ticulars of it." We think that passage, which in almost its entirety was quoted and adopted in the second case cited, correctly states the law. It shows that any act or statement admitted as part of the *res gestæ* is not admitted on its own independent footing, but as inseparably bound up along with the main fact as part of the transaction itself that is inquired into. This gives considerable latitude, but fixes a standard of limitation. But to go beyond the limits stated would in our opinion be dangerous, because the rule must operate both ways, and it is not difficult to see the peril into which an accused person might be brought if any other guide were to prevail. Whatever rule is adopted, much is left in the first instance to the discretion of the Judge (See *Taylor on Evidence*, 10th ed., p. 412). That, however, is subject to review (*per Parke* B. in *Wright* v. *Tatham* (1)).

There is, however, a phase connected with the rejection of this evidence which deserves attention. If admitted, it might have affected the view of the jury as to Hickey's opinion or belief with regard to the person in whose hand the revolver went off. In the re-examination of George Gawkrodger, evidence was adduced as to what Hickey had said to him on this important subject at a time subsequent to that at which the rejected incident occurred. The evidence so obtained on re-examination—said Mr. *Garland* on this appeal—was adduced as part of a conversation otherwise obtained from the witness in cross-examination. But on the authority of cases like *Prince* v. *Samo* (2), that additional statement, wholly unconnected with the subject matter previously inquired about, was inadmissible. The statement was referred to in the learned Judge's charge to the jury.

If that statement had been admissible, the evidence tendered and rejected, relating to Hickey's expression of belief on the same occurrence, and qualifying what Gawkrodger said, could not well be objected to; and if the re-examination statement were, as we think it was, inadmissible on the only ground suggested to us, the rejection complained of was still more injurious.

(1) 7 A. & E., 313, at p. 356.

(2) 7 A. & E., 627, at pp. 632, 633.

H. C. OF A. 1913.

BROWN v. THE KING.

Gavan Duffy J. Rich J.

The judgment of GAVAN DUFFY and RICH JJ. was read by

RICH J. In this appeal two points were argued before the Supreme Court. The same points, together with two additional points, were argued before this Court. We are not prepared to decide that the latter points were properly before us, and we do not propose to express any opinion about them.

The first point on which we express an opinion involves the construction of secs. 405 and 407 of the *Crimes Act* 1900.

These sections provide two independent courses, either or both of which may be adopted by an accused person. If he makes a statement under sec. 405 and does not give evidence under sec. 407, it is clear that he cannot be examined by counsel for the Crown or by the Court. The mere fact that the accused has made a statement does not render him liable to examination. If, however, after making a statement he also gives evidence, he lays himself open to cross-examination on all the relevant issues in the case subject to the exception contained in sec. 407 (1) (*b*). This point must therefore be determined against the appellant.

The remaining point properly before us concerns the direction of *Sly* J. that the jury were not at liberty to find any other verdict than guilty or not guilty of the charge of murder contained in the indictment. We consider that this direction is incorrect, and that in consequence there ought to be a new trial.

In the circumstances we think it undesirable to discuss the evidence given at the trial or to express any opinions as to the inferences which might be drawn from any part of it.

Appeal allowed. Order appealed from discharged. Conviction set aside and new trial ordered. Rule 52 *of the Criminal Appeal Rules* 1912 (*N.S.W.*) *to operate.*

Solicitors, for the appellant, *W. Carter Smith.*

Solicitor, for the respondent, *J. V. Tillett,* Crown Solicitor for New South Wales.

B. L.

2 6 AUG. 1914
SOLICITOR
CONDOCOLIN

[HIGH COURT OF AUSTRALIA.]

THE CIVIL SERVICE CO-OPERATIVE SOCIETY OF VICTORIA LIMITED
DEFENDANTS, } APPELLANTS;

AND

BLYTH AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1914.

MELBOURNE, *March* 23, 24, 25, 26.

Griffith C.J., Barton and Isaacs JJ.

Contract—Rescission—Misrepresentation—Contract to take shares in provident society—Acquiescence—Delay in bringing action—Provident Societies Act 1890 (*Vict.*) (*No.* 1131), *secs.* 7, 23, 25.

