other hand by the pursuer here that he is entitled to bring successive actions for damages arising from time to time. It is quite true you cannot tell the exact amount of damage you may have caused, but the same thing occurs daily in all actions relating to personal injuries. Although no doubt the amount is to a certain extent a matter of speculation, the evil resulting from the claim embracing both past and future damage is in my opinion far less than if we were to allow successive actions to be brought. How many actions would the pursuer bring? Would he bring an action every month or every year, arising from the one wrongous act? This would be an intolerable state of affairs. We have had one action, which covered the damage to July 1886. Then there is this second action for the same wrong, which includes the damage from the last mentioned date to March 1887, or a period of about nine months. I see the obligation runs to 1890, and therefore the pursuer if he is right could raise actions up to that date. This is a thing totally unheard of in the practice of this Court, and I think that such a view of the matter should receive no encouragement, the justice and practice being quite against it.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Sol.-Gen. Robertson — Ure. Agents — Campbell & Smith, S.S.C.

Counsel for the Defenders (Respondents)—Asher, Q.C.—Dickson. Agents—Davidson & Syme, W.S.

Wednesday, December 7.

SECOND DIVISION.

[Lord Trayner, Ordinary.

MITCHELL *v.* DUNNETT.

(*Ante*, vol. xxii. p. 298; 12 R. 400.)

Title to Sue—Public Company—Individual Shareholder—Fraudulent Misrepresentation.

In 1877 a number of persons registered themselves under the Companies Acts as a joint-stock company for the purpose of purchasing and working an estate which was represented to them to contain a specified quantity of valuable timber and iron ore. They bought the estate from the person who made these representations, upon certain terms which were set forth in a memorandum, and appointed him their manager. He continued to act as such till October 1878, when in consequence of disputes which arose between him and the company as to the construction to be put upon the above-mentioned memorandum he ceased to be manager. By an agreement entered into between him and the company in November 1879, his appointment as manager was cancelled, and all claims at the instance of either party were mutually discharged. In 1878 the company became aware that the representations regarding the estate were to a great extent inaccurate, and by 1880 they were fully aware of the extent of the inaccuracy. They continued, however, to work the estate till 1884, when they sold it by public auction. Thereafter the company went into liquidation, and in 1885 it was dissolved. In 1883 certain individual shareholders of the company raised an action of damages against the seller, on the ground that his representations, made before the formation of the company and purchase of the estate, as to the size of the estate and extent and value of the timber and minerals, were false and fraudulent, and that they had become shareholders of the company in reliance on the truth of these representations. In this action decree in absence was pronounced. The defender then brought a suspension as of a threatened charge on this decree. The Court *suspended* the decree, holding that the individual shareholders of the company had no title to sue, the title to sue being in the company, who had barred themselves by their actings in retaining, working, and selling the estate after they were aware that the representations of the seller were inaccurate.

Opinions that the mutual agreement was a discharge by the company of all claims against the complainer.

On 8th November 1883 Alexander Mitchell, timber merchant, Glasgow, in his own right, and as assignee of Robert Robinson, timber merchant, Partick, John Donald, iron merchant, Glasgow, and James Lockhart Mitchell, timber merchant there, raised an action of damages against Matthew Dunnett, then residing at Molde in Norway. The summons was served edictally, and no appearance having been entered, decree in absence was pronounced on 8th December 1883. On 10th February 1884 Dunnett presented this note of suspension as of a threatened charge on this decree. The Lord Ordinary on the Bills passed the note, and a record was made up in the suspension. The averments in the original summons were to all intents the same as those now made in the answers for the respondent.

He set forth that the complainer, who, though a Scotsman, had been for some years resident in Norway, came to Glasgow in 1877 to promote the formation of a small limited company to purchase the estate of Vaagsoeter in Romsdal County, Norway, in which he professed to have discovered a valuable bed of iron ore, together with the forest of valuable timber growing thereon; that he waited on the respondent and on other friends, including the respondent's cedents Robinson and J. L. Mitchell, in order to interest them in the proposed company, and drew up a prospectus of the proposed company, and special descriptive reports of its forests and minerals; that he represented the estate to contain within his own knowledge 1000 English acres, and to be five miles in length, and from one-third to one-half a mile in breadth; that he represented the forest to contain trees of number and dimension according to a classified inventory which he guaranteed, and which were valued by him at £25,303; that he made similar representations as to the iron ore on the

estate based upon alleged analyses; that after repeated meetings, at which the complainer was present and reiterated the statements in said prospectus and reports, it was agreed, in reliance on and on the faith of these statements by the respondent and a few friends who had been induced to take an interest in the matter, to promote a company on the lines of the said prospectus, the formation of the company, however, being postponed until a deputation of two of those interested, viz., Messrs Robinson and Broom, should, along with the complainer, visit the estate and report; that this deputation visited Vaagsoeter in September 1877, and being misled by the complainer and a native guide named Knud Petersen, provided by him, as to the true boundaries of the properties, they reported that it appeared to them to contain the number of acres represented; that the company was thereafter formed and registered on 26th November 1877, under the name of the Vaagsoeter Estate Company, Limited, with a capital of £5000 in five hundred shares of £10 each; that relying on the truth of the statements and representations of the complainer condescended on, the respondent and his cedents subscribed for 180 shares in the company, and paid calls thereon to the amount of £1800, and subsequently advanced certain sums on debenture bonds of the company; that the purchase price of the estate was paid on 6th December 1877, out of which the complainer, who acted as intermediary in acquiring the estate from the original vendors in Norway, received certain sums stated as his profit on the transaction; that the management of the company's affairs in Norway was placed at first in the hands of the complainer in fulfilment of a clause, by which it had been agreed that the vendor should become the company's local resident manager in Norway, subject to the board of directors, at the annual salary of £250; that the complainer continued to manage the estate till October 1878, when he ceased to be manager in consequence of disputes between him and the directors; that the parties were not then at variance in regard to the truth or otherwise of the complainer's representations as to the estate, &c.; that on 30th December 1879, in terms of a minute of agreement with the company, he received from the company £300 in cash, a mortgage over Vaagsoeter for other £300, and his ninety-five fully paid-up shares in full of his claim for salary and advances, and a discharge of the company's counter claims arising out of the matters then in dispute between them as aforesaid.

