right of voting in vestry. And this applies to all vestry meetings: otherwise the statute would be a very imperfect "Act for the regulation of parish vestries." As to the other question, it is hardly arguable. Stat. 58 G. 3, c. 69, s. 3, expressly says that "no inhabitant shall be entitled to give more than six votes." Then stat. 13 & 14 Vict. c. 99, s. 6, gives the owner "the same right to vote in vestry, as if he were an occupier duly rated in respect of the same tenement." If he were an occupier so rated, he would not have more than six votes.

(Wightman J. was absent.)

Erle J. There is now no common law right of voting in vestry giving any thing beyond what is given by stat. 58 G. 3, c. 69. That statute intended to regulate the right, and to take away all rights not there declared. The preamble states that "it is expedient to regulate the manner of holding parish vestries, and the right of voting therein." Sect. 1 extends to all vestries: "no vestry or meeting of the inhabitants in vestry of or for any parish shall be holden" without such notice as is there prescribed: only sects. 8, 9 and 10 exempt customary vestries, vestries regulated by special Acts, and vestries in London and Southwark. Sect. 2 provides as to the chairman. Sect. 3 enacts that "in all such **[147]** vestries every inhabitant present, who shall, by the last rate which shall have been made for the relief of the poor, have been assessed and charged upon or in respect of any annual rent, profit or value not amounting to 50l., shall have and be entitled to give one vote and no more;" and so on for higher assessments. It is true that we do not find the words "and no other person:" but the clear implication is that only the persons specified are to vote. I therefore am of opinion that the common law right does not exist beyond the qualification laid down in the Act. Then stat. 13 & 14 Vict. c. 99, when adopted, makes the owner of tenements of a value not exceeding 6l. assessable to the poor rate, and gives him, by sect. 6, "the same right to vote in vestry, as if he were an occupier duly rated in respect of the same tenement." He therefore can have no more than six votes, sect. 3 of stat. 58 G. 3, c. 69, so prescribing universally.

Crompton J. I am of the same opinion on both points. Stat. 58 G. 3, c. 69, was passed for the purpose of regulating the votes in vestry: sect. 3 defines those who are to vote. It is affirmative in words; but it implies the negative. It would otherwise be very strange to enact that persons should be entitled to vote who were entitled without any enactment. Sect. 4 affords a strong argument that the enactment is exclusive. Then stat. 13 & 14 Vict. c. 99, is equally clear. When the Act is adopted, the owner of the small tenement is, by sect. 6, to have the same right of voting in vestry as if he were an occupier rated for that tenement. Then comes the question, whether he is to vote in respect of each tenement, beyond the number of six votes. He can give **[148]** only six votes, by sect. 3 of stat. 58 G. 3, c. 69, whatever number of tenements he may occupy. Mr. Lush contends that he may vote as occupier of A., as occupier of B., and so on, to any extent. But this view is not consistent with the words of the Act.

Appeal dismissed.

THOMAS CLARKE *against* SAMUEL AUCHMUTY DICKSON, JOHN WILLIAMS AND THOMAS GIBBS. Monday, April 26th, 1858. A person induced by fraud to enter into a contract under which he pays money may, at his option, rescind the contract, and recover back the price, as money had and received, if he can return what he has received under it. But, when he can no longer place the parties in statu quo, as if he has become unable to return what he has received in the same plight as that in which he received it, the right to rescind no longer exists: and his remedy must be by an action for deceit, and not for money had and received.

[S. C. 27 L. J. Q. B. 223; 4 Jur. N. S. 715. Discussed, *Western Bank of Scotland* v. *Addie*, 1867, L. R. 1 H. L. (Sc.) 159. Approved, *Oakes* v. *Turquand*, 1867, L. R. 2 H. L. 347. Referred to, *Heilbutt* v. *Hickson*, 1872, L. R. 7 C. P. 451; *Sheffield Nickel and Plating Company* v. *Unwin*, 1877, 2 Q. B. D. 223. Approved, *Urquhart* v. *Macpherson*, 1878, 3 App. Cas. 831. Referred to, *Erlanger* v. *New Sombrero Phosphate Company*, 1878, 3 App. Cas. 1278. Referred to, *Houldsworth* v. *City of Glasgow Bank*, 1880, 5 App. Cas. 339; *In re Duncan*, [1899] 1 Ch. 392.]