By the rules of a society registered under the *Provident Societies Act* 1890 (Vict.) it was provided that the Society might raise capital by shares of £1 each which might be paid for by instalments; that any person applying for shares and making the prescribed payments should become a member; and that members might withdraw the amounts of their shares at any time on short notice, subject to a power of the directors to suspend withdrawals if the circumstances of the Society should render it necessary. The Society issued circulars inviting the public to take shares, and stating that shareholders could withdraw the whole or any portion of their share capital at any time as if they had their money in a savings bank, that though their money was invested in shares of the Society it was as accessible as money upon current account, and that depositors would receive 5 per cent. on their deposits. No mention was made of the power of the directors to suspend withdrawals. In an action by certain of the shareholders against the Society for rescission of their contracts to take shares on the ground that they were induced to take the shares by the statements in the circulars, which they alleged to be a misrepresentation,

Held, that the plaintiffs were disentitled to relief inasmuch as they had not brought their action until more than two years after they all knew the whole of the material facts relied on as entitling them to rescission.

H. C. OF A. 1914.

CIVIL SERVICE CO-OPERATIVE SOCIETY v. BLYTH.

Held, also, by *Griffith* C.J. and *Barton* J., on the evidence, that the plaintiffs had not acted on the representations alleged, but had acted on an assurance that the rule of the Society giving power to suspend withdrawals would not be put in force, which was not a representation of an existing fact; and, therefore, that the plaintiffs were not entitled to any relief.

Decision of the Supreme Court of Victoria (*à Beckett* J.) reversed.

APPEAL from the Supreme Court of Victoria.

By a writ issued on 14th September 1911, an action was instituted by John Blyth, Minnie Tighe and John Charles Kubale, against the Civil Service Co-operative Society of Victoria Limited, a society duly incorporated and registered under the *Provident Societies Act* 1890, and Thomas Michael Burke, the managing director of the Society, claiming as against the Society rescission of three several contracts between the Society and each of the plaintiffs respectively to take £1 shares in the Society, and repayment of certain moneys deposited by the plaintiffs respectively, with interest thereon at the rate of £5 per cent. per annum from the date of deposit until repayment, and alternatively against the defendant Burke, damages equal to the respective amounts of the respective deposits, with interest thereon at £5 per cent. per annum from the date of deposit until repayment.

The material facts are stated in the judgments hereunder.

The action was heard by *à Beckett* J., who made an order rescinding each of the several contracts to take shares, and ordering the Society to pay to each of the plaintiffs the sum deposited by him, with interest at £5 per cent. per annum, and ordering judgment to be entered for the defendant Burke as against each of the plaintiffs.

From this decision, except so far as judgment was ordered to be entered for the defendant Burke, the Society now appealed to the High Court.

Starke (with him *S. R. Lewis*), for the appellants. The learned Judge has found that there was no fraud; and in the case of an executed contract, such as this was, the relief of rescission cannot in the absence of fraud be given: *Seddon* v. *North Eastern Salt Co.* (1); *Angel* v. *Jay* (2); *Kettlewell* v. *Refuge Assurance Co.* (3);

(1) (1905) 1 Ch., 326. (2) (1911) 1 K.B., 666.
(3) (1908) 1 K.B., 545, at pp. 549-551.

Halsbury's Laws of England, vol. XX., p. 742, note (*o*); *Anson on Contracts*, 13th ed., p. 184.

[BARTON J. referred to *Mair* v. *Rio Grande Rubber Estates Ltd.* (1).]

On the evidence the respondents did not rely on the statements in the circulars, and it is found that the representations made by the manager went no further. They all knew of the rule giving the directors power to suspend withdrawals, and what they relied on was the representation that it would not be put into operation. That is not a misrepresentation which entitles them to rescission. No reasonable person could have believed that no circumstances could arise under which that rule would necessarily be put in force. The whole of the representations must be taken together: *Aaron's Reefs Ltd.* v. *Twiss* (2); and their general effect is not false. They cannot be taken to mean that there was no rule which enabled the Society to stop withdrawals in case of financial necessity. The delay in bringing the action has been so long that the respondents must be taken to have acquiesced, and they are now disentitled to relief: *Lindsay Petroleum Co.* v. *Hurd* (3).

Mitchell K.C. and *A. H. Davis*, for the respondents. The learned Judge has found that the statements in the circulars were fraudulent in the sense used by Lord *Herschell* in *Derry* v. *Peek* (4). If the Court comes to the conclusion that any mention of the rule giving power to suspend withdrawals was omitted from the circulars because the directors thought that by omitting it they would get people to take shares, and that if they inserted it people would not do so, that is fraud. But the existence of fraud is not necessary in order to entitle the respondents to rescission. There has been no such delay or acquiescence as to bar the respondents from claiming relief. Delay and acquiescence are a defence only when the rights of third parties have intervened: *Lindsay Petroleum Co.* v. *Hurd* (5); *Erlanger* v. *New Sombrero Phosphate Co.* (6); *Halsbury's Laws of England*, vol. XX., p. 751. Delay and acquiescence are not defences unless either some one

(1) (1913) A.C., 853, at p. 869.
(2) (1896) A.C., 273, at p. 291.
(3) L.R. 5 P.C., 221.
(4) 14 App. Cas., 337, at p. 370.
(5) L.R. 5 P.C., 221, at p. 239.
(6) 3 App. Cas., 1218, at p. 1279.