The above minute of agreement was in these terms—"Whereas disputes have arisen between the parties in regard to the intent and meaning of the second party's contract with the company, constituted by a certain memorandum or prospectus dated 9th August 1877, under the hand of the second party, afterwards adopted as the basis of his agreement with the company, for the sale to the company of the estate of Vaagsoeter in Norway, and the appointment of the second party as the manager of the company in Norway; and whereas the second party ceased to be manager of the company as at 31st October 1878, at which date he claimed, *inter alia*, from the company the sum of £806 as advances by him on behalf of the company, and salary to that said date, with interest thereon since said date at 5 per cent. per annum; and whereas the parties have now arranged for a settlement of said claim, and of the other claims arising by the one party against the other in respect of their said contract, and the cancelment of the second party's appointment as manager on the following terms—". . . *Fourth* (after making provision in the previous clauses for certain payments to be made by the company to the second party), In respect of the settlement of the second party's claims in manner foresaid, both parties hereby cancel, and declare to be no longer in force or binding on either of them, the contract heretofore subsisting between them as embodied in the said memorandum or prospectus of 9th August 1877, and the parties instantly abandon and discharge all claims at the instance of the one against the other for implement of the obligations specified in said memorandum or prospectus."

The respondent stated that the business was thereafter carried on on behalf of the company by Mr John Olsen, who had formerly been the complainer's assistant or foreman; that so long as the complainer remained their manager nothing occurred to cause suspicion of the complainer's representations as to the estate and its forests and minerals; that it was only after his dismissal, and in June 1882, that the directors, and through them the respondent and his cedents, learned from Mr Olsen that the forest was exhausted; that the estate instead of containing 1000 acres, only contained 530; that the deputation who had inspected the property in 1877 had been deceived as to the boundaries by the complainer and his guide Knud Petersen, who though both of them were previously fully acquainted with the true boundaries, fraudulently concealed them, and failed to point them out as they were bound to do.

The representations as to the timber and iron ore made by the complainer were stated in detail to be false in the knowledge of the complainer, and to have been fraudulently made by him.

The respondent further stated—"The statements and representations of the complainer condescended on in statements 2, 3, 5, and 10 were false and untrue, and were made by the complainer in the knowledge of their falsehood, and fraudulently, for the purpose of inducing the respondent and his cedents, as in point of fact they were thereby induced to form, along with others, the said company for the purpose of purchasing the said estate from him. And the respondent and his cedents were also induced by the said false and fraudulent misrepresentations, and the foresaid fraudulent concealment on the part of the defender, to subscribe for shares in said company, and pay the calls thereon as aforesaid, and to make the said debenture advances."

It was admitted that after the date of the decree sought to be suspended, and before the raising of the process of suspension, *i.e.*, in January 1884, the company sold the estate by public auction to Olsen; that thereafter on 30th January the company went into liquidation, and on 29th July 1885 it was dissolved. The respondent alleged that the price obtained for the estate barely paid a mortgage on it, and that

there were no further assets to meet the debenture debt, or divide among the shareholders.

The complainer stated that the respondent's averments were unfounded in fact. The whole of his representations were true to the best of his knowledge and belief, and there had been no concealment by him of essential facts within his knowledge. The fact was that the company was formed, and the respondent and his cedents took shares therein, and the purchase of the estate was made, on the faith of the report of the deputation sent out to report on the estate. Further, he stated that he had a good answer to the claim of damages in respect (1) of the agreement, (2) of *mora* and acquiescence in the transaction complained of, and (3) of the actings of the company and of the respondent and his cedents, after they knew all they alleged. As regards the agreement, he averred that it covered all questions as regarded any representations made by him, and that it had been acted upon by both parties ever since it was entered into; that it had never been repudiated by either of them, and that the company remained in possession of the estate till it was sold in March 1884.

The respondent pleaded—"(1) The respondent being entitled to damages as concluded for in said action against the complainer, in respect that he and his cedents were induced to take and pay for shares in, and take up debenture bonds of said company, by the false and fraudulent representations and concealment of the complainer, the suspension should be refused."

