BRAMWELL, B., WILDE, B., and CHANNELL, B., concurred.
Rule discharged.(*a*)

1936 1 K.B. 214.

CAVE *v.* MILLS. Feb. 27, 1862.—The plaintiff was surveyor to the trustees of certain turnpike roads It was his duty to make all contracts, and pay the amounts due, for labour and materials required for the repair of the roads, he being permitted to draw on the treasurer to a certain amount His expenditure was not strictly limited to that amount, and in the yearly accounts, which it was his duty to present to the trustees, a balance was generally claimed as due to him and was carried to the next year's account He rendered accounts for the years 1856, 1857 and 1858, shewing certain balances due to himself. These accounts were audited, examined and allowed by the trustees at their general annual meeting and a statement, based on them, of the revenue and expenditure of the trust, was published as required by the 3 Geo 4, c 126, s. 78 The trustees, believing the accounts correct, paid off with monies in hand a portion of their mortgage debt. The plaintiff afterwards claimed a larger sum in respect of payments which had in fact been made by him, and which he ought to have brought into the accounts of the above years, but knowingly omitted. The plaintiff also rendered an account for the year 1859, which, on inquiry by the trustees, he stated did not include all the payments, and he subsequently rendered another account for that year in which he claimed a larger sum as due to him. —Held : First, that the plaintiff was estopped from recovering the sums omitted in the accounts for the years 1856, 1857 and 1858, since the trustees had acted upon the faith that those accounts were true: Per Pollock, C. B, Channell, B, and Wilde, B Bramwell, B., dissentiente.—Secondly, that the plaintiff was entitled to recover the sums omitted in the account for 1859, since it was not accepted by the trustees as true : Per totam Curiam.

[S. C 31 L. Ex. 265, 8 Jur. (N. S.) 363; 10 W. R. 471; 6 L T. 650.]

This was an action against the trustees for carrying into execution the 53 Geo. 3, c. 133 (local and personal), who were sued in the name of their clerk, for money payable to **[914]** their surveyor for work and materials, &c The cause was referred by a Judge's order to an arbitrator, who stated the following case for the opinion of this Court —

The plaintiff, from the year 1855 to January 1860, was surveyor to the trustees of the Enstone, &c., turnpike roads, at the yearly salary of 40l By verbal arrangement between the plaintiff and the trustees, it was the duty of the plaintiff to make all contracts and give orders for labour and materials required for the maintenance of the roads, on behalf of the trustees, and to pay the amounts due therefor, the plaintiff being for that purpose permitted by the trustees to "draw" on the treasurer from time to time A certain monthly sum was fixed upon by the trustees at the commencement of each year as the limit of the amount of such "draw" in addition to the plaintiff's salary ; but the paramount duty of the surveyor being to maintain the roads in efficient repair, the expenditure by the plaintiff was not strictly limited to that amount, and in the yearly accounts, which it was the practice and duty of the plaintiff to present to the trustees, a balance was generally claimed by him and duly allowed by the trustees, and carried on to the next year's account.

In this manner similar accounts were rendered and allowed for the years 1856, 1857 and 1858, these accounts being entitled "An Abstract of Receipts and Expenditure" and "Abstract of Surveyor's Expenditure," and representing balances in the above years in favour of the plaintiff of 75l. 2s 11d., 81l. 9s 5d. and 86l. 18s. 11d. respectively.

[915] The plaintiff presented these accounts at the general annual meeting of the trustees, held in the month of January, and these accounts were audited and examined by or on behalf of the trustees and compared with vouchers produced for the payments, and the accounts were duly allowed, and a minute of the fact of allowance was duly made

(*a*) Reported by W. Marshall, Esq

In pursuance of the Act, 3 Geo 4, c 126, s 78, the defendant, as clerk to the trustees, annually made out and transmitted to the clerk of the peace, after approval thereof by the trustees, a statement of the debts, revenues, and expenditure received or incurred on account of the trust. This statement, so far as respected the expenditure on the roads, was based upon the above mentioned accounts rendered by the plaintiff as surveyor, although not always strictly following them.

The following are copies of the plaintiff's account for 1858, and of the statement for the same year subsequently returned by the trustees to the clerk of the peace, and which statements were duly published as required by law.

