CAN FRAUD BE PURGED?

I.

Can fraud be purged? Suppose that B makes to A a false, fraudulent and material representation of fact upon which B relies and which induces him to act. B attempts to purge his fraud by making his representation good. Can he do so?

Let us take a concrete case. B to induce A to purchase a certain mortgage upon Blackacre falsely and fraudulently represents that the mortgage is a first mortgage. In truth the mortgage is a second mortgage. A, relying upon the representation, agrees to purchase the mortgage three months from date. B thereafter pays and discharges the first mortgage so that the mortgage purchased by A becomes in truth a first mortgage. When, if ever, will B's discharge of the first mortgage cure the fraud previously perpetrated on A?

Many other similar cases may be imagined. B may fraudulently represent that he has good title to Blackacre, or that the title is free and clear from incumbrances, or that certain bonds are first mortgage bonds, or that certain improvements have been made. In all these cases and in many others that might be put, the facts may ultimately be made to square exactly with the representation. The question which we shall consider is whether the fraudulent party can improve his legal position by making true that which he previously had fraudulently represented to be true, assuming, of course, that the defrauded party in no way assents to what might be described as "specific repentance."

It is of course familiar law that a defrauded party has two courses open to him upon discovery of the fraud. He may return whatever he has received and rescind the whole transaction. He may affirm the transaction, and sue for damages in deceit. If the transaction has not been wholly executed he may likewise invoke the fraud as a defense,—provided of course that he seasonably returns whatever he has received and disaffirms. This, however, is simply rescinding an executory bargain as compared with undoing a completed transaction. Broadly speaking, therefore,

the defrauded party has but two options open,—to rescind and recover whatever he has paid or parted with, or to affirm and sue for damages.

It is also plain that the repentance of the fraudulent party may occur at any stage in the proceedings. Conceivably he might make his false representation good even before its falsity is discovered and before it is acted on. Again, he may make the representation true after it has been acted on, but before the defrauded party has made any election to affirm or disaffirm. Finally, the fraudulent party may conform the facts to the representation after the defrauded party has discovered the fraud and taken some step for his protection either by way of rescission, or by bringing an action of deceit, or by setting up the fraud as a defense to any rights asserted by the fraudulent party. These situations seem to exhaust all the real possibilities of the case. They will be considered in inverse order.

II.

What are B's rights where he is induced by A to act upon a false and fraudulent representation, and after he has discovered the fraud and has asserted rights based upon it, A, without B's assent, makes the representation good? Can A in that case defeat an action for rescission? Has B in that case a defense to an action of deceit? If the transaction be still executory, can A destroy the defense of fraud by making his representation good against B's will? Each situation will be taken up in turn.

On principle, A cannot defeat rescission by making the false representation good, *after B has elected to rescind.* A transaction procured by fraud is voidable at the election of the defrauded party. This right of election is vested in the defrauded party at the moment the fraud is consummated. According to circumstances it may be exercised either at law or in equity. On principle, it would seem that this right being already vested in the defrauded party, cannot be taken away by the fraudulent party, nor can he substitute something else therefor. Still less can the fraudulent party determine how the defrauded party shall elect, or the consequences of an election, if made. To permit

the fraudulent party, by making his representation true to affirm the transaction and defeat the election to rescind, would enable him to force a compromise upon terms to which the defrauded party does not assent. A compromise is essentially a matter of contract in which both parties must concur. Certainly, the law should not, even if it could, permit a fraudulent party to dictate the terms upon which his own fraud shall be adjusted.

Merritt v. *Robinson*[1] was an action of replevin for a mule. The evidence tended to show that Merritt (the defendant below) induced the plaintiff Robinson to trade the mule for a pony, Merritt knowing and concealing that the pony was mortgaged to one Pierce. Robinson, on discovery of the facts, tendered the pony (on Sunday) to Merritt and demanded the mule. Merritt declined to rescind, and after this action was brought obtained a release of the mortgage from Pierce. The court in deciding that the fraudulent concealment would entitle Robinson to rescind, and that the release of the mortgage after action brought was no defense, said by English, C. J.:

"Appellant could not defeat appellee's (Robinson's) right of action for the mule by procuring the pony to be released from the mortgage after the commencement of the suit."

Thompson v. *Coultas*[2] was a bill in equity to rescind an exchange of lands upon the ground that the defendant fraudulently represented that the title to his lands was perfect, and free from incumbrances, although in truth these lands were subject to judgment liens aggregating $1300. After the bill was brought the defendant (appellant) paid off the liens. The court below held that this was no defense to the action and decreed rescission. In affirming this decree the court said, by Walker, C. J.:

"Nor does it matter that the judgments have been paid since the suit was commenced. When the appellees filed their original bill they thereby rescinded the contract, and elected to recover

[1] 35 Ark. 483. The case ultimately went for the defendant below (Merritt) on the ground that the plaintiff's tender was insufficient because made on Sunday.

[2] 76 Ill. 493.

back their property, and to place the appellant *in statu quo*, and from that time forward, appellant could do no act unassented to by appellees, which would revive the contract or change the right of appellees to rescind. He, by his fault, placed it in the power of appellees to rescind, and he could not deprive them of that right."

Moody v. *North*[3] was a bill in equity to rescind a contract for the purchase of real estate on the ground that the defendant (an executor) had fraudulently represented that he had power to sell. After the bill was brought the defendant got in the title. The court below decreed rescission. In affirming this judgment the court said, by Geren, J.:

"But if a party fraudulently sell and convey an estate to which he has no title the vendee, who comes into equity to rescind the contract, will not be compelled to take an after acquired title from the vendor."

