rights. I do not know what is the foundation for such an argument. It appears to me to be in flat contradiction to what the statute has provided, with the best judgment of Parliament, within certain limits, namely, an arrangement for the purchase on the one hand and the protection of both parties on the other, and that there is nothing, either by express contract or by the language of the statute, to warrant your Lordships in invading the common law rights as they exist in England and Scotland to the extent sought.

Judgment appealed from affirmed and appeal dismissed with costs.

Counsel for the Appellants — Sir A. Cripps, K.C.—P. O. Lawrence, K.C.—J. Dixon—Ashworth James. Agents—Rawle, Johnstone, & Co., for Mason, Fernandes, & Greaves, Wakefield, Solicitors.

Counsel for the Respondents—Sir R. Finlay, K.C.—Ernest Page, K.C.—MacSwinney—Tweedale. Agent—C. de J. Andrewes, Solicitor.

HOUSE OF LORDS.

Monday, November 11, 1912.

(Before the Lord Chancellor (Viscount Haldane), Lords Atkinson and Moulton.)

HEILBUT, SYMONS, & COMPANY *v.* BUCKLETON.

(On Appeal from the Court of Appeal in England.)

Contract—Sale—Warranty—Misrepresentation.

In an action of damages for fraudulent misrepresentation and breach of warranty, the plaintiff founded on a conversation between himself and the defendants' representative. In this conversation the plaintiff said—"I understand that you are bringing out a rubber company." The reply was—"We are." The plaintiff then asked "if it was all right," and received the answer—"We are bringing it out," to which he replied —"That is good enough for me." He thereupon applied for and received an allotment of 5000 shares in the company at a premium, which subsequently fell in value. A jury having negatived fraudulent misrepresentation, but found that the company could not properly be described as a rubber company, and that the defendants had given a warranty to that effect, *held* that the intention to constitute a representation of the seller a warranty must be clearly proved, that the evidence put before the jury was insufficient to prove such intention, and should therefore not have been submitted by the judge to the jury as material on which to base a finding.

This was an appeal from a judgment of the Court of Appeal (Lord Alverstone, C.J., Vaughan Williams and Farwell, L.JJ.), affirming Lush, J.'s, judgment in a jury trial.

The *facts* are apparent from their Lordships' considered judgment, which was delivered as follows:—

Lord Chancellor (Haldane) — The appellants, who were rubber merchants in London, in the spring of 1910 underwrote a large number of shares in a company called the Filisola Rubber and Produce Estates, Limited, a company which was promoted and registered by other persons about that time. They instructed a Mr Johnston, who was the manager of their Liverpool business, to obtain applications for shares in Liverpool. Johnston, who had seen a draft prospectus in London but had then no copy of the prospectus, mentioned the company to several people in Liverpool, including a Mr Wright, who sometimes acted as broker for the respondent. On the 14th April the respondent telephoned to Johnston from Wright's office. As to what passed there is no dispute. The respondent said, "I understand that you are bringing out a rubber company." The reply was "We are." The respondent then asked whether Johnston had any prospectuses, and his reply was in the negative. The respondent then asked "if it was all right," and Johnston replied "We are bringing it out," to which the respondent rejoined "That is good enough for me." He went on to ask how many shares he could have, and to say that he would take almost any number. He explained in his evidence-in-chief that his reason for being willing to do this was that the position which the appellants occupied in the rubber trade was of such high standing that "any company which they should see fit to bring out was a sufficient warranty" to him "that it was all right in every respect." Afterwards, as the result of the conversation, a large number of shares were allotted to the respondent.

About this time the rubber boom of 1910 was at its height and the shares of the Filisola Company were, and for a short time remained, at a premium. Later on it was discovered that there was a large deficiency in the rubber trees which were said in the prospectus to exist on the Filisola estate and the shares fell in value. The respondent brought an action against the appellants for fraudulent misrepresentation, and alternatively for damages for breach of warranty that the company was a rubber company whose main object was to produce rubber.

The action was tried at Liverpool Assizes before Lush, J., and a special jury. The jury found that there was no fraudulent misrepresentation by the appellants or Johnston, but that the company could not properly be described as a rubber company, and that the appellants or Johnston or both had warranted that the company was a rubber company.

