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COURT OF APPEALS OF KENTUCKY

MARY E. McGEE, - - - - - - - - Appellant,

vs.

FIDELITY AND COLUMBIA TRUST COMPANY, - - - - - - - - Appellee.

BRIEF FOR APPELLEE.

TRABUE, DOOLAN, HELM & HELM,
Attorneys for Appellee.

April 4, 1925.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

POINTS AND AUTHORITIES.

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VIII.

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FIDELITY AND COLUMBIA TRUST COMPANY, - *Appellee.*

BRIEF FOR APPELLEE.

May it please the Court:

I.

STATEMENT OF CASE.

This is avowedly a *common-law action of deceit* brought by appellant, Mrs. McGee, against appellee, Fidelity and Columbia Trust Company, to recover more than $30,000.00 claimed as damages for alleged "false representations" and "fraudulent concealment" of material facts by Mr. John T. Malone, formerly an officer of the Trust Company.

At the trial below judgment was rendered for the Trust Company under peremptory instructions from the court; hence this appeal.

OUTLINE OF MRS. McGEE'S CLAIMS.

Mrs. McGee claims that Mr. Malone, acting on behalf of the Trust Company, on September 26, 1918 (while in its service), and again on October 28, 1920 (after leaving its service), induced her, by the means above stated, to pledge certain securities of her own as additional collateral on a debt owing to the Trust Company by her husband, Judge J. Wheeler McGee, in order to secure indulgence for him in the payment of his debt and to forestall a sale of his pledged collateral in the *then* state of the securities market.

It is further charged by Mrs. McGee that Mr. Malone was enabled thus unduly to influence her and to dominate her will in the matter (regardless of any "false representations" or "fraudulent concealment") by reason of some "confidential relationship" long subsisting between Mrs. McGee and himself or the Trust Company, and this "confidential relationship" is relied on as raising presumptive evidence of the "false representations" or "fraudulent concealment" indispensable to the maintenance of this common-law action of deceit.

No attempt is made to *rescind* the contracts on the ground of imposition or undue influence, or on any other ground whatever. On the other hand, by this action Mrs. McGee, under advice of her counsel, deliberately and admittedly affirms the contracts in question and adopts them as her own.

OUTLINE OF TRUST COMPANY'S DEFENSE.

The Trust Company, by Paragraph II of its answer (Rec. 13-25), denies *in toto* the charges of false representation or fraudulent concealment or undue influence, or imposition of any kind whatever, on the part of Mr. Malone or any of its officers or agents.

In Paragraph III of its answer (Rec. 25-42) it affirmatively pleads in avoidance or estoppel certain written and oral transactions had with Mrs. McGee in a mutual desire to help Judge McGee save his securities from sacrifice.

Beginning with the initial contract of pledge on September 26, 1918, the answer pleads in detail the various facts and circumstances which, in the darkest days of the World War (when the Argonne drive was just beginning and the Government had conscripted the capital as well as the man power of the country), rendered it obviously an unfavorable time to market the securities Judge McGee had pledged for the payment of his debt.

The answer further shows that to avoid the sacrifice which *all parties* thought would inevitably result from a sale of Judge McGee's securities at that time, Mrs. McGee pledged a portion of her securities in the desire to help her husband, as she had previously helped him in a similar transaction with another creditor.

The Trust Company's answer supports its averments by filing, as exhibits, five separate writings

signed by Mrs. McGee respectively September 26, 1918; May 1, 1920; October 28, 1920; February 28, 1921, and December 28, 1922, which show her full knowledge at all times of all material facts which she *now* claims were misrepresented to her or concealed from her.

At the trial, her complaint of *"false representation" utterly* collapsed, and we hear nothing more about that in this case.

Likewise her claim of *"fraudulent concealment"* fell to the ground, and *not a line of proof* appears in this record to show that the Trust Company or any of its officers made the slightest *attempt* or had the slightest intention to *conceal* or withhold from Mrs. McGee any information material to her contracts or desired by her.

Counsel for Mrs. McGee devote several pages of their brief, beginning at page 13, to arguing the proposition that "Fraudulent concealment is ground for an action for damages." In doing so they "set up a straw man" for the pleasure of knocking him over. They wholly misconceive our position.

We have all along contended, and we now maintain, (1) that there was no "concealment" in this case, and (2) that the utter failure of proof to show concealment can not be supplied in an action of deceit by a presumption of defendant's guilt.

Mrs. McGee's whole case at the trial was reduced to the contention that because of certain confidential relations between herself and Mr. John T. Malone,

the former officer of the Trust Company with whom these transactions were had, the court should, in this *common-law action of deceit,* extend the rules of substantive law and of evidence heretofore governing such actions, and should supply an absolute lack of proof necessary to sustain an action of deceit, by a presumption of wrongdoing on the part of Mr. Malone, acting for the Trust Company.

This the trial court refused to do, and accordingly at the trial, when the testimony for Mrs. McGee was closed, the court sustained the Trust Company's motion for a peremptory instruction. In doing so he said (Rec. 120; Tr. 124):

> "On the whole case, I am constrained to say that I am unable to see that there was any misrepresentation either of statement or act or conduct on the part of the defendant that comes within the rules of law entitling the plaintiff to maintain *this* action, and I therefore sustain defendant's motion for a directed verdict."

From the judgment accordingly entered this appeal is prosecuted, and the only question discussed in the brief of Mrs. McGee's counsel in this court is the propriety of the peremptory instruction.

The amended answer of the Trust Company (Rec. 65-69) presents a further defense in this case of *res judicata* and of waiver or condonation of alleged wrongs, but the trial court found it unnecessary to decide the issues raised thereby, because he sustained the motion for a peremptory instruction on the ground of failure of proof.

On behalf of the Trust Company, we also maintain that the peremptory instruction was properly given, not only because of a complete failure of proof, but for the additional reason that Mrs. McGee, by her conduct and actions covering a period of more than five years—from September 26, 1918, to October 16, 1923, had repeatedly ratified the transaction now complained of by her as fraudulent, by the renewal of her contracts and by the payments made thereon repeatedly, after she admittedly obtained knowledge of the alleged "fraud," "misrepresentation" or "concealment"; that by such acts and conduct on her part she has waived or condoned any wrong of which she *now* complains; and that, moreover, the whole issue of wrongdoing was conclusively adjudged against her when, under advice of counsel, she failed to defend an action previously brought by the Trust Company against her upon a note growing out of these same transactions, and permitted default judgment to go on this note.

The issue thus becomes *res judicata,* as explicitly held by this court in these cases, to be later reviewed herein:

Jefferson, &c., v. Western Nat'l Bank, 144 Ky. 62, *68, 69.*
Shaw v. Milby's Ex'r, 23 Ky. L. R. 645, 63 S. W. 577.

Whether the question be *res judicata* or not, the alleged wrong has been condoned by Mrs. McGee, as

explicitly held by this court in numerous cases to be presently reviewed:

Hartford Life Ins. Co. v. Hanlon, 139 Ky. 346.
Summers v. Carpenter, 156 Ky. 337, *341*.
Mackenzie v. Eschmann's Ex'rs, 174 Ky. 450, 453, *454*.
Johns v. Masterson, 176 Ky. 399.
Smith v. Bank of Lewisport, 27 Ky. L. R. 406, 85 S. W. 219.
Thompson v. McKee, &c., 119 S. W. 229.

II.

SETTLED PRINCIPLES OF LAW.

As already stated, this is a common-law action of deceit. It affirms, ratifies and adopts the contracts of pledge as valid and binding.

Piersall v. Huber Mfg. Co., 159 Ky. 338, 341.
Long v. Douthitt, 142 Ky. 427, 431.
Ligon v. Minton, 125 S. W. 305, 306.

The elements necessary to be proven in a common-law action of deceit have been so many times stated by this court that we apologize for restating them.

They are thus set forth in the recent case of Crescent Grocery Co. v. Vick, 194 Ky. 727-733, a common-law action, where this court, speaking through Judge Sampson, said (pp. 729, 730):

> "We have adopted the general rule that an action can not be maintained for fraud or deceit unless it be made to appear:

(1) that defendant made a material representation;

(2) that it was false;

(3) that when he made it he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion;

(4) that he made it with intention of inducing plaintiff to act or that it should be acted upon by the plaintiff;

(5) that plaintiff acted in reliance upon it, and

(6) that plaintiff thereby suffered injury.

"Although the alleged representation was made by defendant, if it was not material, or was not false, or defendant did not know it was false, and did not make it recklessly in disregard of the truth, or did not make the representation intending that plaintiff should be induced to act upon it; or, if plaintiff was not induced to and did not act upon the representation, or if he did so without injury or loss resulting to him, no cause of action exists in favor of the plaintiff."

The rules above stated apply equally well where there has been an *attempt* to *suppress* or *conceal* material facts as where there has been a false representation as to material facts. Indeed, in the Crescent Grocery Co. case the charge of deception was that appellee, Vick, in stating to the Grocery Company the nature of his contract with a former employer, had stated only part of the contract, and thereby had misrepresented the nature of that contract.

The court held that the part so concealed or suppressed was *not material* to the making of the contract.

There are so many cases to the same effect that we would not be justified in citing them.

Guilty intention is an essential element in every common-law action of deceit. It is so held in all the cases, one of the latest being—

> Pickrell & Craig Co. v. Bollinger-Babbage Co., 204 Ky. 314, *321*, *323*.

There must be not only a *purpose* to deceive or mislead, but there must be some *conscious effort* to mislead by false representation or by fraudulent *concealment,* and from such guilty intention and wrongful acts there must proceed actual deception practiced upon the plaintiff on some material point of existing fact, but for which actual deception the plaintiff would not have entered into the contract.

Having elected, under advice of counsel, to affirm the contracts by bringing this action of deceit, Mrs. McGee has necessarily cut herself off from contending that the contracts are not her own, but were imposed upon her by the dominating will of Mr. Malone.

Had she elected to rescind the contracts, she might have gone into equity and asked the court to adjudge a rescission on the ground that the contracts do not express her free will because Mr. Malone dominated or overpowered her will by reason

of the alleged "confidential relationship" theretofore existing between them, which gave him an ascendancy or control over her will and thus enabled him to impose his own will upon her.

Equity may consistently grant relief upon such grounds where the proof justifies it, because in such case the contract does not express the will of the plaintiff.

However, it is entirely different in a common-law action of deceit. The plaintiff can not affirm the contract, *thereby* saying *it is his contract,* and at the same time put up the plea that *it is not his contract* because his will was dominated by that of the defendant.

The plaintiff in a common-law action of deceit *puts himself* in the position of standing at arm's length with the defendant, and in the very nature of such a case the plaintiff can not recover in an action of deceit merely by showing that the defendant had the stronger will. He must also show that the defendant deceived him by making some false representation to induce the contract, or by concealing some material fact.

This implies intent or at least a conscious purpose on the part of the defendant to mislead the plaintiff. Mere suggestion or even command that plaintiff enter into the contract *is not deceit,* and it will not give a right to relief in a common-law action *of deceit* even if it be assumed that the suggestion or command emanating from the defendant overpowered or controlled the action of the plaintiff because of their pe-

culiar relationship to each other or because the stronger mind of the defendant dominated the weaker mind of the plaintiff.

Thus it is that wherever the courts of this State have granted relief on the ground of imposition involving the domination of a weaker mind by a stronger one, such relief has been granted *only in a court of equity* by way of rescission of the contract.

McDowell v. Edwards, 156 Ky. 475-483.
McDonald, &c., v. Baker, &c., 207 Ky. 293-*299*.
Rogers, &c., v. Samples, 207 Ky. 150-*154*.
Miller v. Taylor, 165 Ky. 463.
King v. Burkhart, 167 Ky. 424.
Williamson v. Lowe, 172 Ky. 80.
Roberts v. Parsons, 195 Ky. 274.
Taylor v. Mullins, 151 Ky. 597.
Bewley, &c., v. Moremen, 162 Ky. 32.
Hoeb v. Maschinot, 140 Ky. 330.
Baker v. McDonald, 185 Ky. 471.
S. Rose Co. v. Hasenzahl, 141 Ky. 576.
Marksberry v. First Nat'l Bank of Owensboro, 194 Ky. 401.
Adkins v. Stewart, 159 Ky. 218.

Not a single case has been cited where a recovery has been allowed in an action of deceit in the absence of deception practiced either *suggestio falsi* or *suppressio veri*. The very nature and the name of the action exclude the idea of recovery except for deceit, which, as already stated, involves intent or purpose to deceive.

FRAUDULENT CONCEALMENT.