Enstons, Heyford Bridge, Bicester, Weston on the Green, and Kirtlington Turnpike Roads.

Abstract of Surveyor's Expenditure for 1858.

EXPENDITURE.	£ s. d.	RECEIPTS	£ s. d.
Balance from 1857. . .	81 9 5	By Cash of Treasurer . .	412 0 0
Day Labour . .	172 14 1		
Materials dug and prepared .	141 16 6		
Damage done in obtaining Materials . . .	6 16 1		
Carriage of Materials	45 11 9		
Materials Purchased .	3 12 3		
Tradesmen's Bills . .	6 17 2		
Incidental Expenses . .	0 1 8		
Surveyor's Salary .	40 0 0	Balance due to Surveyor	86 18 11
	£498 18 11		£498 18 11

[916] General Statement of the Income and Expenditure of the Enstons, Heyford Bridge, Bicester, Weston on the Green, and Kirtlington Turnpike Roads, between the 1st day of January and the 31st day of December, 1858, both inclusive —

INCOME.	£ s. d.	£ s. d.	EXPENDITURE	£ s. d.	£ s. d.
Balance in hand of Treasurer . .	323 15 11		Monies paid on account of Surface repairs of Roads .		365 2 3
Sinking Funds in hands of Treasurer deducted from the above balance .	241 10 10		Damage done in obtaining Materials		6 16 1
		£ s. d.	Tradesmen's Bills		10 6 7
Real balance . .		82 5 1	Salaries Treasurer	5 5 0	
Revenue received from Tolls		760 13 4	„ Surveyor	40 0 0	
£2 per Cent. overpaid to Bondholders for the year 1856, transferred to Sinking Fund .		91 10 10	„ Clerk .	25 0 0	
					70 5 0
Received from Magistrates' Clerk for Fines . .		3 7 6	Law Charges . . .		5 5 6
			Improvements and Incidental Expenses		0 1 8
			One year's Interest to Bondholders to December 1857 .		137 6 2
			£2 per Cent overpaid to Bondholders for the year 1856, transferred to Sinking Fund . . .		91 10 10
			Balance in hands of Treasurer		251 2 8
		£937 16 9			£937 16 9

Name	Amount.	Rate of Interest	Sinking Fund	Amount	State the Name and Place of Abode of Treasurer Clerk and General Superintendent Surveyor below
Bond for a Mortgage Debt	£4577 0 0	£3 per Cent	Sinking Fund in hands of Treasurer .	£ s d 150 0 0	Treasurers Messrs Tubbs & Coleman, Bankers, Bicester.
			Do. do £2 per Cent. overpaid for the year 1856 . .	91 10 10	Clerk Francis Burton Mills, Solicitor, Bicester
				£241 10 10	Surveyor Charles Cave, Surveyor, Banbury

Examined and allowed at the General Annual Meeting of the Trustees of the Turnpike Roads, held at the King's Arms Inn in Bicester, in the county of Oxford, on the 26th day of January, 1859 H PEYTON, Chairman

[917] At the General Annual Meeting of the Trustees in January, 1860, the plaintiff rendered the following Account for the year 1859.—

DR. SURVEYOR'S EXPENDITURE, 1859 CR

	£ s. d	£ s d		£ s d
Balance due from 1858 . . .		86 18 11	By cash of Treasurer .	481 4 0
Day Labour . . .	185 10 11			
Materials dug and prepared . . .	117 17 10			
Damages done in obtaining Materials	4 14 8			
Carriage of Materials	106 14 10			
Purchase of Materials	32 8 0		Balance due to Surveyor	129 15 5
Tradesmen's Bills	15 16 3			
Repairs to Toll Houses	20 0 0			
Incidental Expences .	0 18 0			
Surveyor's Salary . .	40 0 0			
		524 0 6		
		£610 19 5		£610 19 5

In answer to an inquiry by the trustees, the plaintiff then informed them that the above account did not include the whole of the payments made by him, and that there were other outstanding claims. The following minute was made in the trustees' book:—"The surveyor's account for the first year was examined, when there appeared to be a balance due to him of 129l. 15s. 5d."

The meeting was adjourned, and at the adjourned meeting the plaintiff rendered an account claiming 436l. 4s. as due to him, instead of the above mentioned balance of 129l. 15s. 5d.

