CHAPTER IV

REPRESENTATION

In Behn v. Burness, William J. said that a representation is a statement, or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. This statement or assertion if construed as forming term of the contract may amount to a condition or a warranty.

A representation is different from a promise. The former implies an existing fact, whereas, the latter implies something to do in future. However, it does not mean that a promise to do something in future cannot be a representation at all. A representation of an existing intention to do something in future is more than a representation to do "for it often implies the existence of the will or the power to do what is promised". If there is no intention to fulfil the promise, it is a clear misrepresentation of the existing

1. (1863) 3 B & S 751 at P. 753
2. A representation is a statement of existing fact or past event, made at the time or before making the contract, which results in inducing the other party to enter into contract. Lamare v. Dixon (1873) L.R. 6, H.L. 414
fact. Misrepresentation is actionable only under certain circumstances which shall be discussed later on. The general rule is that there is no duty to disclose and mere silence does not amount to fraud or misrepresentation unless the defendant stands in a fiduciary relationship with the plaintiff. However, a single word or a nod or a wink from either the vendor or the vendee which may induce the other in believing a non-existing fact to exist and which may consequently influence his judgment to fix the price will amount to misrepresentation. Also where the vendor or the vendee speaks selected truth, concealing material fact, creating a misapprehension in the mind of the representee about the true state of affairs, it will amount to misrepresentation. So far as keeping silence is concerned, it is based upon the maxim of Caveat

4. "The state of a man's mind is as much a fact as the state of his digestion --- A mis-statement of the state of a man's mind is a misrepresentation of fact" per Bowen L.J. in Edington v. Fitzmaurice (1885) 29 Ch.D. 459 at 483

5. Explanation to section 17 of Indian Contract Act 1872

6. Fox v. Mackrath (1788), 2 Cox, Eq. cas. 320, at pp. 320, 321, per Lord Thurlow.

7. "A fiduciary is a person who undertakes to act in the interest of another person. It is immaterial whether the undertaking is in the form of a contract. It is immaterial that the undertaking is gratuitous". Prof. Scott 37 Col. L.Fev. 539 at 540


**Emptor**, first applicable to Titles in land. From the law of Conveyancing, it had crept in the law relating to Sale of goods. However, this rule has been abrogated vide section 55 of Transfer of Property Act 1882. Now there is a duty on the part of vendor and vendee to disclose the peculiar facts within their knowledge which may affect the value of the property. A similar provision is needed to reform the law relating to sale of goods.

A misrepresentation, has been held unactionable even though contained in a written instrument, unless it is construed as forming an integral part of contract or made fraudulently. A statement of fact is only capable of being misrepresented and it must be distinguished from a statement of opinion.

If the vendor says that "the animal is sound", it is a statement of fact amounting to warranty. But if he says "I believe, the animal is sound", it is only an opinion. Further, if the statement relates to a matter of which the buyer is ignorant and seeks information from the seller, the information furnished or statement given by him will amount to statement of fact. But if the buyer was as competent as the seller to pass judgment, this will amount to

10. **Derry v. Peek** (1889) 14 A.C. 337, **Annes v. Clifford** (1891) 2 Ch. 449 C.A.
opinion only. However, even though the buyer was competent
to pass his own judgment by inspecting the goods but was
dissuaded due to positive statements of the seller, he
should be entitled to treat such statements of the seller
as warranty or condition as may be the case.

With regard to statement of soundness of animals the
older authorities are of the view that such a statement may,
though not necessarily, be a matter of opinion. However the
modern authorities hold the view that a positive statement
made with regard to soundness of animals or value of goods
may amount to warranty.

When the seller warrants his own opinion, it may
amount to warranty. Statements made by a person occupying a
fiduciary position or an expert will hold him liable. Similar
is the position where a statement of opinion is made with
the knowledge of its falsehood.

11. Ivre v. Causey, 4 Har. (Del.) 425; Hawkins v. Berry
10 Ill. 36; House v. Fort, 4 Black (Ind.) 293
12. Whitney v. Sutton 10 Wend. (N.Y) 411; Baird v. Mathews,
6 Dana (ky) 129; Hazard v. Irvin, 18 Pick (Mass.) 95.
13. Riddle v. Webb, 110 Ala 599; Cummins v. Ennis, 4 Del. 424
15. Phillips v. Crosby, 70 N.J.L. 785 Titus v. Poole, 145, N.Y.
144; Gnesl v. Weisman, 88 S.W. 290 (Tex., Civ. App.).
17. Deming v. Darling, 148 Mass. 504. However, mere commenda-
tion by the seller does not come under this category,
where the seller vaguely commends his opinion which is
bound to be subject to different views.
Similar to the statement of opinion is the puff or commendation by the vendor of his articles, couched in the language of an exaggeration, which he makes at the time of sale, is not a representation.