The only evidence of warranty before the jury was the conversation which I have

quoted above. Lush, J., gave judgment for the respondent for £406, 5s., being the agreed amount of damages. The appellants appealed to the Court of Appeal, consisting of the Lord Chief-Justice and Vaughan Williams and Farwell, L.JJ., on the ground that both findings ought to be set aside on the ground of want of evidence to go to the jury or as being against the weight of evidence, and that the appellants were consequently entitled to judgment. The Court of Appeal dismissed the appeal on the ground that the evidence entitled the jury to find as it did.

As the case so far as based on fraudulent misrepresentation has been decided in favour of the appellants, who acted honestly, it is not necessary to consider whether the company was improperly described as a rubber company unless the finding of the jury that there was a warranty can stand, for the warranty has become the sole ground on which the respondent can succeed. As I have already stated, the whole of the evidence of the conversation out of which the warranty alleged is said to have arisen is contained in the passages which I have cited from the respondent's evidence in chief, and this conversation is not in dispute.

It is true that when a jury has found facts a Court of Appeal is not free to review unfetteredly the reasoning by which the jury has arrived at its conclusion. When evidence has been properly submitted to the jury that body is entrusted with a duty which in large measure limits the province of the judge. If there was evidence on which the jury could properly find, its finding cannot be set aside merely because if the Court had been dealing with that evidence the Court would have found otherwise. So far I agree with the Court of Appeal in the present case. But the question always remains whether the evidence was, so far as the relevant issue is concerned, of a character so insufficient as to render it wrong in law for the Judge to have submitted it to the jury as material on which to base a finding on that issue.

As neither the circumstances of the conversation nor its words were in dispute, I think that the question of warranty or representation was one purely of law, and that it ought not to have been submitted to the jury.

As soon as fraudulent representation was negatived, it seems to me that as to this there was no question of fact. The words of Mr Johnston in the conversation proved by the respondent were words which appear to me to have been words not of contract but of representation of fact. No doubt this representation formed part of the inducement to enter into the contract to take the shares which was made immediately afterwards and was embodied in two letters dated the next day, the 15th April. But neither in these letters nor in the conversation itself are there words either expressing or in my opinion implying a special contract of warranty collateral to the main contract, which was one to procure allotment.

It is contrary to the general policy of the law of England to presume the making of such a collateral contract in the absence of language expressing or implying it, and I think that the learned Judge who tried the case ought to have informed the jury that on the issue of warranty there was no case to go to it, and that on this issue he and the Court of Appeal ought to have given judgment for the appellants. The strongest presentation of the case for the respondent seems to me that of Farwell, L.J., to the effect that there was a contract that the shares should be shares in a rubber company, and that the jury has found that the company was not a rubber company. But even on the basis of this finding, I do not think that the account given by the learned Lord Justice of the transaction describes it properly. The respondent did not ask the technical question whether the company of which he had heard vaguely was correctly described as a rubber company. That he was not thinking of this point seems to me clear from the fact that when he received the letters informing him that he was to have shares in the Filisola Rubber and Produce Estates (a description which was in accordance with that in the prospectus) he made no further inquiry. What he from the first wanted to know was whether Johnston thought the company was "all right," a question to which Johnston simply replied that the appellants were bringing it out, an answer which, to my mind, simply conveyed that a firm of their standing would not be bringing it out if they did not believe it to be all right. From the evidence of the respondent, which immediately follows the passage which I have quoted, it seems to me plain that this was accepted by the respondent as the answer which he wanted.

Words which on the face of them appear to be simply representations of fact may, if the context so requires, import a contract of warranty. The judgment of Lord Blackburn in *Brownlie* v. *Campbell* (1880, 5 A.C. 925, 7 R. (H.L.) 66, 17 S.L.R. 805) is instructive on this point. But I cannot find in the words under construction or in the circumstances any context which required the Court to put upon them any interpretation beyond the natural one which I have stated. This interpretation I think they naturally bore, and the parties themselves appear to have put it upon them.