In consequence of an intimation from the trustees the plaintiff resigned his situation as surveyor.

The following account for 1859 was subsequently returned to the clerk of the peace:—

[918] General Statement of the Income and Expenditure of the Enstons (&c.) Turnpike Roads, between 1st day of January and the 31st day of December 1859.

INCOME	£	s	d
Balance in hands of Treasurer brought forward	251	2	8
Balance received from Tolls	790	0	0

EXPENDITURE	£	s	d	£	s	d
Monies received on account of Surface repairs of Roads				414	7	4
Damages done in obtaining Materials				4	14	8
Tradesmen's Bills				10	5	1
Salaries Treasurer	5	5	0			
„ Surveyor	40	0	0			
„ Clerk	25	0	0			
				70	5	0
Law Charges				6	7	6
Improvements and Incidental Expences				1	9	6
One year's Interest to Bondholders to December 1858, at £1 per Cent				45	15	4
Repairs of Toll Houses				20	0	0
Claim made by Surveyor for extra Labour extending over several years, but refused payment by the Trustees				436	4	0
Balance in hands of Treasurer				31	14	3
				£1,041	2	8

In the general statement at the foot, it appears that the mortgage debt of the trust had been reduced by the sum of 228l. 17s., the amount of three bonds paid off during the year.

In the statement of the year 1860, sent to the clerk of the peace after the present action was commenced, the sum of 428l. 3s. 11d is stated to be "retained in treasurer's hands to meet the claim of Mr. Cave, late surveyor, to be tried at the Oxon March Assizes, 1861."

The plaintiff, before the commencement of this action, had in fact made payments to the amount of 220l. in respect of labour and materials reasonably necessary for and done, and expended in, the repairs of the roads during the years 1856, 1857, 1858 and 1859, in excess of the amount included in his accounts as originally rendered to the trustees for the **[919]** above years; and there are besides still outstanding claims by third persons to a considerable amount in respect of work and materials for the roads done and supplied in the above years, under verbal orders and directions given by the plaintiff as surveyor, and which last mentioned outstanding claims are not within the present action or order of reference.

The above sum of 220l. consisted in part of balances paid by the plaintiff after he rendered his account for 1859, for monies due to labourers and others, for work and materials during the above years, and on account of which they had been paid monies by the plaintiff from time to time.

The whole amount ought to have been paid and brought into the accounts of the above years, but was knowingly omitted by the plaintiff, partly from negligence and partly to avoid complaint by the trustees, and to keep the apparent expenditure as low as possible, and in the expectation that the trust funds would in future years be better able to afford the outlay necessary for the maintenance of the roads and the payment of former arrears, and there was no actual fraud contemplated by the plaintiff.

Neither the defendant nor the trustees had any notice or knowledge or means of knowledge of these outstanding debts or claims, but on the contrary they believed, and the plaintiff intended they should believe, that the accounts rendered by him to them included all the debts and liabilities incurred by him in respect of the repairs of the said roads to the close of each year, and such accounts were acted upon by the trustees as above mentioned.

The pleadings and local acts of parliament are to be referred to, if necessary, as part of the case.

The question for the opinion of the Court is, whether the plaintiff is entitled at law to recover the whole or any part of the said sum of 220l

[920] If the Court should be of opinion that the plaintiff is entitled to recover the said sum of 220l., then I (the arbitrator) find and award that the defendant, as such clerk as aforesaid, is indebted to the plaintiff in the sum of 268l 6s (being the said sum of 220l. added to the balance of the plaintiff's claim of 129l. 15s 5d in his last account, beyond the amount paid into Court), and judgment is to be entered for that sum.

If the Court should be of opinion that the plaintiff is entitled in law to recover the amount actually paid by him in respect of repairs for the year 1859 only, as distinguished from the previous years, then I find and award that the defendant, as such clerk, is indebted to the plaintiff in the sum of 103l. 6s (being one-fourth of the said sum of 220l. added to the above mentioned balance, beyond the amount paid into Court), and judgment is to be entered for that sum.

But if the Court should be of opinion that the plaintiff is not entitled to recover any part of the said sum of 220l., then I find and award that the defendant, as such clerk, is indebted to the plaintiff in the sum of 48l. 6s. beyond the amount paid into Court, and judgment is to be entered for that sum.

