[HEARD 13*th*—JUDGMENT 16*th July*, 1849.]

ADAM BURNES, Writer in Montrose, *Appellant*.

WILLIAM PENNELL, Official Assignee, and WILLIAM COOK and Others, Creditors, Assignees of the Forth Marine Insurance Company, *Respondents*.

Process.—The Inner House, at reviewing an interlocutor of the Lord Ordinary upon a reclaiming note which brings up the whole case, is not limited to disposing of the particular ground upon which the Lord Ordinary adjudicated, but should pronounce that interlocutor which the Lord Ordinary ought to have pronounced.

Process.—It is not incompetent to object to the relevancy of the Pursuer's averments after condescendence and answer.

Partnership.—A provision in a deed of partnership that a transferee of shares in the Company shall not become a shareholder until he shall have subscribed a minute in the Company's books, is a provision in favour of the Company, not of the transferee, which the Company may dispense with.

Ibid—Ibid.—A partner in a Joint Stock Company cannot bind the Company by representations made by him in regard to the Company's affairs, although at the time he may have been likewise the law agent of the Company, the making of the representation not coming within the scope of his employment as such agent.

Ibid—Ibid.—Directors of a Joint Stock Company declaring dividends, when no profits have been earned, and which must be paid out of capital, with the view of enhancing the value of the shares of the Company, are civilly, as well as criminally, liable to those who may have been deceived by this operation into becoming purchasers of shares.

BY the deed of partnership of the Forth Marine Insurance Company, the shareholders were taken bound to pay at the

outset of its business an instalment of 10 per cent. on the subscribed value of the shares, and to advance such further proportions of their shares at such periods and by such instalments as the Directors should appoint.

The deed contained among others the following clauses:—

"VI. That it being advisable that part of the free interest "and profits should be retained and set apart to answer losses, "in order thereby to lessen the chance of encroachment on the "said advanced capital, it is hereby accordingly declared, that "there shall yearly, before division, be retained and set apart "from the clear interest and profits of the Company fifty per "cent. of the same, and that aye and until the whole sums so "retained shall amount to ten per cent. on the capital stock of "the Company, so far as subscribed at the time; and it is "farther provided and declared, that in the event of their being "a balance against the Company on their profit and loss account "in any one year, such balance shall be stated against, or paid "out of the said profits retained and set apart as aforesaid at the "time, so far as they may be sufficient for that purpose; and "the said sum of fifty per cent. on the clear interest and profits "shall from time to time, as occasion requires, be retained in "manner above directed, aye and until the sum total of retained "profits again amount as before specified to ten per cent. on the "capital stock subscribed for at the time as aforesaid.

"XV. That the partners shall not be at liberty to transfer "and dispose of the whole or any number of the shares held by "them until the expiry of twelve months from the said "day of being the period of the commencement "of this contract of copartnery, but that immediately thereafter "they shall be at liberty to do so, and that either gratuitously "or for an onerous consideration *inter vivos* or *mortis causa*. "But declaring always, that in the case of a sale or a conveyance "*inter vivos*, whether for an onerous consideration or gratuitously, "such sale or conveyance shall in no case be valid towards

" making the purchaser or assignee a partner of the Company,
" unless he shall be approved of by the directors, and a minute
" to that effect entered in the sederunt-book. And declaring
" farther, that the directors shall be entitled to consider the
" shares so attempted to be sold or assigned, and the purchaser
" or assignee not approved of, as still belonging to the former
" proprietor thereof. And it is likewise hereby expressly provided
" and declared, that it shall not be lawful for any partner to sell,
" assign, or in any way convey less than one share of the capital
" stock of the Company; and in case the shares of a deceased
" partner shall happen to be divided by the laws of succession,
" or by a deed *mortis causa* into parts less than one share, the
" holders of such fractional part shall have no right to attend or
" vote at the meetings of the Company, or on account of such
" fractional parts to join with others to make up a vote by proxy
" under the 23rd Article of this contract; nor shall the holders
" of such fractional parts have any right to interfere with the
" management of the Company's business, but they shall in
" every respect be subject to the same rules and regulations
" with regard to calls, sales, and otherwise, as if they were each
" and every one holders of complete and integral shares.