I wish to add that I entirely agree with the observations made by Lord Moulton in the judgment which he is about to deliver, and which I have had the advantage of reading, on the authorities as to the test of whether words can be interpreted as giving rise to a warranty. Considerable confusion has arisen from failure to keep in view the simple principle to which he refers as enunciated by Holt, C.J., that an affirmation can only be a warranty provided that it appear on the evidence to have been so intended. The words of Holt, C.J., are cited with approval by Buller, J., in *Pasley* v. *Freeman* (1789, 3 T.R. 51). Not the least interesting of the older

authorities which laid down the general principle, even in days when the action of assumpsit was by no means clearly marked off from that of case,* is *Chandelor* v. *Lopus* (1603, Cro. Jac. 4). It was there decided that the plaintiff, who was suing the defendant for misrepresentation as to the character of a precious stone sold to him, must declare on a contract, or if he declared in tort for a misrepresentation must aver a scienter. Had the moral of this decision with its firm distinction between two different causes of action been steadily kept in view there would have been less disposition than the reports disclose to slip, by the easy process of leaving a supposed question of fact to a jury, from one legal conception into another which is totally distinct.

Neither the respondent nor Johnston appears to have had any question in his mind other than whether some company dealing with rubber, as to the identity of which there was no question raised, was being brought out by the appellants. For the respondent says that the position of the appellants in the rubber trade was such that "any company which they should see fit to bring out was a sufficient warranty" to him "that it was all right in every respect." His interest was in the shares for which he was minded to apply, and all that he was really asking for was the assurance which I have mentioned. Had Johnston thought that he was being asked to do anything else than answer the question whether the appellants were bringing out the company he might well have refused to pledge himself, and I do not believe that either he or the respondent, regard being had to the character of the conversation, was thinking of any other question. But if not, there was in point of law no evidence to go to the jury on the issue as to warranty, and this issue ought not to have been submitted to it. In reality the only contract entered into seems to have been the contract reduced into writing by the two letters of the 15th April for procuring an allotment of shares in what was described as the Filisola "Rubber and Produce Estates" Company.

It is with great reluctance that, in a case where the Court of Appeal has agreed with the verdict of a jury and the judgment of the judge who tried the case, I feel myself bound to come to a different conclusion. But I cannot, on the facts of this case, take any other view than that the appeal ought to be allowed. Judgment should, in my opinion, be entered in the action for the appellants, and the respondents ought to pay the costs here and in the Courts below. I move your Lordships accordingly.

LORD ATKINSON—I concur.

The facts of the case have been so fully stated by the Lord Chancellor that I need not recapitulate them further than is necessary to make my judgment intelligible.

The plaintiff, the respondent in this appeal, having applied for 6000 shares in a certain limited liability company about to be brought out, called the Filisola Rubber and Produce Estates Limited, the defendants (the appellants) procured the same to be allotted to him on the 14th April 1910. The plaintiff accepted these shares and paid in respect of them the sum of £987, 10s. The fact of this allotment having been made was communicated to him by two letters, both dated the 15th April 1910, signed in the names of the defendants and addressed to him. One of these letters dealt with 5000 of these shares and the other with 1000 of them. The letters only differ from each other in the number of the shares with which they respectively deal and the amount of the premium to be paid, which was 1s. 3d. in the former instance and 1s. 6d. in the latter. It will only be necessary therefore to refer to the first. It ran as follows:—"14 Chapel Street, Liverpool, 15th April 1910.—E. Buckleton, Esq., 10 Croxteth Road, Liverpool.—Dear Sir—We beg to confirm the arrangement we have made with you to secure the allotment to you of 5000 shares in the Filisola Rubber and Produce Estates in consideration of a premium of 1s. 3d. per share to be paid to us.—Yours truly, HEILBUT, SYMONS, & Co."

By these letters the plaintiff was fully informed what was the full name of the company, and so far as that name would indicate what was its intended business. It was to be a "produce" company as well as a "rubber" company. He made no objection whatever on this account, nor any complaint that he had been misled as to the nature of its intended business.

The defendants, who are persons of high position in rubber finance and trade, had underwritten shares of the company for a large amount. On the 11th April 1910 they wrote to their agent, one Johnston, a letter asking him, for the first time, to induce his friends to apply for some shares in this company. So far as its contents are material they were as follows:—"The Filisola Rubber and Produce Estates will come out Monday next. It has all been underwritten, but we shall be pleased if you can induce some of your friends to apply for some shares. The capital consists of £120,000 (2s. shares), of which 920,000 shares will be issued at par. Of these, so far, about 500,000 have been applied for. The prospectus shows profits for 1910-11 at 30 per cent., going up to 49 per cent. in 1914-15.—Yours faithfully, HEILBUT, SYMONS, & Co."