Stevenson v. *Marble*[4] was a bill in equity brought to rescind a fully executed purchase of stock and bonds of the V. Electric Company on the ground that that purchase was procured by a false and fraudulent representation that the bonds in question were secured by a first mortgage, whereas in truth a prior mortgage was still outstanding. The complainant gave notice of rescission on April 14, 1896, and brought the bill on April 29, 1896. The prior mortgage was paid off and cancelled in July, 1896, after the bill was filed. It was urged that this purged the fraud and defeated the bill. In overruling this contention, Wellborn, J., said:

"I repeat that when the suit was brought the lien of $27,500 on the property of the V. Electric Company must necessarily have impaired the value of the bonds of said company, secured by a subordinate lien, as well as the value of the stock of the company,

[3] 6 Humph. (Tenn.) 309. This case is all the stronger since in Tennessee an after-acquired title may be held sufficient where there was no fraud in the original contract. Blackmore v. Shelby, 8 Humph. 439, 441; Elliott v. Blair, 5 Cold. 185, 193.

[4] 84 Fed. 23 (C. C. S. D. Cal.).

and that complainant's right, accruing in part therefrom, to rescind the contract could not be defeated by a discharge of the prior lien after suit was brought."

Green v. *Chandler*[5] was a case where suit was brought by Chandler upon a promissory note given as part of the purchase price of certain land. The defense was that the sale was procured by false and fraudulent representations as to the title to the property. To meet this Chandler offered evidence that after a tender of rescission by Green, he (Chandler) had put himself in position to cure the defect. The court below, over Green's exception, charged that if the defect had been cured the fraud constituted no defense. In holding that this instruction was error, the court said, by Roberts, J.:

"The fact that Chandler, after such abandonment (by Green) cured the defect in his right, or that Watson offered to make a good title upon the payment of the money by Green would not defeat Green's right to rescind the contract."

The leading case of *Dalby* v. *Pullen*[6] is to the same effect. In that case Sir George Wigram, having agreed to purchase certain real estate, paid the money into court and was let into possession, pending a report by a master upon the title. Upon investigation it appeared that there was a fatal defect in the chain of title, which was known to and concealed by the solicitor for the plaintiff. Before the master's report upon the defect came in the plaintiff bought in the outstanding interest, and asked for a further reference to the master to determine whether the defect had been cured. The court held that the plaintiff, though morally innocent, was affected by the fraudulent concealment of his solicitor, and that in view of this fraudulent concealment, he was not entitled to specific performance even though the defect had been made good.

These cases seem to cover the situation fully where the fraud

[5] 25 Tex. 148.
[6] 1 Russ. & M. 296.

is made good after it had been invoked by way of rescission or defense. Two cases [7] were at law and were grounded on a rescission *in pais* as a condition precedent to legal relief. In *Merritt* v. *Robinson* the defrauded party after such rescission sought to replevy the mule of which he had been deprived by the fraud. In *Green* v. *Chandler* the defrauded defendant, after tender of rescission *in pais* successfully set up the fraud as a defense to his note, even though the fraud had been made good before action brought. The other three cases, *Woods* v. *North*, *Thompson* v. *Coultas* and *Stevenson* v. *Marble*, were bills in equity for rescission where rescission *in pais* was not a condition precedent to maintenance of the bill, and where "specific repentance" after the bill was brought was held to be no defense. In *Dalby* v. *Pullen* the fraud was discovered in the course of a proceeding for specific performance by a vendor who was morally innocent but legally responsible for the fraudulent concealment of his solicitor. Even in this case specific reparation against the will of the defrauded party was held unavailing and specific performance was denied to the morally innocent vendor. These cases seem to establish that where the defrauded party has elected to *disaffirm* the transaction, and has taken adequate steps so to do, subsequent specific reparation by the fraudulent party against the will of the defrauded party will not defeat the disaffirmance whether the defrauded party sue in equity or at law and whether the fraud be invoked as a ground of defense or as a ground of affirmative relief.[8]

A different question is presented where the defrauded party, instead of electing to rescind, has elected to sue for damages. In such a case what is the effect of specific reparation upon damages, assuming that such reparation is made after action brought and without the assent of the party defrauded? On the one hand it may be urged that unless such reparation is applied in mitigation of damages the plaintiff is unjustly enriched. On the other

[7] Merritt v. Robinson, 35 Ark. 483; Green v. Chandler, 25 Tex. 148.

[8] *Cf.*, Richmond v. Gray, 3 Allen (Mass.) 25; Boynton v. Hazelboom, 14 Allen (Mass.) 107; Burke v. Schreiber, 183 Mass. 35.

hand it may be urged that the fraudulent party should not be allowed credit for a benefit which he thrusts upon the plaintiff against his will. The cases which touch the precise question are few, so that it must be decided in the light of principle rather than by authority.

In many cases the facts cannot be conformed to the representation. In other cases reparation can only be made with the concurrence and assent of the plaintiff. Thus if the title to the property be falsely represented to be perfect, although in truth there is an outstanding interest, the representation cannot be made good unless the plaintiff assents to conveyance of the outstanding interest to him. Title cannot be put into him against his will. In a few cases the representation may be made good without the actual concurrence of the plaintiff, as where the defendant discharges outstanding liens held by third parties. The latter case presents the greatest difficulty, since the plaintiff does in fact receive a benefit, though without his assent or concurrence.