" XVII. That where the share or shares of any partner are
" regularly transferred or conveyed, in terms of the articles
" before written, or either of them, and that whether by the
" partner himself or by the directors of the Company, the
" assignation or conveyance thereof, or other deeds of trans-
" ference whatsoever, or an extract from a proper record, shall
" be produced to the directors, and entered in a book to be
" kept for that purpose; and, in like manner, upon the suc-
" cession of any heir or executor to the share or shares of a
" deceased partner, proper evidence of his title to succeed shall
" also be produced, and a regular entry thereof be made in the
" book to be kept by the Company as aforesaid, and such pur-
" chaser, assignee, heir, or executor, shall become subject to,

" and be bound to observe, the whole articles and conditions of " this contract, as well as all the regulations of the Company, " made or to be made in virtue of the powers herein contained; " and a minute to that effect shall be engrossed in the Company's " books, and regularly subscribed by such purchaser, assignees, " heir, or executor foresaid, either personally under his own " hand, or by an attorney duly authorized to act for him; and " no purchaser, assignee, heir, or executor, shall be deemed " or entitled to exercise any of the rights of a partner until " every one of these requisites shall have been complied " with."

The deed likewise provided that the books of the Company should be balanced first upon the 31st day of May, 1840, and afterwards upon the same day in each succeeding year; and that no profits arising previous to the period of the first balancing of the books was to take place, " But the clear interest and " profits of every succeeding year, as they shall appear at the " time of each balance, after deducting therefrom fifty per cent. " thereof, in manner and for the purposes before set forth " under Article VI hereof, shall be divided among the partners " according to their respective interests. But declaring always " that in striking the amount of the said clear interest and " profits for division, the directors shall have full power, and " they are hereby authorized and directed, to take into their " consideration the extent of risks then pending, and upon a " proper estimation of the same, to deduct from the said inte- " rest and profits such a proportion thereof as they shall deem " it prudent and requisite to set aside on account of the foresaid " pending risks, and that for the purpose of meeting the said " risks, should need be."

The first annual general meeting of the Company was held on the 16th of June, 1840. At this meeting a balance-sheet was exhibited, showing a clear balance of 29,135*l.* 5*s.* 7*d.*, after deducting expenses and losses actually incurred.

BURNES *v.* PENNELL AND OTHERS.—16th July, 1849.

The second meeting took place on the 15th of June, 1841, when the balance-sheet exhibited showed that 198,036*l.* 8*s.* 9*d.* had been received for premiums in the preceding year, and that the losses incurred, averages, and other charges, amounted to 111,962*l.* 12*s.* 7*d.*, leaving a balance in favour of the Company of 86,073*l.* 16*s.* 2*d.* On this showing of the Company's affairs, the directors recommended that a dividend of fifteen per cent. on 10,000*l.*, the amount of the paid-up capital, should be declared; and this was agreed to by the shareholders.

It was resolved at this meeting that the balance-sheet to be reported to the third general meeting in June, 1842, should be confined to the business done between 31st of May and 31st December, 1841, "with the view of leaving a space of five "months to exhaust in some measure the outstanding risks and "enable the directors to estimate the profit and loss from the "results of experience."

The third meeting was held on the 21st of June, 1842, and the balance-sheet then exhibited, showed that there had been received for premiums during that period, 152,592*l.* 15*s.* 4*d.*, and that the losses and averages already settled amounted to 99,193*l.* 3*s.*, leaving a balance of 53,399*l.* 12*s.* 4*d.*

But the directors reported to the meeting that there was a very large amount of losses unsettled, and that after deducting these, so far as they were known, and the estimated amount of those unknown, the balance would be reduced to 6,337*l.* 13*s.* 2*d.* They further reported that although during the preceding year the payment of losses, &c., and the dividend of the previous year, amounted to 234,954*l.* 9*s.* 11*d.*, yet a balance remained in favour of the Company of 62,032*l.* 17*s.* 10*d.* The meeting approved of the directors' report, and resolved that a dividend of 7 per cent. on the paid-up capital should be declared.

On the 26th of July, 1842, the directors made a call upon the partners of 10 per cent. upon the subscribed capital. This call was duly intimated to Mc Kenzie, a holder of fifty shares,

who at this time was a clerk in the service of the Appellant, a solicitor in Montrose, and in consequence of his failure to pay it at the time specified, a correspondence ensued between him and the secretary of the Company, which was taken up by Gilmour, who was the solicitor, and at the same time a shareholder of the Company, and had instructions to enforce payment of the call. On the 5th November, 1842, Gilmour wrote Mc Kenzie an urgent letter, which he answered by saying that the Appellant was to be in Edinburgh on the 13th of November and would call on Gilmour to arrange the matter.