No information is afforded by this letter as to the character of the company, the nature of the assets which it was proposed that it should acquire, or the business which it would, when floated, carry on. Between this date and two o'clock in the afternoon of the 14th April there is, in my view, nothing in the evidence to show that Johnston had acquired any information upon any of these subjects in addition

* The action of assumpsit was on contract to recover damages for the breach of an agreement whereby the defendant incurred an obligation. The action of trespass on the case was one of tort, providing a remedy for an injury arising indirectly out of the defendant's act.—*Ed.*

to what he possessed on the former of these days. It is, I think, vital to consider and bear in mind what was the precise nature and amount of that information. In his evidence in chief he stated that before the 11th April 1910, at a time when he did not know that he would ever have anything to do with this company, one Mr Reimers, in the presence of one Mr Vogel, both interested in the company, handed to him a draft prospectus of it. He only glanced, he said, at the draft, and from that glance, coupled with what passed between them on that occasion, merely learned that the prospectus was the prospectus of a company about to be brought out, that its title was to be Filisola, that it was to be (that is, I presume, was to operate) in Mexico, and that there were on the estates the number of rubber trees mentioned in it, but nothing more. He did not see a prospectus of the company till long after the 14th April, if at all.

That was the state of ignorance in which Johnston was when the conversation through a telephone, upon the effect of which this appeal turns, took place between him and the plaintiff. He stated, however, that he thought that the main business of the company was the production of rubber, and that had he then known what the real nature of its business turned out to be he would have thought it misleading to have described it as a rubber company. He stated positively, however, that he himself never described it as a "rubber company" or the "Filisola Rubber Company," that he might have spoken of it as the "Filisola," but otherwise always as the "Filisola Rubber and Produce Estates." I cannot find that this evidence is to any material extent contradicted or qualified. There is not a suggestion from beginning to end of the case that his principals ever expressly or impliedly authorised or directed him to represent the company as a rubber company, or as a company whose business was solely or mainly in rubber. Happening to be in Manchester on business on the 12th April Johnston induced two business acquaintances or friends of his engaged in the rubber trade to apply for 30,000 of these shares. On the 13th April some persons in Liverpool, in addition apparently, applied for many thousands of them. That as I take it appears from a letter signed by him. He was, it would seem, rapidly disposing of these shares. They were being applied for briskly in large numbers. On the 14th April he received a letter from his principals offering him 75,000 more of their shares at 1s. 3d. premium, which offer he accepted. Now that was the condition of things when the plaintiff, to whom he, Johnston, had never applied to take any of these shares, or suggested that he should take any of them, opened negotiations by telephone with him.

The plaintiff's account of what passed was accepted as correct. It has been already fully stated, and it is unnecessary to repeat it in detail. It is plain, however, from it that it was the plaintiff who, in the first instance, designated or described the company as a "rubber company." The description was his, not Johnston's, but Johnston unfortunately did not correct that misdescription, or rather that imperfect or incomplete description, If in answer to the plaintiff's question "I understand that you are bringing out a rubber company?" he had replied "Not a rubber company, but a rubber and produce company," this claim for breach of warranty could, I think, hardly have been maintained. It is this omission to correct the plaintiff's incomplete description of the company, coupled with what followed on the 14th April, which, it is contended, supplied evidence on which a jury could reasonably find as an inference of fact, not a mere conjecture or surmise, that this agent then intended on behalf of his principals to enter into and did enter into a contract binding upon them, warranting this company, of whose real business he knew almost nothing, to be a company intending to engage solely or mainly in the future in the production of rubber—a contract collateral to the written contract to take shares, but entering into and forming part of the entire bargain between the parties.