Of course, fraud or deception may be practiced by concealing or suppressing the truth, as well as by stating a falsehood. In such case, however, the concealment or suppression must be intentional, under the established rule as stated in the Crescent Grocery Co. case, *supra;* that is to say, the false statement must be made or the truth suppressed—

"with intention of inducing plaintiff to act."

In *Adkins* v. *Stewart,* 159 Ky. 218-221, this court, speaking through Judge Hannah, said (our italics):

> *"But fraudulent concealment implies knowledge and intention."*

Mere silence does not, in and of itself, amount to concealment, when unaccompanied by any *purpose* to deceive or any *active* effort to *conceal.*

Webster thus defines "conceal":

> "To hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of; to withhold knowledge of."

The Century Dictionary thus defines "concealment":

> "2. *Specifically,* in *law,* the *intentional suppression* of truth, to the injury or prejudice of another."

All these definitions involve intention and purpose and a conscious act on the part of the person concealing.

We ask the court to bear these general principles in mind in analyzing the evidence and the issues of fact in this case, and in applying the law thereto.

NEW ELEMENT CONTENDED FOR BY COUNSEL FOR APPELLANT.

Counsel for Mrs. McGee would alter the settled rule of this court as to proof indispensable in common-law actions of deceit, and, by disregarding the question of materiality and the question of intention or knowledge on Mr. Malone's part, would have this court lay down for this case a new rule that because of an alleged "confidential relationship" existing between himself and Mrs. McGee, Mr. Malone must be *presumed guilty* of an intention to rob her of her bonds.

Moreover, counsel contend for this radical change in the rule of law governing actions of deceit when their client by her testimony shows that no representation or concealment on Mr. Malone's part could have been material, because she says she would have done anything he said, without asking any questions (Tr. 15-16, 25, 61, 62, 64).

Mrs. McGee, by her testimony in the case, manifested a willingness to put herself in the position of yielding to Mr. Malone's suggestion, without any representation of any kind. In other words, she would claim that she simply surrendered her will to his, and that the contracts of September 26, 1918,

and October 28, 1920, were Mr. Malone's contracts, and not her's.

If any weight is to be given her testimony along those lines, *it would certainly not make out a case for misrepresentation or concealment necessary in an action of deceit,* but it would show a case where a weak person had been influenced by a stronger one to make a contract of which she had repented and from from which she desired to be released.

But this is not the case. Mrs. McGee has not asked to be released from the contract which her counsel now say was imposed upon her by Mr. Malone. With full knowledge of all the facts, under the advice of learned counsel, she has elected to stand by the contract—to make it hers in fact.

It is only upon that theory of affirmance that this action of deceit can be maintained at all.

The alternative is an action to rescind the contract, and if Mrs. McGee was in fact imposed upon by reason of Mr. Malone's ascendancy and influence over her, so that she would do whatever he suggested, without asking any questions, her remedy lies in a court of equity, which, on application in a proper state of case, would *rescind the contract* and release her from its burdens.

However, by affirming the contract, with full knowledge of all the facts, she casts aside the claim that it was not her contract, but was simply foisted upon her by Mr. Malone. She adopts the contract, under advice of counsel, and thus places herself in

the situation of dealing with Mr. Malone at arm's length.

It is well said by the U. S. Supreme Court in *Fitzpatrick* v. *Flannagan,* 106 U. S. 648-660:

> "A subsequent promise, with full knowledge of the facts, is certainly equivalent to an original promise under similar circumstances; and no one, acting with full knowledge, can justly say that he has been deceived by false representations."

There is a wide difference in law between fraud and misrepresentation or fraudulent concealment, on the one hand, and mere imposition of a stronger will upon the weaker, without false representation or fraudulent concealment on the other hand.

There is a remedy at law, by an action of deceit, for intentional deception or conscious deception, but the only remedy for "imposition" without deception is a right to rescind the contract, and where Mrs. McGee, under advice of counsel, has elected *not to rescind,* she confirms or ratifies the contract and chooses to *stake her whole case,* in an action of deceit, upon showing *conscious purpose* on the part of the defendant, by false representation or fraudulent concealment, to mislead her.

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Manifestly this must be true on principle. She can not say in one breath that the contract complained of was not her contract because imposed upon her by the superior mentality of Mr. Malone in view of his "confidential" relationship to her, and

in the same breath say that the contract in question is her contract and that she was intentionally deceived by Mr. Malone into making it.

The two propositions simply will not stand together. And this is the reason why her counsel, after searching for months, have not been able to produce a single case from Kentucky or any other State holding that *in an action at common law for deceit,* the court will impute *guilty purpose* and intention to the defendant and place upon him the *burden of proving* his innocence. Certainly in this case Mrs. McGee has wholly failed to produce a scintilla of evidence of illegal or conscious purpose on Mr. Malone's part to mislead her as to any fact deemed by anybody material to the transactions in which she sought to help her husband, or to prove more than a mere suggestion attributed to Mr. Malone, that husbands dislike to ask their wives for financial assistance, and that she ought to help Judge McGee out with his debt.

III.

ANALYSIS OF PLEADINGS.

Counsel for Mrs. McGee contend that she was overreached by Mr. Malone, who "concealed" from her material facts, which if known to her would have resulted in her refusal to aid Judge McGee by pledging her securities as additional collateral for his debt, in order to prevent the sale and consequent sacrifice of his collateral.

This record will not support such a contention.

It is of first importance to find out what is in issue in this case. To determine this the court must first look to the pleadings to find what allegations are confessed and what are controverted. Resort to the testimony will be necessary only where the pleadings present a controverted point.

Paragraph III of the answer (Rec. 25-42) sets up "a statement of facts constituting an estoppel against or an avoidance of the cause of action stated in plaintiff's petition." (Civil Code, Sec. 95, Subsec. 2.)

The uncontroverted portions of the answer absolutely take out of this case any pretense that Mr. Malone *sought* to mislead or *intended* to mislead Mrs. McGee either by false representation or by fraudulent concealment, and absolutely cut out all ground for contending on this appeal that Mrs. McGee was actually mislead as to any fact material to her admitted purpose to help her husband when, as she says, the idea of doing so was presented to her.

It is true that in her testimony (Tr. 12), Mrs. McGee said that she was not told that Judge McGee's securities, on September 26, 1918, *were worth $11,000 less* than the amount of his debt, but she *nowhere said* in her testimony that she did not know the securities were in fact worth *something less* than his debt. *Her own memorandum book shows that she did know it.* (Tr. 98-101-104-105.) The mere fact that she was asked to put up her securities, of the

par value of $14,000, conclusively indicated to her that there was *a very substantial deficiency* in Judge McGee's collateral.

She says in her testimony that she did not ask any questions—that she did not want any further information than the mere suggestion from Mr. Malone that husbands were reluctant to ask their wives for financial assistance.

This, of itself, shows that no other information, whether given or withheld, would have been material to her course of conduct.

Again, the court will see that in her original petition, sworn to by Mrs. McGee, it is stated (Rec. 3) that Mr. Malone "informed this plaintiff that said securities had depreciated in value."

It is also true that by her amended petition an attempt is made by interlineation to explain that this statement in the original petition was inserted as the result of a mistake of her attorney; but Mrs. McGee's own memorandum book, as well as the paper she signed on September 26, 1918, clearly indicates that Mrs. McGee was informed and then knew that the securities of Judge McGee had depreciated in value. Such depreciation was the only conceivable purpose that Mrs. McGee or any of the parties could have had in view when she pledged her own securities to save Judge McGee's securities from sale and resulting sacrifice.

In this connection we quote the following uncontroverted portions of the answer, showing that there

was absolutely no attempt to impose upon Mrs. McGee or to take advantage of her by false representation or fraudulent concealment in either of the two transactions of September 26, 1918, and October 28, 1920.

Extract from Answer. (Rec. 25-27.)

The allegations contained in this extract are not denied. They set up the facts as to the origin of Judge McGee's debt back in May, 1913, and the sufficiency of the securities pledged by him, down to the time when the war broke out in 1914, and the decline thereafter of such securities, due to the abnormal conditions brought about by the war.

They also set out the amount of Judge McGee's indebtedness and the securities pledged therefor, and also show (Rec. 26-27) that Judge McGee's securities, on September 26, 1918, were worth approximately $11,000 less than the amount of his debt, for which they had been pledged, the following significant language being added:

> (Rec. 27) "* * * * though it was believed *by the plaintiff herein* and her said husband, and also believed by this defendant and its officers, that eventually, with the restoration of normal conditions and peace, commerce and finance, the said securities so pledged by J. Wheeler McGee would return to their former value and would be worth substantially more than the amount of said indebtedness to this defendant."

Paragraph II of the reply filed March 20, 1924, is the only pleading which controverts to any extent any averments in Paragraph III of defendant's answer. It is drawn in a very guarded way, and the opening sentence of Paragraph II of the reply (Rec. 73), in response to the language just quoted from Paragraph III of the answer, carefully avoids controverting the allegation that *"it was then believed by the plaintiff herein and her said husband"* that eventually Judge McGee's securities would return to their normal value, and contents itself with denying that the defendant or its officers believed in a return of these securities to their normal value.

This state of the pleadings alone is sufficient to disprove all the argument made in this case to the effiect that Mr. Malone *"concealed"* from Mrs. McGee some information he ought to have given her.

Extract from Answer. (Rec. 30.)

In this extract it is alleged that:

> "it was believed by the plaintiff and her said husband, and also by this defendant, that a sale of his said securities pledged by Judge McGee to secure his indebtedness to this defendant would involve a tremendous sacrifice of their ultimate value and great loss to him."

Nowhere is it denied in the pleadings that the plaintiff and her husband and the defendant itself believed these vitally important facts on September 26, 1918.

Again, the reply, in dealing with this point, is most guarded and contents itself with the evasive denial that defendant forbore to sell Judge McGee's securities because of the alleged fact that a sale would involve a tremendous sacrifice of their ultimate value.

There is no denial of the allegation that Mrs. McGee and her husband, and the defendant also, *believed* on September 26, 1918, that a sale of Judge McGee's securities would involve a tremendous sacrifice.

Again, in this extract it is alleged, and not denied, that prior to September 26, 1918, "in response to repeated demands for payment, Judge McGee made repeated pleas for indulgence."

The plaintiff does deny that she united with her husband in said pleas for indulgence, but she *does not deny* the allegation that on September 26, 1918, "after repeated visits by plaintiff and her said husband to this defendant, and repeated appeals by them for delay in the sale of Judge McGee's pledged securities," the defendant consented to the extension, in consideration of the pledge of the securities.

The plaintiff does deny that she *herself* made any appeals for delay, but she *does not deny* that she *went with Judge McGee* when *he* made these appeals for indulgence.

Extract from Answer. (Rec. 30.)

In this portion of the answer the following allegation occurs, and it is wholly uncontroverted:

> "Said written pledge by plaintiff (September 26, 1918), *was made with full knowledge on her part* of the fact that Judge McGee was unable to pay his debt to this defendant * * * and was made for the purpose of aiding her husband and preventing a sale and, *as she then considered,* a sacrifice of his securities."

Detached portions of the rhetorical paragraph from which the foregoing quotation is made are denied in the reply, but the allegation above quoted stands undenied.

For example, the reply denies knowledge on Mrs. McGee's part of the securities market affecting her husband's securities, and denies the averment that she put up her securities without being prompted or urged to do so by the defendant. But again we say that the reply *does not deny* that her pledge was made with *full knowledge on her part* that Judge McGee could not pay his debt (and this meant that his securities were insufficient), and was made for the purpose of aiding Judge McGee and preventing a sale and, *as she then considered,* a sacrifice of his securities.

Extract from Answer. (Rec. 34.)

This extract deals with the pledge of October 28, 1920, and the circumstances under which it was made. This is wholly uncontroverted by any reply

or other responsive pleading and shows the circumstances under which, and the writing by which, Mrs. McGee pledged her equity ($8,500) in the Liberty Bonds. It is hardly worth while to insert those uncontroverted facts here.

Extract from Answer. (Rec. 37.)

The following significant paragraph occurs in the answer (Rec. 37) and it is wholly uncontroverted. It follows the pledge of October 28, 1920, and sets up the vitally important fact that:

> "Contrary to the *expectations of the plaintiff* and of this defendant and *all parties concerned,* the mounting costs of operation, construction and maintenance of such companies as had issued the securities pledged to this defendant by the plaintiff and her said husband, had continued during the year 1920 and had greatly depreciated the value of the securities of said companies, so that they continued to decline."

All this shows that Mrs. McGee not only had full information as to the facts which her counsel now say were concealed from her, but exercised her own judgment with reference thereto, and entertained her own expectations with reference to the rise in price of Judge McGee's securities as well as her own.

Expectations are founded upon information; they do not arise out of such absolute ignorance as Mrs. McGee's counsel now claim for her.