The complainer pleaded—"(4) The respondent had no title to sue the said action. (5) The shareholders and creditors of the company were not entitled to make any claim arising out of the transactions referred to on record as individuals and apart from the company, not having alleged or sustained any loss apart or distinct from the company. (6) The respondent's claim in the said action was bad, in respect that the alleged damage was not the natural, necessary, or actual consequence of the respondent and his cedents having become shareholders or creditors of the company, but arose out of the purchase by the company, as its *proxima causa*, and the right to claim damage in respect of said purchase belongs to the company alone. (7) All claims on the part of the said company, or *separatim*, the shareholders thereof, against the complainer were extinguished by the agreement of November 1879. (8) The company, and *separatim*, the respondent, is barred from insisting in the claim made in the said action by *mora* and acquiescence, and the retention and sale in March 1884 of said estate after knowledge, actual or imputable, to them of the matters complained of. (11) The said company having before the purchase of the said estate, and at least before payment of the price and conveyance of the subjects, had equally good opportunities with the complainer of investigating the extent and value of the said estate, the respondent's claim cannot be maintained."

On 29th July 1884 the Lord Ordinary (ADAM) suspended the decree in absence, threatened charge, and whole grounds and warrants thereof, sustaining the complainer's 4th plea-in-law, that the respondent had no title to sue.

On a reclaiming-note their Lordships of the Second Division, on January 6th 1885 (*vide* 12R. 400) recalled the interlocutor of the Lord Ordinary, and remitted the cause to the Lord Ordinary with instructions to allow the parties a proof of their respective averments.

A proof was accordingly led, which was directed to the following points—(1) The nature of the complainer's representations. (2) How far the company acted on those representations in purchasing the estate. (3) The actings of parties as bearing on the meaning of the agreement. (4) The actings of parties as bearing on the pleas of *mora* and acquiescence. The import of the proof so far as bearing on the last two of these points is contained in the portions of the Lord Ordinary's note and in the Judges' opinions quoted *infra*. As regards the question of the respondent's title as a debenture-holder, it was proved that the so-called debenture debt (for which debentures were never issued) consisted of sums paid (1) to meet an overdraft which the shareholders had authorised, and (2) to enable the company to effect a settlement of certain claims made upon it by the complainer.

The Lord Ordinary (TRAYNER) on 17th June 1887 suspended the decree complained of, threatened charge thereon, and whole grounds and warrants thereof, and decerned, finding the complainer entitled to expenses subject to modification.

"*Opinion.*— . . . [*After narrating the nature of the action and the previous procedure in the case*] — The proof so allowed has been led partly before me and partly on commission, and I have now to consider, *first*, whether the respondent had any title to sue the action of damages; and *second*, whether he has made good in law his claim to the damages he seeks. (1) I am of opinion that as a debenture-holder of the company, the respondent has no title to sue, because he is not in point of fact a debenture-holder in any reasonable sense of that term. . . .

"On the other hand, I am of opinion (differing from Lord Adam) that as shareholders of the company the respondent and his cedents had a good title to sue the original action. It is averred that the respondent and his cedents were induced to form the company and buy the estate through the fraud or deceit practised by the complainer. If they had formed no company, but had gone into the purchase of the estate as a joint-adventure, each joint-adventurer would have had his claim against the complainer for the damage resulting to him individually through the complainer's fraud. I cannot see that the formation of a company makes any material difference, especially when it is averred that the formation of the company was itself induced by the same fraud as that which led the respondent and his cedents to embark their capital in it. In point of fact, the greater part of the purchase price of the estate was paid up by the respondent and his cedents, as well as others who joined them in the transaction before the company was formed, and therefore their damage (if any) was sustained before the company came into existence. I think, moreover, that the title of persons injured, as the respondent and his cedents say they have been, to recover damages directly from the person who has done them

the wrong, has already been recognised by authority. In the case of *Leslies* v. *Lumsden*, 14 D. 213, the representatives of a shareholder in a bank sued certain of the directors for the loss occasioned by their alleged fraudulent proceedings. The defenders maintained that the pursuers had no title to sue, on the ground that if, as the pursuers alleged, the directors had caused loss to the company, they were answerable therefor to the company, but that they could not be called to account by an individual shareholder for his share of the loss. That plea was repelled, and the title to sue sustained. In that case, no doubt, the alleged fraud was said to have been concealed until the company had been dissolved, but I do not regard that as a material distinction between that case and the present. A company continues to exist after dissolution to the effect of enforcing its rights or being made responsible for its obligations, and if the company could on principle alone sue for a wrong done to it, and through it to each shareholder, then the dissolution of the company would not have conferred a title on the shareholder which he would not have had prior to the dissolution. The case of *Tulloch* v. *Davidson*, 20 D. 1045, is another authority in the respondent's favour on this question of title.

"If the respondent had sued the complainer in respect of a contract entered into between the complainer and the company, I think the plea to title now maintained would have been sound. But the respondent's action is based on the complainer's delict or *quasi*-delict, and in such a case I think the rule of law to be that the person wronged has always his remedy against the wrongdoer. Of course it may be said in reply to this that the company was the only person wronged, and that the company's title to sue is not disputed. But the company could only suffer wrong, at least to its pecuniary loss, through the pockets of its shareholders—the real wrong was done to them. The complainer in support of his plea of 'no title,' relied upon the rule laid down in *Foss* v. *Harbottle*, 2 Hare 461, and approved in subsequent cases, as *e.g.*, *M'Dougall* v. *Gardiner*, 1 L.R., Ch. Div. 13. I do not think that rule applicable to the present case; and besides, there is nothing in that rule (as explained by Lord Justice James in *M'Dougall's* case) which conflicts with the views I have already expressed. Assuming, therefore, that the respondent had a good title to sue the original actions, there remains the question—(2) Whether the respondent has made good his right to recover the damages for which he concludes in that action? [*His Lordship next proceeded to review the evidence as regards the representations made by the complainer.*]

"On this part of the case I think the respondent has failed to prove that the complainer's representations were false and fraudulent. If the views which I have expressed are sound, the complainer is entitled to judgment in his favour. . . . .