Even assuming that the omission by Johnston to correct the plaintiff's misdescription of this company should be treated as an adoption of that misdescription, and be taken as an affirmation by Johnston that the company was a "rubber company," which is putting it more strongly in favour of the plaintiff, more strongly perhaps than is legitimate, the question of Johnston's intention in making that affirmation remains. That is elementary law. It was laid down so long ago as 1789 by Buller, J., in *Pasley* v. *Freeman*. "It was," he said, "rightly held by Holt, C.J., in *Crosse* v. *Gardner* (1689, Carth. 90, 3 Mod. 261), and *Medina* v. *Stoughton* (1699, 1 Salk. 210), and has been uniformly adopted ever since, that an affirmation at the time of sale is a warranty, provided it appear on evidence to be so intended." The existence or non-existence of such an intention in the mind of the party making an affirmation, that his affirmation should be taken as a warranty of the truth of the fact affirmed, is in an action of breach of warranty no doubt a question for the decision of the jury which tries the action, and all the evidence in the case touching the knowledge, conduct, words, and actions of that party, from first to last, may be considered by them in arriving at a conclusion on this question. In the present case it would appear to me that every relevant piece of evidence given, every fact proved, tends to disprove the existence of such an intention in Johnston's mind when this conversation took place, rather than to establish it.

The jury found in his favour on the charge of fraud. He must now be taken not to have stated what he knew to be untrue in fact, and not to have recklessly stated to be true that as to which he did not know whether it was either true or false. Either

of these things would have amounted to fraud, and the jury have found that there was no fraud. But reckless as it might have been in him, having regard to his comparative ignorance of all the facts, to have deliberately represented this company to be a rubber company within the meaning which these words have been held by the jury to bear in the language of the commercial world, it would have been still more reckless in him, without any authority or permission, to have contracted on behalf of his principals that this company was in fact of that character; and, moreover, it would apparently have been as unnecessary as reckless. Nothing was proved to show that Johnston was at all anxious to induce the plaintiff to become a subscriber for these shares. Again, the plaintiff did not ask for any warranty. Indeed, he was not satisfied with the reply to his first question, which, as I understand, it is now contended constituted the warranty; for he asked had Johnston any prospectus. And being answered in the negative, he went on to inquire if it (the company) "was all right." Johnston, the ignorant and reckless agent, did not answer "Yes," as one would certainly have expected him to have done if he had already given, or intended to give, the warranty relied upon; on the contrary he gave the guarded answer, "We are bringing it out." The plaintiff then replied, "That is good enough for me."

Surely the "that" which was good enough for him was obviously the fact that a firm of the high position of the defendants in the commercial world was bringing the company out. It was this, not the alleged warranty to which he never referred, which induced him to speculate in these shares for a rise during the frenzied boom then taking place in the rubber market. But it would not be enough that Johnston should have offered to give a warranty as a term of the bargain to take these shares. The plaintiff should accept that offer and act upon it so as to make complete this collateral contract. His own language on this occasion appears to me to be repugnant to the idea that he accepted the alleged offer or treated it as part of the bargain. For these reasons I think that there was no evidence before the jury upon which they could reasonably find either that Johnston intended to give a warranty of these shares or that the plaintiff intended to accept such a warranty or thought that he had got it.

In what I have said I have assumed that this company was not, in fact, a rubber company, as these words, though not technical terms, are understood in the commercial world, because the jury have so found; and I think that there was sufficient evidence before them to sustain that finding. I confess that I should have had great difficulty myself in coming to such a conclusion, because it would appear to me that, according to the ordinary and natural meaning of language, a company formed to acquire land, to plant rubber trees extensively upon it, and to endeavour to produce large quantities of rubber in the future, does not cease to be a rubber company properly so called because in the interval while those trees are maturing it raises upon its land bananas or any other product. That, however, is, for the reason which I have mentioned, immaterial. I am, therefore, of opinion that this appeal should be allowed; that the verdict and judgment entered for the plaintiff should be set aside; and judgment entered for the defendants with costs both here and below, including the costs of the trial.

LORD MOULTON — In this action the plaintiff sought relief in damages against the defendants in respect of two contracts whereby the defendants undertook to procure for the plaintiff, and the plaintiff undertook to accept, the allotment of 5000 and 1000 shares in a company called the Filisola Rubber and Produce Estates, Limited. The claim for such relief was mainly based on the allegation that the plaintiff had been induced to enter into these contracts by the false and fraudulent representation of the defendants that the said company was a rubber company. This was the sole ground for relief which was put forward by the plaintiff in the proceedings before action and in the indorsement on the writ; but in the statement of claim an alternative claim for damages was included, based on the breach of an alleged warranty given by the defendants that the company was a rubber company.