On the 15th of November the Appellant called upon Gilmour, and asked from him information as to the affairs of the Company, and expressed a desire to relieve his clerk (Mc Kenzie) from the liability he had incurred. Gilmour upon this occasion showed the Appellant the reports which have been alluded to as having been presented to the previous general meetings, and a conversation ensued from which the Appellant was induced, by what fell from Gilmour, to take so favourable a view of the concerns of the Company, that within ten days afterwards he purchased Mc Kenzie's shares for 200*l.*, or at a premium of 75*l.* above what had been paid up by Mc Kenzie. The Appellant on the 25th of November wrote the secretary of the Company that he had made the purchase, and would remit the amount of the call which had been made, so soon as the transfer from Mc Kenzie to him should be approved of. On the 30th November, Gilmour intimated to the Appellant that the sale to him had been approved of by the directors on condition of the Appellant paying the call that had been made. On the 2nd of December a deed of transfer was executed by the parties, and on the same day the Appellant remitted the amount of the call to Gilmour, through whom it was paid over to the Company; but the Appellant did not then or at any subsequent period subscribe the minute in the Company's books required by the 17th article of the deed of partnership.

BURNES *v.* PENNELL AND OTHERS.—16th July, 1849.

On the 19th of December, 1842, the directors made a further call upon the partners of 20 per cent., payable by two instalments, on the 1st of March and 1st of May, 1843, in order to meet pressing demands upon losses which had occurred.

The proceedings of the directors in regard to the making of this call, and the arrangements made by them for discharging the claims of the Company, were approved of by a general meeting of the shareholders, which was held on the 20th of June, 1843, which also authorized a further call of 15 per cent. to be made for liquidation of still further losses upon the policies of the Company.

The Appellant did not pay either of the last-mentioned calls. In consequence the Company, in July 1843, brought an action against him to compel payment. The Appellant pleaded defences to this action, and subsequently, in May 1844, brought an action against the Company and likewise against Mc Kenzie, concluding to have the transference to him by Mc Kenzie reduced and set aside, and to have it declared that he had never been a partner of the Company and was in no way responsible as such, and also concluding for repetition of the amount of the call which he had paid to the Company.

The grounds upon which the Appellant rested this action were: 1st, that at the time of his purchase from Mc Kenzie he was led to believe that the stock of the Company was a fair marketable article and subject of sale, whereas it was of no value whatever, because of the losses which had been previously sustained, but which had been kept concealed by the directors, whereby at the time of the sale the Appellant was labouring under error as to the nature and existence of the subject of the sale. 2nd. That he had been induced to enter into the sale through the fraudulent concealment and misrepresentation of the defenders by Gilmour, their partner and law agent, for the purpose of substituting the Appellant in the place of Mc Kenzie,

who was known to them as being a person of no means or ability to answer the demands of the Company upon him.

The averments of the Appellant in support of this action were to this effect:

"The whole sales of the Company's stock, which took place "betwixt the general meeting of June 1842 and the date of "the transaction with the defender, were made by directors, "extraordinary directors, or trustees of the Company, who "possessed knowledge of the ruinous state of its affairs, and "for the purpose of avoiding the loss to which they were "exposed by holding shares of the concern. One of these "parties, on being permitted to retire, granted bond to the "Company without the knowledge of the purchaser, whereby "he continued his liability for the whole debts and obligations.

"The directors of the Company, from the commencement "down to the date of the said transaction with the defender, "practised a system of deception upon the partners of the "Company, and upon the public in general, by making up and "exhibiting false statements and balance-sheets, such as to "make it appear that the affairs of the Company were in a "prosperous state, and such as apparently to justify a large "division of profits for several successive years. Whereas, "during these years, the Company, so far from making profit, "had actually sustained enormous losses; and by these fraudu-"lent devices, as well as by the misrepresentations of their law "agent Mr. Gilmour, the defender was deceived and misled, "and thereby induced to enter into the foresaid transaction "of sale.

"At the date of the transfer to the defender, when he was "entrapped as before mentioned, and previously, the affairs of "the Company were in a state of irretrievable ruin, and they "were known to the directors, office-bearers, and law agent to "be so.

