on the evidence of the appellant, considered that the reckless statements by him were quite as much against his own interest as in favour of it, and did not find that he was deliberately intending to mislead the Court. He also found, as I think rightly, on the evidence, that the transaction impeached was known to the respondent quite as well as to the appellant, and that, although in giving advice he was actuated by the fact that he was personally interested, as was well known to the respondent, yet there was no conscious neglect of the respondent's interests and no intention to defraud him.

The question remains to be considered whether, in the absence of mens rea, the appellant is liable to the respondent. It is practically admitted that the appellant, in advising the respondent, did not use the skill and care required of a solicitor, and that in the transaction which resulted in the release of Block A from the mortgage he committed a breach of duty rendering him liable in negligence, quite apart from fraudulent intention. Neville J. stated his opinion that the appellant fell far short of the duty which he owed to the respondent as a

solicitor, and the Master of the Rolls says that, if the respondent had claimed damages on the ground of negligence, the action would have been practically undefended as to the part of the case not varied by statutory limitation. Neville J. held, however, after careful consideration of paragraphs 31 to 33 of the statement of claim, which have reference to the release of Block A, that fraud had been definitely alleged in connection with the whole story, and that he would not be acting with justice if he were to divide the case, and treat this part of the action as severable from the rest, and consider whether, on other grounds than the alleged ground of fraud, he should be right in giving relief against the appellant.

The same view was expressed in the Court of Appeal, but it was less material, since the Court of Appeal found fraud against the appellant. It is necessary to note that the pleadings could not be amended so as to charge negligence, if amendment was necessary, since at the date of the suggested amendment such a charge would be statute-barred.

My Lords, the question therefore arises in a simple form, whether the pleadings sufficiently raise a charge of breach of duty irrespective of fraud or fraudulent intention. The answer depends on a consideration of paragraphs 31 to 33, read in connection with the terms of the declaration claimed by the respondent. Turning first to the claim, it deals with the whole transaction, and not separately with the release of Block A, and asks for a declaration that the respondent was improperly advised and instructed by the appellant whilst acting as his confidential solicitor to advance to Douglas and Holloway the sum of 65,000*l.* upon the security mentioned. The relevant paragraphs in the statement of claim are 31 to 33. Paragraphs 31 and 32 are narrative.

No doubt paragraph 33 does directly allege fraud in connection with the release of Block A, but if all the allegations directly imputing fraud are excluded, sufficient remains on which to found a charge of negligence for breach of duty of the appellant in his employment as a solicitor. It does not appear to me that there would be any injustice to the appellant in dealing with the action as one of negligence for breach of

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duty. The same evidence would have been required whether the action had been founded on negligence or fraud, and the defence would have been conducted in either case on the same lines. My Lords, reference was made during the hearing in your Lordships' House to the case of *Derry* v. *Peek*. (1) That case decides that in an action founded on deceit, and in which deceit is a necessary factor, actual dishonesty, involving mens rea, must be proved. The case in my opinion has no bearing whatever on actions founded on a breach of duty in which dishonesty is not a necessary factor.

My Lords, in my opinion the judgment of the Court of Appeal should be affirmed, but the appellant is absolved from the charge of fraud.

Order of the Court of Appeal affirmed and original and cross-appeals dismissed with costs, such costs to be set off.

Lords' Journals, June 19, 1914.

Solicitors for appellant: *Collyer-Bristow, Curtis, Booth, Birks & Langley, for Frederic Hall, Folkestone.*

Solicitor for respondent: *H. S. Knight Gregson.*

(1) 14 App. Cas. 337.