II

GROUND OF ACTIONABILITY

(1) Inducement: A misrepresentation is not always a cause of action even though the plaintiff sustained damages. It is essential that he must have known, relied upon such knowledge and induced to form a contract which resulted into damage complained of.\(^\text{17}\)

A representation, which does not induce the plaintiff to enter into contract or influence his judgment, even made with a view to that is no cause of action and also where the representee obtains his own independent advice. However, if representation is cause of formation of contract, it is sufficient, even though not the sole cause.\(^\text{19}\)

\(^\text{16}\) Scott v. Hanson (1829), 1 Russ & M. 128 (describing land as "uncommonly rich water meadow" or Dimmock v. Hailott (1866) 2 Ch. app. 21 ("fertile & improvable"). Also refer Williston 21 Har. L. Rev. at pp. 567-568

\(^\text{17}\) Pe Northumberland And Durham District Banking Co. (1858), 28 L.J. (Ch.) 50, Smith v. Chadwick (1884) 9 App. Cas. 187 at p. 194

\(^\text{18}\) Atwood v. Small (1838), 6 C.l. & Fin. 232

\(^\text{19}\) Edington v. Fitzmaurice n. 4 id.
court does not allow a postmortem examination of the relative importance of the contributory causes.

Knowledge of the untruth of the misrepresentation is a complete bar for action.

II - Reliance: Generally no positive evidence is required to be proved by the buyer. That is necessary is that the seller's statement should have been of a type which could induce the buyer to purchase the goods and that he actually purchased them. If, he was unaware of the statement, at the time of purchasing the goods, he cannot be said to have relied upon them and there is no consideration for that.

The cases under the heading of reliance can be classified into four categories.

22. Mitchell v. Pinckney 126 Ia 696; J.I. Case Co. v. Mc. Kinoor, 82 Minn 75; Shordan v. Kyler 87, Ind. 38
23. Land man v. Bloome , 117 Ala. 312; Lindsay v. Lindsay 34 Miss 432.
24. Williston, 21 Har. L. Rev. at 570
1. **Obvious defects:**

   This category covers all those defects which the buyer must have observed. If the seller of blind horse says that the horse is sound, it means it is sound minus both the eyes. The same rule applies to latent defects of which the vendor tells or the vendee knows. However, the question is not so simple as it looks. If the seller has made statements about the soundness, the buyer may not inspect the horse or animal or he may not be able to ascertain the nature, extent or consequences of such defect. Under such circumstances, the seller cannot be heard to say that well I stated falsely, it was open to the buyer to ascertain the defect. If the seller activity conceals defects, he is liable.

2. **Inspection:**

   It may cover goods with patent and latent defects. In former, the seller may argue that there was no intention to cover obvious or patent defects. But, he is clearly liable for latent defects. Leaving apart, cases of implied warranty, so far as express warranties are concerned, it is no defence to say that on thorough inspection, buyer could have discovered the untruthfulness of the seller's

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25. Kenner v. Harding 85 Ill. 264, 268; Robertson v. Clarkson 9 R Mon (Ky) 506; Irving v. Thomas 18 Me 418; Roseman v. Canovan, 43 Cal. 170
statement. Seller's statement is much more reliable than the inspection of buyer who knows thoroughly well about the article he displays for sale.

In an American case, it was held that inspection by the buyer excluded express warranty by the seller. It is submitted that this decision is erroneous and in practice, every buyer inspects the goods but apart from that he has every reason to rely upon the statement of the seller and hold him by his words, if they fall short of it.

3. Statements made before the bargain:

It is said that the seller should be only held liable for the statements made immediately before making contract and not for statements made long before the bargain, because they form no part of warranty. But as such statements regarding goods have the impact upon the mind of the buyer, inducing him to buy subsequently, seller should be held liable for them even though they did not form part of contract.