"The directors of the said Company, by dealing with the

" defender as if the stock of the said Company was then a fair " marketable article and subject of sale, when they knew and " concealed the fact of the ruinous state of their affairs, and " that the Company's stock was not only of no value whatever, " but must inevitably be the cause of enormous loss to the " holders thereof, and by receiving the sum stipulated as the " price, were guilty of fraud, misrepresentation, and undue " concealment."

McKenzie did not put in any defence to this action, and decree in absence was pronounced against him.

The Respondents pleaded in defence: 1st, That the Appellant, as a partner of the Company, was bound to pay the money sued for; 2nd, That the Appellant's allegations were not founded in truth, and were not relevant to protect him from paying up the proportion of the stock corresponding to the shares held by him; 3rd, That the allegations upon which the challenge of the transfer was founded were not relevant in law to support the challenge; 4th, That the challenge was barred by the act of the Appellant in obtaining himself to be enrolled as a partner, and continuing so enrolled, and so preventing the Company from compelling McKenzie to pay up the capital upon the shares transferred.

The two actions by the Respondents and by the Appellant were conjoined. On the 3rd of July, 1847, the Lord Ordinary (Wood) pronounced the following interlocutor:—" Finds, in " the reduction and declarator, that the statements made in the " record by Adam Burnes, the pursuer of said action, are relevant " to support the reductive conclusions thereof, and therefore " repels the defences for the Forth Marine Insurance Company, " and the third plea in law, annexed to the revised and amended " condescendence of the Company, in so far as it is in said " defences or plea maintained that the allegations upon which " the said Adam Burnes founds, in support of his challenge of " the writ or writs called for to be set aside, even if true, are not

" relevant in law to support such challenge; and, before further " answer, appoints the process to be enrolled, that parties may " state how they propose that the cause shall be proceeded with."

The Respondents reclaimed against this interlocutor, and by their note prayed the Court " To recal or alter the interlocutor " submitted to review, and, in the reduction and declarator, to " sustain the defences for the Forth Marine Insurance Com- " pany, and the third plea in law annexed to the revised and " amended condescendence for the Company, and to assoilzie " the said Company from the conclusions of the said action of " reduction and declarator; and, in the action at the said Com- " pany's instance, to decern in terms of the conclusions of the " libel, to find the said Forth Marine Insurance Company entitled " to expenses in both actions; or to do otherwise in the premises " as to your Lordships shall seem just."

On the 16th of February, 1848, the Court pronounced this interlocutor:—

" Alter the interlocutor of the Lord Ordinary reclaimed " against: Find, that in the month of December 1842, Adam " Burnes, defender in the ordinary action, and pursuer in the " reduction, became a partner in the Forth Marine Insurance " Company to the extent of fifty shares of the capital stock " thereof: Find, that there are no averments on record relevant " to set aside the transaction by which the said Adam Burnes " became a partner as aforesaid, or to liberate him from the " obligations and liabilities thereby undertaken by him to the " extent of fifty shares as aforesaid: Therefore, in the reduction, " repel the reasons of reduction, sustain the defences, and " decern; and in the action at the instance of the manager " of the Forth Marine Insurance Company, now insisted in by " the official and creditor assignees of the bankrupt estate of " the said Company, repel the defences stated by the said Adam " Burnes, and decern in terms of the libel: find the said Adam " Burnes liable in expenses in the said actions; appoint an

BURNES *v.* PENNELL AND OTHERS.—16th July, 1849.

" account thereof to be lodged; and remit to the auditor to tax " the same and to report."

The appeal was taken against this interlocutor, and a subsequent one modifying the expenses.

Mr. Attorney-General and *Mr. Anderson* for the Appellant.—I. All that was disposed of by the interlocutor of the Lord Ordinary was the relevancy of the averments in the reduction and declarator to support the conclusions of that action. The interlocutor left untouched the action for payment of the calls. It was, therefore, *ultra vires* of the Inner House as a court of review to do more than assent to or dissent from—to adhere to or alter the Lord Ordinary's finding. Dissenting from the Lord Ordinary's opinion as to the relevancy, the interlocutor of the Inner House does not confine itself to altering his interlocutor in this respect, and remitting to the Lord Ordinary to proceed further, but it goes on in the exercise of an original jurisdiction to dispose of the action by the Respondents which the Lord Ordinary had not in any way considered. The interlocutor of the Court, therefore, was void, and ought to be altered.