"There remains only the question, whether the respondent, or the company of which he was a shareholder, discharged the complainer of all claims arising out of the purchase of the Vaagsoeter estate? I have considered all the evidence bearing upon this question, although I do not now propose to go into it in detail. The result I have arrived at is favourable to the complainer's contention. I think the settlement under which the complainer surrendered certain claims was a compromise between the parties, intended and believed to be a complete discharge of all claims *hinc inde* arising out of the Vaagsoeter estate transaction. It is said now by the respondent (or rather his agent Mr Bryson) that the settlement only affected claims and questions known to the company at the time of settlement. By that time I think the company had come to know that they had made a bad bargain, and that the estate was not in fact what it had been represented to be both by the complainer and Messrs Broom and Robinson. The extent and quality of the timber on the estate, which was its chief feature so far as mercantile value was concerned, had by the date of the settlement been ascertained, and the report and opinion of Mr Donald (one of the shareholders and a cedent of the respondent's) on that subject was before the company. In these circumstances the parties entered into an agreement by which they 'mutually abandon and discharge all claims at the instance of the one against the other for implement of the obligations specified in said memorandum or prospectus.' It is quite true that the present claim is not one specified in the prospectus. But reading the agreement or discharge as a whole, I cannot resist the conclusion that it was, as I have said, a final and complete settlement of the whole claims arising or competent *hinc inde* in respect of the sale of the estate by the complainer to the company.

"On the whole matter my judgment is in favour of the complainer, and I shall accordingly suspend the decree complained of."

The respondent reclaimed, and argued—(1) The representations made by the complainer were in fact false and fraudulent, being made either in the knowledge that they were false or without the belief that they were true, or were made by him without reasonable grounds for believing them to be true. The respondent relied on the representation so made in forming the company and in purchasing the estate. (2) Even if it were held that the purchase was made not upon the faith of the complainer's representations, but on the report of Messrs Robinson and Broom, these gentlemen were led to make that report because they were fraudulently misled by the complainer as to the boundaries, &c., of the estate when they made the inspection. (3) The agreement of November 1879 did not discharge the respondent's claim against the complainer,—1st, because the present claim had not then arisen, and the agreement referred to other matters altogether, having reference to the complainer's conduct as manager; and 2d, the agreement being between the company and the complainer, could not in any case bar the respondent's claim for individual loss. (4) The respondent had, as a shareholder of the company, a title to sue and recover damages directly from the complainer, who had done him the wrong of inducing him by fraud and deceit to form the company. The fact that the company was formed made no difference, because it was the fact that the greater part of the price of the estate was

paid up by the respondent and his cedents before the company was formed, and therefore their damage was sustained before the company came into existence.—*Leslie's Representatives* v. *Lumsden*, December 15, 1851, 14 D. 213; *Tulloch* v. *Davidson*, June 3, 1858, 20 D. 1045—*aff.* February 20, 1860, 3 Macq. App. 783; *Gordon* v. *Davidson*, February 26, 1864, 2 Macph. 758.

The respondent admitted that the Lord Ordinary's view as to the claim as a debentureholder was correct, and no argument was submitted upon that point.

The complainer replied—(1) The representations made, although incorrect in point of fact, were not fraudulent, being made in the belief that they were true, and on reasonable grounds; (2) the respondent or the company did not rely on the complainer's representations in purchasing the estate, but upon tne inspection and report of Messrs Robinson and Broom, who were not in any way misled or deceived by the complainer in making the inspection—*Attwood* v. *Small and Others*, March 22, 1838, 6 C. & F. p. 232; *Gray* v. *Lewis*, August 5, 1873, 8 L.R., Ch. App. 1035. (3) The respondent had no title to sue. The damage in respect of which the action was raised was damage suffered by the company, and by the respondent only indirectly, in consequence of his being a shareholder of a company which had been damnified, and for that damage the company alone was entitled to sue—*Duckett* v. *Gover*, March 5, 1877, 6 L.R., Ch. Div. 82. The cases of *Leslie's Representatives*, *Tulloch*, and *Gordon*, were cases in which the fraud did not emerge till after the company had been dissolved, which distinguished them from the present case. When this action was raised the company was still in existence. (4) In any event, the respondents should have no higher right of action than the company would have had, and any answer good against the company was good against them. (5) The agreement of November 1879 operated a discharge of the present claim. It was known to the company before its date that the complainer's representations, especially with reference to the minerals, were incorrect. (6) At latest, by 1880, the extent of the inaccuracy of the complainer's statements was fully known to the company, and by retaining the estate and working the timber upon it thereafter till January 1884, and ultimately selling the estate by public roup at that date, the company and the respondents were completely barred from now claiming damages from the complainer.

At advising—

Lord Justice-Clerk—This is an important case to the parties, and in some aspects of it also to the law. The proceedings have been protracted, and the documents are very voluminous, and even yet, owing to the circumstances under which the question arises, the facts on which the case turns are involved in some obscurity. We have had a long and very able argument from the bar, and we have also the benefit of an elaborate opinion from the Lord Ordinary explanatory of the grounds on which he has arrived at the result under review.

