rescind it as soon as he learns the facts, or else he forfeits all claim to relief."

In *In re Scottish Petroleum Co.* (1) three propositions were laid down in the leading judgment of the Court of Appeal, with reference to cases of cancellation of share contracts. The second is relevant. It refers to what it terms "the well recognized rule in equity that a person who has been induced to enter into a contract by the fraudulent conduct of those with whom he has contracted, is entitled to rescind such contract provided he does so within a reasonable time after his discovery of the fraud. In such cases the contract is voidable, not void." The third rule restricts that power to the extent of requiring it to be exercised before winding up, when interests of third parties intervene. In such case the Court withholds its assistance. If a contract be such that at common law it is rescindable by the act of the party, that is, by mere repudiation, the doctrine does not apply, because repudiation itself works avoidance, but in the case of a contract to take shares that is not sufficient. This is pointed out in the same case by *Fry* L.J. (2), in an important passage:— "In the case of ordinary contracts if they are voidable an express repudiation avoids them. . . . This is not the case of an ordinary contract, but of a contract to take shares, which stands on a different footing. As regards such contracts the legislature has interposed, and has provided that they shall be made known in a particular way to shareholders and creditors; notice of them is given to the world. Now the general principle is that no contract can be rescinded so as to affect rights acquired *bonâ fide* by third parties under it. It is true that the creditors and the other shareholders have not acquired direct interests under the contract, but they have acquired an indirect interest. The shareholders have got a co-contributory, the creditors have got another person liable to contribute to the assets of the concern." This is in line with the observations of Lord *Romilly* in *Kisch's Case* (3), referred to by Mr. *Mitchell*.

In *Scholey* v. *Central Railway Co. of Venezuela* (4) Lord *Cairns* L.C. said:—"The Court would be most careful to see, in

(1) 23 Ch. D., 413, at p. 429.
(2) 23 Ch. D., 413, at pp. 438, 439.
(3) L.R. 2 H.L., 99.
(4) L.R. 9 Eq., 266, n.

H. C. OF A. 1914.

CIVIL SERVICE CO-OPERATIVE SOCIETY v. BLYTH.

Isaacs J.

a company going on and trading, in which the rights of the shareholders and others varied from day to day, that a person coming to complain of misrepresentation of this kind, and coming to avoid a voidable contract, came within the shortest limit of time which was fairly possible in such a case."

In *In re Snyder Dynamite Projectile Co.—Skelton's Case* (1) *Stirling* J. applied these principles and thought a delay even from February 19 to March 21 too long in the circumstances.

Mr. *Mitchell* sought to escape from the analogy by urging that this Society, a provident society, is in such a different position that the reason does not apply. But there is sufficient resemblance to make the reason equally forcible. The Society is a corporation; creditors have no claims against the individuals, but against the corporation only; the liability of members is limited; there is a register of members, that is compulsory; it is *primâ facie* evidence; and what is very material as showing the legislative protection of creditors in relation to members, sec. 23 of the *Provident Societies Act* 1890 preserves to a certain extent the liabilities of past members in winding up.

But even if the difficulty as to creditors were out of the way, there is the mutual relation of members themselves; and the principles enunciated in the *Scottish Petroleum Co.'s Case* (2) and other cases show that equity would consider that relation a material circumstance in connection with the release of a shareholder.

It is unnecessary for me to examine the facts relative to the delay. That has been done by the learned Chief Justice. I will only say that in the result they show beyond controversy that the material facts were all known to the respondents years before action, and yet they continued their membership. Knowledge or belief of rights is, no doubt, an essential part of the defence of acquiescence in the sense necessary for such a defence; but it is not always necessary to prove that by direct evidence. The circumstances may be such that it will be presumed (see *per Knight Bruce* L.J. in *Stafford* v. *Stafford* (3)); and in so simple a case as a discovered misrepresentation, or, as the

(1) 68 L.T., 210.

(2) 23 Ch. D., 413.

(3) 1 DeG. & J., 193, at p. 202.

respondent Miss Tighe says, a "cheat," it is almost an irresistible inference that a person *sui juris*, sound in mind and body, and of ordinary intelligence, would understand enough to ask to be released altogether if he so desired. If, however, he were only dissatisfied with the exercise, as distinguished from the existence, of the power of suspension, and were willing to take the chance of its removal on the advent of more prosperous times bringing at the same time profits and interest, then it amounts to an election to stand by the contract and his fellow shareholders. This is what the respondents must be taken to have done and so I agree that the appeal should be allowed.

Appeal allowed. Judgment appealed from discharged. Judgment entered for the defendants.

Solicitors, for the appellants, *Snowball & Kaufmann.*

Solicitors, for the respondents, *McInerney, McInerney & Wingrove.*

B. L.

[HIGH COURT OF AUSTRALIA.]