II. After condescendence of facts, and a full answer to each averment, it is no longer competent to object to the relevancy of the facts averred; the facts must go to the decision of a jury. Here a full answer to the averments of the Appellant had been made by the Respondents. It was not competent, therefore, for the Lord Ordinary or the Court to determine the relevancy at the stage at which the case had arrived. McDonald *v.* McKie & Co., 5 *Wils. & Sh.* 462.

III. According to the provisions of the deed of partnership, it was necessary, before the Appellant could become a partner, that he should, in pursuance of the 17th Article, have signed a minute agreeing to observe the conditions of the deed. Until he did this, he was no partner. The stipulations of this article were not in favour of the Company alone; they were reciprocal.

BURNES *v.* PENNELL AND OTHERS.—16th July, 1849.

It was in the power of the Company to refuse to allow him to become a partner, and it was equally in his power to refuse to become one. Preston *v.* Collier Dock Company, 2 *Railway Cases*, 335; Hebblewhite, *v.* McMorine, *Ibid.* 51.

IV. If the Appellant had in form become a partner without signing the Company's books, he had been induced to become so through the falsehood and fraud of the directors, or those employed by them. The accounts which were exhibited by the directors were intended by them to produce the notion that the Company was in thriving and prosperous circumstances, while the reverse was the truth. Accordingly, while they paraded the large amount of premiums which had been received in the first year of the Company's business, and brought out a balance of 29,135*l.*, after deducting actual losses, they concealed the enormous amount of risks which were still open, and did not make any estimate of the probable losses yet to be incurred, or any deduction from the balance on this account. So in the second year the directors exhibited a balance-sheet showing a surplus of 86,073*l.*; but in this instance they not only, as in the other, did not make any deduction for the estimated loss upon outstanding risks, while they brought into account the premiums paid in respect of these risks, but they omitted to bring into account the amount of the losses which had already been incurred, but which had not as yet been settled with the parties claiming. Nevertheless, they recommended, and the Company adopted their recommendation, that a dividend of 15 per cent. on the paid-up capital should be declared. Again, at the third meeting, in June 1842, by the balance-sheet brought into account, the premiums which had been paid up to the day of the account, although the resolution of the previous meeting had been that the accounts should be confined to the business done from the period from 1st June to 31st December, 1841. If this had been adhered to, the premiums received between 31st December and the date of the meeting would have been

excluded by the balance; but by bringing them into the balance, and not stating against them any estimate of the probable loss to be incurred in respect of these premiums, an apparent surplus of 6,337*l.* 17*s.* 2*d.* was shewn, out of which a dividend was again declared, although the fact of the losses already paid having nearly exhausted the great amount of premiums received, leaving only this small sum of 6,337*l.* 17*s.* 2*d.*, must have impressed the conviction that in the result the concern would be a ruinous one.

The object of all these accounts was to deceive the shareholders and the public into the belief that the concern was prosperous. This effect was produced upon the Appellant by Gilmour, who exhibited these accounts to him while making up his mind whether to take McKenzie's shares. And as Gilmour was not only a shareholder, but acting as the law agent of the Company, the deceit thus imposed on the Appellant was the act of the Company, for which it must be responsible to the effect of relieving the Appellant of all liability arising from the purchase he had made under the influence of this deception. It is not necessary that there should have been either a legal or moral obligation on the directors to disclose to the Appellant the true state of the Company's affairs, or that they should themselves have given the erroneous information. It is sufficient that the Appellant has been deceived in a matter which was within their knowledge, and by Gilmour, who was employed by them. Fuller *v.* Wilson, 3 *Ad. & Ell. N.S.* 58; Evans *v.* Collins, 5 *Ad. & Ell. N.S.* 804; Langridge *v.* Levi, 2 *Mees. & Wels.* 519.

Neither is it an answer to the Appellant to say that the accounts and the statements of Gilmour were not made with the view and intent to induce him to make the particular purchase. The object may have been to induce insurances by the public, or give fictitious value to the shares in the market; but if the evil effect has been produced, this is sufficient to entitle the Appellant to relief. Stainbank *v.* Fernley, 9 *Sim.* 556.