The case itself is of this nature. The pursuer of the action is a Mr Mitchell, and he says he was a member of a copartnery formed by him and several other persons in Glasgow for the purpose of purchasing a piece of land in Norway called the Vaagsoeter estate, on which a forest of timber was understood to grow. The defender Dunnett had proposed this purchase to the pursuer and his colleagues, and had made certain statements founded on his alleged knowledge to induce them—so it is said—to take the step of forming a company. The main object of this company was to cut down and deal in the timber which it was said was to be found growing plentifully on the estate, and to be a valuable article of commerce. According to the pursuer, it was also held out that iron ore existed in the lands, and although the defender was not in a position to speak with certainty as to the prospect of working the ore to profit, yet he held out great encouragement in the hope that it might be worked to profit. The statement of the pursuer therefore is that the company was formed on the inducements thus held out by the defender, and that the partners of the company contributed a considerable amount of capital. His contention now is that they were induced to join the concern and to pay their money on the representations held out by the defender, which have turned out to be false and fraudulent. He now, on his own account, and as assignee of three other parties, sues Dunnett, who became the manager of the company for some time in Norway, for damages in respect of those misrepresentations, and in respect of the money which they have lost in consequence.

A very voluminous proof has been led, and in conclusion the Lord Ordinary found that the allegations of fraud and misrepresentation had not been established. He accordingly assoilzied the defender from the conclusions of the action, explaining his views, as I have said, in a very able and elaborate note.

I have come, after full consideration, but with little hesitation, to concur in the result at which the Lord Ordinary has arrived, and that upon the main ground on which the action is based—the alleged misrepresentations of the defender. At a former stage of this action, Lord Adam, who was the Lord Ordinary when it came into Court, assoilzied the defender *simpliciter*. On a reclaiming-note it was in this Division thought that the facts ought to be investigated. I was not present at that judgment, but I see no reason to differ from it. And indeed it would have been difficult to have arrived at the conclusion which Lord Trayner has reached without these facts having been ascertained. At the same time, in regard to the question of title, I am inclined, if it were necessary to decide that question, to concur with the original judgment of Lord Adam, and that to a large extent in consequence of the actings of the parties under the arrangement which is said to have been induced by the fraud of the defender. I am also inclined to be of opinion with the Lord Ordinary that the discharge which was granted by the company to the defender in the course of the operations of the company is sufficient of itself to bar this action, and still more is that the case when the proceedings of the company are taken into consideration.

As the whole case is fully discussed in the note of the Lord Ordinary, I shall simply upon this matter of title content myself with enumerating the topics that have weighed with me in coming

to the result I have indicated.

I. The pursuer and his cedents were shareholders in this company. The company was formed for the object I have already explained, and Dunnett was appointed manager of the company when it started in 1877. The company became dissatisfied with Dunnett's management, and appointed Mr Olsen, who had been Dunnett's adviser in the purchase, to succeed him, and Olsen took the opportunity of directing a survey of the whole estate. From this survey it appeared that the representations which had been made by Dunnett in regard to the extent of the estate, the amount of timber, and the prospects of the mineral workings, had been entirely misrepresented. That was in 1879–80. But notwithstanding this the company went on for three years afterwards. It was ultimately wound up, and the property sold in 1884. This action was raised in 1883.

Now, I should have doubted, independently of the discharge, whether under these circumstances any recourse could be had against Dunnett on the alleged misrepresentations. Even if it could be said—which probably it could—that when the discharge between Dunnett and the company was granted the company were not aware of the extent of the misrepresentations of which the pursuer complains, I cannot think that the company or its shareholders were entitled to go on for three years, and deal with the subject of their purchase, and to exhaust, as in fact they seem to have done, the whole available timber on the estate, and then to go back and demand from Dunnett recompense for the sums which they had thus unprofitably expended. I think if they meant to make any such demand it should have been made at once—that is to say, whenever they found that these representations were untrue. I am therefore of opinion that the company itself could not, after the discharge in question, and their proceedings after the date of the discharge, have made the demand which is before us in this action. I think that on well-known principles they were not at all entitled to take that course. Therefore, although I think the discharge itself in 1879, according to its fair interpretation, would have been conclusive against such a proceeding, I think their retention of the subject-matter of the contract between them and Dunnett, and their taking the chance of turning it to profit for three years, would have been sufficient to exclude it.

If this be so, can the partners of the company have a higher right than the company itself? I think not; and that all the more that in this instance, at all events, *restitutio in integrum* is entirely impossible. Nor do I think it makes any difference on this head that the company is now dissolved, and that the claim which is made in the summons takes the shape of an individual action on delict. If any such claim arose it was vested in the company, who could unquestionably have discharged it in terms, and could have bound the shareholders by that discharge. Therefore I should be inclined to hold that neither on the ground of a debenture debt, nor in respect of the shares which were taken in the company, had the individual shareholders any right to insist for reparation.

II. But in the second place, I think the allegations of fraudulent representations have not been established.—[*His Lordship here reviewed the evidence as regards the representations*].

These are the views I take of the more prominent aspect of the case. I think the Lord Ordinary's view upon the evidence is sound. It is quite certain that all the parties concerned acted with almost incredible credulity and rashness, but I think the same may be said of all of them, and I do not see any ground on which in justice Mr Dunnett can be made liable in damages.

Lord Young—I come to the same conclusion. We are here in a suspension of a decree, but we must deal with the case every way as if we were in an original action in which decree in absence is pronounced, regarding the respondent as the pursuer, and the complainer as the defender.