Further comment on the pleadings in this case would seem to be unnecessary.

IV.

ANALYSIS OF EVIDENCE.

Mrs. McGee's evidence does not even measure up to her pleadings.

Straining every possible point in her favor when she not only contradicts herself in her oral testimony, but contradicts her oral testimony by her own writings, her claim amounts simply to this:

TRANSACTION OF SEPTEMBER 26, 1918.

She says that on this date she happened to be in the office of the Trust Company, and Mr. Malone saw her and said to her, in substance, that husbands hesitate to ask their wives for financial assistance; that she ought to help Judge McGee out to prevent a sale of his securities; that she ought to put up some of her own securities for this purpose; and this was all he said (Tr. 12-13), except that he suggested which of her securities she should put up, selecting for that purpose securities having a par value of $14,000 (Tr. 10-11-12-13-55-68).

She makes the remarkable statement that down to this time she had never heard that Judge McGee owed the Trust Company anything; that she had no idea what securities he had pledged, or as to the value of them; that Judge McGee had never mentioned the subject to her or discussed business with her in any way, nor had she discussed his affairs with him.

To be sure she later contradicts this when confronted with her memorandum book.

She says that she had never heard of this debt before; that she did not ask the amount of it or the value of Judge McGee's collateral, but simply acceded to Mr. Malone's suggestion and got her securities out of her box and signed a paper pledging them for her husband's debt.

She says that she asked no questions as to the value of Judge McGee's securities, and that Mr. Malone gave her no information on that subject either one way or the other.

The paper which she signed, on its very face, shows the amount of Judge McGee's debt—and this is one of the facts which she says were not communicated to her.

Her own written memorandum as to the disposition of her securities also shows the amount of Judge McGee's debt and shows that her securities were pledged "as additional collateral" for Judge McGee's debt, in addition to securities "*originally* deemed sufficient."

She admits the memorandum, and its contradiction of her oral testimony. Her only word of explanation is that she had forgotten that she had ever written that in the book (Tr. 101-102-103). But it was true, nevertheless.

She also says that upon her return home after having learned for the first time that Judge McGee owed the Trust Company over $40,000 and that his

securities were not sufficient to pay the debt, and after putting up $14,000 par value of her own securities, she never mentioned the subject to him; that she never intimated to him in any way, from September 26, 1918, until after February 10, 1921, that she had ever put up any of her securities as collateral for his debt.

Of course, this staggers belief, and Mrs. McGee shows it by her own testimony when she says that she wrote the memoranda in her book at Judge McGee's dictation, or copied them from memoranda furnished by Judge McGee (Tr. 103-105.)

She also says that Judge McGee, after October 14, 1920, was ill and unable to write except to write his own name (Tr. 43, 57, 59, 73, 84).

We forbear to characterize such testimony as this, but we are bound to point out its inherent contradictions and to analyze them in the light of the issues made by the pleadings in this case.

As to False Representation:

Now where is the false representation made by Mr. Malone to Mrs. McGee on September 26, 1918? Confessedly there is none. All that branch of this case has disappeared. Mr. Malone is alleged to have said to her that husbands dislike to ask their wives for financial assistance. Does any one say that this was untrue, even if it were a material fact?

He is also alleged to have said that she ought to help Judge McGee by putting up some of her securi-

ties on his debt. Is this anything more than an expression of opinion on his part? And does any one say that the opinion is wrong?

This is the whole case of misrepresentation, and, of course, counsel have ceased to talk about it.

As to Fraudulent Concealment:

The case of false representation having utterly collapsed, counsel for plaintiff stake their whole case on what they call "fraudulent *concealment.*"

What did Mr. Malone conceal? Mrs. McGee at one time intimated that he concealed the amount of the debt, but the paper she signed shows that the amount of the debt was disclosed, and her memorandum book also shows she knew it.

Her counsel charge that Mr. Malone "*concealed*" the fact that Judge McGee's securities had declined. But this was completely disproved by Mrs. McGee's own memorandum book and by the writing which she signed pledging additional collateral, and by her own statement that she was called on to put up her securities in order to make Judge McGee's debt safe (Tr. 12)—which meant to every one that his debt was not safe, and that it was necessary for her to put up $14,000 par value of her bonds in order to make it safe.

Right here her own memorandum proves beyond any question her knowledge at the time that Judge McGee's securities had in fact declined, because it refers to them as "originally deemed sufficient."

Furthermore, Mrs. McGee knew the war was on —she must be presumed to have known that. She knew that Judge McGee's securities had declined. She knew it required $14,000 par value of her securities to make his debt safe at that time.

Then what was the *fact* concealed from her by Mr. Malone? husband's debt $11000 more than pr collateral worth

It must be understood that the law, before holding a man guilty of deceit, requires that it shall be shown that he has knowingly misrepresented an *existing* or *past* fact. Mere predictions for the future do not count in actions of deceit.

Baker v. McDonald, 185 Ky. 471-*474-5*.

Certainly *a failure to make any prediction* as to the future does not measure up to the requirements in *an action of deceit.*

Again, nobody says anywhere that Mr. Malone thought Judge McGee's securities would continue to decline, and the stipulation filed as evidence in this case, adopting market quotations given by Harrison Hunter, of the firm of Henning Chambers & Co., shows that Judge McGee's securities, in point of fact, increased in value between September 26, 1918, and October 1, 1919, when the year's extension contracted by Mrs. McGee had expired.

For example, on September 26, 1918, Commonwealth Preferred stock was worth 37; Commonwealth Common, 18; and Kentucky Wagon Co. stock, 70; while on October 1, 1919, Commonwealth Pre-

ferred had advanced to 55, Commonwealth Common to 24, and Kentucky Wagon Co. to 87.

So if a mere prediction as to the rise in value of Judge McGee's securities would support an action of deceit, and if Mr. Malone had made a prediction (which he did not do) that they would rise in value, the fact is they did rise in value, and there was absolutely no untruth or misrepresentation on that point.

Again we say—what did Mr. Malone conceal? There is not a line of proof in this case to show that he concealed anything. He certainly can not be said to have concealed from her the danger of losing her securities, because the mere fact that she was asked to put them up in order to make the debt safe carried to the ordinary mind, and certainly to her mind, the idea that such a possibility existed.

The securities were put up because the debt was not safe without them.

As to Material Facts:

Not only have counsel for plaintiff utterly failed to show any false representation or even any false prediction by Mr. Malone, but they have wholly failed to show any suggestion or desire on his part to keep Mrs. McGee from finding out any fact, from any source, that might be material to her pledge of her securities for the purpose of helping her husband.

Indeed, if we take Mrs. McGee's case and her testimony at its full value, there was not one single fact

that could be material except the one fact that Judge McGee needed her help, and of this she admits she was fully advised—and the pleadings clearly show this to be true.

It is mere bunkum to talk about material facts, and to say that Mrs. McGee would not have put up her securities if she had known what the future might develop. Actions of deceit can not be predicated upon such shadowy or flimsy grounds.

So the things that are now suggested as possibly material were *so utterly immaterial* to Mrs. McGee at the time she made this pledge that she not *only did not ask* Mr. Malone about them but she says she went home and *for more than two years never mentioned the matter to her husband,* an experienced lawyer and business man then in the full state of his mental faculties.

It is hard to deal seriously with a contention like this, so desperate does it appear to be in all its essentials.

As said by the Court of Appeals in *Crescent Grocery Co.* v. *Vick,* 194 Ky. 727, 733, it is essential that a false representation or a fraudulent concealment, in an action for deceit, should be as to a material fact, and in that case, where the defendant had stated a half truth with respect to his contract with his former employer, concealing or suppressing a portion of the contract (such concealment amounting in fact to a misrepresentation of the contract), the court said that the undisclosed portion of defendant's contract

with his former employer was not a material factor in inducing plaintiff to contract with him, and therefore a judgment rendered in favor of the defendant was affirmed on the ground of the immateriality of the thing misrepresented or concealed.

As to Charge of Imposition Based upon Confidential Relationship:

Having utterly failed to prove any false representation or any fraudulent concealment of any material fact inducing the pledge of Mrs. McGee's securities on September 26, 1918, plaintiff's counsel branch out into the realms of equity and ask this court to lay down *a new rule governing actions of deceit* and to say that where *confidential relations* have existed between plaintiff and defendant, the *defendant assumes a burden which the law refuses to place upon the meanest criminal,* and is compelled, before a jury in an action of deceit, to *prove his innocence* and *practically* to show that he did everything to *dissuade* the plaintiff from entering into contract relations with him.

This is an unheard-of extension of the rule in an action of deceit. It is an illogical proposition and it can not be maintained on principle.

At the hearing of our motion for a peremptory instruction we challenged counsel for Mrs. McGee to produce one single case from this court or any other court where an action of deceit was allowed to be maintained on any such ground as this, and after a

search of the books extending back more than a hundred years in Kentucky (to 1 T. B. Monroe) and stretching out to the West as far as the State of Kansas, not one case has been produced or cited by counsel for plaintiff that will justify the extraordinary doctrine necessary to keep the plaintiff in court *in this case at common law.*

A moment's study of the nature of this action will show how impossible it is to base an action of deceit upon a mere claim that Mrs. McGee trusted Mr. Malone so implicitly that she acted upon a bare suggestion from him.

If it be true that she did trust Mr. Malone and do exactly as he said, without exercising any will of her own in the matter, then she might have set aside this contract on the ground of imposition or dominating influence practiced upon her by Mr. Malone. But, under advice of her counsel, she elected not to do this. Having full knowledge of the facts, she elected to affirm the contract—to say that it was her contract—that her mind did assent to it and does now assent to it. Therefore, it is not and it can not be simply a case of imposition.

Mrs. McGee can not in one breath affirm the contract as her own, with full knowledge of the facts, and in another breath say it was not her contract, but Mr. Malone's will, imposed upon her, and therefore she should be released from it.

True, if what her counsel now claim were supported by the evidence, she might have gone into

equity to rescind a contract imposed upon her by the will of Mr. Malone, to which her own mind never gave assent; but if she went into equity, she would have to do equity, and that is one thing she did not want to do in this case. She wanted to get for her husband the benefit of an extension and the surrender of $1,500 of his in cash, representing the proceeds of his collateral, and at the same time, by such testimony as she has given, *to take her chances before a jury* in an *action of deceit,* in which she could hold with the hare and run with the hounds.

Manifestly a cause of action bottomed purely upon imposition and having no foundation *except a presumption* to be drawn from proof of imposition through confidential relationship, is cognizable only in equity, and not one case can be found holding that such a case is cognizable at common law in an action for deceit.

TRANSACTION OF OCTOBER 28, 1920.

What we have said with reference to the transaction of September 26, 1918, applies with full force to the transaction of October 28, 1920. On the latter date the only suggestion of misrepresentation is that Mr. Malone told Mrs. McGee, in answer to her question ("purely accidental" asked after bonds had been put up) (Tr. 19-20) about how the Kentucky Wagon Co. was doing. "They are paying good dividend now and will pay off everything" (Tr. 19, 20, 22, 88).

Now who says this was untrue? Harrison Hunter's statement shows that in the year 1920 the stock of the Kentucky Wagon Co. ranged from 93 on January 1st to 74 on October 28th, having risen from 70, the price on September 26, 1918, when the first pledge was made.

Nobody says that Mr. Malone made a single untrue statement with reference to the Kentucky Wagon Co. Nobody says that the company was not doing well during that year. Nobody says that the stock was not paying good dividends. Of course, it was a mere matter of judgment or prediction for the future as to what the company could do thereafter, but nobody says that Mr. Malone's judgment was wrong under then existing conditions when he said, or if he predicted that the Wagon Company would "pay out everything"—meaning, of course, that the Wagon Company would pay out its own obligations, and certainly not meaning—and nobody says he meant—that 200 shares of Kentucky Wagon Co. stock, at the prevailing price or at any conceivable price, would pay off Judge McGee's debt.

It would certainly be worse than medieval justice to convict Mr. Malone of false representation by perverting what he is charged to have said, into a representation that Judge McGee's Kentucky Wagon Co. stock would pay off his entire debt to the Trust Company. He never said that—he never meant it—and there is absolutely no basis for any charge of false representation or fraudulent con-

cealment with respect to the transaction of October 28, 1920.

Moreover, it should always be borne in mind that this transaction of October 28, 1920, was as much for the benefit of Mrs. McGee, to save her securities *theretofore pledged,* as for the benefit of Judge McGee.

IV.

ASSUMPTION OF MRS. McGEE'S UTTER IGNORANCE AND HELPLESSNESS.

One of the amazing things about this case is the way in which Mrs. McGee and her counsel have started out to convince, first the jury, and then the court, that she is destitute of any sense whatever.