Practically speaking subsequent reparation cannot absolutely make good the wrong, even though the false representation be ultimately made good to the letter. The plaintiff has been subjected to a risk and a detriment which would not have existed if the fraud had not been committed. It is one thing to purchase a property actually free from encumbrances, or a bond secured by a valid first mortgage, and quite a different thing to purchase a property from which the liens are subsequently removed or a bond which ultimately becomes secured by a valid first mortgage. So long as the defects exist the purchaser is to a greater or less extent at the mercy of third parties, and further cannot use or dispose of the property as he might have done had the fact corresponded to the representation. Subsequent reparation may protect him for the future, but it cannot undo the past. In other words, subsequent reparation, even if swiftly made, cannot wholly mitigate the damages caused by the defendant's wrong. How closely it may approach complete mitigation without ever reaching it must depend on the facts of each case. But the fact that subsequent reparation cannot be made complete is a circumstance to be taken into account in considering how far if at all such miti-

gation of damages may be thrust upon the plaintiff against his will.

It is a well-settled principle of quasi-contracts that a party cannot be compelled to pay for a benefit conferred without his assent. The obligation to pay for benefits received is essentially equitable in its nature and will not be imposed in favor of a volunteer,[9] or in favor of one who has intentionally violated his legal obligations,[10] or in favor of a party who has committed a fraud.[11] Nor can a defrauded party be compelled to assent to specific reparation in order to mitigate his damages.[12] The defendant is *ex hypothesi* a fraudulent volunteer. He is seeking to compel the plaintiff to account for a benefit which the plaintiff was powerless to prevent, to which he has not assented, and to which he could not have been compelled to assent had such assent been a condition precedent to his receiving it. The defendant confessedly comes into court with unclean hands. Under such circumstances he is in no position to claim the benefit of the principles of quasi-contracts which are equitable in their nature. The claim of unjust enrichment cannot on principle be sustained.

Further considerations reinforce this conclusion. In the first place, as we have seen, the mitigation is only partial. Defendant cannot undo the risk to which the plaintiff has been subjected in the past, though it may make the future safe. The difficulty in determining the extent of the mitigation (even if it could otherwise be permitted) may well weigh against granting such relief to a wrongdoer and volunteer.[13] In the second place, damages at law are payable in money, not property. To permit the defendant to compel the plaintiff to account for the benefit received would in effect permit the defendant to pay *pro tanto* in kind instead of in cash. In the third place the mitigation suggested would be a direct encouragement to the commission of fraud. To determine the damages according to the situation at

Boston Ice Co. v. Potter, 123 Mass. 28; 9 Cyc. 252, note 60, and cases cited.

[10] Bowen v. Kimball, 203 Mass. 364, and cases cited.

[11] See Sibley v. Stickney, 190 Mass. 43.

[12] First Nat. Bank v. Hackett, 159 Wis. 113; Nash v. Minnesota Title Ins. & Trust Co., 163 Mass. 574, 583 (head note inadequate).

[13] Nash v. Minnesota Title Ins. & Trust Co., 163 Mass. 574, 583.

the time of trial would minimize to that extent the danger to the wrongdoer, and correspondingly increase the risk to the party defrauded. All three considerations bear strongly against a rule in conflict with the basic principles of quasi-contracts, favorable to the wrongdoer and correspondingly unfavorable to the party defrauded.

It must be admitted, however, that the few immediate authorities are not altogether harmonious. It has been held that subsequent reparation is a bar to punitive or exemplary damages.[14] It would seem, however, that in both cases last cited [15] the reparation was made before the defrauded party brought his action for deceit or set up the fraud in recoupment of the plaintiff's claim. Conceivably this may make a difference, as we shall see later. Moreover, as punitive or exemplary damages are at best unscientific, in that they are based upon the defendant's turpitude rather than upon the plaintiff's injury, it may well be urged that one who had undone his wrong so far as he could ought not to be held to pay "smart money." If this is all these cases stand for they may perhaps be supported in jurisdictions where punitive damages are permitted. In any event, *Barber* v. *Kilbourn* [16] seems to be confined to punitive damages, if not overthrown by the recent Wisconsin case of *First Nat. Bank* v. *Hackett.*[17]

A more serious authority is *Sonnesyn* v. *Akin.*[18] In that case the plaintiff brought suit on November 26, 1902, alleging that on September 30, 1902, the defendants, by falsely representing that they (defendants) had title to certain lands, induced the plaintiff to agree to purchase the lands and to pay therefor by instalments, the last instalment to be paid and conveyance to be made on January 1, 1903. The declaration further alleged that the plaintiff had paid nearly $13,000 under the contract in reli-

[14] Barber v. Kilbourn, 16 Wis. 485; Nye v. Merriam, 35 Vt. 438. But see First Nat. Bank v. Hackett, 159 Wis. 113.

[15] Barber v. Kilbourn, 16 Wis. 485; Nye v. Merriam, 35 Vt. 438.

[16] 16 Wis. 485.

[17] 159 Wis. 113.

[18] 14 N. D. 248. 104 N. W. 1026.

ance upon the representations. The answer admitted the contract and payment, but alleged that the defendants had acquired title to the property long prior to January 1, 1903, the date when conveyance was to be made. The jury by a special verdict found that the plaintiff was induced to enter into the contract and pay some $13,000 by the false representations alleged, and that on the date when the action was brought the defendants had no title to the lands. On this verdict, the trial court rendered a judgment for the plaintiff in the sum of $13,000, *but later on motion for a new trial set it aside* upon proof that on January 1, 1903, the defendants had title to the lands and were able and ready to perform their agreement. The appellate court held that it could not be said that the trial court abused its discretion in setting aside the verdict, *and this is all that the case actually decides.* But two of the three judges went further and in an elaborate dictum held that the action was for deceit; that since the defendants were ready to convey at the time stipulated in the contract the plaintiff suffered no damage and could not recover, since the action for deceit affirmed the contract. On the other hand, Fisk, J., dissented on the ground that the action should be held to be for rescission, and in that case the fact that the defendants had made their representations good after action brought would be no defense.