Parol Evidence - It has been decided through a series of cases that where the contract is in writing, no extrinsic evidence is admissible. However, exceptions are made in those cases where a written document does not constitute a comprehensive contract in itself.

If the vendor has made positive statements with regard to the goods prior to making the bargain which has induced the buyer to conclude the contract, there is no reason for refusing admission to these statements in evidence. Innocent statements like false and fraudulent ones should render the seller liable, if they induced the buyer to enter into contract. This argument is fully supported by the case De-lasalle v. Guildford.


31. Allen v. Pink, 4 M & W 140; Ruff v. Jarrett, 94 III 475; Jackson v. Mott, 76 Ia 263

32. (1901) 2 K.P. 215 Also refer Waterbury v. Russell & Baxt. (Tenn.) 159. However Telluride Power Co. v. Crane, 103 III. App. 647, confined it to fraudulent misrepresentation only.
4. **Warranties given subsequent to the sale:**

Where warranties are given subsequent to sale a fresh consideration is essential. If the buyer is entitled to return the goods and he is induced not to do so for certain promises, he is entitled to enforce them. But if he is persuaded not to return them, even though he has no such right, he is not entitled to enforce such promises.

It has been held that any warranty made before delivery of goods is valid.

Sometimes, the seller represents certain facts but refuses to warrant them. The buyer will not be justified in relying upon them. However, if the seller's statement is qualified, the buyer may rely upon the representation which has been warranted though not on unwarranted one.

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33. Peacock v. Thomas (1842) 3 G.B. 234; Baldwin v. Daniel, 69 Cal. 82
Summers v. Vaughan, 35 Ind. 323; Farmers Association v.
Scott, 53 Kan. 534; Cady v. Leiker, 62 Mich. 157
34. White v. Dakes, 80 Me. 367; Fletcher v. Nelson, 61 Dak. 94
35. Webster v. Hodgkins, 25 N.H. 128
36. Fauntleroy v. Lilcox, 111 Ill. 477; Lynch v. Cyrm, 65 Finn. 170; Smith v. Bank, Floy, et al. (S.T.) 173
37. Richardson v. Brown, 1 Finn, 344
III
KINDS OF REPRESENTATION

(A) INNOCENT MISREPRESENTATION:

A representation is said to be made when the representor believes to be true what he asserts and has no intention to deceive. However, the representee acts to his detriment and suffers loss.

This can be broadly divided into two categories namely, misrepresentation (a) forming part of contract and (b) not forming part of contract but inducing the parties to enter into contract. The position at common law and Equity is briefly summarised hereunder:

I- Common Law:

An innocent misrepresentation was a ground for action if intended by the parties to form a term of contract. If not, the representee had no cause of action. The way, court construed as to whether a particular representation was intended to form a term of contract was very uncertain and arbitrary which is clear from the case of Hopkins v. Tanqueray

1. Section 18 of The Indian Contract Act 1872 defines
"Misrepresentation as follows:
"Misrepresentation" means and includes-1. the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
2. any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him.
3. causing, however, innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

2. (1843-60) All E.R. Rep. 96
Wherein the defendant sent his horse for auction-sale.
The plaintiff, one day before the sale, was kneeling down
to see the horse's leg. The defendant said "you need not
do that/he is alright, he is perfectly sound." The vendee
discovered, after sale the unsoundness of the horse. The
matter was referred to some friends of the parties before
whom "the defendant admitted that what he had said to the
plaintiff amounted to a warranty".

The lower court held for the plaintiff, but on appeal,
the judgment was reversed for defendant.

It is submitted that the decision is open to objection for the following reasons:

1. From the fact, it appears that the defendant was a
dealer in horses and he was well aware of horse-diseases
and their symptoms. That is why the plaintiff was dissuaded
to examine the horse. Otherwise, he might have discovered
the defect by minute or careful inspection.

3. id. at P. 97 D
4. id. at P. 97 E
5. Swelling of the legs of a horse is symptom of its unsoundness and the defendant knew it well. That is why
he told the plaintiff not to examine the leg and that the horse was sound.
2. From the facts and circumstances, it is clear that the defendant knew the intention of the plaintiff that he was inspecting the horse with a view to purchase it and the assertion of the defendant was couched in a clear language amounting to warranty. Further, he had admitted this fact before third parties. Hence there was no question of declaring that the representation did not amount to warranty.

