lord chief justice was mistaken in both respects, i.e., that the communication was not privileged, and that there was evidence of malice.

But we think that the case falls within the class of privileged communications, which is not so restricted as it was contended on behalf of the plaintiff. It comprehends all cases of communications made bonâ fide, in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words. In this case, supposing the defendant himself to believe the charge,—a supposition always to be made when the question is whether a communication be privileged or not,—it was the duty of the defendant, and also his interest, to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff; as such association might reasonably be apprehended to be likely to be followed by injurious consequences, both to the servants and to the defendant himself.

[590] We think, therefore, the communication in question was privileged, i.e. it was made under circumstances which rebut the presumption of malice, which would otherwise arise from the nature of the words used. That presumption being rebutted, it was for the plaintiff to shew affirmatively that the words were spoken maliciously; for, the question, being one the affirmative of which lies on the plaintiff, must, in the absence of evidence, be determined in favour of the defendant.

On considering the evidence in this case, we cannot see that the jury would have been justified in finding that the defendant acted maliciously. It is true that the facts proved are consistent with the presence of malice, as well as with its absence. But this is not sufficient to entitle the plaintiff to have the question of malice left to the jury; for, the existence of malice is consistent with the evidence in all cases except those in which something inconsistent with malice is shewn in evidence: so that, to say, that, in all cases where the evidence was consistent with malice, it ought to be left to the jury, would be in effect to say that the jury might find malice in any case in which it was not disproved,—which would be inconsistent with the admitted rule, that, in cases of privileged communication, malice must be proved, and therefore its absence must be presumed until such proof is given.

It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence.

In the present case, the evidence, as it appears to us, does not raise any probability of malice; and is quite as consistent with its absence as with its presence: and **[591]** considering, as we have before observed, that the mere possibility of malice which is found in this case, and in all cases where it is not disproved, would not be sufficient to justify a jury in finding for the plaintiff, we think the lord chief justice was right in not leaving the question to them, and consequently that this rule must be discharged.

Rule discharged.

KEATES *v.* THE EARL OF CADOGAN. Jan. 20, 1851.

[S. C. 20 L. J. C. P. 76; 15 Jur. 428. Referred to, *Peek* v. *Gurney*, 1873, L. R. 6 H. L. 390.]

There is no implied duty in the owner of a house which is in a ruinous and unsafe condition, to inform a proposed tenant that it is unfit for habitation; and no action will lie against him for an omission to do so, in the absence of express warranty, or active deceit.

This was an action upon the case. The first count of the declaration stated that the defendant, before and at the time of the committing of the grievance by him as thereinafter next mentioned, was possessed of a certain dwelling-house, situate in the county of Middlesex, and which said dwelling-house, at the time of the committing of the said grievance, and of the making of the proposal and agreement, and of the plaintiff becoming tenant to the defendant, as thereinafter mentioned, and thence until the plaintiff entered into and occupied and dwelt therein, as thereinafter mentioned,