It may be that the dicta in this case may be supported on its peculiar facts. The action was brought before the time for performance by the defendants had arrived. It was clearly open to the plaintiff to disaffirm, but this, according to the majority of the court, he did not do. On the contrary, according to the majority, he affirmed the contract by bringing an action for deceit instead of rescission. If so, he still left it open to the defendants to perform at the time stipulated for their performance. As he sued in deceit before it could be known whether they could or would perform their agreement, which was still executory, it may be plausibly urged that the action was brought before he suffered damage by reason of their fraud. If so, recovery might be denied *in deceit* on the ground that the action was premature, instead of on the ground that after action brought the defendants

had mitigated the damage by putting themselves in position to fulfil their contract. Taking the case on its facts, even the dicta of the majority scarcely go to the length that a fraudulent defendant may mitigate damages *actually suffered* by making his representations good after an action of deceit has been brought.

An authority more nearly in point is *First Nat. Bank* v. *Hackett*.[19] That was an action for deceit to recover damages for inducing the plaintiff to buy a note by representing that the note was secured by a valid mortgage of certain land in Michigan. At the trial there was evidence that the mortgage was given by a dummy who did not have title to the property, but there was also evidence of contracts by which the title could have been put in the dummy, though in fact this was not done. The trial court in substance instructed the jury that these contracts, if found to exist, were the substantial equivalent of a valid mortgage. The jury found for the defendant. *Held,* that this instruction was error. In answer to a special question the jury also found that if the plaintiff, some eight months after the note was bought, had assented to a subsequent arrangement, the note would have been fully secured. *Held,* that the submission of this question was error since the finding was immaterial. In so deciding, the court said:

"The plaintiff had a right to stand upon its cause of action for fraud, and was not obliged to enter into any negotiations resulting in a substitution of its existing cause of action for some other."

Two points are directly decided by this case. First, that ability to make the false representation good, even though existing at the time when the representation is made, does not cure its actual falsity. Second, that where the plaintiff has been induced to act to his damage by a false representation, he is not bound, even before action brought, to assent to specific reparation. On the contrary, he may stand upon his cause of action for deceit and insist upon money damages. If even before action brought

[19] 159 Wis. 113.

the plaintiff cannot have specific reparation forced upon him against his will, it seems plain that specific reparation after action brought will not be available in mitigation of compensatory damages. Plainly, the Hackett case limits the earlier Wisconsin case of *Barber* v. *Kilbourn* to the principle that a specific reparation after the damage is suffered and the action accrues is only a bar to punitive damages.

In *Nash* v. *Minnesota Title Ins. & Trust Co.*,[20] though it was alleged that the defendant represented to the plaintiffs that the title to certain real estate was perfect and thereby induced the plaintiff to purchase from defendant certain bonds secured by a mortgage thereon, in truth there was a prior mortgage. The defendant offered to prove that it had procured an assignment of this prior mortgage to itself and had tendered a discharge thereof to the plaintiff in mitigation of damages. It repeated the tender at the trial. The trial court ruled that none of this evidence could be considered in mitigation of damages. In affirming this ruling, Knowlton, J., said:

"The defendant may hold and use its mortgage in any lawful way, but the plaintiffs ought not to be compelled to receive the discharge of it in mitigation of their damages after the expiration of so long a time. If the mortgage were discharged, it would not, as matter of law, limit their recovery to normal damages. If there had been no encumbrance they might long ago have sold their bonds on better terms than can be obtained now. Moreover, the commission of the fraud, if fraud is proved, was a wilful wrong, and the case is analogous to a wilful conversion of property, and an offer to return it in mitigation of damages after its condition has changed and its value has depreciated. Practically it might be difficult in this case to measure the amount that should be allowed now on account of a discharge of the mortgage in mitigation of damages, and we are of opinion that we ought not to compel the plaintiff to accept the tender or to make allowance in the assessment of damages as if they had accepted it."

This case clearly recognizes the right of the plaintiff to determine whether it will accept or reject the proffered reparation

[20] 163 Mass. 574, 583 (case reversed on another point not material here).

in specie. The result would clearly have been the same if the defendant had discharged the prior mortgage without the plaintiff's consent. No distinction can successfully be made between the case where the plaintiff's consent is essential to complete the act of reparation and those cases where the act of reparation does not require his concurrence in order to complete it. Under this decision specific reparation cannot be forced on him against his will.

This case also indicates two difficulties which would arise if a defendant could force specific reparation on the plaintiff against his will. In the first place, no reparation can change the fact that the plaintiff has been subjected to a risk by reason of the fraud, which would not have existed had there been no fraud. In the second place, the value of reparation at a subsequent time is extremely difficult to determine. The difficulty is increased if the reparation is at best only partial aside from this element of time. The law may well refuse to permit the fraudulent defendant to thrust such problems on the plaintiff against his will.