3. It is no defence to say that there was no fraud on the part of defendant. So he was not liable. Once a representation is the sole cause of damage to a party, it is no consolation to him that it was not fraudulent. He is entitled to rescind the contract and claim damages. The rule in Derry v. Peek is not based on sound footing and has been substantially modified by Directors liability Act 1890 and Misrepresentation Act 1967 in England.

Jervis C.J. said "I think that what took place at arbitration and what was said by the defendant, makes no difference. It only shows that he did not know what a legal warranty was". Is ignorance of law any excuse? Even if it could be, how could it become an excuse in the eyes of a law lord? If such a pretext is to prevail, the law and its legal implications would be difficult to follow:

6. n. 4 id.
7. id.
Maule J. said that "it only amounts to this, that the defendant was believed by the plaintiff to be a person of veracity and skill about horses; and, the plaintiff being about to examine the horse, the defendant says "you need not do this - I have examined him and found him sound", that is said without any fraud and is merely a representation by the defendant that the horse is in his opinion perfectly sound. And he did not intend to subject him to the liability for paying the loss.

It may be argued well that the defendant was an expert in horses and fraudulently induced the plaintiff to purchase without inspecting the horse. This argument is further strengthened by the fact that the defendant gave no warranty at the time of sale realizing fully well the repercussion of his deceit. No vendor intends or likes to be responsible for his positive assertions proving to be untrue. It is law which holds him liable for his misrepresentation. The defendant had positively asserted something about the condition of the horse which amounted to warranty.

In all those cases where the representation induced the representee to enter into contract but was not incorporated into the contract, the common law afforded no relief. But court of chancery provided equitable relief in such cases.

8. id. at p. 98
The misrepresentee could escape the consequences of a contract by bringing an action for rescission or by pleading the misrepresentation as a defence to a suit for specific performance.

Recently certain changes have taken place which have improved the chances of success of the misrepresentee as follows:

(1) The House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* has enlarged the area of duty of care in tort of negligence by covering careless statements where "special relationship" exists between the parties. It is earnestly hoped that the courts will award damages in an action in tort for negligent misrepresentation by the misrepresentee where he has been induced to form a contract even though it is not incorporated as one of its terms.

9. It means abrogation or revocation, particularly of a contract. If a party is entitled to rescind a contract owing to a misrepresentation having been made, he must notify the other party of his intention by pleading invalidity as a defence to proceedings to enforce the contract, or by bringing a suit for having the contract, judicially set aside. Rescission is only allowed where restitution is possible.

(2) A statutory right to damages has been conferred by Misrepresentation Act, 1967 as follows:

"Where a person has entered into a contract, after a misrepresentation has been made to him by another party thereto and as a result thereof, he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof, had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation has not been made fraudulently, unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true". 11

It will be noted that unlike the remedies in tort for negligence, the onus of proof lies upon the representor that he said that what he had reasonable grounds to believe to be true. The test of "reasonable grounds to believe" incorporated under the above Act is no doubt more favourable to the representee and has the effect of nullifying the decision in Derry v. Peek but it does not cover that ground where a certain statement, though based on reasonable grounds is not correct and leads the plaintiff to suffer loss by acting and relying upon it. The position in England requires further legislative measures.

So far as this country is concerned the provisions of sec.18 of the Indian Contract 1872 are broad enough to cover up such situations.

11. Section 2 (1)
II- Equity:

An innocent misrepresentation not forming term of contract but inducing the misrepresentee to enter into it entitles him to rescind it in equity but not to recover damages. Rescission follows giving back and taking back on both sides. That is, the parties must restore the benefits received from either side.

In Wilde v. Gibson, Lord Campbell, said that where there had been an innocent misrepresentation, rescission would not be ordered after conveyance. This was approved by Joyce J. in Seddon v. North Eastern Salt Co. Ltd. and applied in several other cases. A contrary view has been taken in many cases namely the rescission could be ordered of an executed contract where there has been innocent misrepresentation. Cheshire and Fifoot observe that


13. Powen L.J. explained in New Pegging v. Adam (1896) 34 Ch. D. 582 at 594 that restoring the benefits from either side does not mean that the misrepresentee is to be restored to the position which he held before the misrepresentation nor that the person injured must be indemnified against the loss arising out of contract. Because this will be equivalent to damages arising at common law. Then he proceeds to say that this will cover obligations necessarily created by contract. This is indemnity in true sense and has been distinguished from damages in Whittington v. Seal Hayne (1900) 82 L.T. 49

14. (1848) 1 H.L. Cas. 605 at 632

15. (1905) 1 Ch. 326


reaction could be ordered if an executed contract. Co long as **restitution in intemnum** is possible and that the plaintiff was entitled to return the picture in Lead v. International Galleries (a firm) and the parties could be restored to their original position.