Action for money had and received.

Plea: Never indebted. Issue thereon.

On the trial, before Lord Campbell C.J., at the London Sittings after last Michaelmas Term, the statements made by the plaintiff's counsel, in opening his case, were: that, in 1853, the plaintiff was induced, by representations made by the three defendants, to take shares in a Company called The Welsh Potosi Lead and Copper Mining Company, which was then formed for working a mine on the cost book principle, and of which the defendants were directors; and to pay deposits for those shares. The mine was worked by the Company during the years 1854, 1855 and 1856; and dividends were declared in each of those years. The plaintiff was induced to accept fresh allotments of shares in lieu of the dividends declared. In 1857 the Company was in bad circumstances: it was, with the plaintiff's assent, registered as a Company with limited liability, and was afterwards wound up under the Winding-up Act. During the process of winding up, the plaintiff for the first time **[149]** discovered that the representations by which he was induced to make the purchase were false and fraudulent on the part of the defendants, and that the dividends declared were fraudulent dividends. He therefore brought this action to recover back the deposits which he had paid for the shares.

The Lord Chief Justice declared it to be his opinion that, assuming the contract to take shares to have been induced by fraud, it was not void but only voidable, and that it could not be avoided by the plaintiff after he had taken benefit under the contract. He was therefore of opinion that, assuming the statement to be proved, the plaintiff's remedy was by an action for deceit, and that he could not maintain the present action for money had and received. On this ground he nonsuited the plaintiff on the opening of his counsel.

Kinglake Serjt., in last Hilary Term, obtained a rule Nisi for a new trial, on the ground: "that the Lord Chief Justice, on the opening statement of counsel for the plaintiff, 'That the plaintiff was induced by fraud and fraudulent misrepresentation to become a shareholder in a Company of which the defendants were at the time directors and privy to the fraud, and had subsequently, but before discovering the fraud, received credit for a dividend fraudulently paid out of capital,' was wrong in holding that the plaintiff was not entitled to recover the moneys paid by him on such shares."

Knowles, Edwin James, Dowdeswell and Aspland now shewed cause. The general doctrine, that fraud does not render a contract void, but only voidable at the election of the party defrauded, is now well settled; **[150]** *Load* v. *Green* (15 M. & W. 216), *Murray* v. *Mann* (2 Exch. 538). It is too late for him to avoid the contract after a third party has acquired an interest; *Kingsford* v. *Merry* (11 Exch. 577). Neither can he avoid the contract if he has dealt with the article as his own; *Campbell* v. *Fleming* (1 A. & E. 40). In that case the dealing was after the party had notice of the fraud; but the principle applies if he has received any benefit before the discovery. "There can be no rescission of the contract, unless the parties can be placed in statu quo;" per Parke B. in *Blackburn* v. *Smith* (2 Exch. 783, 790). There is no rescission unless it be total; *Ferguson* v. *Carrington* (9 B. & C. 59), *Strutt* v. *Smith* (1 C. M. & R. 312). So in *Sully* v. *Frean* (10 Exch. 535) a plea to a bill of exchange, that the bill was for the price of a ship which the defendant was induced to buy by means of false and fraudulent representations as to its state, it being in fact rotten, was held not issuable; Parke B. observing: "The plea merely sets up at best a partial failure of consideration. The defendant still has the ship." In *Deposit Life Assurance* v. *Ayscouch* (6 E. & B. 761, 762) the same principle was stated by Crompton J. He says: "When the record shews that the contract has been executed so far that the defendant has received a benefit, I have doubted whether, in an action on the contract, the plea of fraud must not shew that he has restored what he has received." And it is understood that subsequently, in a case of *Cole* v. *Bishop* (*l*), nowhere reported, this Court acted upon

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(*l*) *Cole* against *Bishop*.