Another decision which supports the same principle is *Blanchard* v. *Ellis.*[21] That was an action upon the covenant against encumbrances contained in a deed dated November 9, 1838. In fact, the land was subject to an attachment against the grantor upon which the land was taken in execution on December 25, 1838. On December 4, 1848, after the plaintiff had been evicted by the judgment creditor, the defendant bought in the judgment creditor's title. The present action was brought on October 18, 1851. The defendant contended that when he bought in the outstanding title of the judgment creditor it enured by estoppel to the plaintiff, so that the plaintiff, in this action subsequently brought, could recover only nominal damages. The case having been reserved for the full court upon the facts, that court in deciding that the doctrine of estoppel could not be invoked to defeat recovery of substantial damages said, by Thomas, J.:

"We place the decision of this case on this precise ground,

[21] 1 Gray (Mass.) 195. See also Medbury v. Watson, 6 Met. (Mass.) 246; Cornell v. Jackson, 3 Cush. (Mass.) 506. And compare Baxter v. Bradbury, 20 Me. 260.

that where a deed of land has been made with covenants of warranty, and the grantee has been wholly evicted from the premises by a title paramount, the grantor cannot, after such entire eviction of the grantee, purchase the title paramount and compel the grantee to take the same against his will, either in satisfaction of the covenant against encumbrances, or in mitigation of damages for the breach of it."

It is true that *Blanchard* v. *Ellis* is a case of covenant, not a case of fraud. But there is little distinction so far as the question we are considering is concerned, between a false covenant that the premises are free from encumbrances, and a false representation to the same effect, even though the action for breach of the covenant sounds in contract, and the action for the false representation sounds in tort. The difference is procedural rather than substantial. Be that as it may, *Blanchard* v. *Ellis* stands squarely for the principle that where damages have been suffered by the defendant's wrong, the defendant cannot force specific reparation upon the plaintiff either in satisfaction of the cause of action or in mitigation of damages.

A further analogy is presented by cases concerning the effect of resale by a purchaser to whom a false warranty or false representation has been made. Where a party has been induced to purchase property by false representations, the weight of authority is that a resale by him for as much or more than he paid is neither a bar to a subsequent action of deceit [22] nor available in mitigation of damages.[23] So also a resale by the warrantee is incompetent in mitigation of damages for breach of warranty.[24] In these cases, of course, there is no specific reparation by the fraudulent party or warrantor. He has done nothing to mitigate his wrong. Instead, he relies on mitigation by subsequent events in which he has no part, *i. e.*, that the plaintiff has recouped him-

[22] Clark v. Morgan, etc., Bank, 196 Fed. 709 (D. C. Col.), and cases cited; 20 Cyc. 136.

[23] Medbury v. Watson, 6 Met. (Mass.) 246; 20 Cyc. 136; *cf.*, Stewart v. Joyce, 201 Mass. 391; Hall v. Paine, 224 Mass. 62.

[24] Brown v. Bigelow, 10 Allen (Mass.) 242; see also Cornell v. Jackson, 3 Cush. (Mass.) 506.

self by a resale. This by the weight of authority he cannot do. The resale is held to have no effect on the previous wrong either in bar or in mitigation of damages.

The weight of authority therefore seems to be in accord with principle. Specific reparation against the will of the defrauded party will not defeat a rescission already made. Specific reparation after action brought is no bar to an action of deceit or to an action for breach of warranty, nor is it available in mitigation of damages.

III.

Suppose, however, that specific reparation is made after the false representation has been acted on to the damage of the defrauded party, but *before* he has elected whether he will affirm or disaffirm. In the previous section we considered the effect of reparation after the cause of action had accrued *and after it had been asserted against the wrongdoer.* We now consider the case where the cause of action has accrued, *but, before it is asserted,* reparation is made without the assent of the party wronged. What is the effect of such reparation upon subsequent rescission? What is its effect on the assertion of the fraud as a defense, in case the transaction be executory? What is its effect on damages in case a subsequent action of deceit is brought? In other words, are the rights of the defrauded party lessened because reparation is made without his assent before he determines how he will act?

On principle, reparation, against the will of the defrauded party, should not defeat subsequent rescission. The option to rescind or to affirm became vested in him the moment the fraud was consummated. His election to rescind is merely an exercise of the option which he previously possessed. We have seen that when once the option to rescind has been exercised, subsequent reparation, against the will of the defrauded party, will not avail to defeat it.[25] If such reparation will not avail to defeat the option after it has been exercised, it should not prevent the exercise of the option itself. The option is itself in the nature of a

[25] *Supra,* notes 1 to 8, inclusive.

right of action. To defeat it in effect affirms the transaction. If the fraudulent party can in effect affirm the transaction by making reparation the option is taken from the defrauded party without his assent and transferred to the party who committed the fraud. Plainly, the wrongdoer should not be permitted to dictate to the party wronged, what the legal consequences of the wrong shall be.

It may perhaps be urged that if the fraud be made good before the defrauded party has taken any step grounded on the fraud he has received exactly what he bargained for and should abide by his bargain. It will perhaps be said that to permit rescission in such a case would permit the defrauded party, upon discovery of the fraud, to speculate in the light of past events at the expense of the wrongdoer, and to affirm or disaffirm as his interests, irrespective of the fraud, would dictate. But this is in no sense unjust. The fraudulent party, when he committed the fraud, knew that he thereby rendered the transaction voidable at the election of the party defrauded. He chose to run that risk. He certainly is in no position to complain if that option is exercised again him. A party who by express agreement confers on the other party a right to rescind at his election cannot defeat the exercise of that election. In the case of a fraud the option is conferred by law instead of by agreement. Certainly, the law should not be solicitous to relieve one who has committed a fraud, from the right to avoid, which that very fraud has conferred.