H. C. OF A. 1914.

CIVIL SERVICE CO-OPERATIVE SOCIETY v. BLYTH.

has been hurt by reason thereof, or unless the plaintiff has done something to show a positive affirmation of the contract: *Halsbury's Laws of England*, vol. XX., p. 752; *Central Railway Co. of Venezuela* v. *Kisch* (1); *Clough* v. *London and North Western Railway Co.* (2); *Aaron's Reefs Ltd.* v. *Twiss* (3); *Buckley on Companies*, 9th ed., p. 97.

[GRIFFITH C.J. referred to *Morrison* v. *Universal Marine Insurance Co.* (4).]

[ISAACS J. referred to *Downes* v. *Ship* (5); *In re Estates Investment Co.*; *Ashley's Case* (6); *Sharpley* v. *Louth and East Coast Railway Co.* (7); *Ogilvie* v. *Currie* (8).]

The reasons which necessitate special promptitude in bringing an action to rescind a contract to take shares in an ordinary company do not apply to the case of a society registered under the *Provident Societies Act* 1890. In order that delay and acquiescence may be a defence, the person who is said to be bound must have known that he had a right to get legal redress: *Encyclopaedia of Laws of England*, vol. I., p. 90; *Robinson* v. *Abbott* (9); *Lacey* v. *Hill* (10); *Marker* v. *Marker* (11). [Counsel also referred to *Moffat* v. *Sheppard* (12); *In re Metropolitan Coal Consumers' Association*; *Ex parte Edwards* (13); *Halsbury's Laws of England*, vol. XX., p. 749.]

Starke, in reply, referred to *Meyers* v. *Casey* (14); *Lindsay Petroleum Co.* v. *Hurd* (15); *Scholey* v. *Central Railway Co. of Venezuela* (16); *In re Christineville Rubber Estates Ltd.* (17); *Provident Societies Act* 1890, secs. 7, 23, 25.

GRIFFITH C.J. The appellants are a society registered under the *Provident Societies Act* 1890, the relevant provisions of which are substantially the same as those of the Companies Acts. The action is in substance an action for the rescission of contracts to

(1) L.R. 2 H.L., 99, at p. 125.
(2) L.R. 7 Ex., 26.
(3) (1896) A.C., 273, at p. 294.
(4) L.R. 8 Ex., 197.
(5) L.R. 3 H.L., 343.
(6) L.R. 9 Eq., 263.
(7) 2 Ch. D., 663, at p. 665.
(8) 37 L.J. Ch., 541.
(9) 20 V.L.R., 346, at pp. 369, 379; 14 A.L.T., 277; 16 A.L.T., 101.
(10) 4 Ch. D., 537, at p. 546.
(11) 9 Ha., 1, at p. 16.
(12) 9 C.L.R., 265, at p. 281.
(13) 64 L.T., 561.
(14) 17 C.L.R., 90.
(15) L.R. 5 P.C., 221, at p. 241.
(16) L.R. 9 Eq., 266 (n).
(17) 106 L.T., 260.

take shares, and for repayment of money paid under a misapprehension when taking the shares. The rules of the Society, which were made as prescribed by the Act, authorized it to raise capital by shares of £1 each which might be paid by instalments, and any person applying for shares and making the prescribed payments became a member. The rules also authorized members to withdraw the amount of their shares at any time on short notice, subject to a power of the board of directors to suspend withdrawals if the circumstances of the Society should render it necessary. Each member on the acceptance of his application and payment of the prescribed amount received a pass-book, to which a copy of the rules was annexed, and in which were entered all payments made on account of the shares and all withdrawals. I take the following statement of facts of the case from the judgment of the learned Judge :—

"In 1907 and 1908 the plaintiffs, who have no connection with one another but join in one complaint of that which they allege was an imposition practised by the same means upon all of them, paid various sums to the Society; they say by way of deposit, entitling them, as they were led to believe, to £5 per cent. on the amounts of their deposits with participation in the profits and the right of withdrawal at any time. The defendants say that the moneys so paid were paid for the purchase of £1 shares in the Society making them members of it and subject to its rules.