This was an action brought to recover a balance of 200*l*. on an agreement for the sale of the lease of the plaintiff's house, the fixtures, fittings, stock in trade and the good will of the plaintiff's business, for 750*l*. Pleas: Non assumpsit and Fraud. Issues thereon. On the first trial, before Lord Campbell C.J., at the Middlesex Sittings after Hilary Term 1854, the verdict passed for the plaintiff for the full amount claimed. In the ensuing term, M. Chambers obtained a rule Nisi for a new trial upon affidavits only; which was made absolute in the same term (May 1st 1854), before Lord Camp-

[151] that principle that this doubt was well founded. The principle laid down by Lord Ellenborough in *Hunt* v. *Silk* (5 East, 449), that, "Where a contract is to be rescinded at all, it must be rescinded in toto, and the parties put in statu quo," is as applicable to a rescission on the ground of fraud as to any other rescission. Now how, on the plaintiff's own statement, can he here put the parties in statu quo? He has had shares; and for three years he has had the chance of their proving profitable. He has received dividends; he might have received them in [152] money, but elected to receive them in shares; and on them also he has had his chance of profit. An offer to return these shares now, if it were practicable, would be like an offer to return a lottery ticket after it has turned up a blank. But it is not possible to return the shares: the other partners in the mine and the creditors of the Company have vested rights which prevent that. And, besides, the nature of the shares has been changed; they have, by the act of the plaintiff, been converted from shares in a common partnership into shares in a Company with limited liability.

Kinglake Serjt., Phinn and Horace Lloyd, in support of the rule. The question is, whether the opening statement disclosed a case to go to the jury: if it did, the nonsuit was wrong. An allottee of shares in a mine, to be conducted on the cost book principle, may recover his deposits; *Johnson* v. *Goslett* (*a*). [Crompton J. In that case the projected Company was wholly abortive.] The case is as strong when the company is fraudulent. It is not to be disputed that fraud does not render a contract void except at the option of the party defrauded. [Crompton J. When you enunciate the proposition that a party has a right to rescind, you involve in it the qualification, if the state of things is such that he can rescind. If you are fraudulently induced to buy a cake you may return it and get back the price; but you cannot both eat your cake and return your cake.] The decision in *Campbell* v. *Fleming* (1 A. & E. 40) turned entirely on the dealing [153] with the property after the discovery of the fraud. The statement here was that the defendants were themselves fraudulent; it cannot be said that this fresh fraud put the dividends in a better situation. [Lord Campbell C.J. For three years the plaintiff has had the chance of profit. Do you say that in the case put, of the lottery ticket, you could return it after it had turned up a blank? Crompton J. And, besides, the plaintiff has changed the nature of the shares. Do you say that a butcher who has bought live cattle could insist on the vendor restoring the price and taking back the slaughtered carcases?] It is hard if all remedy for the fraud is lost where the deceit can be prolonged till the deceived party has acted on it. [Crompton J. All remedy is not lost. He can no longer rescind the contract, which would work injustice; but he may bring an action on the deceit, and recover his real damage. Erle J. That was the case of *Cole* v. *Bishop* (ante, p. 150, note (*l*)). The purchaser was unable to treat the contract as void ab initio: but in a cross action tried before me, of *Bishop* v. *Cole*, he recovered a full indemnity.]

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bell C.J., Wightman, Erle and Crompton Js. On the second trial, at the Middlesex Sittings in Trinity Term 1854, before Wightman J., the plaintiff again obtained a verdict, which was not disturbed. The affidavits used on the motion shew that, before the bargain was made, the defendant had, by plaintiff's consent, placed an agent in the shop to receive the proceeds of the business for one week; and that it was on the report of this agent that the price was agreed on. The affidavits for the defendant made out a strong case to shew that during this week the plaintiff had employed different people to go as if they were customers, and pay to the defendant's agent with the plaintiff's money for the goods they seemed to buy; and that the defendant at the trial was taken by surprise, and could not produce his evidence to prove this fraud. The affidavits in answer, besides denying the fraud, stated that the lease, fixtures, fittings and stock in trade were very nearly worth the whole money, and that the defendant was still in possession of them. The reporters are unable to obtain any account of what passed in Banc when the rule was made absolute: but, from the observations made by the Court in the case in the text, it is presumed that the Court was of opinion that the matter had not been sufficiently investigated at the first trial, but that, if it appeared that the defendant had received benefit under the agreement, as alleged on the affidavits, the plaintiff would be entitled to a verdict; and that Wightman J. ruled accordingly at the second trial.