A contrary rule would permit the wrongdoer to speculate at the risk of the party defrauded. When the defrauded party is induced to act on the fraudulent representation he is subjected to the risk that he will never receive what he bargains for. This risk is thrown on him by the fraudulent party. He still runs this risk, even though the fraudulent party subsequently make his representations good. To permit the fraudulent party to stand on his bargain provided he makes his representations good before he is caught and the defrauded party elects to disaffirm would be an incentive to fraud. As between the wrongdoer and the wronged the risk should clearly be cast on the wrongdoer.

The cases already discussed indicate that such is the rule. Thus reparation after rescission will not defeat rescission.[26] So also it has been held that one who has been defrauded may stand upon the fraud and cannot be forced to assent to a subsequent arrangement by which the fraud would be made good.[27] Again, where a covenant against encumbrances has been broken by an eviction, and before action brought, the covenantor buys in the title paramount, the covenantor cannot directly by conveyance, or indirectly by the doctrine of estoppel, force such title on the covenantee either in bar of a subsequent action or in mitigation of damages.[28] So also the fact that the defrauded party[29] or warrantee[30] has, before action brought resold the property for as much or more than he paid for it, will neither defeat the subsequent action,[31] nor avail to mitigate damages.[32] It would seem that the exercise of an option to rescind cannot be defeated by similar means, whether rescission is relied on to undo an executed transaction or as a defense to further performance of an executory bargain.

If specific reparation, against the will of the party wronged will not defeat subsequent exercise of the option to rescind, it plainly will not defeat subsequent assertion of the fraud as a defense to the transaction if it still be executory. This is obvious in cases where tender of rescission is a condition precedent to assertion of the defense of fraud and renders that defense available. It must be equally true where the assertion of the defense is itself a sufficient disaffirmance. The law is not so inconsistent as to undo the transaction if it be executed, but

[26] *Supra*, notes 1 to 8, inclusive.

[27] First Nat. Bank v. Hackett, 159 Wis. 113; Nash v. Minnesota Title Ins. & Trust Co., 163 Mass. 574, 583.

[28] Blanchard v. Ellis, 1 Gray (Mass.) 195; and see also Nash v. Minnesota Title Ins. & Trust Co., 163 Mass. 574, 583.

[29] Medbury v. Watson, 6 Met. (Mass.) 246; Clark v. Morgan, etc., Bank, 196 Fed. 709 (D. C. Col.), and cases cited.

[30] Brown v. Bigelow, 10 Allen (Mass.) 242; see also Cornell v. Jackson, 3 Cush. (Mass.) 506.

[31] Clark v. Morgan, etc., Bank, 196 Fed. 709 (D. C. Col.).

[32] Medbury v. Watson, 6 Met. (Mass.) 246; Brown v. Bigelow, 10 Allen (Mass.) 242; see also Cornell v. Jackson, 3 Cush. (Mass.) 506.

nevertheless to enforce the bargain if it be executory. The right to rescind on the ground of fraud necessarily includes the right to defend on the same ground.

Suppose, however, that instead of electing to rescind the plaintiff elects to affirm the transaction and sue for damages *after* the defendant has made the fact conform to the representation. This case differs from that considered in the previous section in that here the reparation takes place *before* the election to affirm instead of *afterwards*. The question is whether under these circumstances the reparation is to be considered in mitigation of damages.

It may well be urged that when the cause of action has once accrued (as we assume it has) no act by the defendant can decrease the damages to which the plaintiff then became entitled. There is much force in this suggestion. But if we apply the same principles heretofore considered we shall see that the situation which exists at the time when the plaintiff elects to affirm or to disaffirm may well affect the damages which he is entitled to recover.

If at the time when the plaintiff elects to keep the property and affirm the transaction *he knows* that the false representation has been made good his election to retain the property is necessarily an election to accept the benefit thereby conferred. If he does not desire to accept entire property or benefit he need only return the property and rescind the transaction. Since *ex hypothesi* that choice is open to him at the time when he decides to keep the property the decision to retain it is necessarily a decision to retain it in its changed condition—assuming, of course that he knows of the change. But if in the knowledge that the benefit has been conferred and the value of the property enhanced he chooses to accept that benefit, on ordinary principles of quasi-contract he should take the benefit into account in mitigation of damages. But in this situation the obligation to take the reparation into account in mitigation of damages flows from the assent of the plaintiff to such reparation and not merely from the act of the defendant in making the reparation. This distinguishes the case from the situation considered

in the last section, where the reparation took place after the plaintiff had made his election to rescind or to affirm.

If, however, at the time the action for deceit is brought the plaintiff is ignorant that reparation has been made, he should not be held to have consented that such reparation be considered in mitigation of damages. Knowledge is an essential element of ratification.[33] Acts done in ignorance of the facts do not ratify. The election to affirm the fraud and seek compensation in money may well have been made in the expectation that such compensation would be paid in money. Conceivably the plaintiff would have rescinded if compensation were to be made *in specie*. Any consent to receive reparation *in specie* is lacking. In the absence of such consent the plaintiff should not be held liable to account for a benefit conferred by a volunteer without notice to him. The knowledge of and consent to the receipt of the benefit, which alone can raise the obligation to account for it, are absent.[34] If the wrongdoer desires that the reparation shall operate in mitigation of damages he need only inform the plaintiff and leave the plaintiff to determine whether he will accept reparation in that form or rescind. As the wrongdoer has not chosen to inform the plaintiff so that the plaintiff can decide intelligently in the full light of all the facts, he cannot justly complain, if he is treated as a volunteer to whom compensation for specific reparation is denied.