Hayes, Serjt. (A. S. Hill with him), argued for the plaintiff (*a*) By the 3 Geo. 4, c. 126, s. 78, the trustees of every turnpike road are required, at their general annual meeting in each year, to examine, audit and settle the accounts of their treasurers, clerks and surveyors; and when the accounts shall be settled and allowed by the trustees, they shall be signed by the chairman, and if any treasurer, clerk or surveyor, shall refuse or neglect to produce his accounts, he shall be dealt with according to the provisions with regard to officers refusing to account, and when the accounts shall **[921]** be audited, allowed and signed, the clerk to the trustees shall make out a statement of the debts, revenue, and expenditure received or incurred on account of the trust, which shall be submitted to the trustees, and when approved by the majority shall be signed by the chairman; and the clerk shall, within thirty days, transmit the same to the clerk of the peace of the county in which the road to which the statement relates shall lie. The 7th section requires the clerk of the peace to cause the statement to be produced to the Quarter Sessions, and to be registered. There is no estoppel. An estoppel must be mutual; here it would not be. When, indeed, a person wilfully makes a false statement, with the intention that another should act upon it, and he does so to his prejudice, the former is precluded from contesting its truth: *Pickard* v. *Sears* (6 A. & E. 469), *Freeman* v. *Cooke* (2 Exch. 654) But here the trustees have not been prejudiced by the accounts rendered by the defendant. On the contrary, they have been benefited, for they have had a larger balance in hand, and have been enabled to pay off some bond debts The authorities on this subject are collected in Smith's Lead Cas vol. 2, p. 334, 4th ed. *Skyring* v. *Greenwood* (4 B. & C. 281) is distinguishable There, the paymasters of a military corps had given credit in account to an officer for increased pay, to which they knew he was not entitled, and for more than four years they allowed him to draw upon the faith that the money belonged to him; so that their conduct was equivalent to a voluntary payment with full knowledge of the facts. [Channell, B. In *Shaw* v. *Picton* (4 B & C. 715), the agent of the grantor and grantee of an annuity delivered an account to the grantee, by which it appeared that the agent had received certain payments on account of the annuity, which had not in fact been received, and it was held that the agent was **[922]** bound by the account which he had delivered, unless he could shew that he had given credit for those payments by mistake.] That decision proceeded upon the same principle as *Skyring* v. *Greenwood* (4 B. & C 281) [Wilde, B At the bottom of the account for 1858, is. "Examined and allowed at the General Annual Meeting of the trustees," and it is signed by the chairman, as credited and settled. Then, can the surveyor, after that, claim items not included in it?] Unless a statement in an account that money has been received, which has not in fact been received, differs from the suppression of a claim, *Shaw* v. *Picton* is in point. [Channell, B., referred to *Lucas* v. *Oldham* (Moo. & R. 293).] Suppose a person has a claim for 500l,

(*a*) In last Michaelmas Term, Nov. 18 and 22.

and omits to include it in an account delivered, can the debtor say, "I have laid out the money and made a profit of it, and therefore you are estopped from recovering it back?" [Channell, B. The arbitrator finds that the omission was designedly made.] In *Heane* v. *Rogers* (9 B. & C. 577, 586), Bayley, J., in delivering the judgment of the Court, said: "There is no doubt, but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him, but we think, that he is at liberty to prove that such admissions were mistaken, or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him), and that transaction; but as to third persons he is not bound" [Wilde, B Suppose a servant is directed to make certain disbursements, and he does it in an extravagant manner, and then says that he has disbursed far less than he really has, can he after some years say, "I disbursed more, pay me the difference?"] There is no estoppel unless the **[923]** other party is prejudiced by the misrepresentation With respect to the account for the year 1859, there is clearly no estoppel, for that account was not accepted by the trustees, and another was substituted by the plaintiff.