was in such a ruinous and dangerous state and condition as to be dangerous to enter, occupy, or dwell in, and was likely wholly or in part to fall down, and thereby do damage and injury to persons and property therein, and which the defendant then, and during all the time aforesaid and hereinafter mentioned, well knew: That the plaintiff, without any knowledge, notice, information, or warning whatever, that the said house was in the said state and condition, or likely wholly or in part to fall down, to wit, on the 20th of November, 1848, proposed to the defen-**[592]**-dant that the defendant should demise to him, and that the plaintiff should take of him, as his tenant, for the purpose of the plaintiff's immediately occupying and dwelling in the same, the said dwelling-house, and also a certain yard adjoining to the same, for the term of three years from the 29th of September, 1848, at a certain rent and upon certain terms to be agreed upon between them: That the defendant, well knowing the premises, to wit, on the 20th of November, 1848, by an agreement in writing then made between the defendant, by one Daniel Price Owen, his agent in that behalf, of the one part, and the plaintiff of the other part, agreed to demise, and did demise to the plaintiff the said dwelling-house and yard for the said term of three years from the said 29th of September, 1848, at the yearly rent of 25l., commencing from the day and year last aforesaid, payable quarterly, the first quarter to become due on the 25th of December, 1848, the plaintiff paying all rates, taxes, &c.; and the plaintiff thereby also agreed with the defendant to take, and did thereby take, the said dwelling-house and yard for the said term, and to pay the said rent in manner aforesaid, and the said rates, taxes, &c.: That the plaintiff thereupon then entered into and upon the said dwelling-house, and commenced occupying and dwelling therein: That, for and during all the time aforesaid, and from thence until the happening of the injury, loss, and damage as thereinafter mentioned, he the plaintiff did not have any notice, knowledge, information, or warning whatever that the said house was in the said state and condition, so as to be dangerous to enter, occupy, or dwell in, or that it was likely wholly or in part to fall down; and the defendant, for and during all the time aforesaid, well knew that the plaintiff had not any such notice, knowledge, information, or warning, and believed that he could immediately after the making of the said agreement, enter into and upon, and occupy and dwell **[593]** in, the said house: Breach, that, although the defendant could and might, before the making of the said agreement, and also before the plaintiff so entered upon and commenced occupying or dwelling in the said house as aforesaid, have given or caused to be given to the plaintiff notice, information, or warning that the said house was in the said state and condition, and likely wholly or in part to fall down; and although the defendant ought to have given or caused to be given to the plaintiff notice, information, or warning of that fact; yet that the defendant, not regarding his duty in that behalf, wholly omitted and neglected to, and did not, nor would at any time give or cause to be given to the plaintiff any notice, information, or warning whatever that the said house was in the said state and condition, and likely to fall down, but wholly neglected and omitted so to do; and that by means of the premises, afterwards, and shortly after the plaintiff had so entered into and upon, and commenced occupying and dwelling in, the said house, and whilst the plaintiff and his family were occupying and dwelling therein, and during the said term so granted to him therein as aforesaid, to wit, on, &c., a great part of the said house, by reason of its being in such ruinous and dangerous state and condition as aforesaid, fell down, and thereby became and was no longer habitable, and thereby the lives of the plaintiff and his family, occupying and dwelling in the said house, became and were greatly endangered, &c. The count then alleged for special damage, injury to the plaintiff's wife, and also to his goods, and delay of his business, &c.

Sixth plea,—that it was not the duty of the defendant to have given or caused to be given to the plaintiff such notice, information, or warning as in the first count mentioned, in manner and form as in the said first count alleged.

Special demurrer, and joinder.

[594] Cleasby, in support of the demurrer. The plea is clearly bad, for putting in issue that which is a mere matter of law. [Needham, contrà, admitted that he could not sustain the plea.] The question then will be, whether there is a good cause of action disclosed upon the declaration. If there is, the plaintiff will not be prejudiced by any defective or improper statement of the duty which the law infers from the facts alleged. This is exemplified by the case of *Parnaby* v. *The Lancaster Canal*

Company (11 Ad. & E. 223). There, a declaration in case against a canal company, stated, that, by the canal act, 32 G. 3, c. ci., the company was formed to make and maintain the canal, with power to take tolls; and all persons had free liberty to navigate the canal; and, if any boat should be sunk in the canal, and the owner or person having the care of it should not without loss of time weigh it up, it was, by the statute, to be lawful for the company to weigh it up, and detain it till payment of expenses; that the company completed the canal, and took tolls on it: that a boat sunk in the canal, so that vessels passed with difficulty in the day, and at night were in danger of running foul of it; that, although the company could, and ought to have requested the owner, &c. to weigh it up, and, if that was not done without loss of time, could, and ought to have weighed it up, and, in the mean time, have caused a light or signal to be placed, to enable boats to avoid it: yet that the company did not cause the owner, &c., to weigh it up, nor themselves weigh it up, nor place a light or signal: and that thereby the plaintiff's boat, navigating the canal, ran foul of the sunken boat, and was damaged. It was held, by the Exchequer Chamber, affirming the judgment of the court of Queen's Bench, that the declaration disclosed a sufficient duty and breach. And it was further held, by the Exchequer Chamber, that such **[595]** duty was not created by the clause enabling the company to weigh the boat, but arose upon a common-law principle, that the owners of a canal, taking tolls for the navigation, were bound to use reasonable care in making the navigation secure; and that the want of such reasonable care might be collected from the declaration, although the complaint was ostensibly founded upon the statute. Tindal, C. J., in delivering the judgment of the court of error, there says (11 Ad. & E. 242): "Neither the clause recited, nor anything in the act of parliament contained, imposes such a duty (*b*) on the defendants below: and the allegation in the declaration, as to the duty of the company, seems to have been founded on a mistake as to the true meaning and effect of that clause. But, admitting this to be so, the question then arises, whether, upon the facts stated in the declaration, another duty of a different kind was not imposed by the common law upon this company; and whether a sufficient breach of that duty is not alleged. It is clear that the statement of the duty in the declaration is an inference of law from the facts, and need not be stated at all, or, if improperly stated, may be altogether rejected. Omitting, therefore, as it appears to us, the improper and unfounded statement of duty in the declaration, the facts stated in the inducement shew that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company: and the common law, in such a case, imposes a duty upon the proprietors, not, perhaps, to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property." Upon the same principle, if a man lets me a **[596]** house to reside in, knowing it to be in a dangerous state, and likely to fall down, and injure me and my property, but, concealing the fact, permits me to enter into the occupation, and the house falls, and I thereby sustain damage, the party so letting the house is clearly responsible for the consequences of his fraudulent concealment: for, every deceit done by one to the damage of another, gives a cause of action. [Maule, J. If a horse-dealer contracts to sell a gentleman a horse fit to carry him, and he sells him one which he knows to be unfit for the purpose, he does not perform his contract. But, if a man buys a horse generally, the seller will not be responsible, although, knowing that his customer wanted the horse for his own riding, he sells him one which will not carry him.] Suppose a man were to sell a farmer a shepherd's dog, knowing that the animal was accustomed to worry and destroy sheep, and he were to kill the purchaser's sheep which were intrusted to his care,—could any one doubt that an action would lie for this deceit? In Com. Dig. Action upon the Case for a Deceipt (A. 1), it is said: "An action upon the case for a deceipt lies when a man does any deceipt to the damage of another." (A. 8) "If a merchant sell cloth that he knows to be badly fulled" (*a*). Concealment of material circumstances will vitiate all contracts. Thus, in *Hodgson* v. *Richardson* (1 W. Blac. 463), it was held that concealment of the true port of loading would avoid a policy of insurance: and Yates, J., lays it down as a general proposition, that "the concealment of