"So far as the form of the transactions was concerned the payments were undoubtedly made in the form of taking shares in the Society.

"I have to decide whether the representations made and inducements held out to the plaintiffs were of such a character as to entitle them to get their money back. The case may be concisely stated as follows:—By printed statements published by the Society persons invited to invest were told that they could get their money back at any time. They were not told that under one of the rules of the Society the board of directors had power to suspend withdrawals altogether if the circumstances of the Society rendered it necessary. The necessity afterwards arose, and the power of suspension was exercised. The plaintiffs

H. C. of A. 1914.

CIVIL SERVICE CO-OPERATIVE SOCIETY v. BLYTH.

Griffith C.J.

asked to withdraw their money and were informed that they could not. Hence this action."

To that I will only add that, on the evidence, all the plaintiffs knew that they were in form applying for shares in the Society, that is, to become members of the Society. The case made by the plaintiffs is sufficiently stated in the quotation I have read.

The representations relied on were contained in two circulars, which were apparently circulated broadcast, inviting the public to become members of the Society. One of the inducements offered was that those who took shares could get their money back whenever they liked—that the conditions were in fact very like those of a savings bank, except that depositors received 5 per cent. on their deposits—that is, that they could receive back the amount paid for their shares, or so much of it as they desired, on short notice. That was, in effect, the practical course of the operations of the Society carried on in the manner prescribed by the rules.

It is not the first case of the kind that has come under my notice, and I do not think it is at all an unusual form of carrying on such business. The circulars did not make any mention of the power of the board of directors to suspend withdrawals; and, if the case rested there, there would, I think, have been established a misrepresentation of a material fact which, in a proper case, would have entitled the plaintiffs to rescission of their contracts to take shares and to get their money back. But it would, of course, be essential to show that the plaintiffs did not know of the power of suspension. If they did, they did not rely on the fact of its omission from the circulars. But the plaintiffs did not at the trial rely entirely upon the representations contained in the circulars. They relied also on conversations which they had with the secretary of the Society at the times when they applied for the shares. I will refer to what each plaintiff said on that point, in order to determine whether they relied on the omission from the circulars or on something else.

The plaintiff Blyth said that when he went to the Society's office he had a conversation with the secretary, who told him that the money was as safe as in a savings bank. Blythe said, "Are the rules the same?" by which I understand, "Do the rules

correspond with those in the pass-book or have they been altered?" The answer was, "Don't bother about the rules. They do not apply. Just come and let me know when you want it, and you can have it at any time." At a later interview with the secretary he said, "What did you mean by telling me I could get my money at any time and the rules did not apply?" The learned Judge said that he did not believe all the plaintiffs' evidence as to these interviews, but taking it most favourably for Blyth the alleged representation was in substance no more than an assurance, relating to the future, that notwithstanding the existence of the rule providing for suspension Blyth need not be afraid that he would not get his money when he wanted it. That is not a representation as to an existing fact. From Blyth's own evidence, therefore, it is plain that what he relied upon was not the representation that there was no power of suspension in the rules, but the assurance that that power would not be put in force. That is a representation of an intention and not of an existing fact.

In the case of Kubale the facts are even stronger. He had been a member for some months before the transaction of which he now complains, and he says that when he went to pay in the money which he now seeks to recover he said to the secretary, "I see in accordance with rule 5 that directors have power to stop withdrawals altogether," to which the secretary replied, "You must not take any notice of that rule as it was never intended to apply, as the Society has an overdraft. You therefore need not be afraid, as when you require your money the bank overdraft will be increased by the amount which you withdraw." Again the learned Judge said that he did not believe all Kubale's evidence, but taking it most favourably for him, he was well aware of the power of the directors to suspend withdrawals, and he relied, not on the omission from the circulars to mention the particular rule, but on the assurance of the secretary that he need not be afraid that the rule would be put in operation.

With respect to Miss Tighe the case is, perhaps, not quite so clear. She says that when she went first to the office she said to the secretary, "I understood that the rules gave you the right to stop withdrawals at any time," to which the secretary replied,

H. C. OF A. 1914.

CIVIL SERVICE CO-OPERATIVE SOCIETY v. BLYTH.

Griffith C.J.