Mellish (Sawyer with him). The plaintiff from time to time delivered accounts to the trustees, in which he wilfully omitted large disbursements, and upon the faith of those accounts the trustees have dealt with the trust money in a way which they ought not and could not have done if true accounts had been rendered, for they have made public returns of a balance in hand, with which they have paid off debts. The arbitrator has found that no fraud was in fact contemplated by the plaintiff, but that means that there was no pecuniary dishonesty, for he has done that which, in point of law, is a fraud, for he has made a wilfully false statement with the intention to deceive. It resembles the case of directors of a joint stock Company publishing false accounts, in which case an action of deceit will lie. The case therefore falls within the principle of *Picard* v. *Sears* (6 A & E. 469). [Wilde, B The trustees are bound every year to examine, audit, and settle the accounts, which must be signed by the chairman as correct, but if a surveyor can at his own pleasure pass any accounts, the audit is wasted.] The expenses ought to be paid out of the receipts of the current year, but the effect of these accounts is to make them payable in a manner not contemplated by the statute. If a steward for the space of four or five years, rendered accounts in which disbursements were omitted, could he, upon its being discovered, recover the money? [Bramwell, B Where a person has paid money with full knowledge of the facts, he cannot recover it back, that, how-**[924]**-ever, is the case of a person seeking to undo that which he has deliberately and intentionally done But, suppose a butcher sent in his account week by week and was paid it, if, at the end of a twelvemonth, he sent in a supplementary bill, that would not be undoing anything which he had done, but the simple omission to bring some items into account The case of an agent may be different, because there is a legal duty to render a correct account.] The position of the trustees has been altered by reason of the false account rendered by the plaintiff After the accounts have been examined, audited and signed, the trustees are bound to print copies and transmit them to each of the trustees and to one of the Secretaries of State, who is to cause abstracts to be laid before Parliament. 3 Geo 4, c. 126, ss. 78, 80, 3 & 4 Wm 4, c. 80, ss. 1, 5. The market value of turnpike bonds is regulated by these accounts, the trustees of the roads are trustees for the shareholders; they are empowered to form a sinking fund, and when it amounts to 200l., they must apply it in discharge of the monies borrowed by paying the creditors willing to accept the lowest composition. 12 & 13 Vict. c. 87, s. 3; 13 & 14 Vict c 79, s. 4. The trustees are prejudiced, because the effect of publishing false accounts is to make the affairs of the trust appear in a better condition than they really are, and consequently the trustees would be obliged to purchase their bonds at a higher rate. The plaintiff may have intended to take upon himself the outstanding liabilities and not to charge the trustees, if so, these would be honest accounts; but if he intended, from some motive of his own, to suppress for a time those liabilities, and to charge the trustees with them in some future year, they would be dishonest accounts. As against him, it must be assumed that they are honest accounts. [Wilde, B. The maxim applies: "Allegans contraria non est audiendus," Broom's Maxims, p. 160, 161, 3rd ed.] *Skyring* v **[925]** *Greenwood*

(4 B. & C. 281), *Shaw* v. *Picton* (4 B. & C. 715), and *Freeman* v *Cooke* (2 Exch. 654), are authorities in point.

Hayes, Serjt, replied.

Cur. adv. vult.

The learned Judges having differed in opinion, the following judgments were now delivered.

WILDE, B. The judgment which I am about to deliver, is that of the Lord Chief Baron, my brother Channell and myself.

This was a special case stated by an arbitrator for our opinion

We consider that the question intended to be submitted to us by the arbitrator is, whether he ought, as arbitrator, to give effect to the evidence of the plaintiff in reference to the omitted items. He finds the evidence to be true, but leaving to us to determine whether the plaintiff is to be entitled to the benefit of it It has been contended that he was not so entitled by reason of his own conduct as found and stated in the case by the arbitrator.

It was broadly laid down, in *Shaw* v *Picton* (4 B. & C. 729), that "if an agent (employed to receive money, and bound by his duty to his principal from time to time to communicate to him whether the money is received or not) renders an account from time to time, which contains a statement that the money is received, he is bound by that account, unless he can shew that that statement was made unintentionally and by mistake. If he cannot shew that, he is not at liberty afterwards to say that the money had not been received, and never will be received, and to claim reimbursement in respect of those sums for which he had previously given **[926]** credit," and the Court went on to say, that "when an agent has deliberately and intentionally communicated to a principal that the money due to him has been received, he makes the communication at his peril, and is not at liberty afterwards to recover the money back again" In that case, his agent's intentional statement was, that certain monies properly stood to his principal's credit, whereas the present case involves only a statement equally intentional (but probably with a worse motive), that the expenses to which his principal was liable were restricted to certain sums by him stated.