Fortunately, her own business dealings disprove any such claim. We venture to say that there are not ten women in the city of Louisville who keep as systematic and thorough a record of their business affairs and keep so completely in touch with them as Mrs. McGee appears by her own memorandum book to have maintained throughout this whole transaction.

She knew from her experience in the Almstedt transaction exactly what it meant to put up her securities for Judge McGee's debt. *She admits that she did that at Judge McGee's instance.* She is by no means so devoid of sense or business experience as she woud now have the court believe.

But, if all that she now claims for the purposes of this litigation were assumed to be true, her only

remedy is in a court of equity, which alone could protect her from the alleged imposition now charged by her to Mr. Malone.

There are many cases in Kentucky which hold that in a proper state of case relief may be granted in equity by the cancellation of a contract procured through imposition and undue influence.

But there is not one single case holding that a remedy for a contract so procured, without conscious effort to deceive by misrepresentation or by suppression of the truth, can be afforded through an action of deceit at common law.

See authorities cited, *ante,* p. 11.

V.

DEFENSE OF RES JUDICATA.

While the action of the trial court in granting a peremptory instruction for the Trust Company was based solely upon the utter failure of proof indispensable to support an action of deceit, an additional defense, complete in itself, is presented by the amended answer (Rec. 64-69), pleading *res judicata.*

This is further made to appear from the transcript of the entire record in suit No. 141,251, brought in Equity in the Jefferson Circuit Court by the Trust Company against Mrs. McGee to enforce collection of the balance due on her $14,000.00 note given by her on December 28, 1922, in ratification and settlement of her part in the various transactions

now alleged as the basis of her claim in this case.

The record in the Trust Company suit against Mrs. McGee was placed in evidence by her counsel as Exhibit No. 4 (Tr. 117).

Paragraph I of the original answer (Rec. 11-13), was filed originally as a plea in abatement of this action because of the pendency of the Trust Company's prior suit against Mrs. McGee growing out of and involving the very transactions relied on for recovery in the instant case.

While the instant case was pending, the Trust Company's prior suit in equity against Mrs. McGee proceeded to a judgment, enforcing its lien upon the very collateral of which she now claims she was deprived by the alleged fraud of Mr. Malone.

Mrs. McGee and her counsel were so unwilling to submit her case to a court of equity, which would require equity at her hands, that, although summoned to appear and served with written notice of the Trust Company's intention to ask judgment against her (see Exhibit No. 4, pp. 6 and 7), she ignored the equity case and judgment went against her by default.

Thereupon, the Trust Company amended its answer and converted its plea in abatement into a plea of *res judicata* in bar of this common-law action of deceit.

It is well settled that a judgment by default is just as effective an adjudication of a party's rights as a judgment rendered upon issues joined.

Jefferson, Noyes & Brown v. Western Nat'l Bank, 144 Ky. 62.
Shaw v. Milby's Ex'r, 23 Ky. L. R. 645, 63 S. W. 577.
Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 683-691.

Undoubtedly the facts relied upon by Mrs. McGee in this case, if sufficient to suppport a cause of action for deceit, would have been entirely sufficient to defeat a recovery by the Trust Company upon her note growing out of these identical transactions.

As stated by this court, speaking through Judge Miller, in Jefferson, Noyes & Brown v. Western National Bank, 144 Ky. 67, Mrs. McGee "could have presented the facts of misrepresentation and fraud now relied upon, in defense of plaintiff's action upon the notes, but she did not do so."

Again quoting (144 Ky. 67):

> "The judgment in the former case established the *validity* of the notes and merged them into the judgment, while the effect of a judgment according to the prayer of the petition in this case would establish the *invalidity* of the notes. It follows, therefore, that appellant's *claim was a defense* to and avoidance of appellee's claim upon the notes, and was not a counterclaim separate and independent from appellee's right of action upon the notes."

This court has twice considered exactly similar questions and decided them in favor of the defense of *res judicata,* such as the Trust Company has made in this case.

The two cases above cited afford abundant authority for holding that the judgment rendered in favor of the Trust Company in its suit against Mrs. McGee upon her note given Dec. 30, 1922, for a consideration alleged to be fraudulent, is conclusive against her on all issues of alleged fraud and imposition claimed to have been practiced upon her.

If any such fraud or imposition had been practiced upon her as is claimed in this action, it could have been pleaded and should have been pleaded as a defense to the action on the note. Not having been so pleaded at that time, it can not now be alleged as the basis of an independent action.

In *Shaw* v. *Milby's Ex'r*, 23 Ky. L. R. 645, 63 S. W. 577, the exact question was involved. Amanda Shaw had given her two notes to W. L. Mudd and W. H. Milby, secured by a mortgage on her land.

The payees of the notes brought suit against her in the Green Circuit Court, obtained a judgment thereon, and sold her land under the judgment.

Thereafter she brought an action of deceit against W. L. Mudd and the Executor of W. H. Milby, alleging that they had misrepresented to her a certain state of facts, upon which they procured her execution of the two notes which had passed into judgment.

By reason of this misrepresentation she claimed to have been damaged in the sum of $1,000.00.

A demurrer to her petition was sustained and her action dismissed, whereupon she appealed to the Court of Appeals. The judgment of the lower court

was affirmed in an opinion by Judge O'Rear, from which we quote as follows (23 Ky. L. R. 646):

> "Were all the facts true concerning the alleged misrepresentation of the attorneys, they would have vitiated the transactions evidenced by the notes and mortgages, and would have been a complete defense to the suit to enforce the liens created by the mortgages. Therefore, when the action was brought by the mortgagees upon these notes and mortgages, this defense, if it existed, was available to the mortgagor, and it should have been presented.
>
> "It is a familiar and salutary rule of law that any defense that might have been presented, will be presumed to have been passed upon in the original action. (Citing authorities.)
>
> "It follows that the facts alleged in this case were either adjudged against appellant or must in this action be conclusively presumed to have been adjudged against her."

In *Jefferson, Noyes & Brown* v. *Western National* Bank, 144 Ky. 62-70, this identical question was involved and the doctrine of Shaw v. Milby reaffirmed.

Jefferson, Noyes & Brown were fire insurance agents in Louisville and they extended a line of credit to the Howe Manufacturing Co., on the faith of representations made to them by officers of the Bank that the Howe Co., was financially sound and solvent and able to pay the premiums. They took a note from the Howe Co., for the amount of the premiums due, $734.40, and then discounted the note with the bank.

When the note matured, the Howe Co. failed to pay it. The bank sued Jefferson, Noyes & Brown as endorsers and obtained a judgment against them by default.

Having paid the judgment, Jefferson, Noyes & Brown brought their action against the bank to recover damages for the deceit and misrepresentation practiced upon them by it and its officers, by reason whereof they were induced to extend credit to the Howe Co. in reliance upon the representations of the bank, which were alleged to have been false and fraudulent and known to be so by the bank at the time they were made, and to have been made in reckless disregard of the truth or falsity thereof.

In other words, this was a plain action of deceit or fraud against the bank to recover damages arising out of alleged fraud and misrepresentation.

It appeared in their petition that they had been sued by the Bank and that judgment had been rendered against them. The court sustained a demurrer to the petition on the ground that the allegations of fraud and misrepresentation relied upon for recovery would have constituted a defense to the suit on the notes, and whether pleaded or not in that action, the judgment therein was conclusive against Jefferson, Noyes & Brown.

On appeal, Jefferson, Noyes & Brown contended that the fraudulent misrepresentation by the bank gave rise to a counterclaim, upon which they could maintain an independent action, while the bank con-

tended that the facts alleged, if true, constituted at most a mere defense to the Bank's suit on the notes and should have been relied upon in the former action (p. 64).

The court, speaking through Judge Miller, delivered an elaborate and well-reasoned opinion, affirming the judgment of the lower court and holding that Jefferson, Noyes & Brown were precluded by the judgment in the bank's case from setting up in their own independent action facts which, if pleaded in the bank case as a defense and established, would have defeated recovery therein.

After stating the well-settled rule that a judgment is conclusive not only as to all matters actually litigated and decided in a case, but as to all matters necessarily involved and which might have been litigated therein, the court went on to point out the difference between matters which are merely defensive and matters constituting a counterclaim (pp. 65-66). It illustrated this difference by referring to the Malpractice Cases, in which it is held that where a doctor sues for the amount of his bill and recovers judgment therein, such judgment is a bar to an independent action for malpractice which the patient may thereafter bring against the doctor, the reason being that the former action adjudges a compliance by the doctor with his contract of employment, and this means that he discharged the duties of the employment with reasonable skill and care, thus negativing any want of proper care or skill.

The court also cites Black on Judgments, Vol. 2, Sec. 767, as follows (foot of p. 66):

> "Where judgment goes against the defendant, and he afterwards sues the plaintiff on a cross-claim which he might have presented in the first suit but did not, if the facts which he must establish to authorize his recovery are inconsistent with the facts on which the plaintiff recovered in the first action, or in direct opposition to them, the former judgment is a bar. In other words, if the way to his own recovery lies through a negation of the facts alleged by the plaintiff, that negation must be made good when the facts are first set up. For afterwards he can not deny what the judgment affirms to be true."

The same doctrine is cited from 1 Freeman on Judgments (4th Ed.), Sec. 282.

From these authorities the court deduces the rule (p. 67):

> "* * * that if the determination of a question is necessarily involved in the former judgment, it is immaterial whether it was actually litigated or not. * * *
>
> "In the case at bar appellants *could have presented* the facts of misrepresentation and fraud now relied upon, *in defense* of plaintiff's action upon the notes, but they did not do so. * * *
>
> "The judgment in the former case established the *validity* of the notes and merged them into the judgment, while the effect of a judgment according to the prayer of the petition in this case would establish the *invalidity* of the notes. It follows, therefore, that appellant's *claim was a defense* to and in avoidance of appellee's claim upon the notes, and was not a

> counterclaim separate and independent from appellee's right of action upon the notes."

After again citing the New York case (Dunham v. Bower, 77 N. Y. 76), the court states the question before it in the following language (p. 68):

> "Applying the reasoning of the foregoing language to the facts of this case, it is equally difficult to see how the bank's right to recover upon the notes, and the appellant's right to wholly defeat the notes upon the ground that appellee had fraudulently procured appellants to accept them, can co-exist. One of them is necessarily unfounded; and when one of them has been established by a judgment, the other is thereby necessarily disaffirmed."

On page 69 the court further discusses the case and shows that in that case the bank's whole claim was based upon the notes, which were paid as the result of the judgment thereon, and that the only damage accruing to appellant must have accrued from such payment. Hence, when it was adjudged that they were bound to pay, it must have been adjudged their damage arose simply from complying with the judgment.

Again, on page 70 the court, by quoting from its former decisions, holds that a defendant who fails to plead matters essentially defensive, can not assert them by an independent suit.

In *Watson* v. *Carmon's Adm'r,* 10 Ky. L. R. 288, 6 S. W. 450, there had been a suit by an administrator for the settlement of his decedent's estate, to

which a distributee was made party, and a final judgment rendered therein. Later the distributee asserted a claim to the proceeds of a note which had been collected by the administrator as a part of his decedent's estate, claiming the note as a gift *causa mortis* from the decedent, who was her father.

She brought suit upon this claim, and the judgment in the former settlement suit was pleaded as a bar and, as such, sustained by the Court of Appeals in an opinion delivered by Chief Justice Pryor.

An attempt was made to differentiate between the two cases, the latter of which sought affirmative relief, it being contended that the former litigation did not involve litigation over the title to the note.

The court, citing with approval *Mallory* v. *Horan,* 49 N. Y. 111, held that the second action was barred by the mere failure of the plaintiff therein to set up her claim in the settlement suit, because the judgment rendered in the settement suit was inconsistent with the recognition of her claim to the note or its proceeds.

In *Last Chance Mining Co.* v. *Tyler Mining Co.,* 157 U. S. 683, 691, the question arose as to the effect of a judgment by default when pleaded as *res judicata* in a second suit. The court said (p. 691):

> "But a judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment, as one rendered after answer and contest."

On page 692 the court quotes with approval from Bigelow on Estoppel, page 77:

> "The meaning simply is that judgment by default, like judgment on contest, is conclusive of what it actually professes to decide, as determined from the pleadings; in other words, that facts are not open to further controversy if they are necessarily at variance with the judgment on the pleadings."

On the strength of the authorities above cited, we assert with confidence that when Mrs. McGee, then represented in this action by eminent counsel, refused to interpose any defense to the Trust Company's suit in equity on her note, the questions now raised in this action were conclusively adjudged against her.

VI.

DEFENSE OF WAIVER OR CONDONATION.