Time did not begin to run against the plaintiff, until he discovered that the picture was not in fact painted by Constable. The contract was conditional in the sense that the picture was guaranteed to be painted by Constable—an eminent painter of his time. If such was the intention, the property in the goods did not pass from the seller to the buyer even after acceptance for the reason that the buyer had no means to detect or to whom had painted the picture. It is, therefore, submitted that an acceptance out of mistake of certain material stipulation is no acceptance.

The rule in Foden's case supra was disliked in Commercial circles and was deprecated by Law Reform Committee and a sweeping legislation, namely "Disrepresent Act, 1967" has been enacted. Since then, the injured party's rights have been enlarged. By section 1 of the "Disrepresentation Act 1967,

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14. (1950) 2 H. 76
20. For a different view, refer: Smith J.C., "The Right To Rescind For Breach of Condition In Sale of Specific Goods under the Sale of Goods Act, 1963" (1951) 14 P.L.R. 173 at 175
he may be able to obtain rescission for a non-fraudulent misrepresentation, whether or not it has become a term of the contract and whether or not the contract has been performed. By section 2 of the act, he may be able to claim damages for a non-fraudulent misrepresentation by which he was induced to make a contract and as a result, suffered loss.

(B) Fraudulent Misrepresentation:

Fraud at Common Law: "A charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any court unless it is shown that he had a wicked mind". In Derry v. Peek, Lord Herschell said that it means a false statement made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false.

24. id, at P. 22
25. Sec. 17 of the Indian Contract Act 1872 defines fraud as follows: "Fraud" means and includes any of the following acts committed by a party to a contract, or with his convenience or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

(1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
(2) the active concealment of a fact by one having knowledge and belief of the fact;
(3) a promise made without any intention of performing it;
(4) any other act fitted to deceive;
(5) any such act or omission as the law specially declares to be fraudulent.

Explanation: Mere silence as to facts likely to affect the willingness of a person to enter into contract is not fraud, unless the circumstances of the case are such that regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to spea
The House of Lords has in the above case distinguished fraud with negligence. Their Lordship were of the view that fraud involved dishonesty. Put to express a belief, though negligently and without reasonable grounds is not fraud. Carelessness is not dishonesty. However, if a representative shuts his eyes to the facts, or deliberately abstains from investigation, his belief is not honest, and he is liable in the same manner as if he had knowingly stated a falsehood.

**Difference between fraud and misrepresentation:**

In the former, the person making the suggestion does not believe it to be true and in the latter, he believes it to be true, though in both cases, it is a mis-statement of fact which misleads.

**Effect of Fraudulent Misrepresentation:**

Where mistake, due to fraud, is of fundamental nature the contract is rendered void. Apart from this, the effect of fraud is to render the contract voidable and the representative is entitled to rescind the transaction.

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26. *Miaj Ahmad Khan v. Larbough* (1931) 53 All. 374; (1931) A.A. 154, 156
27. *Cundy v. Lindsay* (1878) 3 A.C. 459; 3 R L.T. 573
There are a series of cases in which mistake as to identity of a person rendered the contract void and voidable. It is submitted that the view of the court should be invariably to hold it voidable for the reason that otherwise third party purchaser (the sub-buyer) will not get any title to the goods and the original seller can always recover the goods from him. If the immediate transferee from such seller absconds, the innocent purchaser for value in good faith suffers for no genuine reasons.

The contract remains binding till disaffirmed. There is no time limit for that. However, an unreasonable period after discovery of fraud will be tantamount to affirmation.

For fraud, damages are recoverable in tort as well as in contract, even though the representation is not a term of contract. But for innocent misrepresentation, no action will be in tort. Precisely speaking, the defrauded party, while affirming the contract, may bring an action of Deceit for recovery of damages. In addition to such recovery, he may rescind the contract as well. Further, defrauded party may claim the price of goods after returning the goods to the defrauding vendor as money had and received.