There is to begin with a melancholy amount of litigation. I much wish that it could have been avoided, for I think in the end the case comes to a very simple issue indeed. I am disposed to concur in acquitting Dunnett of any actionable fraud, but it does require charity to cover his transgressions. I cannot sympathise with the favourable account which he gave of this property. I think it does require a deal of charity to cover the extravagance of his statements. But then we have a good deal of charity, and even if the pursuer had a title here, and there was no impediment in the way of his action, he would have failed. But I am of opinion that he (I should say "they," because he represents others) — that they are not in a position to sue the action at all. They were the partners of a joint-stock company, and the ground of action is, that they were induced to become constituent members of the joint-stock company by the defender holding out the prospect of this estate in Norway being so successful as a timber-growing estate. It is said that the prospect which he thus held out was delusive—in short, fraudulent—and that he must therefore give them compensation. I know of no precedent for such a case as that. I know of no case approaching that. The company was formed, and they purchased the estate upon the representations held out to them, including the alleged falsehood upon which the present action is founded. I have laid out of view the measures which they took to satisfy themselves regarding the value of the estate, and the expediency of making the purchase before actually making it, for they themselves never sought to repudiate the purchase which they had made upon those representations. Whether the representations were true or untrue, honest or fraudulent, they made the purchase, and retained the property for years, selling it as their own, and never making any attempt to get rid of it or of the contract. They made the purchase in 1877. They bought it as their own. They seem to have made something out of it until 1884. In that year it was thought better to sell it. A short time before it was thus sold by the company some of the constituent members of the company bring an action, not to set aside the contract as induced by fraudulent representations, but for damages because the same fraudulent representations on which the contract was made had induced the partners to associate themselves together as a company. I cannot commend that

as very ingenuous. One sees the view, but it cannot in my opinion be sustained. I put the question to Mr Gloag in the course of the argument, whether any distinction could be made between the case of a joint-stock company and an ordinary partnership at common law? Mr Gloag, with that candour and loyalty to the law which one always finds in him, said he could see no distinction. I should not found on that for a moment of course to the prejudice of Mr Gloag's argument if I could see any distinction myself. If I could see that any such distinction existed, and was well-founded, I should act upon it. But, I repeat, I can see no such distinction in the matter with which we are dealing as between a joint-stock company under the Companies Acts and a private partnership at common law. Just put the case, therefore, of A B being induced by a magnificent prospectus setting forth the glories of an estate in Norway, and the profit to be made by a purchaser, saying to himself and two or three others—"Let us associate together as a partnership and buy it." They accordingly communicate with the proprietor who has given this account of it, and who says to them—"Will you buy the estate, for it is all that I represent it to be?" Well, the long and the short of it is, that they do buy it, and they hold on to it for a period of seven years, and then sell it as their own, in the meantime discharging all claims against the partners and against the parties who had sold it to them. Then A B and the other individuals say—"Oh, this leaves us at liberty to bring an action of damages against you, the parties who sold this estate to us, for having induced us to join together for the purpose of buying this estate." Upon my word I think that extravagant. I think that this is a correct representation of the present case if there is no distinction between the case of a joint-stock company and a partnership at common law, and the very learned counsel for the respondent agrees with me in thinking that there is none.

But I go further. I think there is no distinction between the company and the case of an individual adventurer. If an individual adventurer, induced by those representations, had bought the estate from Mr Dunnett, engaged him as manager, taking his guarantee and all the rest of it in terms of the prospectus of 9th August 1877, and after two years of his management had found the estate not to be what had been represented, and that it was quite unprofitable, and that the manager was running up claims upon them, and felt that it was better to quit grips with Dunnett and come to terms with him, could any one say that it had been in the contemplation of that party to bring an action afterwards for damages for having been induced to form the company? Just look at the arrangement to which the parties came. The agreement says—"In respect of the settlement of the second party's claims in manner foresaid"—that is to say, that he should take £600, £300, £200, and so on, and should have a mortgage over the property for payment—"both parties hereby cancel and declare to be no longer in force or binding upon either of them the contract heretofore subsisting between them as arranged in the same memorandum or prospectus of 9th August 1877, and the parties mutually abandon and discharge all claims at the instance of the one party against the other for implement of the obligations specified in the said memorandum or prospectus." Was it in the contemplation of the purchaser to bring such an action as we have here? Can it be said to have been in the contemplation of this party to bring an action of damages for having by fraudulent misrepresentations induced the purchase of the very estate over which he is thus giving him a mortgage in satisfaction of the payment of his claim? The guarantees which were exchanged were somewhat numerous. The vendor Mr Dunnett guarantees that £2850 is to be repaid to the buyers within four years from the company's entering on possession. He is, in short, under a series of obligations as to the truth of the representations in the prospectus. After two years and a half of experience they discharge him, he agreeing to limit his demand against them to a certain sum. In such circumstances would an individual or an ordinary partnership at common law be allowed to bring such an action? I do not mean that there might not be an ascertainment of some horrid conspiracy and fraud of which the parties had been made the victims, and of which they had no knowledge at the time. Under rare or exceptional circumstances the Court will be astute or even ingenious to find a remedy to do justice. But the claim in the present action, or any such action as I am mentioning at the instance of an individual adventurer or common law partnership, for having extravagantly represented the value of an estate, the quantity of timber upon it, the iron ore in it, and all the rest of its advantages, which were found to be deceitful at the time that they were made—I mean deceitful not in the sense of any fraud having been perpetrated, but misleading — I say such an action would never be permitted after a settlement of this kind. That is a settlement which would have been conclusive in the case of an ordinary partnership and individual adventurer, and which for the same reason is conclusive evidence in the case of a joint-stock company. I have said so much with reference to the discharge, but I think the right to determine whether the contract of discharge was to be set aside and damages claimed in respect of fraudulent inducements held out to form the company, lay with the company itself. It was for the company to determine, after their experience of the property, whether they would stand by the contract they had made, or set it aside if they had grounds for doing so. It was for them to judge whether they had grounds for setting it aside on the head of fraud, and also to judge whether it was for their interest to do so even if they had grounds. Well, they determined that it was not for their interest to do so. They stood aside for seven years without ever challenging the contract on which they held the property; and ultimately they sold the property as their own, having no title to it except what Dunnett gave them. Well, could the constituent members of the company take it up and say—"We shall bring an action?" Is such a thing possible? I can conceive circumstances—it does not require much ingenuity to do so, although the circumstances would be very different from what we have here—in which if a company came