At the trial the substantial case which it was sought to make on behalf of the plaintiff had reference solely to the alleged false and fraudulent representation. Evidence was given by the plaintiff, and not challenged by the defendants, as to a conversation which took place over the telephone between the plaintiff and Mr Johnston, a representative of the defendants, in which undoubtedly Mr Johnston stated that the company was a rubber company. The making of the alleged representation was therefore not in issue, and the whole of the evidence on both sides was directed to the issue whether such representation was false, and whether, if so, it was fraudulently made. No evidence was given upon the issue of a warranty having been given by the defendants that the company was a rubber company other than so far as the proof of the conversation above referred to may have amounted to such evidence.

In answer to questions put to them by the Judge, the jury found (1) that the company could not properly be described as a rubber company; (2) that the defendants did not fraudulently represent, but that (3) they did warrant, that it was a rubber company. Against the second of these findings there is no appeal, so that the only questions before us are as to whether the first and third of these findings can stand.

The alleged warranty rested entirely upon the following evidence. The plaintiff

got a friend to ring up on the telephone Mr Johnston (a representative of the defendants, for whose acts they accept the full responsibility) to tell him that the plaintiff wished to speak to him. The plaintiff's evidence continues thus—"I went to the telephone and I said, 'Is that you, Johnston?' He said 'Yes.' I said, 'I understand that you are bringing out a rubber company,' and he said, 'We are.'"

The material part of the evidence ends here. The further conversation related to the soundness of the company, but no claim for relief is based on what then passed either by way of fraudulent representation or warranty.

The plaintiff then asked if he could have some shares. Mr Johnston said he thought he could let him have 5000 at a premium of 1s. 3d., which the plaintiff expressed himself ready to take, but no bargain was then concluded. On the next day, however, Mr Johnston accepted in writing the offer of the plaintiff as to taking 5000 shares. Later on the plaintiff applied to Mr Johnston for a further 1000 shares, and obtained them at a somewhat higher premium. In each case the terms of the contract were reduced to writing by Mr Johnston, acting for the defendants, and sent to the plaintiff. The contracts were not contracts of sale of the shares of the company (which had not then been issued), but contracts whereby the defendants (who were underwriters of the shares in the forthcoming issue) undertook to procure for the plaintiff the allotment of the shares on his applying for them. There is, of course, no conflict as to the actual terms of these contracts which appear from the letters. They were acted upon by the plaintiff, who duly applied for and received the allotments of 5000 and 1000 shares of the company, such allotments having been procured by the defendants by the exercise of their rights as underwriters. The plaintiff parted with some of his shares but retained the remainder, and it is in respect of these latter that the damages are claimed in this action.

There is no controversy between the parties as to certain points of fact and of law. It is not contested that the only company referred to was the Filisola Rubber and Produce Estates Limited, or that the reply of Mr Johnston to the plaintiff's question over the telephone was a representation by the defendants that the company was a "rubber company," whatever may be the meaning of that phrase; nor is there any controversy as to the legal nature of that which the plaintiff must establish. He must show a warranty—*i.e.*, a contract collateral to the main contract to take the shares, whereby the defendants in consideration of the plaintiff taking the shares promised that the company itself was a rubber company. The sole question in issue is whether there was any evidence that such a contract was made between the parties.

It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds," is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by £100, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them, and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter.

There is in the present case an entire absence of any evidence to support the existence of such a collateral contract. The statement of Mr Johnston in answer to plaintiff's question was beyond controversy a mere statement of fact, for it was in reply to a question for information and nothing more. No doubt it was a representation as to fact, and indeed it was the actual representation upon which the main case of the plaintiff rested. It was this representation which he alleged to have been false and fraudulent and to have induced him to enter into the contracts and take the shares. There is no suggestion throughout the whole of his evidence that he regarded it as anything but a representation. Neither the plaintiff nor the defendants were asked any question or gave any evidence tending to show the existence of any *animus contrahendi* other than as regards the main contracts. The whole case for the existence of a collateral contract therefore rests on the mere fact that the statement was made as to the character of the company, and if this is to be treated as evidence sufficient to establish the existence of a collateral contract of the kind alleged the same result must follow with regard to any other statement relating to the subject-matter of a contract made by a contracting party prior to its execution. This would negative entirely the firmly established rule that an innocent representation gives no right to damages. It would amount to saying that the making of any representation prior to a contract relating to its subject-matter is sufficient to establish the existence of a collateral contract that the statement is true,

and therefore to give a right to damages if such should not be the case.