32. Atwood v. Small (1838) 6 C. & Fin. 232
33. Clarke v. Dickson (1858) 1 E. P. & E. 148
C: EQUITABLE DOCTRINE OF CONSTRUCTIVE FRAUD:

At common law, nothing less than a lie will constitute a fraud. But equity has developed a doctrine of constructive fraud which reveals no dishonesty. It is directed against conduct which though free perhaps from moral turpitude or from actual evil design may tend to the deception of third parties or to the abuse of a confidential relationship, or to the injury of public interest. Under certain circumstances, a duty may arise to disclose a material fact and its non-disclosure may have the same effect as a representation of its non-existence. Such confidential relationship is deemed to exist, between principal and agent, pleader and client, doctor and patient etc. Sub-clause(2) of Section 18 is probably intended to meet all these cases which are called by the courts of Equity, as cases of constructive fraud.

34. Sargent J., while explaining the scope of sec. 18(2), in Oriental Bank Corporation v. Fleming (1879) 3 Bom. 242, 267 said that perhaps it is meant to meet all those cases which are called, in the Courts of Equity the cases of constructive fraud, in which there is no intention to deceive, but where the circumstances are such as to make the party who derives a benefit from the transaction, equally answerable in effect as if he were actuated by motives of fraud or deceit.
37. Fegat Hastings Ltd. v. Gulliver (1942) 1 All E.R. 378
38. Oriental Bank Corporation v. Fleming, n. 34 id. This refers to Section 18(2) of Indian Contract Act, 1872
IV

Basis of liability for honest misrepresentation:

The view at the close of 16th century was that if a person sold certain goods as his own, this was sufficient to hold that they belonged to him. Scienter or knowledge was not essential for breach of warranty of title. This position was maintained up to Padina v. Stoughton.

In cases of breaches of warranty of quality, the rule since the beginning of 19th century is that mere representation to induce a bargain is sufficient. Scienter is not essential. In Derry v. Peek the House of Lords held that in order to hold a person liable for misrepresentation in tort, scienter or knowledge of falsehood was essential. Similar to facts of Derry v. Peek are the facts of an American case, Jler v. Jennings. It may be recalled that the decision in Derry v. Peek, supra created so much of commotion in public and commercial circles that within one year, Directors liability Act 1890 was passed by British Parliament which held every director liable for his misrepresentation, if it was not based on reasonable grounds.

2. (1700) 1 Ld. Rayon 593; S.C. 1 Salk 210
3. (1889) 14 A.C. 337
4. 68 S.E. 1041 (S.C.) (Defendant, a director, misrepresenting corporate assets and liabilities of a company to the plaintiff, was held liable without proof of scienter).
In *Collen v. Wright*, an agent was held liable for breach of warranty of authority and the principle in this case has been accepted by courts in America and affirmed by House of Lords in *Starkey v. Bank of England*. There was no scienter. But liability was quasi-contractual.

It is not essential that a defendant may be liable for falsely misrepresenting the facts in Tort, he may be liable for honestly misrepresenting them of which he may be peculiarly informed.

In *Western Bank of Scotland v. Addie*, Lord President said that if a case should occur of directors taking upon themselves to put forth in their report statements of importance in regard to the affairs of the bank, false in themselves and which they did not believe or had no reasonable ground to believe, to be true, that would be misrepresentation or deceit.

Lord Cairns in *Peek v. Curney*, remarked that was there or was there not misrepresentation in point of fact? If there was, however, innocent the motive may have been, your Lordships will be obliged to arrive at the consequences which properly would result from what was done.

5. (1857) 8 E. & B. 647
6. *Fecher, Agency*, Sec. 545
7. (1903) A.C. 114, There was "an undertaking on the part of the agent that the thing which he represented to be genuine was genuine. That contains every element of warranty" (per Lord Halsbury at P. 118)
9. Colley on *Torts* vol. 2 (3 ed.) 956
10. (1867), L.R. I. SC & Div. 145
11. (1873), L.R. 6 H.L. 377 at Pp. 409, 410
Cotton L.J. in Heir v. Fall said that "recklessly" is equivalent to "without any ground for believing" the statements made. Lord Horschel also says that to sustain an action of deceit, it must be shown that a false representation has been made recklessly not caring whether it be true or false. Can't we say that the statement of directors was reckless because without confirming or properly reading the certificate of Incorporation, granted by the Board of Trade, they positively stated that the company had power to run steam carriages when the authority to do so had to be conferred by the Board of Trade?