BURNES *v.* PENNELL AND OTHERS.—16th July, 1849.

That a fraudulent object was intended is shown by the facts averred by the Appellant in regard to the conduct of the directors in the sale of their own shares; that effect was produced upon the Appellant. If a dormant partner of an ordinary trading company were to induce the purchase of a share of the company's business through a fraudulent representation of its value, the company could not take advantage of the transaction, although a representation of the state of the company's affairs was not within the province of the dormant partner—a partner of a joint stock company is neither more nor less than a dormant partner. Even, therefore, if it could be said that the communication of Gilmour to the Appellant, acting, as he was at the time, as the agent of the directors, *i. e.*, of the Company, was not the communication of the directors, still, as Gilmour was likewise a shareholder, the result would be the same.

A member of a joint stock company has no power to contract or make representations on behalf of the Company. It may be said, So neither has a director power to make representations as to the state of the Company's concerns, that is not within the sphere of his duties; but if the partner or director do make the representation, the Company cannot take the benefit of any transaction arising out of it.

Mr. Rolt and *Mr. Inglis* for the Respondent.—I. From the time when the two actions were conjoined there was but one action before the Court. It was competent, therefore, for the Lord Ordinary, instead of confining his interlocutor disposing of the relevancy of the averments to support the action of reduction, to have disposed of the action for calls upon its merits, if he had been of opinion that the action of reduction was not founded upon relevant grounds. The Inner House, while reviewing the Lord Ordinary's interlocutor, stood precisely in the same position that he had done, and might com-

petently reverse his interlocutor and pronounce that interlocutor which, in the opinion of the Court, he ought originally to have pronounced.

II. It was not possible for the Respondents to have objected to the relevancy of the Appellant's averments until these were made upon the record. The 4th sect. of 6 Geo. IV, cap. 120, enacts that the Court shall not give judgment upon the merits until the averments of the parties in fact and their pleas in matter of law shall be set forth on the record. This provision of the statute had in no way been departed from, and prevented any other course being taken than that which had been taken. In Mackie & Co. *v.* Mc Donald, the objection of want of relevancy was not raised upon the defences, although the averments upon which the action was founded were sufficiently set forth in the summons to call for this defence. The defender reserved the objection of want of relevancy in the action until after specific averments of every fact to be proved in support of the action had been made, in other words, until nothing remained but to ascertain the truth of these averments by the verdict of a jury. But the Court, confounding their province as judges of the law with the functions of a jury as judges of the fact, determined upon the truth of the facts alleged, and hence the reversal of their judgment in that case.

III. The 17th clause of this deed of partnership was not intended for the benefit of transferees of shares, but was manifestly a provision in favour of the Company, and for its protection by preserving evidence of the liability of incoming partners. It was in the power of the Company, therefore, either to insist upon the provision against the party, or to waive it in their own favour. In Preston *v.* Collier Dock Company, no transfer whatever had been executed by the party, as in the present instance, and, moreover, there was the enactment of a statute prescribing the particular form of transfer to be used. The question that occurs in the present case never was

raised in that one. But it was raised and decided in favour of the Respondent's position in two cases which occurred in Scotland East Lothian Bank *v.* Turnbull, 3 *S. & D.*, and Allan *v.* Turnbull, 7 *Wil. & Sh.* 281.

IV. Though the imputation of fraud is in terms ascribed to the acts of the directors, there is no averment of that which does in fact amount to fraud, or anything like it. It was no duty of the directors to introduce into the annual balance-sheets a statement of the Company's business: and if they had tried to make a calculation of the unascertained losses, there were no data on which they could have proceeded. The conduct of the directors might have been imprudent, but could not be said to have been fraudulent. It was necessary, however, for the Appellant, in order to entitle him to the relief he asked, to have averred not only misrepresentation, but that the misrepresentation was made with the intention of deceiving him as to the particular matter in regard to which the misrepresentation was made. A mere naked falsehood stated to a party will not give him any right of action. The misrepresentation must have been made with the intention that the party should act upon it. But there is no allegation that the accounts which are alleged to have been fraudulently concocted were made with the view of inducing the Appellant in particular to purchase shares. They might have been made with the view of increasing insurances, but they could not well have had the Appellant's purchase in view. But even if their acts would warrant a claim of relief against the directors personally, they could not be the foundation of a claim against the Company at large. A Company may be bound by the acts of a partner in everything incident to the partnership; but inducing strangers to become partners can never be said to be within the scope of a partnership. In Stainbank *v.* Fearnley, the suit was not directed against the Company, but against the individual director by whom the fraud had been committed. But none of the cases

show a successful claim for relief, not against the director or officer making the misrepresentation, but against the Company itself, of which indeed the Appellant is himself by the statement of his summons one of the partners.