to an end, leaving the individual members of it great sufferers by some fraud which had been practised upon them, there would be resources in the Court to do justice to the injured parties, the *disjecta membra* of the dissolved company. There are resources in law as well as in civilisation. Legal resources are a part of the resources of civilisation. But there is no case of that kind here. This is a case of a company having a legal contract, taking over a certain property, retaining it for a length of time, and then dissolving the company, and those who had been members of the company coming and complaining of the fraudulent representations in consequence of which the company, as they say, was formed. It is a mere pretence to say that it was damage done by their becoming members of the company with a view to buying. I am therefore against the respondents here, not merely upon the merits, but also upon the title and the discharge, although it requires a little charity to cover his representations and to acquit him of all guile. . .

Upon these grounds, I confess without any considerable doubt, I am of opinion that the judgment ought to be affirmed which suspends this decree as one unfounded in point of fact. I should only like to add that while the Lord Ordinary finds expenses due subject to modification, I myself see no ground for modification, and I should therefore give the successful party full expenses.

Lord Craighill—There are three questions put forward in the present litigation. The first is, whether the pursuer, who is the reclaimer, is entitled to sue? the second is, whether, if he is entitled to sue, he has proved the fraud which is the ground of imputed liability? and the third is, whether the defender's liability was not extinguished by the minute of agreement and discharge entered into between the company and the defender in 1879, or, at all events, whether it was not discharged by the conduct of the company in keeping, working, and ultimately selling the estate, without claiming for the loss said to have been sustained?

On all these questions except the first the Lord Ordinary has given judgment for the defender, and I am so well satisfied, not merely with the result, but with the reasons which the Lord Ordinary has given, that I refer to them as the expression of my views of the case. I could add nothing likely to render the judgment clearer or more satisfactory. But I differ from the Lord Ordinary on the plea against title. He has repelled that plea. I think it ought to be sustained. The matter is in the circumstances one of small moment to the parties, since judgment is to be given on other grounds, but the plea is one of general importance, and therefore it appears to me to be right that I should in a general way communicate my views on the subject.

In the autumn of 1877 the defender circulated among his friends in Glasgow a prospectus of the Vaagsoeter Company, Limited, the purpose of which, should it be formed, was to purchase from him the Vaagsoeter estate in the kingdom of Norway. Those who saw the prospectus were favourably impressed with the proposal, but it was only after two of them had gone as a deputation to inspect the estate that the company was formed. The company thus formed was registered on 26th November 1877, under the name of the Vaagsoeter Estate Company, Limited, with a capital of £5000, divided into 500 shares of £10 each. The pursuer and his cedents were original shareholders. The price to be paid for the property was £3800, of which three-fourths, or £2850, was paid in cash, the other one-fourth, or £950, being paid in paid-up shares of the company. Possession of the estate was at once taken by the company, and the defender proceeded to Vaagsoeter as their resident manager. That was in fulfilment of a clause by which it had been agreed that the vendor should become the company's local resident manager in Norway, subject to the board of directors, at the annual salary of £250.

The results of this arrangement were not satisfactory either to the company or to Mr Dunnett. Misunderstanding and controversy followed. On the one hand, the company complained that he was not providing the machinery, for which money was to be advanced by him. On the other hand, he put forward claims for salary and certain other charges, payment of which he alleged to be in arrear. The end of it was that Mr Dunnett was superseded as the manager in October 1878, and Mr Olsen, who had been his adviser in the purchase of the property, was appointed his successor. In 1879 a compromise was arranged, and in December of the same year a formal minute of agreement and discharge was signed by the parties. It is necessary to look at what this document sets forth—[*His Lordship here read the terms of the minute of agreement above quoted*].

The company continued to carry on the works at Vaagsoeter under the management of Mr Olsen until 1883. The property was sold by the company to him in 1884. Soon after that a resolution was passed to wind up voluntarily the Vaagsoeter Estate Company, Limited, and this resolution has been carried out.