"The rules do not apply to the savings bank deposits at all and will not affect you in any way." She also says that at a later interview she said to the secretary, "You told me the rules would not apply to my deposit." In the face of that, how can it be said that she did not know of the existence of the rule when she applied to become a member? When she agreed to take shares she knew what the rule was, but she says that she relied on the statement in the circulars, which was literally inconsistent with the rule.

On those facts I fail to see that the plaintiffs made out a *primâ facie* case in respect of the misrepresentation which they allege.

But there is a further defence set up by the appellants. The transactions complained of took place in the case of Blyth in September 1907, in the case of Miss Tighe in January 1908, and in the case of Kubale in February 1908. Kubale had been a member from 1906 and knew the rules perfectly well. All the plaintiffs discovered all the facts not later than the middle of 1909. They made no communication to the Society by way of repudiating the bargain or demanding back their money or otherwise, but remained absolutely silent, until the issue of the writ in September 1911. The defendants set up, amongst other defences, acquiescence and delay. The law on that subject is, I think, settled. I need only refer to the case of *Sharpley* v. *Louth and East Coast Railway Co.* (1). The plaintiffs here became aware of all the facts entitling them to rescind their contracts more than two years before action, and did nothing in the meantime. In *Sharpley's Case*, which was an action for the rescission of a contract to take shares, *James* L J. said (2):—"If a man claims to rescind his contract to take shares in a company on the ground that he has been induced to enter into it by misrepresentation, he must rescind it as soon as he learns the facts, or else he forfeits all claim to relief."

That is a statement of the law of great authority, and no instance has been given where, after such a delay as there has been here, a man who has become a member of a company and had whatever advantages there might be from being a member, has been allowed at the end of so long a time to change his mind

(1) 2 Ch. D., 663.

(2) 2 Ch. D., 663, at p. 685.

and say, "I was misled and now wish to cease to be a member." There is no instance of such a case, and I think it would be unfortunate that one should be made. This point does not seem to have been pressed upon *à Beckett* J., as he does not mention it in his judgment. Under these circumstances I think that the plaintiffs fail on this point also. Each of the plaintiffs is in the same position. They have not established that they relied on the omission of the rule from the circulars, and if they did they are barred from relief by their delay.

I think, therefore, that the appeal should be allowed.

BARTON J. I am of the same opinion. What has struck me from the beginning is that the substantial misrepresentation relied on is that although there was in existence, as the plaintiffs knew, a rule enabling the directors to suspend withdrawals, it would not be enforced against them. That is not a representation of an existing fact. There was not a representation that the respondents had the right to withdraw at any time, but there was perhaps a promise that the rule permitting a suspension of withdrawals would be treated by the directors as a dead letter. That to my mind is not a representation of an existing fact.

Even supposing it were, I think the case is covered by the very short judgment of Lord *Watson* in *Derry* v. *Peek* (1), in which he said:—"My Lords, I agree with *Stirling* J. that, as a matter of fact, the appellants did honestly believe in the truth of the representation upon which this action of deceit is based. It is by no means clear that the learned Judges of the Court of Appeal meant to differ from that conclusion; but they seem to have held that a man who makes a representation with the view of its being acted upon, in the honest belief that it is true, commits a fraud in the eye of the law, if the Court or a jury shall be of opinion that he had no reasonable grounds for his belief. I have no hesitation in rejecting that doctrine, for which I can find no warrant in the law of England." Then he proceeded to say that he accepted without reservation the opinion which Lord *Herschell* was then about to deliver, and which is a celebrated judgment. There is not in the present case any

(1) 14 App. Cas., 337, at p. 345.

H. C. OF A. 1914.

CIVIL SERVICE CO-OPERATIVE SOCIETY v. BLYTH.

Barton J.

evidence from which it can fairly be inferred that the representation, if it was one, was made recklessly or without an honest belief in its truth. The Society and its manager seem to have believed that there was no probability that the circumstances of the Society would become such as to necessitate the enforcement of the rule.

As regards the other branch of the case, it is clear upon the authorities, which are numerous, and need not be cited, that it is the duty of a person who enters a society or a company by applying to it for shares, to repudiate the contract, if he wishes it rescinded, as soon as he reasonably can after he has discovered the truth. In some cases it is said that he must do so within a reasonable time, in others that he must do so at once. I accept the proposition that he must act within a reasonable time, because that time must vary according to the nature of the case. In the case of a contract such as this, where it is reasonable to suppose that the fact of one person applying for shares will influence the action of others contemplating the same course, it is clear that the necessity for prompt action is very much accentuated, and it is in respect of cases of that kind that Judges have said that there is a necessity to act with the least possible delay. In any case it is a question of what is reasonable, and it was reasonable in this case that action should be prompt.