The effect of the one statement was to swell the credit side of the account, that of the other to diminish the debit side.

In either case the balance would be equally affected, the principal equally deceived, and led to act upon the false statement to his prejudice.

The case of *Skyring* v. *Greenwood*, in the same book, proceeds upon a similar view of the law. The Court there treated a credit intentionally given by the agent, with full knowledge of the facts, as standing on the same footing with money voluntarily paid. And as the one could not be recovered back, so the other could not be set off.

And in like manner, in *Denby* v. *Moore* (1 B. & Ald 123), the Court held that a tenant who had for some years paid the land tax, and knowing he was entitled to deduct it from his rent had not done so, could not recover it from his landlord.

Another general principle of law was invoked by the defendants in the present case.

And it was argued, that the plaintiff having made a statement false to his own knowledge, upon which the defendants acted, was bound by such statement.

The case finds that it was the "practice and duty" of **[927]** the plaintiff to render the accounts in question, and that the "defendants believed," as the plaintiff intended they should, "that the accounts were true," and contained all the items to which the plaintiff was entitled.

And further, that the defendants thereupon "allowed" the accounts as required by the statute, and, in further pursuance of the statute, transmitted to the clerk of the peace a statement of the debts, revenue and expenditure of the trust, based upon the accounts so rendered by the plaintiff.

It is also obvious that these false accounts were put forward by the plaintiff for fear his expenditure should be thought extravagant.

It is equally obvious that he had his own objects in avoiding a conclusion to that effect in the minds of the trustees, and it cannot be doubted that he anticipated dismissal, or some action on their part, if they knew the truth, which, however beneficial to the trust they administered, would be prejudicial to him

He intended that the trustees, being kept in ignorance of the truth, should act differently from what they would have done had they known the truth. And it was

contended, upon this state of circumstances, that the trustees who settled, allowed, and adopted the accounts so rendered, "acted" upon them within the meaning of the word "acted" in that rule of law.

We are of opinion that both these principles apply to the present case. Indeed they are but variations of one and the same broad principle, that a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another—making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion Such a principle has its basis in common sense and common justice, and whether it is called "estoppel," or by any other name, it is one which **[928]** Courts of law have in modern times most usefully adopted. We are therefore of opinion that the arbitrator ought not to find for the plaintiff in respect of the sums kept out of the accounts for the years before 1859.

But they do not apply to the accounts for 1859; and for the sums really and properly expended by the plaintiff in that year we are of opinion that he ought to recover.

BRAMWELL, B. In this case, it will be convenient to state the facts, to shew how I appreciate them. The plaintiff was surveyor of a turnpike road, the trustees of which, sued in the name of their clerk, are the defendants. As such surveyor, it was his duty to find and pay for labour and materials for the repair of the road He did so, and received from time to time payments on account for the defendants. It was also his duty to render an account to the trustees, of the payments he made and the sums he received. This is found as a fact, and indeed is shewn by his having done so; and it was not only necessary as a matter of account and means of settling between him and them, but also in order to enable them to make and render accounts as required by the statute. He accordingly rendered an account of the years 1856, 1857 and 1858, in which he stated various payments he had made, the amount of his salary, and, on the other side, gave credit for cash received, shewing certain balances due to himself. These accounts were received by the defendants in the belief that they were correct, and treated as such in the returns they were obliged by statute to make, that is to say, they stated they had laid out the sums he mentioned for labour and materials. In point of fact, he had laid out more. He afterwards rendered another account for the year 1859, but, on being challenged as to its correctness, he acknowledged it was not correct, and stated he had laid out more, and claimed payment thereof, and of the items omitted in former years. This **[929]** second account was not received by the defendants in the belief it was correct, nor treated as such in their returns, as they mentioned therein the sum named in the account, and also the additional sum claimed, adding they had refused payment of it.