(*a*) 3 Com. B. N. S. 569, in Exch. Ch.; affirming the judgment of C. P. in *Johnson* v. *Goslett*, 18 Com. B. 728.

Erle J. I am of opinion that the nonsuit was right. The plaintiff claims to repudiate the contract under which shares were allotted to him; to give up the shares, and recover back the price. There are several grounds of objection, all falling under the same principle: the plaintiff cannot avoid the contract under which he took the shares, because he cannot restore them in the same state as when he took them. In 1853 the plaintiff accepted the shares; and from that time he was, in point of law, in possession of the mine, and worked it by his agent the purser. After three years working of the **[154]** mine, and trying to make a profit, he cannot restore the shares as they were before this was done. But, further, he not only had the chance of profit, but dividends were declared, and received by him. They were not received in money, it is true; but the receipt of money's worth has the same effect in law. Then he has also changed the nature of the article: the shares he received were shares in a company on the cost book principle; the plaintiff offers to restore them after he has converted them into shares in a joint stock corporation. Lastly, the offer to restore these shares is not made till after the Company is in the course of being wound up, when all chance of profit is over, and the shares can only be a source of loss. I have looked at this as if no others were concerned but the plaintiff and defendants; but no doubt there may have been liabilities incurred by the plaintiff to third persons, rendering it impossible for him to rescind.

Crompton J. When once it is settled that a contract induced by fraud is not void, but voidable at the option of the party defrauded, it seems to me to follow that, when that party exercises his option to rescind the contract, he must be in a state to rescind; that is, he must be in such a situation as to be able to put the parties into their original state before the contract. Now here I will assume, what is not clear to me, that the plaintiff bought his shares from the defendants and not from the Company, and that he might at one time have had a right to restore the shares to the defendants if he could, and demand the price from them. But then what did he buy? Shares in a partnership with others. He cannot return those; he has become bound to those others. **[155]** Still stronger, he has changed their nature: what he now has and offers to restore are shares in a quasi corporation now in process of being wound up. That is quite enough to decide this case. The plaintiff must rescind in toto or not at all; he cannot both keep the shares and recover the whole price. That is founded on the plainest principles of justice. If he cannot return the article he must keep it, and sue for his real damage in an action on the deceit. Take the case I put in the argument, of a butcher buying live cattle, killing them, and even selling the meat to his customers. If the rule of law were as the plaintiff contends, that butcher might, upon discovering a fraud on the part of the grazier who sold him the cattle, rescind the contract and get back the whole price: but how could that be consistently with justice? The true doctrine is, that a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition.

Lord Campbell C.J. I will only say that I remain of the opinion which I expressed at the trial. The plaintiff, on his own shewing, cannot rescind the contract and sue for money had and received, but must seek his remedy by a special action for deceit. In that action, if he proves what he states, he will recover, not the original price, but whatever is the real damage sustained.

(No other Judge was present.)

Rule discharged.

[156] HENRY BRINSLEY SHERIDAN *against* THE PHŒNIX LIFE ASSURANCE COMPANY. Monday, April 26th, 1858. Plaintiff effected a policy of assurance with defendant, dated 2d August, 1856, on the life of B. The policy recited that plaintiff had paid to defendant 8l. 5s. as the premium for the assurance to 2d November, 1856; and it witnessed that, if B. should die before the termination of twelve calendar months from the date, or should live beyond such period, and plaintiff should, on or before that period, or on or before the expiration of every succeeding twelve calendar months, provided B. be still living, pay the annual amount of premium, then defendant should be liable to pay 1000l.: provided that, if B. died before the whole of the said quarterly payments should have become payable under these presents for the year in which he should so die, it should be lawful for the defendant to deduct and retain from the said