Another defense pleaded in the Trust Company's answer as amended is that, regardless of any conclusive effect attributable to the judgment rendered in the prior equity suit of the Trust Company against her, Mrs. McGee had, by her acts and conduct over a long series of years, when she admittedly knew all that she now claims to have discovered, waived or condoned any fraud or wrongdoing now imputed to Mr. Malone or the Trust Company.

She not only renewed her contracts from time to time, but every payment made by her, resulting in the loss complained of in this case, was made after she

obtained full knowledge of all the matters now claimed on her behalf in this case.

In the nature of things she could sustain no loss on account of Mr. Malone's alleged wrongdoing until she had made payments to the Trust Company in order to get back her securities.

When she made these payments with knowledge of her "wrongs," the maxim *"Volenti non fit injuria"* applies to her with full force.

We here cite a few of the many Kentucky cases which apply this maxim and lay down the doctrine that where a person claiming to have been defrauded, with knowledge of the facts goes on with the contract and secures further advantage for himself or for some one else, making further payments from time to time, he waives his right to maintain an action for deceit:

Hartford Life Ins. Co. v. Hanlon, 139 Ky. 346.

Opinion by Commissioner Clay.

In this case Hanlon claimed to have been induced to take out a policy in the Hartford Life Insurance Company by one of that company's agents falsely and fraudulently representing the rights that would be secured to him under the policy, with respect to dividends and rates of premium accruing at the end of five years from the date of the policy, and again at the end of seven years from its date.

Plaintiff continued to pay under the policy for ten years, although the falsity of the first representation

was manifest at the end of five years, and the falsity of the second representation at the end of seven years from the date of the policy.

The court said (p. 350) that when the plaintiff discovered the fraud, he did not have to ask a rescission of the contract:

> "All he had to do was to stop paying his premiums and bring an action for deceit. If he intended to rely upon the fraud, he ought to have done so at that time. Instead of doing so, however, *he waived and condoned the fraud* and affirmed the contract by paying the quarterly premiums thereon during a period of three years. Having enjoyed the protection on his life during all that time, *he can not now claim damages for the very fraud which he has himself condoned.*"

The general rule is thus stated by the court (p. 349):

> "Hence, if it is shown that he has at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, his election is irrevocable. By clearly manifesting his intention to abide by the contract, he condones the fraud and is without remedy. He can not, with knowledge of the fraud, enjoy the benefits of the contract, and then file an action for deceit." (Citing Kingman v. Stoddard, &c.)

Summers v. Carpenter, 156 Ky. 337, *341.*

In this case Carpenter had bought from Summers a saloon and lodging house business in Indianapolis, paying part cash and part in notes. There were further payments and renewals of the notes. When Car-

penter was sued thereon, he pleaded fraud in the procurement of the notes and counterclaimed for damages caused him thereby. He made many charges against Summers and, as the court said (p. 340), "proved about all of them;" and yet a judgment in his favor by the court below was reversed by the Court of Appeals because he had "waived his right of action for damages by the acts performed by him after discovery of the alleged fraud on the part of appellant" (p. 341).

It was held that he had thereby condoned the alleged fraud and waived any right of action he might have arising therefrom.

Mackenzie v. Eschmann's Ex'rs, 174 Ky. 450, 453, 454.
Opinion by Commissioner Clay.

Eschmann had made a contract with Dunstan to purchase the stock of a company publishing a magazine, under which the Eschmanns were to pay $15,000 cash and $10,000 in one year for a controlling interest in the company. $2,500 was paid on the note, which appears to have been renewed for a balance of $7,500. Eschmann, being sued on the note, filed a counterclaim in the nature of an action of deceit for fraud in the procurement of the contract.

As to the issue of fraud, the court, in reversing a judgment in favor of the Eschmanns, said (p. 453) it was unnecessary to decide whether the Chancellor's finding of fraud was correct or not, for, conceding its correctness, the defense of fraud was unavailable because the fraud had been condoned or waived.

It appears (p. 454) that after learning of the misrepresentations, the Eschmanns elected to go on with the trade. The court said:

> "It is the rule that a party to a contract obtained by fraud has but one election to repudiate or rescind the same. * * * He can not, with knowledge of the fraud, enjoy the benefits of the contract, and then file an action for deceit." (Citing Hartford Life Ins. Co. v. Hanlon, 139 Ky. 346, and Smith v. Lewisport Bank, 27 Ky. L. R. 406.)

The court commented on the fact that the owner, Eschmann, had collected and retained money which he had no right to collect or retain except by virtue of the contract.

So in the present case, Mrs. McGee procured indulgence for herself and procured the release to Judge McGee of $1,500, proceeds of his Commonwealth bonds, to which he could not have been entitled except for the transaction now complained of as fraudulent.

Johns v. Masterson, 176 Ky. 399.
Opinion by Judge Sampson.

This case cites with approval Hartford Life Ins. Co. v. Hanlon, 139 Ky. 346; Smith v. Lewisport Bank, 27 Ky. L. R. 406; and Mackenzie v. Eschmann's Ex'r, 174 Ky. 454, last above cited.

Smith v. Bank of Lewisport, 27 Ky. L. R. 406, 85 S. W. 219. Opinion by Judge Settle.

In this case the court (p. 411) held that if the fraud had been practiced upon the appellant, he should have complained of it sooner. After discovering the fraud, he twice paid the interest on his note without complaint, participated in a meeting of the stockholders of the Chair Company, and was elected a director of that company; hence he was not allowed to attack the transaction by which he acquired his stock in the company.

Thompson v. McKee, &c., 119 S. W. 229.

Opinion by Judge Hobson.

McKee and his associates made a contract by which they bought from Thompson certain stock in the Diamond Coal Company and other property. They paid part cash and gave notes for the balance. When sued on their notes after the lapse of eleven years, McKee and his associates filed a counterclaim seeking damages in the nature of an action of deceit for misrepresentation as to the value of the stock.

Without going into the evidence as to the allegations of original fraud, the court held that after acquiescing in the transaction for so many years, with knowledge thereof, they could not now recover.

The cases from outside Kentucky are equally emphatic on this point. We shall content ourselves with merely citing some of them.

Fitzpatrick v. Flannagan, 106 U. S. 648, *659, 660.*
Simon v. Goodyear Metallic Rubber Shoe Co. (C. C. A. 6th Cir.), 105 Fed. 573, *581,* 52 L. R. A. 745.

E. H. Taylor, Jr., & Sons v. First National Bank (C. C. A. 6th Cir.), 212 Fed. 898, *903*.
New Martinsville Oil Co. v. Barnett Oil & Gas Co. (C. C. A. 4th Cir.), 261 Fed. *34, 40*.
Richardson, &c., v. Lowe, &c. (C. C. A. 8th Cir.), 149 Fed. 625, *632*.
In re Tear-off Bottle Seal Co. (C. C. A. 2nd Cir.), 224 Fed. 492, *494*.
Kingman & Co. v. Stoddard, &c. (C. C. A. 7th Cir.), 85 Fed. 740.
Thompson v. Libby, 36 Minn. 287, 31 N. W. 52, *53*.
Scott v. Simons, 181 Iowa, 1037, 165 N. W. 161, *162, 163, 164*.
Bean v. Bickley, 187 Iowa, 689, 174 N. W. 675, *683, 684*.
Defiel v. Rosenberg, 144 Minn. 166, 174 N. W. 838.
Tuttle v. Stovall, 134 Ga. 325, 67 S. E. 806, *809*.
Ponder v. Altura Farms Co., 57 Colo. 519, 143 Pac. 570.

VII.

ESTOPPEL BY ACCEPTANCE OF BENEFITS.

Two distinct transactions are now complained of by Mrs. McGee, namely:

(1) The pledge of September 26, 1918.

By this she procured these benefits for Judge McGee:

(a) The extension of his debt for one year.

(b) The postponement for one year of the right to sell his securities, which in the Fall of 1918 meant sacrificing them.

(c) The release to him of $1,500.00 in cash, representing money received upon an exchange of $5,000.00 of his Commonwealth securities for $3,500.00 of new securities issued by the same company. (See uncontroverted averments of answer, Rec. 32.)

During the year's indulgence thus secured for Judge McGee, his collaterals increased in market value from $29,880.00 to $34,990.00—a gain of $5,110.00, to which should be added the $1,500.00 in cash realized by Judge McGee on the exchange of Commonwealth securities, or a total of $6,610.00, representing the improvement in Judge McGee's securities during the year from September 26, 1918, to October 1, 1919.

All this is mathematically demonstrated by Exhibit No. 3 filed with the transcript of testimony, being a statement of market values by Harrison Hunter read in evidence by agreement of parties.

True, only $1,500.00 of this represented actual money going to Judge McGee, but the reason why he did not realize the whole benefit of it was simply because all parties still thought on October 1, 1919, that his securities were far below their real value and that it was still a bad time to sell them.

On the other hand, during the year's indulgence thus secured for her husband, Mrs. McGee's own securities, pledged on September 26, 1918, declined in market value from $12,810.00 on September 26, 1918, to $12,240.00 on October 1, 1919. This likewise ap-

pears from Harrison Hunter's statement above mentioned.

Thus it is that the indulgence granted by the Trust Company to Judge McGee and Mrs. McGee after the expiration of the year contracted for was out of regard for both Mrs. McGee and Judge McGee, to avoid sacrificing or selling the collateral pledged by either of them.

(2) The pledge of October 28, 1920.

Conditions in the securities market got worse after the Versailles peace conference than they had been during the war—so much so that it is said: "We won the war but we could not win the peace."

All these conditions are set forth by uncontroverted averments of defendant's answer (Rec. 25-42). Because of their existence the Trust Company did not force Judge and Mrs. McGee on September 26, 1919, when the year's indulgence contracted for had expired. It waited a year, but conditions in the securities market in 1920 having gotten worse instead of better, the Trust Company notified the parties that it could not carry Judge McGee's debt longer in its then condition.

Thereupon Mrs. McGee made the additional pledge of October 28, 1920, as much to save her own securities theretofore pledged as to save Judge McGee's securities. Thus she got by this pledge a direct benefit for herself, and she secured a four months' extension on Judge McGee's debt.

When the four months' period rolled around—on February 28, 1921, it appears from Harrison Hunter's statement that Judge McGee's Commonwealth securities had sharply declined from their market values in 1919, and the same was true as to Mrs. McGee's securities, so that the Trust Company, instead of having surplus collateral in the sum of $426.00, as it had on September 26, 1918, in fact had a substantial loss on all collaterals pledged with it, including Mrs. McGee's securities.

All this is mathematically demonstrated by the Harrison Hunter statement.

Taking into consideration the facts above pointed out, from this record it is evident that Mrs. McGee, by her contract of September 26, 1918, and later contracts, procured for Judge McGee the benefits pointed out, at the expense of the Trust Company, and, after her first pledge, secured by her later pledges benefits for herself.

No wonder Mrs. McGee has been anxious to keep her case out of equity and has preferred to take her chances upon convincing a jury by such testimony as this record contains.

VIII.

REVIEW OF BRIEF FOR MRS. McGEE.

Our view of this case differs so widely from that presented by Mrs. McGee's counsel that we have found it necessary to state at length our own position and our own version of the case. We shall therefore but briefly notice the brief for appellant.

1. We regret that Mrs. McGee's counsel, as stated on page 3 of their brief, should have restrained a perfectly "natural impulse" to discuss in detail the evidence in this case. Had they done so, it would have materially lightened our labors and shortened our brief; but from their standpoint we agree that it is wise to touch lightly upon the evidence.

2. The essential conclusion of the argument for Mrs. McGee is that Mr. Malone should have advised her not to put up her securities—in other words, that he should have restrained her from doing it, no matter how affectionate her relations with her husband, or how earnest her desire to help him, or how great her ability to do so, or how few the other persons having any claim upon her. Nothing else that Mr. Malone said or did, short of absolutely advising her against her pledge, would, under the logic of her counsel's argument, excuse him from a charge of fraud or imposition.

He may have earnestly believed in the future of Judge McGee's collateral, and may have felt thoroughly convinced that the course Mrs. McGee took

was the wise course, but counsel would condemn him for his judgment and brand him as a traitor to a trust.

We repel the insinuations against Mr. Malone and against the Trust Company and its officers, especially as the trial court held them unsupported by the evidence.

3. Appellant's brief, page 2, curtly charges that Mr. Malone, by *suppressing* the truth, procured Mrs. McGee to make her pledge of September 26, 1918.

We challenge this statement, and, as pointed out, *ante,* pages 27-29, we are supported by the record, including Mrs. McGee's own written contract of September 26, 1918, and her contemporaneous record showing that Judge McGee's securities were "originally deemed sufficient."