This action was brought to recover the omitted items. It was referred to arbitration, and the arbitrator has found, that it was the plaintiff's paramount duty to keep the roads in efficient repair, that, though a certain monthly sum was fixed as the limit, the plaintiff might draw on the treasurer, the plaintiff was not strictly limited to that amount for his outlay, and that he had in fact, in excess of the sums mentioned in the accounts, made payments to the amount of 220l. in respect of labour and materials reasonably necessary for, and done and expended in the repair of the roads during the years 1856, 1757, 1858 and 1859 I take it, therefore, that the arbitrator finds that had the plaintiff rendered just accounts, he would have been entitled to receive that amount from the trustees, that is to say, that at one time he had a cause of action against them for money paid to that amount. Now, these accounts were untrue; they directly, indeed, asserted nothing untrue, but they meant that the amounts mentioned in them had been, and alone had been, expended and incurred in the respective years, and I think it makes no difference, that part of the sums he claimed were in fact paid after the account for 1859 was rendered, because I take it that the accounts mean that the monies mentioned in them are all that have been paid or are payable.

The arbitrator further finds that the whole amount ought to have been brought into the accounts of the above years, but was knowingly omitted by the plaintiff partly through negligence, partly to avoid complaints from the trustees, and in expectation of their being in better funds in future years, and the arbitrator adds, "there was no actual fraud, in fact, **[930]** contemplated by the plaintiff." If this means, as I understand, that he did not intend to put more money in his pocket than was due to him, or that he did not think he was committing a fraud, I am content so to take

it. But if it means that no fraud was committed, then, with sincere respect for the arbitrator, I dissent. Without laying down any more sweeping proposition, I think it may be safely said, that where, as here, there is a duty to tell the truth, and no duty or obligation the other way (which it might be said, would be when one sought to buy poison to murder another), and an untruth is told to the knowledge of the teller, for his own purposes, and the statement is accepted as true, a fraud is committed If fraud, then, makes any difference, I think it exists The questions are, can the plaintiff recover for the years 1856, 1857, 1858 and 1859, or if not, for the last or for none?

Now, if the defendants have any right, as against the plaintiff in consequence of these incorrect accounts, it must be in respect of some duty from him to them. For the question here is not whether he shall be punished, but what are his duties and their rights. Now, his duty was the duty of every one who undertakes anything, viz., to bring honesty and reasonable skill and care to its performance. Having undertaken then to render accounts, he was bound to render them honestly, and with reasonable skill and care, not with absolute accuracy, but with no defect arising from fraud or negligence. The duty of care was as great as the duty of honesty, and negligence as much a breach of duty as fraud in the rendering of the accounts. The trustees, therefore, ought to have the same right against the plaintiff if the incorrectness of the accounts had proceeded from carelessness as from fraud. If *Skyring* v. *Greenwood* proves anything, it proves that. If one can suppose such a case as that there were certain items that ought not to be charged, but he thought they ought, and fraudulently suppressed them, they would have no right **[931]** against him This shews that fraud of itself gives no right—it is inaccuracy, and that gives them rights whether it proceeds from fraud or negligence. But can it be said that any negligence in the accounts, however gross, would cause the plaintiff to lose his debt, and forfeit his cause of action once existing, or estop him from shewing the truth? It is to be remembered that these accounts are but statements. Would an inaccurate verbal statement of the amount due, the inaccuracy proceeding from fraud or negligence, and there being a duty to be honest and careful, have this effect? It seems to me that it would not. It is not for me to give reasons for this, it is for those who assert that the plaintiff has lost his right of action to give reasons why it should be so It is not to punish him, as I have said. Besides, even for punishment such a law as the defendants allege would be unreasonable, because, the punishment would not depend on the gravity of the offence, but on the importance of the subject-matter of it. Thus, the most dishonest suppression of a farthing in the account would be followed by the loss of a farthing only; the most venial suppression of 1000l. would be followed by the loss of that amount Nor is it necessary so to decide such a case to do justice to the defendants If, by the falsity of the account, they have sustained damage, they may maintain an action and recover a sum equal to that damage, and not, as here, make a gain by the transaction. Again, the maxim "Allegans suam turpitudinem non est audiendus" cannot apply. The plaintiff does not allege his turpitude, it is the defendants who do. The plaintiff alleges he paid this money,—he did so The defendants say, you have rendered an incorrect account, and done so fraudulently; he admits the former statement, and denies the latter. How can he then be said to set it up as his cause of action, which is what the maxim means? Nor does the other maxim, "Allegans contraria non est audiendus" apply. The plaintiff does not allege "contraria," **[932]** which I take it, means at the same time doing in fact what is popularly called "blow hot and cold."