With regard, again, to the part which Gilmour is alleged to have acted, he was the law agent of the Company, and was employed alone in that character. He could not, therefore, bind the Company by anything he stated, beyond what came within the scope of his employment. No doubt he was likewise a partner; but this was not a common trading partnership, in which the representation of one partner will bind the other partners, but a joint stock company, as to which all power is withdrawn from the shareholders, and centred in the directors. In short, there is no allegation of anything amounting to fraud, nor of any representation made by the directors, or any one authorized by them to the Appellant, with the view of inducing the result of which he complains.

LORD CAMPBELL.—My Lords, on the 28th of July, 1843, the Forth Marine Insurance Company, established in the year 1839 as a joint stock company, with transferable shares, commenced an action against the Appellant for calls, alleging that he had become a member of the Company by purchasing and accepting the transfer of fifty shares on the 2nd day of December, 1842. The calls sued for were—one ordered on the 19th of December, 1842, of 20 per cent., and another ordered on the 22nd of June, 1843, of 15*l.* per share.

By his defences he denied his liability as a shareholder, and on the 28th of May, 1844, he commenced an action of reduction against the Company and against David Mc Kenzie, from whom he had purchased the fifty shares, praying by his summons that the transfer of the shares to him might be set aside; that it should be declared that he never was a partner in the Company or liable as such; that he should be reponed and restored

in integrum; that it should be declared that the said David Mc Kenzie remains liable in respect of the fifty shares; and that the sum of 200*l.* paid by him for the shares should be repaid to him with interest.

Although no fraud was alleged against David Mc Kenzie, he (it is alleged) collusively made no defence, and there was a decree against him in absence.

The Company making defences to the action of reduction, the Lord Ordinary very properly conjoined this action with the action at the suit of the Company for calls. In the conjoined actions there was one record, which set forth the condescendence of the Company with the answers of Mr. Burnes, and Mr. Burnes's statement of facts with the answers of the Company, and the pleas in law on both sides. The second and third pleas in law on behalf of the Company, on which the case depends, were, that Mr. Burnes's allegations are not relevant in law to protect him from the payment of the calls, or to support his action of reduction.

The case came on to be argued before Lord Wood as Lord Ordinary, and he, by an interlocutor dated 3rd July, 1847; "found, in the reduction and declarator, that the statements "made in the record by Adam Burnes, the pursuer of said "action, are relevant to support the reductive conclusions "thereof."

On behalf of the Company there was a reclaiming note, and on the 16th of February, 1848, their Lordships of the first division altered the interlocutor of the Lord Ordinary reclaimed against: Find, that there were "no averments on record relevant "to set aside the transaction by which the said Adam Burnes "became a partner as aforesaid, or to liberate him from the "obligations and liabilities thereby undertaken by him to the "extent of fifty shares as aforesaid. Therefore, in the reduction, "repel the reasons of reduction, sustain the defences and "decern, and in the action at the instance of the manager

" of the Forth Marine Insurance Company, repel the defences " stated by the said Adam Burnes, and decern in terms of the " libel, and find the said Adam Burnes liable in expenses in the " said actions."

From this interlocutor Mr. Burnes has appealed to your Lordships' House. And the first objection taken to it by his learned counsel is, that it finally disposes of both actions, whereas the Lord Ordinary had only decided a single point in the action of reduction, and had given no opinion respecting the action for calls, it being contended that the Inner House had exceeded its jurisdiction, which was confined to a review of the decision of the Lord Ordinary on the point which *he* had disposed of. This objection was not made in the Court below, where all the questions arising in both actions were very copiously discussed without any doubt as to jurisdiction, and it is not even hinted at in the cases laid on your Lordships' table. I am of opinion that it is wholly untenable. The reclaiming note professed to bring, and brought, both actions before the Inner House, and the Inner House, as the Court of Appeal, was empowered, and was bound to pronounce the judgment which ought to have been pronounced by the Court of first instance. The Lord Ordinary, if he had thought fit, might have reported both actions at once to the Inner House without deciding anything; and when the case came before the Inner House upon the reclaiming note, an equally extensive jurisdiction was conferred upon them.