(*b*) I.e. to remove the obstruction caused by the sunken boat.
(*a*) Citing 1 Rol. 90, l. 38; Kit. 174 a.

material circumstances vitiates all contracts, upon the principles of natural law." It may be that concealment as to a matter which merely affects the value, and not the use, of the thing sold or let, will not give a cause of action. But, in all cases, an **[597]** action lies, where, but for the misrepresentation, the injured party would not have entered into the contract: *Levi* v. *Langridge* (2 M. & W. 519, 3 M. & W. 337). [Maule, J. There was a perfectly good cause of action there: the only doubt was, whether the proper person sued. Besides, there was an actual fraudulent representation made there.] There is no distinction between an actual misrepresentation and a fraudulent concealment of something the knowledge of which, if communicated to the buyer, must necessarily prevent him from entering into the contract. In *Pilmore* v. *Hood* (5 N. C. 97, 6 Scott, 827), the defendant being about to sell a public-house, falsely represented to B., who had agreed to purchase it, that the receipts were 180*l.* a month: B. having, to the knowledge of the defendant, communicated this representation to the plaintiff, who became the purchaser, instead of B.,—it was held, that an action lay against the defendant at the suit of the plaintiff. In *Williams* v. *The East India Company* (3 East, 192) also, the concealment of a material fact was held to give a ground of action. In *Cornfoot* v. *Fowke* (6 M. & W. 358),—where a false representation had been made by an agent upon letting a house to the defendant,—Lord Abinger says (ibid. 380): "Clarke, the agent, at least for letting the house, has in this case induced the defendant to enter into a contract by a false representation by no means free from moral turpitude, even upon the presumption that he was wholly ignorant of the matter. That the truth (*f*) was known to the plaintiff, is admitted; that he had an interest to conceal it, cannot be denied; nor can it be denied that it was concealed from the defendant. Whether his concealment was consistent with good faith and free from **[598]** moral turpitude, may be determined by a reference to the case put by Cicero, in the third book of his treatise De Officiis; which I the rather mention because the house the sale of which he puts hypothetically, by way of example, was liable to an objection that bears some analogy to the present:—'Vendat ædes vir bonus propter aliqua vitia, quæ ipse nôrit, cæteri ignorent: pestilentes sint, et habeantur salubres; ignoretur in omnibus cubiculis apparere serpentes; male materiatæ, ruinosæ: sed hoc præter dominum nemo sciat: quero, si hoc emptoribus venditor non dixerit, ædesque vendiderit pluris multo, quam se venditurum putarit, num id injustè an improbè fecerit?' He then gives the arguments on both sides, and concludes that the vendor ought not to have concealed these defects in the house from the buyer. 'Neque enim id est celare, quidquid reticeas: sed cum, quod tu scias, id ignorare emolumenti tui causâ velis eos, quorum intersit id scire.' Then this illustrious moralist gives his own opinion of the moral turpitude of such a concealment; for, he says: 'Hoc autem celandi genus quale sit, et cujus hominis, quis non videt? certe non aperti, non simplicis, non ingenui, non justi, non boni viri; versuti potius, obscuri, astuti, fallacis, malitiosi, callidi, veteratoris, vafri.' Now, the present is a case in which the fraudulent concealment of a material fact by the principal, and the false representation of the agent, combine to constitute a sufficient degree of fraud, even morally speaking, to sustain the defendant's plea, that he was induced by fraud, covin, and false representation, to sign the contract." *Hill* v. *Gray* (1 Stark. N. P. C. 434) is precisely in point. There, the agent of the vendor of a picture, knowing that the vendee laboured under a delusion with respect to the picture, which materially influenced his judgment, permitted him to make the purchase, without **[599]** removing that delusion: and the sale was held void. The facts were these:—A person named Butt had been employed by the plaintiff to sell the picture in question. The defendant, being desirous of purchasing it, pressed Butt to inform him whose property it was; which the latter refused to do. In the course of the treaty, Butt being at that time employed in selling a number of pictures for Sir Felix Agar, the defendant, misled by circumstances, erroneously supposed that the picture in question was also the property of Sir Felix Agar. Butt knew that the defendant laboured under that delusion, but did not remove it; and the defendant, under this misapprehension, purchased the picture. The plaintiff offered to prove, by the testimony of the most eminent artists, that the picture was a genuine Claude, and of great value: and it appeared, that, after the sale had been completed, and after the defendant had been