Cotton, L.J. in the Court of Appeal said that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether is to be true or false, that is, without any reasonable ground for believing it to be true, he is liable in an action of deceit at the suit of any one to whom it was addressed, or any one of the class to whom it was addressed, and who was materially induced by the misstatement to do an act to his prejudice. The learned law lord further says that it will amount as a departure from duty when a man makes an untrue

12. (1878) 3 Ex. O. 238
13. Derry v. Peek, Supra at n. 22
14. Derry v. Peek (1886) 90 n. 13 id. at p. 13
statement with an intention that it shall be acted upon without any reasonable ground for believing that statement to be true, he makes a default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statement have, to have true statement only made to them.

Sir James Hannen said that he took the law to be that, if a man took upon himself to assert a thing to be true, which he did not know to be true, and had no reasonable ground to be true, in order to induce another to act, was thereby damnified, the person so damnified was entitled to maintain an action for deceit.

The Supreme Court of Massachusetts, while entertaining an action of deceit for representing a horse to be sound, said "It is not always necessary to prove that the defendant knew that the facts stated by him were false,.. The falsity and fraud consist in representing that he knows the facts to be true, of his own knowledge when he has not such knowledge". Once it is ascertained that the defendant positively asserted about the state of the horse and he had even reasonable grounds for belief but he was still liable.

15. n. 14 id. at p. 15
16. Litchfield v. Hutchinson, 117 Mass. 195, 197. The same Court in Chatham Furnace Co. v. Moffett, 147 Mass. 403, 404 observed "The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist and if he does not know it to exist, he must ordinarily be deemed to know that he does not". In Huntress v. Plodgell, 206, Mass. 318, 324, it was observed that, due diligence to ascertain the truth is not sufficient
There are other decisions in America which hold a defendant liable, irrespective of good or bad faith for making a positive false statement.  

The authorities are agreed, including *Derry v. Peck* on the point that a statement made "recklessly, careless whether it be true or false," is fraudulent. Lord Blackburn had expressed the same idea in *Brownlie v. Campbell* earlier than the above decision.

The rules stated by American Courts are to the effect that a defendant is liable though in fact he honestly believed not only that the statement that he made was true, but also that he knew to be true. The Michigan Court observed that it is well settled that if there was in fact a misrepresentation which was made honestly and its deceptive influence was as serious as though it had proceeded from a vicious purpose, the plaintiff would have right at law and equity to recover damages.

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To relieve for liability for false statement, if the matter is false and relied upon as true and the plaintiff suffers loss.

19. 5 A.C. 925, 953 "If a man thinks it highly probable that a thing exists, he chooses to say he knows the thing exists, that is really asserting that it is false— it is a positive fraud."
The question is who should be held responsible to bear the loss, when the defendant has misrepresented falsely certain facts as true though not dishonestly? The reply to this may be that however honest his state of mind, the defendant has induced another to act and damages are the direct result of such misrepresentation. Hence he should be held liable.

In *Deery v. Peek* and *Annes v. Clifford*, the Court held that no recovery was possible even though the statements of the defendants were untrue and which could not be believed that the directors did not know. Their statement was that the company had power to use steam. Though the directors expected to get such right, but their supposition that they actually had it is incredible.

The standard of honesty as laid down in *Deery v. Peek* supra is difficult to apply and is contrary to the decision in *Grosh v. Ivanhoe Land Co.* Any defendant charged with a false representation will make every endeavour to escape liability by proving that his intentions were honest, though his words naturally understood were false. Ascertaining defendant's state of mind is a hard and abstract job to try. It is likely to promote perjury more than justice.

21. (1889) 14 A.C. 337: n. 18 id.
22. (1891) 2 Ch. 449
23. 95 Va 161
The measure of damages in an action of deceit should be that the plaintiff should be placed in the same position in which he would have been in, had no tort been committed. For misrepresentations amounting to warranty or estoppel, the defendant is compelled to place the plaintiff in as good a position as he would have been in, had the misrepresentation been true. In practice, American Courts award the same damages for deceit which they award for breach of warranty. So if the defendant is liable for honest misrepresentations to the extent suggested, the result practically is same in law of tort and contract both. The legislative changes in England as introduced by Misrepresentation Act 1967 have already changed the Common Law position and the defendant is liable to pay full damages in Deery v. Peek like situation and the position in India is still uncertain because of lack of initiative to pass legislation by parliament in this country.