4. Again, on page 2, appellant's brief states that the Trust Company consumed all but $8000.00 out of $34,000.00 in securities pledged by Mrs. McGee.

The facts are these:

(a) Mrs. McGee first pledged bonds of the par value of $14,000.00—market value $12,810.00. Only $5000.00, par value, of this pledge was ever applied on Judge McGee's debt, the remaining securities, aggregating $9000.00 par value, being returned to Mrs. McGee, as shown by her original receipt December 28, 1922, filed as an exhibit with the answer in this case (Rec. 427⅛; Answer, Rec. 40).

(b) The $3000.00 Liberty Bonds pledged February 10, 1921, were shortly thereafter returned to

Mrs. McGee, and no claim therefor is made in this case (Tr. 87; Answer, Rec. 40).

(c) The pledge of October 28, 1920, included *at that time* merely Mrs. McGee's equity (about $8500.00) in $17,000.00 of Liberty Bonds. Later her equity was increased by her payments for the bonds but when thus increased, other securities were released from the pledge and redelivered to her, as above shown.

As a matter of fact, Mrs. McGee, in her amended petition, stretching her case as far as possible, claims the following items of damage:

$5070.00	Proceeds of Commonwealth Bonds
$ 500.00	Proceeds of bank deposit
$2668.40	Interest
$8238.40	Paid in money.

In addition, she claims $14,000.00 for conversion of Liberty Bonds pledged on her note of December 28, 1922.

These bonds were not converted by the Trust Company. The court sold $12,000.00 par value of them under its judgment adjudging and enforcing the Trust Company's rights (Ex. 4, Tr. 117).

5. On page 7 of their brief, and again on page 13, Mrs. McGee's counsel misconceive our contentions in this case. They assume erroneously that we contend that deceit can never be predicated upon fraudulent concealment.

This is not our contention at all. As already pointed out, *ante,* pages 32, 33, what we do maintain is that in an action for deceit there must be some *proof* of deceit, and intent to deceive must be shown, whether the deception be practiced by way of *fraudulent concealment* or by way of *false representation.*

In this case, no such proof is offered, but Mrs. McGee asks the court to presume that Mr. Malone had a guilty purpose to mislead her and, in pursuance of such purpose, suppressed or concealed some information.

In S. Rose Co. v. Hasenzahl, 141 Ky. 576, this Court, speaking through Judge Clay, said:

> "Fraud cannot be sustained by mere suspicion, strained inference or conjecture. Evidence which produces a vague misgiving is not enough. The rule is that in every case, there must be such legal evidence as is sufficient to overcome in the mind the *legal presumption of innocence* and beget a belief of the truth of this allegation of fraud."

6. The cases cited by Mrs. McGee's counsel do not meet the exigencies of their situation. We shall briefly analyze them:

Roberts v. Parsons, 195 Ky. 274.
Hays v. Meyers, 139 Ky. 440, 32 Ky. L. R. 832.
Ruffner, &c., v. Ridley, 81 Ky. 165.
Brown v. Slaton, 172 Ky. 787.
Hunter v. Owens, 10 Ky. L. R. 651, 9 S. W. 717.
Taylor v. Bradshaw, 6 T. B. M. 145.

These are all equity suits. The first five were brought to rescind a contract alleged to have been obtained by fraud.

Suits for rescission are essentially different from actions of deceit, the former disavowing the contract, and the latter adopting it. Plainly the plaintiff can not say in one breath that the contract is his, and in the next breath that it is not his merely because foisted upon him by the dominating will of the defendant.

In Taylor v. Bradshaw, there was no showing of confidential relationship, and cancellation was denied even in equity.

Adkins v. Stewart, 159 Ky. 218, 222.
Elsey v. Lamkin, 156 Ky. 836.

In each of these cases the court found positive proof of fraudulent concealment amounting to false representation, in that the defendant in each case, in answer to questions by plaintiff, stated a half truth, as a complete answer to the question, thereby intentionally and fraudulently concealing the other half of the truth.

Hughes v. Robertson, 1 T. B. M. 215.
Faris v. Lewis, 2 T. B. M. 375.
Singleton &c., v. Kennedy & Co., 9 B. M. 222, 225.

These are cases involving the old rule in the sale of personalty of a sound article for a sound price.

In the Hughes case, a blind horse was foisted on an ignorant and innocent purchaser.

In the Faris case, a horse infected with glanders was likewise sold to an ignorant and unsuspecting purchaser.

In the Singleton case, bagging was sold under a brand previously well and favorably known, when the seller knew it was in effect falsely misbranded.

McCowen &c., v. Short, 118 N. E. 538.

This case was decided by an intermediate court. It was not affirmed on appeal, but a rehearing was denied by the same court in 119 N. E. 216. When examined, it is a plain case of false representation proven by the evidence and found by the jury.

The case did not turn on any mere presumption growing out of confidential relationship, and what the court has to say on that point is largely if not wholly dictum.

Van Natta v. Snyder, 157 Pac. 432.

In this case there was positive fraud, and the court said:

> "The evidence was sufficient to establish it. The hotel stood on the east portions of two lots. The defendant was shown the property in such a way as to lead her to believe she was getting the building and all of both lots, which appeared to form and appeared to be used as a unit known as the Brunswick Hotel. The deed conveyed only the east half of the lots, the west half having previously been deeded to the plaintiff's son."

Thus there was no question about positive fraud which would certainly sustain an action of deceit.

Again, the purchaser, when sued on her notes, filed in that same action her counterclaim for fraud. Hence, no question of *res judicata* was involved in the case.

The only point was as to waiver or condonation of the fraud by acts *in pais* after the purchaser had discovered the fraud, and the court held that, under the peculiar circumstances of that case, the purchaser was not estopped to assert her rights when discovered.

The case is vastly different from the instant case, where Mrs. McGee claims to have discovered on February 10, 1921, that imposition had been practiced upon her, and that, a few months later, upon her return from Florida, she consulted friends and relatives, including her brother-in-law and two Chicago lawyers. After all this was done, she went ahead, renewing the contract and making payments thereon, and finally employed counsel in Louisville to bring this suit, and, notwithstanding that fact, permitted the prior suit of the Trust Company to proceed to a default judgment adjudging the validity of the very note which she now says was invalid.

First National Bank, &c., v. Mattingly, 92 Ky. 650.
Smith v. First National Bank of London, 107 Ky. 257.
Julius Winter v. Forrest, 145 Ky. 581.
Graves v. Lebanon National Bank, 10 Bush, 23.

These are all suretyship or guarantee cases. We can not see what application they have. There is no element of suretyship in the instant case. A surety makes himself jointly bound with the principal. Mrs. McGee never did this. Moreover, the confidential relationship, if any, properly exists between the surety and his principal, and not between the surety and the creditor, who in every case deals at arm's length with the surety as to matters arising prior to the suretyship.

In the trial court, Mrs. McGee's counsel admitted that the principle they contend for was not in fact applied in those cases, so that everything quoted from the opinions was pure dictum.

Directly opposed to these cases is the recent decision of this court in *Marksberry* v. *First National Bank of Owensboro,* 194 Ky. 401, where Judge Sampson, speaking for the court, said (p. 410):

> "If A owes B a sum of money, and is unable to pay it, may not B insist upon A securing the obligation, and is B under the legal necessity of saying to C, whom A procures to become his surety, that he (B) does not believe that A's assets are equal to his liabilities and that C may be required in the course of events to pay the money owed by A to B?
>
> "The mere statement of this proposition is sufficient to refute it."

7. Much ado is made in appellant's brief about confidential relationship between Mrs. McGee and Mr. Malone, and there is danger of losing sight of the only

reason in law for admitting any such proof in this action for deceit.

The only reason why such proof is admitted in a common-law case of deceit is to show a probability that *if* false representations were made to Mrs. McGee, she would be more apt to rely upon them, when made by a person standing in confidential relationship to her, than she would be if made by one known to be avowedly antagonistic. In other words, the proof is admitted for the purpose of attempting to excuse Mrs. McGee in failing to make for herself such investigation of the facts as, if made, would have disclosed the falsity of the representation.

However, in every such case there must be some falsity of representation or some conscious effort to mislead either by falsely representing or by fraudulently *concealing* (by affirmative act) the real situation from the plaintiff. Mere proof of confidential relationship between the parties can not supply the proof of actual misrepresentation, false representation, or actual *concealment* with fraudulent intent.

It can not be said that if it were proved that A and B were intimate friends, it would follow, *because of such confidential relationship, that A would be permitted to turn and rend B in an action of deceit, without any proof at all to show that he was deceived,* resting simply on the *presumption* (invoked in this case), that B is guilty until he shall establish his own innocence.

Again, we maintain the proposition that the reason why relief is afforded in equity, *and only in equity,* for an abuse of confidential relationship, is that the contract which equity rescinds is not the will of the plaintiff but is the will of the dominant defendant; hence the plaintiff has a right to recede from the contract—that is, to rescind it, and this right of rescission is an equitable remedy.

However, if a plaintiff, with full knowledge of the facts, under advice of counsel, affirms the contract, then he makes it his contract from the beginning, and puts himself on the same footing with the defendant. No matter what their confidential relationship may have previously been, plaintiff and defendant thereafter stand on the same footing and deal at arm's length, and this is the only status that can be recognized by a court of law in an action for deceit.

IX.

CONCLUSION.

In concluding this brief, we ask the court to put itself in the position of the parties at the time the transactions in question occurred. Judge McGee was the owner of securities having a value considered to be far in excess of any market quotations then prevailing. Assume that he wanted to save them from sacrifice; that the Trust Company wanted to give him a chance; that his wife was able to help him and wanted to help him; that Mr. Malone thought it was

all right for her to help him, and that she would be safe in doing so.

Now, in such a situation, was there anything wrong in Mrs. McGee going to the Trust Company, or helping her husband as she had previously helped him with Almstedt Bros (Tr. 45, 46, 102).

Ordinarily, a person seeking financial assistance for himself or another would go to his own banker. In fact, he would not expect such favors from a complete stranger.

If Mrs. McGee's claims be upheld, it is no longer safe to do business with one's friends, lest a presumption of fraud be inferred from the fact of friendship.

We are convinced that the judgment of the lower court in this case is right, and we ask that it be affirmed.

Respectfully submitted,

TRABUE, DOOLAN, HELM & HELM,
Attorneys for Appellee.

April 4, 1925.

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> character as to render it certain that they do not deal on terms of equality, but either on the one side from superior knowledge of the matter derived from a fiduciary relation or from overmastering influence, or on the other from weakness or dependence or trust justifiably reposed, unfair advantage in a transaction is rendered probable, the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary *and well understood.*''

In the case of *Roberts* v. *Parsons,* 195 Ky. 274, the Court in discussing the duty of the respective parties to each other where a confidential relation exists, says:

> ''In such cases it is quite universally held that when the relation is established, the burden is cast upon the defendant to show the perfect fairness of the transaction. * * * But whether there exists a confidential relation or not, it is fraud on the part of the one possessing superior knowledge of the facts affecting the subject matter of the contract to not disclose those facts to the other party if he knows that the former is ignorant thereof and relies on and can only rely on him to make a full disclosure. * * * This is required in order that the parties may be placed upon an equal footing, and in furtherance of common honesty and fair dealing, the rule being in such cases 'that *suppressio veri,* as well as *suggesto falso,* is a ground for setting aside a contract.' ''

We must keep in mind that under the law of Kentucky there is no difference in the principle applicable

to suits for a rescission of contracts obtained through fraud and suits for damages arising from the execution of a contract induced by the fraud of another, except that in rescission action must be taken promptly, whereas in suits for damages the contract may be ratified and later on suit brought for damages.

In the case of *Hays* v. *Meyers,* 32 Ky. Law Rep. 832, the Court stated the rule in this way, after discussing the authorities:

> "From these authorities the rule may be deduced that when the parties are dealing at arm's length and there is no relation of trust or confidence between them and no representation or statement made that would have a tendency to deceive or mislead, and there are no special circumstances imposing a duty to speak, mere silence or the non-disclosure of facts in the possession of one of the parties will not amount to such fraud as would authorize a rescission of the contract or justify a refusal to specifically enforce it, although in every case the purchaser will not be permitted to rely on his silence as a defense, *as there are times and occasions when it is the duty of a person to speak, in order that the party he is dealing with may be placed on an equal footing with him, as when the knowledge he possesses is not within the fair and reasonable reach of the* other, or of such a character that by the exercise of diligence it could be discovered, or is not open alike to both parties; and *if any relation of trust or confidence exists between the parties,* or any statement or representation is made that does or might create a wrong impression, or there is a failure to impart information that is asked for, and the knowledge of which would affect the value of the property, or the acts or

> conduct of one of the parties is reasonably calculated to deceive or mislead the other, *or the circumstances surrounding the parties and the transaction are such as to make it the duty to disclose the information not within the knowledge of the other—equity will afford relief.*"

In the case of *Adkins* v. *Stewart,* 159 Ky. 218, the Court said:

> "An actionable fraud may consist as well of the concealment of what is true as the assertion of what is false."