Now, it appears to me, without going into detail, that the delay has been so great as to disentitle these plaintiffs to relief. When one considers the nature and circumstances of the contract now sought to be repudiated, the delay amounts to an election not to avoid the contract. It is not in every case that mere delay will suffice. But in this case the rules were well known to two at least of the plaintiffs, and the existence and purport of the particular rule in question was understood by the third, if we accept her own account of her conversation with the manager. It seems to me that the plaintiffs were not exonerated from the duty of taking prompt action, and they delayed for two years.

I agree, therefore, with the judgment which has just been delivered.

ISAACS J. read the following judgment:—The two circulars

did, in my opinion, contain a misrepresentation, because they stated in an unqualified manner that shareholders could withdraw the whole or any portion of their share capital, as if they had their money in a savings bank, and that though an investment in shares of the Society, it was as accessible as money upon current account, with the further advantage of having the chance of earning 5 per cent. interest. The representation was in fact false, because the rules of the Society at the time the circulars were issued gave power to the directors to suspend withdrawals whenever the circumstances of the Society rendered it necessary. Nothing but the circulars can be relied on, because the learned Judge found as a fact that Burke added nothing to the representations contained in the documents.

The learned primary Judge thought that, in the circumstances, the misstatement was not innocent in the legal sense. I am not sure whether he meant it was fraudulent within the rule of *Derry* v. *Peek* (1). At all events, he considered it blameworthy. It certainly, to my mind, deprived persons likely to be influenced by the circulars from exercising a free judgment as to acting upon it. The circulars were intended to reach a class of persons to whom the clear and unrestricted right of withdrawal must often be of considerable importance.

If it were necessary to determine whether there was fraud or not, I should first have to consider whether the issue was fully before the primary Court. On the pleadings as they stand, the only charge of fraud was abandoned. And it is clear law, on the authority of the highest tribunal, that a charge of fraud must be substantially proved as laid, and that when one kind of fraud has been charged another kind of fraud cannot on failure of proof be substituted for it. That was held by the Privy Council in *Abdool Hoosein* v. *Turner* (2), approving of the decision of Lord *Eldon* in *Montesquieu* v. *Sandys* (3). The issue may, nevertheless, have been actually accepted, and the case conducted on that basis.

But it would not be necessary to determine whether there was fraud or not, even if pleaded, because rescission is independent of

(1) 14 App. Cas., 337.
(2) L.R. 14 Ind. App., 111.
(3) 18 Ves., 302.

H. C. OF A. 1914.

CIVIL SERVICE CO-OPERATIVE SOCIETY v. BLYTH.

Isaacs J.

fraud. Nor is it necessary to determine the question of whether the doctrine applied in *Seddon* v. *North Eastern Salt Co.* (1) and *Angel* v. *Jay* (2), cited by Mr. *Starke*, has any relation to such a case as the present. If that should ever become necessary I should require time to consider those cases, and especially whether the doctrine they enounce is capable of extension to a case like the present, where performance of the bargain is not entirely completed on both sides.

Assuming, however, all other difficulties were out of the way—and as to Kubale his previous membership presents a serious initial obstacle by reason of his knowledge—so as to give a *primâ facie* right to cancellation of the contracts, each of the respondents is nevertheless, in my opinion, disentitled to succeed by reason of his or her delay.

Before entering into the merits of that objection it is necessary to observe that the learned primary Judge has said nothing on the subject. The pleadings on both sides, however, appear to have been of little effect in controlling the conduct of the trial, and, except as to what transpired at the meetings of the Society, both sides apparently fought out on their broad merits the two questions of attack for misrepresentation, and defence on the ground of laches. I feel, therefore, at liberty to deal with this portion of the case upon the evidence given.

The degree of promptitude which equity requires in claiming rescission of a contract varies with the circumstances. It is influenced, for instance, by the nature of the property involved, whether it be wasting or not, or risky or not, and by the status or relative situation of the persons concerned, as well as other circumstances.

In the case of a contract to take shares in a public company, special promptitude is always considered necessary, and the judgment of *James* L.J. in *Sharpley* v. *Louth and East Coast Railway Co.* (3) is distinct. He said :—"If a man claims to rescind his contract to take shares in a company on the ground that he has been induced to enter into it by misrepresentation, he must

(1) (1905) 1 Ch., 326. (2) (1911) 1 K.B., 666.
(3) 2 Ch. D., 663, at p. 685.

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.