V

CONSTRUCTING REPRESENTATIONS AS TERMS OF THE CONTRACT:

A representation made in the Course of dealing, resulting into formation of contract may not constitute as a term of contract, if it amounts to simple commendation, as 24 is the rule Simplex Commendatio non obligat.

Anson enumerates the following rule with regard to ascertainment whether a particular representation amounts to a term of contract or not.

(1) Regard may be had to the lapse of time between the period of making representation and the final conclusion of the agreement. A long interval may reduce the statement to mere representation.

(2) The significance of the statement in the minds of parties may be a clear manifestation to treat it as a term of contract.

(3) If the contract has been reduced to writing, any representation not forming part of such contract may be treated as a mere representation.

(4) Where the maker of a statement asserts a fact about which the other party is ignorant, it may be treated as a term of contract.

25. Anson op.cit supra n.24 at p. 115-116
27. Rannerman v. White (1861) 10 C.P.R. S. 844 Oscar Chess Ltd. v. Williams ,supra
28. Heilbut Symons & Co. v. Puckleton (1913) A.C. 30 at p. 50
29. Harling v. Eddy (1951) 2 K.P. 739
In Heilbut Symons & Co. v. Buckleton, it was stated that a collateral contract depended upon animus contra hendi and must be strictly proved. A collateral contract cannot exist if its terms are inconsistent with the main contract. However, in Coachman v. Hill, an oral warranty given at the time of sale was held to have overridden printed conditions of sale, stipulating that no warranty was given and it was observed that express statement at the time of sale modifies express printed condition.

Uells (Ferstham) Ltd. v. Buckland Sand & Silca Co.Ltd. is a case in which a collateral transaction was involved. Edmund Davies J. said that in order to found a collateral contract, two elements were essential (1) a promise or assertion regarding the condition or quality of goods which may reasonably be regarded by the vendor as animo contra hendi (2) Acquisition by purchaser in reliance of such promise or assertion. The warranty might be enforceable even though specific terms of main contract were not discussed. It must operate up to a reasonable time.

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30. n. 28 id.
32. (1947) K.R. 554
33. Cardiner v. Grigg (1938) 38 S.R. (N.S.W.) 524 at 532
34. (1964) 1 All E.R. 41
35. §184 id. at pp. 45-46
In *Heilbut Symons & Co. v. Buckleton*, it was said that "an affirmation at the time of sale is a warranty, provided it appear on evidence to be so intended". Lord Denning M.R. did not agree to this proposition in *Oscar Chess Ltd. v. Williams*. He observed that the question whether warranty is intended depends upon the conduct of the parties, their words and behaviour, rather than their thought. "If an intelligent by-stander would reasonably infer that a warranty was intended, that will suffice".

It was observed by the same law lord in *Dick Bently Productions Ltd. v. Harold Smith (Motors) Ltd.* that "If a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and if it actually induces him to act on it by entering into a contract, that is *prima facie*

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36. (1911-13) *All E.F. Rep. 83* at P. 92. Requirement of intention was ascribed to Holt, C.J. in *Crosse v. Gardner* (1688), 50 Ed 90 and *Mena v. Stoughton* (1700), 1 Salk 210. It has already been discussed that Holt C.J. had never mentioned the requirement of intention. This was innovation of Puller J. in *Pawley v. Freeman* (1789) 3 Term Rep. 51 at 57.

37. (1957) 1 *All E.R. 325* at Pp. 328 - 329

38. (1965) 2 *All E.F. 65*
ground for inferring that the representation was intended as a Warranty; but the maker of the representation can rebut this inference, if he can show that he was innocent of fault in making it and that it would not be reasonable for him to be bound by it". As a representation as to mileage was not ascertained in the present case, it illustrates absence of reasonable grounds for believing that the representation was true.

The observations of Denning M.R. are in conformity with the recommendations of The Law Reform Committee on which the Misrepresentation Act 1967 is based.

39. Tenth Report (Innocent Misrepresentation) which was presented to Parliament in July 1962 (Comnd. 1787) recommended in paras 18 and 27(5), and which has enacted vide section 2 of Misrepresentation Act, 1967.