BROWNFIELD . . . . . APPELLANT;
DEFENDANT,

AND

EARLE AND OTHERS . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Will—Gift to a class—Remoteness—Rule against Perpetuities.

By his will a testator gave the residue of his property to his trustees with a direction to invest during the life of his widow and upon her death or marriage, "hereinafter termed the time of distribution," to divide the proceeds into three equal parts. One part he directed to be divided into seven shares,

H. C. OF A. 1914.

BROWNFIELD v. EARLE.

and one of the shares to be divided "among S. B. widower of my late sister A. B. and his sons who shall attain the age of 25 years or the survivors of them the said S. B. and his sons the share of each son to be paid to him on his attaining that age." The testator died 16 months after making his will. S. B. had five children by his wife A. B., all of whom were sons, all of whom had attained the age of 25 years at the death of the testator, and all of whom survived the testator's widow. S. B. married again about 2 years and 9 months before the testator died, but had no children by his second wife, and he predeceased the testator's widow. The testator lived in Victoria and S. B. lived in England.

Held, by the Court, that on the death of the testator's widow the five sons of S. B., and they alone, were entitled to share in the gift.

By *Griffith* C.J. and *Barton* J., on the ground that the gift was to designated living persons, and not to a class.

By *Isaacs* and *Gavan Duffy* JJ., on the ground that the gift was to a class consisting of S. B. and the sons of his marriage with A. B.

Decision of the Supreme Court (*Hodges* J.) : *In re Deane* ; *Earle* v. *Deane*, (1913) V.L.R., 272 ; 34 A.L.T., 207, on this point reversed.

APPEAL from the Supreme Court of Victoria.

An originating summons was taken out by William John Earle, the surviving trustee of the estate of James Deane, deceased, to obtain the determination by the Supreme Court of a number of questions including the following:—"As to the share by the will directed to be divided amongst Samuel Brownfield (now deceased) and his sons who should attain twenty-five years or the survivors of them, who is now entitled thereto? And, particularly, is such direction void for remoteness and should the said share consequently be dealt with as under an intestacy of the testator or how otherwise?"

The testator made his will on 26th October 1898, and died on 27th February 1900. The material provisions of the will were as follow:—After giving certain immediate legacies to his wife he directed his trustees to convert the residue of his property within two years from his death, and after payment of certain further legacies to invest the residue of the moneys in their hands during the life of his widow, and upon her death or marriage, "hereinafter termed the time of distribution," to convert all investments into money, and after payment of the expenses of conversion to divide the residue after conversion into three equal parts.

One of such original parts was to be further divided into seven equal shares as to one of which the testator gave the following direction :—"I direct my said trustees to divide another of such seven shares among Samuel Brownfield widower of my late sister Ann Brownfield and his sons who shall attain the age of twenty-five years or the survivors of them the said Samuel Brownfield and his sons the share of each son to be paid to him on his attaining that age." The will further provided that "Should all the persons entitled to any of the shares into which the first original part shall have been divided die before the time of distribution I direct that the share or shares of the person or persons so dying shall be divided among my brother and sisters in equal shares the child or children of any deceased brother or sister taking the share to which his her or their deceased parent would have been entitled if alive." It appeared from the affidavits that Samuel Brownfield married the testator's sister Ann, that she died on 14th December 1895, and that he married a second wife, Elizabeth Reeves ; that Samuel Brownfield had by his first marriage five children only, all sons, and all of whom had attained the age of twenty-five years at the date of the testator's death, and that he had no children by his second marriage ; and that Samuel Brownfield died on 11th March 1912, and had always lived in England, whereas the testator lived in Australia. The testator's widow survived him and died on 6th August 1912.

The originating summons was heard by *Hodges* J., who held that the gift to Samuel Brownfield and his sons was void for remoteness and that the share was distributable as on an intestacy : *In re Deane ; Earle* v. *Deane* (1).

From this decision Frederick Charles Brownfield, who represented himself and all the other sons of Samuel Brownfield, deceased, appealed to the High Court.

Pigott (with him *A. H. Davis*), for the appellant.

Weigall K.C. (with him *à Beckett*), for the respondent Earle.

Schutt, for one of the beneficiaries.

(1) (1913) V.L.R., 272 ; 34 A.L.T., 207.

H. C. OF A. 1914.

BROWNFIELD v. EARLE.

March 17.

Starke (with him *Sproule*), for other beneficiaries.

Cur. adv. vult.