In the case of *Taylor* v. *Bradshaw,* 6 T. B. Monroe, 145, the Court said:

> "Fraud may, no doubt, be, and frequently is, committed by the suppression of truth, as well as by the suggestion of falsehood; *and it is equally competent for the Court to relieve against a fraud whether it be perpetrated in the one way or the other. By suppressing the truth the deception may often be as base, the injury to others as great, as by the suggestion of falsehood. But the failure to disclose to others whatever is known to us can not with any propriety be at all times a suppression of the truth. From those who have reason to expect information from us, the truth should not be withheld;* but such as look *not* to us for information and expect no disclosure from us, have no cause to complain of our silence, and to reproach us for not speaking—with having suppressed the truth."

It seems to us that the principle of law, that failure to speak where there is a duty to speak, as there undoubtedly was in this case because of the confiden-

to speak on the part of one party to a transaction, then silence as to a material fact known by one party to a contract is as much a fraud as if there had been made a positive misstatement, because under such circumstances silence and failure to speak is, in law, a representation that such fact does not exist.

26 Corpus Juris, under the head of "Fraud," page 1071, Section 14, states the rule as follows:

> "An important exception to the rule that mere silence is not fraud exists where the circumstances impose on a person a duty to speak and he deliberately remains silent. Where the law, by reason of the relation of the parties, their respective means of knowledge, the subject matter with reference to which they are dealing, or other circumstances, imposes a duty upon one of them to disclose all material facts known to him and not known to the other, mere silence in violation of this duty with intent to deceive will amount to fraud, as being a deliberate suppression of the truth and equivalent to the assertion of falsehood. The concealment of a fact which one is bound to disclose is an indirect representation that such fact does not exist, and constitutes fraud. A similar rule has in some jurisdictions been affirmed by express statutory provisions. Whether a duty to speak exists in a given case is a question depending upon the peculiar facts involved, such as the nature of the transaction, the mutual relation of the parties, and their respective knowledge and means of knowledge."

In the work of *John W. Smith on the Law of Fraud,* Section 114, the rule is stated as follows:

> "Wherever, however, the relations between the contracting parties appear to be of such

not bound to disclose facts when dealing for his own interest *unless asked about them by the weaker. The law is exactly the reverse of that. The stronger must not wait to be asked.*

Perhaps we had better first dispose of Mr. Doolan's question of ratification or his claim that rescission is the only remedy. It will be found that Mrs. McGee, when defrauded, had the right to sue for rescission of the contract of pledge or, when sued, she had the right to plead the fraud as a defense, or she had the right to affirm the fraudulent contract and sue for damages. There is no possible doubt that such is the law of Kentucky and we will content ourselves by simply citing a few authorities.

Ades v. Wash, 199 Ky. 687.
Head v. Oglesby, 175 Ky. 618.
Jefferson, Noyes, etc., v. Western National Bank, 144 Ky. 62.
Bishop's Admr. v. Bishop, 162 Ky. 769.
Section 17, Civil Code of Practice.

FRAUDULENT CONCEALMENT.

We will show that the Circuit Court erred in holding that the Trust Company's officers were not bound to disclose the facts because Mrs. McGee didn't ask about them.

We recognize the principle to be sound, that ordinarily, where parties are dealing at arm's length, mere silence is not misrepresentation for which damages may be recovered, but this rule does not obtain where there is a duty to speak. Where there is a duty

tial relation, constitutes actionable fraud, just the same as if there had been a direct misrepresentation, is so firmly fixed in our law that no one would seriously question it.

FRAUDULENT CONCEALMENT IS GROUND FOR AN ACTION FOR DAMAGES.

Mr. Doolan, in his argument on the motion for a peremptory, advanced the novel contention that even assuming that there was a fraudulent concealment and failure to speak on the part of the Trust Company and those acting for it, no remedy could be had except a suit for rescission.

In the case of *Hughes* v. *Robertson,* 1 B. Monroe, 215, the very suggestion made by Mr. Doolan in the case at bar was made. In discussing it, Judge Mills, speaking for the Court, said:

> "On the other hand, it is contended that a court of equity will set aside a contract for suppression of truth; but there is no precedent for a declaration in a court of law, and no adjudicated case which warrants an action for a bare concealment, and that the law only gives remedy where there has been a misrepresentation. It is true, that the books of forms do not furnish a precedent expressly in point; but they do exhibit precedents for declarations for deceit in sales, which, in principle, come up to the present case. And it is not necessary that the seller should have been active in producing the concealed defect in the article sold, to make the deceit actionable. If it is placed there by other causes and concealed, the seller is guilty of deceit and ought

to be responsible. But, if the adjudged cases and books of forms were wholly silent on this subject, elementary writers all acknowledge the impropriety of concealment and *suppressio veri* makes no inconsiderable figure on their pages. *If the Chancellor would vacate a contract for it, no good reason can be given why a court of law should not give an action on account of it, and remunerate a party in damages. Indeed, we would rather suppose that the law first admitted the right, and was followed by equity; for courts of law are as such bound to notice fraud, as courts of equity, and to redress it, where it can give complete redress; and no reason is perceived why a court of law can not give as complete redress for concealment as misrepresentation, especially where the party, as in this case, so soon as he discovers the defect, disaffirms the contract, and tenders back the article.*"

This case has been cited with approval in the case of *Adkins* v. *Stewart,* 159 Ky. 218, which was a suit at law on two notes, in which the defendant counterclaimed for damages for fraud in the sale of land, by a concealment of certain defects; in the case of *Elsey* v. *Lamkin,* 156 Ky. 836, which was a suit for damages for fraudulent concealment in the sale of land; in the case of *Singleton* v. *Kennedy,* 9 B. Monroe, 223, which was a suit at law for damages; and in the case of *Farris* v. *Lewis,* 2 B. Monroe, 75, which was a suit for damages for fraudulent concealment.

Given a proper case, such as the one at bar, where there is a confidential relationship and a duty to speak, and disclose facts which would increase the risk about to be assumed, the failure to speak, in law,

was a deliberate falsehood on its face. Margin is a surplus over and above the loan and when the collaterals were less than the loan, there was no margin at all. Malone's purpose was to lead her to believe that there was a margin, though an insufficient margin—that Judge McGee's securities were worth more than the amount of his debt to the appellee—and in doing so his conduct and words amounted to deliberate misrepresentation. Mrs. McGee's evidence shows unqualifiedly the confidential relations and we will be able to show that where such relations exist, it is incumbent on the stronger dealing for himself or his company to impart all the facts to the weaker.

The Trust Company knew the value of the collaterals. In fact, Mr. Speed, the Treasurer, testified that he knew their value; that it was his business to keep posted on them; and Mr. Malone also knew the value of the collaterals, *else it would have been idle for him to have approached Mrs. McGee for more collaterals.*

Mr. Doolan makes the untenable point that rescission is the only remedy. The queer reliance by Mr. Doolan is that Mrs. McGee affirmed or ratified the transaction by which she pledged her stock. She did affirm it, and she could not maintain an action for damages without affirming it. The law is overwhelming to this effect.

Let us repeat that the Circuit Judge was under the impression and acted upon that impression that where confidential relations existed, the stronger was

against a man like Malone whom she trusted as her father had told her to do. The Court will observe by reading her evidence that it fully sustains the appellant's pleadings, especially does it sustain the amended petition above referred to. We feel that a further discussion of the evidence would be simply taking the Court's time, for to read it would be to read what the Court will again read when her evidence is read.

CONFIDENTIAL RELATIONS.

The amended petition shows that when Malone obtained the first $14,000.00 of appellant's securities, Judge McGee's collaterals were worth $11,000.00 less than his loan. In fact, this is pleaded in the answer. When he obtained the second bunch of collaterals from the appellant, to wit, the $17,000.00 of Liberty Bonds, Judge McGee's collaterals were $14,000.00 in value less than his debt. Malone, knowing these facts, and Mrs. McGee not knowing them, he concealed the same from her and obtained her collaterals by withholding the truth.

The relations between them being confidential in the extreme, it was his duty to disclose the true facts when dealing for his Company, the same as if he were dealing for himself. Mrs. McGee testified that had she known that her husband's securities were so inadequate she would not have put up her own securities. She further testified that Malone then told her that Judge McGee's loan needed more margin, which

as heretofore suggested, is nothing more nor less in effect than a positive representation that such facts do not exist.

The case of *Vannatta* v. *Snyder,* 98 Kansas, 102, 157 Pac. 432, fully sustains our contention, not only as to appellant's right to maintain an action for damages, but also is convincing authority to the effect that it was not necessary to plead the fraud of which appellant complains as a defense to the suit on the $14,000.00 note. In that case a woman was induced to purchase a hotel through fraudulent representations of the vendor. The contract of sale was executed on both sides, the vendee paying half the consideration in cash, and executing and delivering her notes, secured by mortgage, for the remainder. After the transaction was concluded, but on the same day, the vendee discovered the fraud. The notes were payable monthly, beginning July 1, 1913. The vendee paid ten of them, the last on October 10, 1913, and meanwhile occupied the property, without complaining of the fraud. In January, 1915, the vendor brought suit to recover on the unpaid notes and to foreclose the mortgage. The vendee was without business experience, and had relied entirely on the vendor, whom she regarded as a friend. She was ashamed and reluctant to think that the vendor had defrauded her and was afraid to make him angry and antagonistic, and was ignorant of her rights until she consulted an attorney after she was sued. The lower Court held that she had waived the fraud, but the Su-

legations contained in it would have supported an independent action.

Aside from the confidential relations existing between Mrs. McGee and the Trust Company, growing out of the confidence which she had been taught to have in the company and its officers by her father, and out of the fact that this company was her trustee, handling practically all of her property and attending to all of her business, the relationship established between the Trust Company and Mrs. McGee, as the result of her suretyship, created an additional confidential relationship, because it seems to be well settled in Kentucky that the relation between the trustee and the creditor of the principal is a confidential one, calling for the fullest disclosure by the creditor to the person about to become surety for the payment of a debt owing by some one else to the creditor.

In the case of *First National Bank of Stanford* v. *Mattingly,* 92 Ky. 650, in discussing the necessity of a creditor's making full disclosure to a person about to become surety for a debt owing to the creditor, the Court said:

> "The general doctrine applicable to this case as quoted from Story's Equity Jurisprudence and approved in Burks v. Wonterline, 6 Bush 20, is thus stated: 'The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of facts, or

now Woodward, Warfield & Hobson) is still in the case. We mention this circumstance so that the Court will draw no unfavorable deductions from the withdrawal of Judge Dawson.

Our natural impulse is to go in detail into the evidence, but we have after careful consideration concluded that it would be a waste of this Court's time to do so, as the whole case will be understood by a reading of the amended petition of the appellant filed May 26, 1924, and found on pages 82 and 95 of the Transcript of Record. This, of course, we know the Court would read, no matter what statement we might make. Then, too, we feel sure that the Court will read the evidence of Mrs. McGee and, for that reason it is useless for us to undertake to re-state it here. We will, therefore, content ourselves by calling attention to a few salient points.

At the conclusion of Mrs. McGee's evidence and the evidence of the Treasurer of the appellee, plaintiff below rested and the defendant moved for a peremptory instruction, which the Circuit Judge gave. It is this instruction that is involved in this appeal.

In sustaining the motion for peremptory instruction the Circuit Judge delivered an opinion, in which the Court said:

> "It is true, as shown, that Mrs. McGee had every trust and confidence in its officials, at least in this particular official, Mr. Malone by name, etc."

Again the Court used these words:

recited in the amended petition. Thereupon John T. Malone, an officer in the appellee, by suppressing that truth procured appellant to pledge $14,000.00 of her own securities to secure her husband's debt. Later on the securities still continuing to decline, John T. Malone, having left the employ of the Fidelity & Columbia Trust Company, was by some fortuitous circumstance in the Fidelity & Columbia Trust Company's office and there he met Mrs. McGee. In reality, he was brought there by appellee's president for the purpose of inducing appellant to pledge more securities. He secured from her a further pledge for her husband's debt of the equity in $17,000.00 of Liberty Bonds. She had borrowed some money to help pay for these bonds which, however, she afterwards paid; so that the appellee acquired $14,000.00 of securities at one time, $17,000.00 at another time and later on $3,000.00 of Liberty Bonds, making in all $34,000.00 in securities.