(*f*) Viz. the existence of a nuisance, the non-existence of which had been averred by the agent.

informed that the picture was not the property of Sir Felix Agar, he had objected to pay for it, not on the ground of any deception that had been practised with respect to the ownership, but on the ground that the picture was not a genuine Claude. But Lord Ellenborough said: "Although it was the finest picture that Claude ever painted, it must not be sold under a deception. The agent ought to have cautiously adhered to his original stipulation, that he should not communicate the name of the proprietor, and not to have let in a suspicion on the part of the purchaser, which he knew enhanced the price. He saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it. I take for granted that you will be able to prove, by the judgment of the first professional artists, that this is a genuine picture of Claude's; and it would not be possible to go further. In Italy, the fact might admit of other proof; as, where a picture has been long preserved in a particular cabinet: here, it **[600]** can only be proved by the concurrent judgment of artists as to its similitude. This case has arrived at its termination; since it appears that the purchaser laboured under a deception, in which the agent permitted him to remain, on a point which he thought material to influence his judgment. I am of opinion that the contract is void." [Cresswell, J. Do you say this contract is void?] It is submitted that the tenant might, at his election, have avoided it; or he may affirm the contract, and sue for the tort.

Needham, contrà, was stopped by the court.

JERVIS, C. J. I have felt some difficulty in consequence of the ruling of Lord Ellenborough in the case last cited. It would at first sight appear that his lordship there held, that the merely allowing the vendee to purchase the picture whilst labouring under a delusion with respect to it, which was calculated to enhance its value in his estimation, was ground for avoiding the contract. But, in *Hill* v. *Gray*, there was what must be taken to amount to an aggressive deceit on the part of the agent of the seller. "The agent," says Lord Ellenborough, "ought to have cautiously adhered to his original stipulation, that he should not communicate the name of the proprietor, and not to have let in a suspicion on the part of the purchaser, which he knew enhanced the price. He saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it." That shews something like an act done. That case being disposed of, I think this declaration does not disclose a sufficient cause of action. It is not pretended that there was any warranty, express or implied, that the house was fit for immediate occupation: but it is said, that, because the defendant knew that the plaintiff wanted it for immediate occu-**[601]**-pation, and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do what any man in his senses would do, viz. make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit: it was a mere ordinary transaction of letting and hiring. The defendant is entitled to judgment.

MAULE, J. The declaration struck me, at first sight, as a perfectly bad one; and it does not improve upon acquaintance.

The rest of the court concurring,

Judgment for the defendant.

[602] DICKSON *v.* ZIZINIA AND ANOTHER. Jan. 18, 1851.

[S. C. 20 L. J. C. P. 73; 15 Jur. 359.]

Upon a contract for the sale of goods, with a particular express warranty, the court will not extend such warranty by implication.—The declaration stated a bargain for the sale by the defendants to the plaintiff of a certain cargo, to wit, the cargo of Indian corn then shipped at Orfano, on board the "Ottoman," at a certain price, including freight and insurance to Cork, Liverpool, or London, and that it was agreed that the quality of the said Indian corn was equal to the average of the shipments of that article in the season of 1847, and that the said Indian corn had been shipped in good and merchantable condition; and alleged for breach, that the corn was not, at the time of shipment, or at any other time, in good and merchantable condition, or in a fit and proper condition for the performance of the voyage from