The following judgments were read:

GRIFFITH C.J. The testator, who died on 27th February 1900, by his will, dated 26th October 1898, after giving certain immediate legacies to his wife, directed his trustees to convert the residue of his property within two years from his death, and after payment of certain further legacies to invest the residue of the moneys in their hands during the life of his widow, and upon her death or marriage, "hereinafter termed the time of distribution," to convert all investments into money, and after payment of the expense of conversion to divide the residue after conversion into three equal parts. One of such original parts was to be further divided into seven equal shares, as to one of which, to which the second question submitted by the originating summons refers, he gave the direction following:—"I direct my said trustees to divide another of such seven shares among Samuel Brownfield widower of my late sister Ann Brownfield and his sons who shall attain the age of twenty-five years or the survivors of them the said Samuel Brownfield and his sons the share of each son to be paid to him on his attaining that age."

The other six of the seven shares were severally given for the benefit of brothers and sisters and a sister-in-law of the testator or their children, with alternative gifts which it is not necessary to mention.

The will contained the following provision:—"Should all the persons entitled to any of the shares into which the first original part shall have been divided die before the time of distribution I direct that the share or shares of the person or persons so dying shall be divided among my brother and sisters in equal shares the child or children of any deceased brother or sister taking the share to which his her or their deceased parent would have been entitled if alive."

The learned Judge thought that the gift failed as infringing the rule against perpetuities, on the ground that it was a gift to

a class which included any sons whom Samuel Brownfield might have by a second marriage.

In construing a will the Court must have regard to the facts as they were present to the mind of the testator.

In the present case the facts relevant to this gift are that in 1857 Samuel Brownfield married the testator's sister Ann, who died in December 1895, and that in June 1897, seventeen months before the date of the will, he married a second wife. By his first marriage he had five children only, all sons, and all of whom had attained the age of twenty-five years at the testator's death. He had no children by the second marriage. He lived in England, while the testator lived in Australia, and it does not appear whether the latter was aware of his brother-in-law's second marriage. Mr. *Pigott* contended that the words "his sons" ought to be construed as "my nephews his sons," that is, the nephews of whom he knew, and whose mother, his sister, was dead. In support of this contention he referred to the case of *Stopford* v. *Chaworth* (1), in which Lord *Langdale* M.R. held, upon the context of the will and the facts, that under limitations in a will to a married woman, her husband and children, the children of a second husband who married her after the testator's death, took nothing. Mr. *Pigott* also pointed out that if the words "his sons" include possible sons by a second marriage, the testator must have intended to postpone the distribution of the fund in question until all such sons should have attained the age of twenty-five or died under that age, and that in the meantime Brownfield and his five living sons were not to receive any payment under the will, and contended that, having regard to the age of Brownfield and his sons at the date of the will, such an intention is not only improbable but inconsistent with the positive direction that the division of the fund is to be made at the death of his widow, and that the share of each son is to be paid to him on his attaining twenty-five, whereas the suggested construction might postpone the payment to the attaining of various ages from fifty upwards. He further pointed out that the final gift over, which I have quoted, which is dependent upon the death of "all the persons entitled" to any of the shares into

(1) 8 Beav., 331.

H. C. OF A. 1914.

BROWNFIELD v. EARLE.

Griffith C.J.

which the first original part is divided before the time of distribution, *i.e.*, before the death of his widow, appears to assume that all the persons who could be entitled to share in the fund must be determined before that event, so that when it occurs the classes of persons to take are definitely closed.

Apart from these considerations I think that the *primâ facie* meaning of the words "to divide among Samuel Brownfield the widower of my sister Ann Brownfield and his sons who shall attain the age of twenty-five years or the survivors of them the said Samuel Brownfield and his sons," followed by words directing immediate payment on the death of the testator's widow, is to direct a division amongst designated living persons provided that they survive the widow and attain twenty-five. The other matters to which I have referred strengthen this view. On the whole, therefore, I am of opinion that the Brownfield gift is not a gift to a class, but a gift to designated living persons, and that in the events that have happened it is divisible amongst the five sons who survived the testator's widow.

The appeal should therefore be allowed.

BARTON J. As to the Brownfield bequest I agree in thinking that it is a gift to specified persons on a contingency as to survivorship and another as to age, and that, as Samuel Brownfield died while the testator's widow was alive, the seventh share of the first "original part" is to be divided among his five sons, the survivors at the time of distribution, who had attained the age of twenty-five. Samuel Brownfield is named as the "widower of" the testator's "sister Ann Brownfield;" if the possible sons of a second marriage were to be included, none such having been born at the testator's death, then the five sons by the first marriage, aged twenty-five years and upwards, would have had to wait another twenty-five years at least before they could receive anything, which does not accord with the testator's direction that each son was to be paid his share on attaining twenty-five. These circumstances, together with the language of the bequest itself, indicate in my view that the sons intended were the sons of the marriage with Ann Deane. There was a nexus of affinity between the testator and the sons of Samuel Brownfield by his