It may perhaps be urged that this view is inconsistent with *Medbury* v. *Watson*,[35] and similar cases,[36] in which it was held that a resale by the plaintiff, before action brought was neither a bar to an action of deceit nor available in mitigation of damages. Such is not the case. In *Medbury* v. *Watson* the wrongdoer had not repaired the wrong. He had done nothing on which any assent of the plaintiff could operate. *Non constat*

[33] Cohen v. Jackson, 210 Mass. 328; Combs v. Scott, 12 Allen (Mass.) 493; Pence v. Langdon, 99 U. S. 578; Dickson v. Patterson, 160 U. S. 584; Valley v. Ostheimer, 159 Fed. 655 (C. C. A.); Manning v. Albee, 11 Allen (Mass.) 520. See also ante, note 12.

[34] *Supra*, note 12.

[35] 6 Met. (Mass.) 246.

[36] *Supra*, notes 22 to 25.

that if the false representations had been made good, the plaintiff would not have obtained a far larger price than he did.[37] The plaintiff by affirming the transaction had become absolute master of the property purchased. It was no concern of the wrongdoer whether the plaintiff sold the property or gave it away. The resale by the plaintiff was not a benefit conferred by the defendant for which the defendant could claim compensation.[38] This of itself distinguishes *Medbury* v. *Watson* and cases like it.

IV.

What is the result where the representation is false when made, but is made good *before it is acted on*? If the transaction has been wholly executed can the party who acts on the representation either rescind or recover damages? If the transaction is an agreement which still remains executory is the naked misrepresentation a defense? In the situations already considered the false representation was acted on while it was still untrue. Here it has become true before any action is taken. Is this a real distinction?

A naked false representation is not actionable unless it cause damage.[39] If it relate to an immaterial matter,[40] or if it be not relied on [41] or if action in reliance thereon cause no legal damage,[42] no action for deceit will lie. So also, if the representation is not what the law deems to be a false and fraudulent representation, action thereon by the plaintiff to his dam-

[37] Brown v. Bigelow, 10 Allen (Mass.) 242.

[38] So in Blanchard v. Ellis, 1 Gray (Mass.) 242, the purchase of the outstanding paramount title by the defendant, without conveyance by the defendant to the plaintiff, was not a benefit for which the plaintiff could be held to account.

[39] Lamb v. Stone, 11 Pick. (Mass.) 526; Wellington v. Small, 3 Cush. (Mass.) 145; Randall v. Hazelton, 12 Allen (Mass.) 412; Bradley v. Fuller, 118 Mass. 239; Dudley v. Briggs, 141 Mass. 582; Graham v. Peale, 173 Fed. 9 (C. C. A.).

[40] Hedden v. Griffin, 136 Mass. 229, 231; Dawe v. Morris, 140 Mass. 188; Palmer v. Bill, 85 Me. 352; Blair v. Buttulph, 72 Ia. 31, 33; Clark v. Everhart, 63 Pa. St. 347, 349; Stone v. Robie, 66 Ut. 245, 247.

[41] Ming v. Woolfolk, 116 U. S. 599; Lilienthal v. Suffolk Brg. Co., 154 Mass. 185, 188.

[42] *Supra*, note 39.

age will not enable him to maintain deceit. In this class fall expressions of opinion,[43] "sellers' talk," [44] and prophecies as to the future.[45] In other words, fraud without damage, or damage without fraud will not sustain an action of deceit.

These principles seem decisive in the case where the representation is made good before it is acted on. In such a case the elements of actionable fraud never coexist. While the representation remains untrue the plaintiff does not act thereon to his damage. When the plaintiff subsequently acts the fraudulent element of the representation has ceased to exist. If the plaintiff sustain damage, that damage is in no just sense a consequence of the prior *falsity* of the representation. Under such circumstances the defendant, by making his representation good before it is acted on *prevents a cause of action from arising.* This differs radically from invoking his subsequent reparation to defeat or mitigate a cause of action which has already arisen. Since no cause of action has arisen, the plaintiff should neither recover damages,[46] nor be permitted to rescind.

In *Lams* v. *Fish*,[47] the plaintiff sued in deceit upon the ground that the defendant, by falsely representing that the G. Company was the owner of a certain lease induced the plaintiff to purchase shares of its stock. The proof showed that when the representation was made the G. Company was not the owner of the lease, but that it became so shortly afterward. In holding that the plaintiff could not recover, the court said, by Kalisch, J.:

"The plaintiff's proof established that the Gem Dredging Company was not the owner of the lease at the time when the representation to that effect was made by the defendant, but that it did acquire the ownership thereof shortly afterwards.

[43] Tryon v. Whitmarsh, 1 Met. (Mass.) 1; Belcher v. Costello, 122 Mass. 189.

[44] Densing v. Darling, 148 Mass. 504.

[45] Dawe v. Morris, 149 Mass. 188; Knowlton v. Keenan, 146 Mass. 186.

[46] Lams v. Fish, 86 N. J. L. 321, 90 Atl. 1105 (N. J. Er. & Ap.); Ball v. Farley, 81 Ala. 288.

[47] 86 N. J. L. 321, 90 Atl. 1105 (N. J. Er. & Ap.).

Under *Byard* v. *Holmes*, 34 N. J. L. 296,[48] this representation was immaterial. Since the Gem Dredging Company did acquire the ownership of the lease it could make no difference in the value of the plaintiff's stock whether the company owned the lease on the day stated or not."

It does not clearly appear from the facts in this case whether the representation was made good just before or just after the plaintiff was induced to purchase his stock. The statement that the representation had become immaterial lends some color to the supposition that it was made good before it was acted on. Even if it was made good shortly after it was acted on the case may still be supported upon the supposition that the action was brought after the plaintiff knew of the reparation. Moreover, since the plaintiff failed to prove any damage the case may be supported on that ground as well. In view of these uncertainties the case is not perhaps a very persuasive authority, but in view of the scarcity of decisions, it seems wise to include it.