Now, these are the circumstances in which this plea of want of title arises for decision. The pursuer says that he is not at all affected by the discharge, or by the subsequent transactions of the company in connection with the estate, because the ground of action is fraudulent misrepresentation and concealment, leading to the formation of the company, and the agreement of the pursuer to become a shareholder. This appears to me to be an erroneous view of the matter. The formation of the company, and the taking of shares by the pursuer, were things with which the defender had no concern. At anyrate they were things which did not in the least cause the loss from which the pursuer is said to have suffered. The pursuer's case is in reality neither more nor less than an attempt to recoup his and his cedents' share of the loss sustained by the company through the purchase of the Vaagsoeter estate. The company purchased the property, they paid the price, and they carried on the management of the estate. They discharged the defender in the course of this management. In the end they sold the property, and the pursuer, in my view, cannot be more successful in a demand for damages on such a head than the company itself would have been. But the company would be barred by their own conduct in keeping the property as their own, and in dis-

posing of it also as their own. They may not now repudiate the contract between them and Dunnett, and if they cannot do that, it is plain they could not insist in an action for damages founded on the assumption that the contract was one induced by fraudulent means, and one from the consequences of which they are entitled to be relieved. Neither the case of *Lumsden* nor the case of *Leslie* appear to me to be in conflict with the views which I have expressed, and indeed there is not, so far as I know, any case in which a title to sue in circumstances like those which here occurred has been put forward, or at all events sustained by the Court, at the instance of an individual partner of a dissolved company.

On the whole matter, my opinion is that this reclaiming-note ought to be refused, and the judgment of the Lord Ordinary sustained.

LORD RUTHERFURD CLARK concurred.

The Court pronounced this interlocutor:—

"Recal the said interlocutor in so far as it finds the complainers entitled to expenses, subject to modification: *Quoad ultra* adhere thereto; find the complainers entitled to the expenses in the whole cause."

Counsel for the Reclaimer—Gloag—J. A. Reid. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Respondent — Jameson—Younger. Agents—J. & J. Ross, W.S.

Thursday, December 8.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

HAY & KYD *v.* CALEDONIAN RAILWAY COMPANY.

Carrier—Delivery to Person other than Consignee—Breach of Contract—Condonation.

A firm of auctioneers sold some cattle to a customer, to whom in the usual course of their dealings they gave a week's credit, and booked them to be conveyed by a railway company to the buyer. The account-sale bore that the sale was for cash, and the buyer was at the time in debt to the sellers for previous transactions. This debt was considerably reduced the day after the sale, but the sellers determined not to deliver the cattle in question without payment. They accordingly, upon the same day, cancelled the invoice, and re-booked the cattle to the same destination, but sent one of their servants to take possession of them. A telegram was at the same time sent by the officials of the railway company to the place of destination with instructions that delivery was on no account to be made to the buyer's servant. The railway company disregarded these instructions, and delivered the cattle to the buyer's servant. The auctioneers' servant met the buyer the same day that he had got the cattle, and it was arranged that the latter should meet the former later in the day, and make payment to him. The auctioneers' servant did not assent to the buyer selling the cattle, nor had he authority to give such consent. The buyer sold the cattle, and failed to pay anything to the auctioneers. The latter then raised an action of damages against the railway company for breach of contract and wrongous delivery. *Held* (1) that the sellers were entitled as undivested owners to retain the cattle in order to secure the balance due to them by the buyer on previous transactions; (2) that the railway company had been guilty of a breach of contract in disregarding the sellers' instructions as to the delivery of the cattle; (3) that this breach of contract had not been condoned by the actings of the sellers' agent; and therefore (4) that the railway company were liable for the price of the cattle.

In this action Messrs Hay & Kyd, live stock salesmen, Victoria Auction Hall, Perth, sued the Caledonian Railway Company for the sum of £281, 7s. 6d. as damages for breach of contract in respect of their failure to deliver to the pursuers' order at Glasgow fifteen cattle which they had given to the company at Perth to be carried to Glasgow.

The facts of the case were as follows:—

On 15th November 1886 the pursuers sold the cattle to James Peebles, a cattle-dealer at Cargill, at the price of £275, 15s., as contained in the former's account of purchases for that day, and in which it was stated that the terms of the sales were cash. The cattle were sent in charge of a drover in the employment of the pursuers to the Caledonian Railway Station at Perth, and by him booked to be conveyed in trucks by the railway company to Glasgow, and there delived to Peebles, £3, 4s. being paid for the carriage. There was an agreement in force between the pursuers and Peebles, who was one of their regular customers, as regarded the settlement of their weekly transactions. The sales were on Mondays every week, and Peebles settled on the following Tuesday for the cattle bought the previous week. He was not, however, in the habit of paying for the cattle sold on the previous day. At the date of the sale in question he was in arrear to the extent of between £500 and £600, and as the pursuers were anxious to be secured in this debt, and in the price of the cattle, they sent one of their servants, J. A. Hunter, to Perth Station to meet Peebles, and to get as large a payment as he could, but not to take cheques. Peebles offered to pay £300 by giving a cheque for £120, his own cheque for £25, both payable in Glasgow, and the balance in cash. This was a payment to account of the balance due, not payment of the price of the cattle. J. A. Hunter took the cheques, and immediately afterwards went to Glasgow to see about them. Before leaving, J. A. Hunter saw the pursuers' cashier, and the footing upon which the matter was left was that the cashier was to take the pursuers' instructions in regard to the cattle. When J. A. Hunter left he did not know whether the cattle were to be consigned to Peebles or himself. The pursuers being dissatisfied with the payment, had the old way-bill or invoice cancelled and a new one made out, in which the cattle were consigned to J. A. Hunter instead of to Peebles. A telegram was then sent from the defenders' traffic manager at Perth to Glasgow, where it was received