In the history of the English law we find many attempts to make persons responsible in damages by reason of innocent misrepresentations, and at times it has seemed as though the attempts would succeed. On the Chancery side of the Court the decisions favouring this view usually took the form of extending the scope of the action for deceit. There was a tendency to recognise the existence of what was sometimes called "legal fraud," *i.e.*, that the making of an incorrect statement of fact without reasonable grounds, or of one which was inconsistent with information which the person had received or had the means of obtaining, entailed the same legal consequences as making it fraudulently. Such a doctrine would make a man liable for forgetfulness or mistake, or even for honestly interpreting the facts known to him or drawing conclusions from them in a way which the Court did not think to be legally warranted. The high-water mark of these decisions is to be found in the judgment pronounced by the Court of Appeal in the case of *Peek* v. *Derry* (1887, 37 Ch. Div. 541), when they laid down that where a misstatement of fact by the defendant materially tended to induce the plaintiff to do an act by which he has incurred damage, and the Court is of opinion that he had no reasonable grounds for believing that it was true, the defendant may be made liable in an action of deceit. But on appeal to your Lordships' House this decision was unanimously reversed, and it was definitely laid down that in order to establish a cause of action sounding in damages for misrepresentation the statement must be fraudulent or, what is equivalent thereto, must be made recklessly, not caring whether it be true or not (1889, 14 App. Cas. 337). The opinions pronounced in your Lordships' House in that case show that both in substance and in form the decision was, and was intended to be, a reaffirmation of the old common law doctrine that actual fraud was essential to an action for deceit, and it finally settled the law that an innocent misrepresentation gives no right of action sounding in damages.

On the common law side of the Court the attempts to make a person liable for an innocent misrepresentation have usually taken the form of attempts to extend the doctrine of warranty beyond its just limits, and to find that a warranty existed in cases where there was nothing more than an innocent misrepresentation. The present case is, in my opinion, an instance of this. But in respect of the question of the existence of a warranty the courts have had the advantage of an admirable enunciation of the true principle of law which was made in very early days by Holt, C.J., with respect to the contract of sale. He says: "An affirmation at the time of the sale is a warranty provided it appear on evidence to be so intended." So far as decisions are concerned, this has, on the whole, been consistently followed in the courts of common law. But from time to time there have been dicta inconsistent with it which have, unfortunately, found their way into text-books and have given rise to confusion and uncertainty in this branch of the law. For example, one often sees quoted the dictum of Bayley, J., in *Cave* v. *Coleman* (1828, 3 Man. & Ry. 2), where, in respect of a representation made verbally during the sale of a horse, he says that "being made in the course of dealing, and before the bargain was complete, it amounted to a warranty"—a proposition which is far too sweeping and cannot be supported. A still more serious deviation from the correct principle is to be found in a passage in the judgment of the Court of Appeal in *De Lassalle* v. *Guildford* ([1901] 2 K.B. 215), which was cited to us in the argument in the present case. In discussing the question whether a representation amounts to a warranty or not, the judgment says — "In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment."

With all deference to the authority of the Court which decided that case, the proposition which it thus formulates cannot be supported. It is clear that the Court did not intend to depart from the law laid down by Holt, C.J., and cited above, for in the same judgment that dictum is referred to and accepted as a correct statement of the law. It is, therefore, evident that the use of the phrase "decisive test" cannot be defended. Otherwise it would be the duty of a judge to direct a jury that if a vendor states a fact of which the buyer is ignorant, they must, as a matter of law, find the existence of a warranty whether or not the totality of the evidence shows that the parties intended the affirmation to form part of the contract, and this would be inconsistent with the law as laid down by Holt, C.J. It may well be that the features thus referred to in the judgment of the Court of Appeal may be criteria of value in guiding a jury in coming to a decision whether or not a warranty was intended, but they cannot be said to furnish decisive tests, because it cannot be said as a matter of law that the presence or absence of those features is conclusive of the intention of the parties. The intention of the parties can only be deduced from the totality of the evidence, and no secondary principles of such a kind can be universally true.