One point in *Lams* v. *Fish*, however, is worth comment. It is said in that case that if the representation was made good it became "immaterial." This suggestion seems unsound. The materiality of a representation does not depend on its truth or falsity. It depends on whether it was an efficient inducement to the plaintiff's act.[49] This is a question of fact dependent upon the operation of the representation upon the plaintiff's mind. On the other hand, if the representation be true at the time it moves the plaintiff to act, the question whether it was false when made may have ceased to be relevant. But in this case, it is the previous falsity of the representation which has ceased to be material, not the representation itself. This distinction was apparently overlooked in *Lams* v. *Fish*. It diminishes the weight to be given to the case.

A somewhat different question is presented by the case

[48] This case is not in point. It simply decided that a certain declaration was too uncertain to be the basis of relief.

[49] Safford v. Grout, 120 Mass. 20; Hindeman v. First Nat. Bank, 112 Fed. 931, 945 (C. C. A.); Edginton v. Fitzmaurice, 29 Ch. D. 459.

where a party who has made a false representation, but made it good before it is acted on, invokes the aid of the court to enforce an executory bargain grounded on that representation. On this point the writer has found but a single *dictum*,[50] by Holmes, J., who said:

"The defendant argues that the plaintiff has suffered nothing because the statement was made good before it was acted on. We are not prepared to say that the fact that one party to a transaction, A, has been guilty of a material fraud, is purged of its effect if the representation is made good before it is acted on by the other party, B. There would be much force in the argument that, if B had known of A's fraud before the bargain was complete, he would not have been likely to complete it whatever the existing facts. People generally break off their dealings with people who are trying to cheat them. The fact that A has tried to cheat B is material, it may be said, because it offers what according to common experience would be a strong motive for not proceeding further."

There is considerable force in this suggestion. On the other hand, it would scarcely be a defence to prove that in prior transactions with other persons A had been a scamp and had committed fraud, larceny or embezzlement. It may well be that if B had known these facts before the bargain was completed he would have immediately broken off relations and declined to deal farther. But A's *general* bad character, even though concealed, would scarcely taint a transaction otherwise free from fraud, simply because B would probably decline to deal with A if he knew of A's previous rascality. It may be, however, that where A has tried to cheat B in this particular transaction the rascality is an indelible ingredient of this particular bargain, even though B, for reason of his own, changes his mind and makes his representation good before it is acted on. If the bargain

[50] Reeve v. Dennett, 145 Mass. 23, 30, in which it was held that where defendant had falsely represented that he owned certain land, but before that representation was acted on, purchased the land on mortgage, it could not be said that a finding that the representation had not been made good was unwarranted by the evidence. Perhaps the dicta in Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026, look the other way.

be still executory, A may perhaps justly object to being compelled to rely for future performance on one who has tried to cheat him. So also the court might perhaps decline to affirm the executory bargain in B's favor, where A seeks to rescind, on the ground that B does not come into court with clean hands as to this particular transaction, whether B comes into court as plaintiff or is dragged in as defendant to a bill in equity for rescission. In either case to affirm the bargain would in effect give A affirmative relief, and this the court might well deny to one who had attempted to cheat in the very case before it, even though the attempted fraud was not in fact consummated. On the grounds suggested by Holmes, J., and on this further ground, this dictum may perhaps be supported in a case where A is seeking the aid of the court to affirm and enforce a bargain which is still executory.

V.

Broadly speaking, a fraud once committed cannot be purged against the will of the party defrauded. The old proverb, "An ounce of prevention is worth a pound of cure," still holds good. Or, to put it another way, "An ounce of previous honesty is worth a pound of specific repentance." On principle, and on authority, specific repentance should not avail the wrongdoer unless it prevents the wrong or unless the injured party chooses to accept it instead of the relief which the law would otherwise afford. This is both good law and good sense. People should not be allowed to cheat their neighbors and then escape liability by undoing the wrong with the fear of the law upon them. Probably most embezzlers promise themselves to repay the "loan" in a few days. But restitution is no bar to conviction for the previous crime. Enforcement of civil liability and criminal punishment are both aids to feeble consciences. Courts should be slow, and are slow, to permit a party who commits a fraud to escape or mitigate civil liability by making specific reparation which the injured party is not willing to accept.

The better view and the weight of authority in so far as there is authority seem to be as follows: Specific reparation

against the will of the defrauded party, will neither defeat a previous election to rescind nor mitigate damages where an action of deceit has been previously brought. Even when specific reparation has been made before the defrauded party has elected whether he will rescind or affirm and sue for damages, it will not defeat a subsequent election to rescind made with knowledge of the facts, nor avail to mitigate damages which are sought in ignorance of such reparation. If, however, the election to affirm and sue for damages be made with knowledge of the reparation, it may well be held that the injured party has assented to such reparation and must account for the benefit received. Where the misrepresentation is made good before it is acted on no cause of action arises, and the party to whom it was made should neither recover damages nor be permitted to set aside a transaction fully executed. It has been intimated, however, that if in such a case the transaction is still executory the party who made the false representation may be denied relief on the ground that if the representation had been known to be originally false the innocent party would never have made the contract. Perhaps relief may likewise be denied in such a case to the party who misrepresents *in this very transaction,* on the ground that he does not come into court with clean hands. Both principle and the weight of authority, therefore, seem to concur in the view that a fraud once committed cannot be purged against the will of the party defrauded.

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