In the windup and sale of Judge McGee's securities and the securities of the appellant by the appellee, everything was consumed except about $8,000.00 of the appellant's Liberty Bonds; so that she has lost by the transaction about $26,000.00 and interest.

Judge Dawson, who was in the case in the lower Court, having gone on the Federal Bench, is disqualified by the United States Statutes from further appearing. Hence his name is dropped, but the firm of which he was at that time a member (which firm is

> any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish sufficient grounds to invalidate the contract. Moreover proof or admission of misrepresentation or concealment of material facts, when fraud is charged by the surety, will, without any regard to the intent to deceive him, *malo animo,* make a case of constructive fraud requiring the creditor to repel the legal deduction by proof of the integrity of the transaction."

This same principle was recognized in the case of *Smith* v. *First National Bank of London,* 107 Ky. 257, although the facts in that case prevented its application. The Court said:

> "The contract of suretyship imports good faith between the parties in regard to the transaction. Concealment of material facts, or express or implied misrepresentations of such facts, will furnish sufficient grounds to invalidate a contract."

The Court in that case went on to point out that the bank, and those acting for it in that particular instance, could not be charged with the duty of revealing facts known to it, but not known to the person about to become surety, because neither the bank in that case nor any one acting for it procured the surety to become such. This was done by the debtor, and not in the presence of the bank or any one acting for it. In this respect the Court said:

> "Jackson did not procure Smith's signature to the note, and, as we have said, was not present

> when he signed it. Therefore, it can not be said that he was guilty of either misrepresentation or concealment."

Jackson was the representative of the bank. The Court in that case, however, clearly implied that if Jackson, representing the bank, had procured Smith to become surety and had concealed from him, or failed to disclose to him, facts material to the risk assumed, Smith would have been entitled to relief on the ground of fraudulent concealment.

Again, this principle is recognized in the case of *Julius Winter* v. *Forrest,* 145 Ky. 581. The Court quoted with approval 1st *Story's Equity Jurisprudence,* Section 215, reading as follows:

> "Thus, if a party taking a guarantee from a surety conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to a fraud, because the party is bound to make the disclosure, and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist."

The principle was also recognized in the case of *Graves* v. *Lebanon National Bank,* 10 Bush, 23.

There can be no question but to all intents and purposes Mrs. McGee, by pledging her securities to pay the debt of her husband, became surety for him, and under the authority of the cases just cited, *if no other relationship of confidence existed than that of surety and creditor,* it was the duty of the Trust

COURT OF APPEALS OF KENTUCKY

MARY E. MCGEE, - - - - - - - *Appellant,*

vs.

FIDELITY & COLUMBIA TRUST COMPANY, - *Appellee.*

BRIEF FOR APPELLANT.

This is an action for damages brought by the appellant against the appellee for deceiving her when she was occupying towards the appellee confidential relations of the closest kind. The deception consisted in some representations, but mainly in the deliberate withholding from appellant necessary facts which, if known, would have defeated the purpose of the appellee and would have saved about $26,000.00 and interest to the appellant.

J. Wheeler McGee, who was at one time Police Judge of Louisville, married Mary Ella Taggart, appellant, in 1900. He became indebted to the Fidelity & Columbia Trust Company, which is the last name of that Company, in the sum of about $42,000.00 and pledged as security for the loan collaterals which were at the time considered ample security. In 1918, Judge McGee's securities had so declined in value as to be worth about $11,000.00 less than the amount of his debt. The answer pleads this fact and it is also

recited in the amended petition. Thereupon John T. Malone, an officer in the appellee, by suppressing that truth procured appellant to pledge $14,000.00 of her own securities to secure her husband's debt. Later on the securities still continuing to decline, John T. Malone, having left the employ of the Fidelity & Columbia Trust Company, was by some fortuitous circumstance in the Fidelity & Columbia Trust Company's office and there he met Mrs. McGee. In reality, he was brought there by appellee's president for the purpose of inducing appellant to pledge more securities. He secured from her a further pledge for her husband's debt of the equity in $17,000.00 of Liberty Bonds. She had borrowed some money to help pay for these bonds which, however, she afterwards paid; so that the appellee acquired $14,000.00 of securities at one time, $17,000.00 at another time and later on $3,000.00 of Liberty Bonds, making in all $34,000.00 in securities.

In the windup and sale of Judge McGee's securities and the securities of the appellant by the appellee, everything was consumed except about $8,000.00 of the appellant's Liberty Bonds; so that she has lost by the transaction about $26,000.00 and interest.

Judge Dawson, who was in the case in the lower Court, having gone on the Federal Bench, is disqualified by the United States Statutes from further appearing. Hence his name is dropped, but the firm of which he was at that time a member (which firm is

> any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish sufficient grounds to invalidate the contract. Moreover proof or admission of misrepresentation or concealment of material facts, when fraud is charged by the surety, will, without any regard to the intent to deceive him, *malo animo,* make a case of constructive fraud requiring the creditor to repel the legal deduction by proof of the integrity of the transaction."

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> "Jackson did not procure Smith's signature to the note, and, as we have said, was not present

Company, knowing as it did the dependence and ignorance of Mrs. McGee, to have told her the exact state of her husband's debt and the value of the securities pledged for its payment, before she was permitted to imperil her property.

Further considering what are confidential relations and the right to maintain an action for the violation of such confidence, we call attention to the following:

> "The suppression of the truth is as vicious and disastrous as if the false representation had been made. In either case the motive is the same and the result should be similar, since it is the intention that constitutes the fraud."
>
> *Ruffner, etc.,* v. *Ridley, etc.,* 81 Ky. 165.

> "Where the petition alleges facts sufficient to show that the grantee stood in a confidential relation to the grantor, who was old, ignorant and infirm, and by reason of such relation obtained of her an unconscionable advantage, such petition states a cause of action and the burden is upon the grantee to show that the deed was understandingly executed by the grantor."
>
> *Brown* v. *Slaton,* 172 Ky. 787.

In the case of *Hunter* v. *Owens,* 10 R. 651, appellee purchased a tract of land worth about $150, for which she paid $600 in cash to appellant. She was an ignorant, dull woman, without business habits, and purchased land upon judgment of appellant, who was a shrewd business man, in whom she had confidence by reason of the fact that he was a friend and

physician of her husband in his lifetime. It was held by the Court that the parties were not dealing at arms' length and that the excess of price justified the chancellor in his inference of fraud and authorized him to set aside the sale.

> "And, actionable fraud may consist as well of the concealment of what is true as the assertion of what is false."

Adkins v. *Stewart,* 159 Ky. 218.

In *People* v. *Palmer,* 152 N. Y. 217, or 46 N. E. 328, it is held that confidential and fiduciary relations are interchangeable terms and these words are used:

> "Such a relation arises whenever a continuous trust is reposed by one person in the skill or integrity of another." 8 Cyc. 565.

McCowen v. *Short,* 118 N. E. 538, affirmed 119 N. E. 216, was a suit for damages. In that case the Court said:

> "Where the parties do not deal at arm's length or occupy substantially the same relative positions in the transaction and one of them is justifiable in, or excusable for, reposing confidence in the other, under the circumstances, the duty rests upon the party occupying the superior position to act in the utmost good faith, *to give to the other party all material information possessed by him, to withhold no information* and to take no undue advantage of his position or of the dependence or weakened condition of the other party.

4. Where a person occupies a confidential relation to another, full disclosure is necessary in transactions between them. The same thing is true where one party to a transaction has a superior means of knowing the facts. The party holding the advantageous position must disclose the full facts without waiting to be asked about them by the other party . . . . . Pages 6–13, 21–24

Roberts v. Parsons, 195 Ky. 277.
Head v. Oglesby, 175 Ky. 613.
Watson v. Watson, 190 Ky. 270.
Ades v. Wash, 199 Ky. 687.
Howell v. Howell's Admr., 189 Ky. 556.
Swords v. Fields, 192 Ky. 629.
Wood v. Moss, 176 Ky. 419.
Shacklette v. Goodall, 151 Ky. 20.
Green River Coal Mining Co. v. Brown, 140 Ky. 330.
Brown v. Slaton, 172 Ky. 787.
26 Corpus Juris, p. 1071.
John W. Smith on Law of Fraud, Sec. 114.
Hays v. Meyers, 32 Ky. L. R. 832.
Adkins v. Stewart, 159 Ky. 218.
Taylor v. Bradshaw, 6 T. B. Monroe, 145.
Hughes v. Robertson, 1 B. Monroe, 215.
Elsey v. Lamkin, 156 Ky. 836.
Singleton v. Kennedy, 9 B. Monroe, 223.
Farris v. Lewis, 2 B. Monroe, 75.
27 Corpus Juris, p. 46.
First National Bank of Stanford v. Mattingly, 92 Ky. 650.
Smith v. First National Bank of London, 107 Ky. 257.
Julius Winter v. Forrest, 145 Ky. 581.
1st Story's Equity Jurisprudence, Sec. 215.
Graves v. Lebanon National Bank, 10 Bush, 23.
Ruffner, etc., v. Ridley, etc., 81 Ky. 165.
Hunter v. Owens, 10 R. 651.

> "Where it appears that the parties occupying such unequal positions, and that the one occupying the superior position has gained a substantial advantage over the other, the law intervenes in behalf of the weaker person or the one from whom such advantage has been gained and raises a presumption of fraud or unfair or unconscionable dealing in his favor, which, when duly prosecuted makes out a *prima facie* case in his favor entitling him to redress unless the other party by proper proof overcomes such inference or presumption of fraud."

In *12 Ruling Case Law,* Section 5, pages 232-4, it is said:

> "Constructive fraud often exists where the parties to a contract have a special confidential or fiduciary relation, which affords the power and means to one to take undue advantage of, or exercise undue influence over, the other. A transaction between persons so situated is watched with extreme jealousy and solicitude, and if there is found the slightest trace of undue influence or unfair advantage redress will be given to the injured party. When such a relation exists, it is the duty of the person in whom the confidence is reposed to exercise the utmost good faith in the transaction, and to refrain from abusing such confidence by obtaining any advantage to himself at the expense of the confiding party (citing many cases)."

In conclusion, we submit that the Circuit Court erred in taking the case from the jury, thereby holding that where confidential relations exist the stronger party dealing for himself or his Company need not

disclose important facts to the other party; for, as stated, the exact contrary is the law.

Respectfully submitted,

JOHN B. BASKIN,
WOODWARD, WARFIELD & HOBSON,
Attorneys for Appellant.

CLASSIFICATION OF QUESTIONS DISCUSSED AND AUTHORITIES CITED.

1. Where written contract is obtained by fraud, the injured party may seek either rescission, or may affirm the contract and seek damages for his injury, either by an action for deceit or by way of counter-claim in a suit brought to enforce the contract,

Pages 13–17

Ades v. Wash, 199 Ky. 687.
Long v. Douthitt, 142 Ky. 431.
Ligon v. Minton, 125 S. W. 304.
Head v. Oglesby, 175 Ky. 618.
Jefferson, Noyes, etc., v. Western National Bank, 144 Ky. 62.
Bishop's Admr. v. Bishop, 162 Ky. 769.
Section 17, Civil Code of Practice.

2. And mere delay in bringing suit for damages, after discovery of fraud, will not bar an action for fraud, although it may be a bar to a suit for rescission . . . . . Pages 8–11

Ades v. Wash, 199 Ky. 687.
Vannatta v. Snyder, 98 Ky. 102, L. R. A. 1918 A.
Head v. Oglesby, 175 Ky. 613.

3. Judgment on the $14,000.00 note is not a bar [redacted] to this action . . . . . Pages 8–17

Jefferson, Noyes & Co. v. Western National Bank, 144 Ky. 62.
Bishop's Admr. v. Bishop, 162 Ky. 769.
Sec. 17, Civil Code of Practice.
Vannatta v. Snyder, 98 Ky. 102, L. R. A. 1918 A.

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COURT OF APPEALS OF KENTUCKY

MARY E. McGEE, - - - - - - - Appellant,

vs.

FIDELITY & COLUMBIA TRUST COMPANY, - - - - - - - - - Appellee.

BRIEF FOR APPELLANT.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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JOHN BRYCE BASKIN
COUNSELOR AT LAW
INTER-SOUTHERN BUILDING
LOUISVILLE, KY.

January 2, 1925.

Honorable Charles I. Dawson,
Inter-Southern Bldg., City.

RE: McGEE VS. FIDELITY & COLUMBIA TRUST COMPANY.

Dear Dawson:-

Mrs. McGee will be at my office at three o'clock January 5th.

You and I ought to have a conference as early as possible, although I am sick and not able to do much. If you are not engaged, call me in the morning and I will come down.

Congratulations!

Sincerely yours,

John B. Baskin