Nor is the case within the rule, that if a man makes a statement with intent another shall act on it, and the other does act on it, the first shall never, against the second, be permitted to deny it, for here there is no evidence the account has been acted on. It was said, I believe by myself, that this account was acted on as much as an account can be, that is to say, it was accepted as true, but if so, it seems to me that such a case cannot be within the rule On examination of that rule it will be found that it supposes a case where, if the plaintiff could deny his former statement and recover, the defendant would lose precisely what the plaintiff would gain, which would not be the result in such cases as this That is to say, if a horse is bought on a representation by A. it does not belong to him, and afterwards A. sues the buyer for the horse, if he recovered, the buyer would lose precisely what A.

recovered, and the damage done by the falsity would be to the amount of that recovery, that is not so here.

Nor do I think those cases apply in which it has been held that money, voluntarily paid with the knowledge of the facts, cannot be recovered back. There an act has been done which it is sought to undo, then as much is to be taken out of the defendant's pocket as is to be put into the plaintiff's. The various authorities cited, with the exception of *Skyring* v. *Greenwood*, are instances of the application of those rules to which I have addressed myself. In *Shaw* v. *Picton* the money had been paid over, and that is relied on in the judgment. That case, however, requires notice. As I have said, if it proves anything it shews that the plaintiff could not recover, whether the inaccuracy of his accounts proceeded from fraud or negligence It is undoubtedly an authority very much in favour of the defendant's argument, but it is distinguishable. Part of the money in **[933]** that case sought to be set off (which is the same as recovered) by the defendants, had actually been paid, and though the residue had not been specifically paid, the account had continued, and if the presumption is good, that the first payment out is against the first payment in, the balance also had been paid out. I am aware that the reasons given are not based on this, but the fact is not lost sight of, and even if it had been, it would only shew the case was the common one of a right judgment with wrong reasons If I thought it in point, I should acquiesce, but I do not, and certainly think it ought not to be extended It seems to me, that this reasoning also furnishes an answer to a question, put, I believe, also by myself: "Suppose if the account had shewn a balance against the plaintiff and he had paid it over, could he have recovered it back?" First, in the case supposed, an act would have been done, secondly, it is not clear that the plaintiff would be seeking to recover back money by demanding payment of items brought forward anew. Another way of putting this difficulty has occurred to me, viz., "Suppose the plaintiff had wrongly charged his side of the account and over estimated his receipts, and paid over a balance?" The case is not very probable, but here also an act would be done, viz., the money paid over.

In the result then, I think the burthen on the defendants, that they have brought forward neither principle nor authority to justify us in holding that the plaintiff has lost a cause of action he once had, that the tenor of the authorities is the other way —I mean those which hold that the statement must be acted on, or the position of the one party changed in order to bind the other (see *Sanderson* v. *Collman*) (4 Man. & G. 209), and the principle also applies by which a bare promise to give a chattel or do anything would not bind, while the gift itself and the act when done would. It seems to me also a great mischief would be introduced if a man might say, "I **[934]** owed you money and have not paid you, but you said, carelessly, I had, so now I will not pay."

I think, therefore, the plaintiff entitled to recover for all the years, but as to the year 1859, I think it clear on the defendants' own reasoning, as to that year the account was not accepted as true; the fraud then was not committed, only attempted; the inaccuracy was corrected, the defendants never could have maintained any action for breach of duty as to the accounts rendered for 1859. It seems to me that the plaintiff is entitled to judgment for his whole claim, clearly for the year 1859

Judgment accordingly

In the Exchequer Chamber.

(Appeal from the Court of Exchequer.)

Atkinson *v.* Denby. Feb. 10, 1862.—The plaintiff, being in embarrassed circumstances, offered his creditors a composition of 5s. in the pound The defendant, a creditor, refused to accept it unless the plaintiff paid him 50l., and gave him a bill of exchange for 108l. The other creditors would not accept the composition if the defendant did not The plaintiff paid the defendant the 50l. and gave him the bill of exchange, and the defendant then executed the composition deed. Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the plaintiff might recover back the 50l in an action for money had and received