It is of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made. In the present case the statement was made in answer to an inquiry for information. There is nothing which can by any possibility be taken as evidence of

an intention on the part of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement. It is a representation as to a specific thing and nothing more. The Judge, therefore, ought not to have left the question of warranty to the jury, and if as a matter of prudence he did so in order to obtain their opinion in case of appeal he ought then to have entered judgment for the defendants notwithstanding the verdict.

It will, of course, be evident that I have only been dealing with warranty or representation relating to a specific thing. This is wholly distinct from the question which arises when goods are sold by description, and their answering to that description becomes a condition of the contract. It is, in my opinion, a failure to recognise that in the present case the parties were referring (as is evident by the written contracts) to one specific thing only, which led Farwell, L.J., to come to a different conclusion from that to which your Lordships ought, in my opinion, to come in this appeal.

Judgment appealed from reversed. Judgment entered for the appellants. Respondent to pay to the appellants their costs in this House and in the Courts below.

Counsel for the Appellants—Buckmaster, K.C. — Greer, K.C. — A. H. Chaytor. Agents — Coward, Hawksley, Sons, & Chance, Solicitors.

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HOUSE OF LORDS.

Monday, November 18, 1912.

(Before the Lord Chancellor (Viscount Haldane), Lords Macnaghten, Atkinson, Shaw, and Moulton.)

VACHER & SONS, LTD. *v.* LONDON SOCIETY OF COMPOSITORS.

(On Appeal from the Court of Appeal in England.)

Trade Union—Trade Disputes Act 1906 (6 *Edw. VII, cap.* 47), *sec.* 4 (1)—*Action of Tort—Competency.*

The Trades Disputes Act 1906, enacts —"Section 4 (1)—An action against a trade union . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court." *Held* that the immunity conferred thereby is not confined to acts done in contemplation or furtherance of a trade dispute, but is absolute.

This was an appeal from an order of the Court of Appeal (Vaughan-Williams and Kennedy, L.J., Farwell, L.J., *dissenting*) *reversing* an order of Channell, J., in chambers.

The appellants, who were a limited company carrying on business as printers in London, brought an action of damages for conspiracy and libel against the respondents who were a trade union, to which the Trade Disputes Act 1906 (6 Edw. VII, c. 47) applied, on the ground that the respondents had conspired to represent, and had untruly represented, the appellants as a firm which dealt unfairly by their workmen. The defendants took out a summons to have their name struck out of the action on the ground that no reasonable cause of action was disclosed against them. Master Wilberforce made an order allowing this application, which order was reversed by Channell, J., on the ground that the point was not one for summary decision but should be decided at the trial.

Their Lordships' considered judgment was delivered as follows:—

Lord Chancellor (Haldane) — This appeal raises the question of the true construction to be put on section 4 of the Trade Disputes Act 1906. That Act was passed five years after the decision of this House in the case of *Taff Vale Railway Company* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426. It had been there decided that a trade union, registered under the Trade Union Acts, could be sued in its registered name, and also that a trade union, whether registered or not, could, since the Judicature Acts, be sued in a common law action if the persons selected as defendants were persons who from their position might fairly be taken to represent the union. It was pointed out by Lord Lindley that if a judgment so obtained was for the payment of damages, it could be enforced only against the property of the union, and that to reach such property it might be necessary to make the trustees parties to any proceedings.

It is common knowledge that this decision gave rise to keen controversy as to whether the law required amendment. On the one hand, it was contended that the principle laid down ought to remain undisturbed, because it simply imposed on the trade unions the legal liability for their actions which ought to accompany the immense powers which the Trade Union Acts had set them free to exercise. On the other side, it was maintained that to impose such liability was to subject their funds, which were held for benevolent purposes as well as for those of industrial battles, to undue risk. It was said that by reason of the nature of their organisation and their responsibilitity in law for the action of a multitude of individuals who would be held in law to be their agents, but over whom it was not possible for them to exercise adequate control, they were by the decision of this House exposed to perils which must cripple their usefulness.

We have heard in the course of this case suggestions as to the merits of the conflicting points of view and as to the reasonableness, in interpreting the language of Parliament in the Trade Disputes Act of 1906, of presuming that the