Another technical objection is made, that the plea of want of relevancy was incompetent, after a condescendence and statement of facts. But I am of opinion that this is equally untenable. According to the existing procedure in the Court of Session (which I agree with a very learned Judge of that Court, who has lately published an able tract upon that subject, stands greatly in need of amendment), generally speaking, till condescendence, the cause of action is not fully developed, and it is

not properly known what the facts are on which the party relies, and which he undertakes to prove. If, in an action which the Judicature Act does not require to be sent to a jury, there must be a jury trial to ascertain the truth of facts which are wholly irrelevant, the most inconvenient consequences would ensue, but on the construction of the Judicature Act, the fit time to deny the relevancy of allegation is, when those allegations have been made. The case of Macdonald *v.* Mackie is no authority to prove the general position, that there cannot be a plea to the relevancy after condescendence, but only, that if the defender, instead of relying on want of relevancy, pleads a new defence, resting upon new facts which he adduces, he cannot afterwards avail himself of want of relevancy.

Another objection made by the Appellant of a formal nature, is, that he had not subscribed an entry in the Company's books according to the 17th article of the deed of co-partnery, which, upon a transfer of shares, requires such a subscription, and declares "that no purchaser shall be deemed or entitled to exercise "any of the rights of a partner until this requisite be complied "with." Although this objection was, after long argument, abandoned by the Appellant's counsel in the Court below, they are not precluded from taking it here, as it is raised by the record; but I am of opinion that it was properly abandoned below, because it is untenable. Looking to the 17th and the preceding article, it is quite clear that the subscription in question is a duty cast upon the purchaser for the benefit of the Company, and that he cannot take advantage of his own default. On the 2nd of December, 1842, there was a regular deed executed, to which Mr. Burnes was a party, and by which, with his consent and with the privity and sanction of the Company, the fifty shares were regularly transferred to him. Therefore, it became his duty to see that the form specified in the 17th article was complied with. From his default the Company might have said that he was "not to be deemed, or entitled, to

BURNES *v.* PENNELL AND OTHERS.—16th July, 1849.

" exercise any of the rights of a partner," but *he* is forbidden to avail himself of any such plea.

We come, therefore, to the question which the Lord Ordinary decided. If the deed of transfer stands, and Mr. Burnes had become a partner, there can be no defence to the action for calls. Everything depends, therefore, on " whether the state-" ments made by him in the action of reduction are relevant to " support the reductive conclusions thereof."

Now we certainly have nothing here to do with evidence, and all the allegations of relevant facts must be taken to be true, whether, upon the record, they are admitted or denied. But facts must be averred with reasonable precision, which, if proved, would be sufficient to support the reductive conclusions of the summons. It is not enough to set forth general allegations of fraud against the defenders. Facts must be alleged which show that such a fraud has been practised by them upon him, as will entitle him to the judgment which he prays.

I am first struck by a circumstance which I do not find noticed in the Court below, that, although it be sought to set aside the transfer against Mc Kenzie, to fix upon him a continuing liability as a partner, and to have a decree pronounced, by which, having sold his shares for 200*l.*, of which sum only a small portion came into his pocket, he would have to pay at least 1000*l.* in respect of subsequent calls. As far as he is concerned, there really is no allegation of fraud to impeach the transaction, either in the summons or condescendence. If the directors are liable to all the charges brought against them, he was sinned against as one of the innocent and betrayed shareholders.

But if the Company cannot avail themselves of any defect in the case, as far as he is concerned, after the decree against him in absence, let us see what facts are alleged, in respect of which the reduction is to be supported against the Company.

Your Lordships will bear in mind that the transfer to be set

aside was executed on the 2nd of December, 1842, and that Mr. Burnes tells you that, till the preceding month of November, he knew nothing about the affairs of this Company (being, probably, ignorant of its existence), and that he then became acquainted with it, from the circumstance of David Mc Kenzie, his clerk, being a shareholder, and unable to pay a call.

Montrose is his usual place of residence, but he then happened to be in Edinburgh, and certain communications were made to him by Mr. Gilmour, who was the law agent, or, as we say in England, solicitor to the Company, and had been employed by the Company in that capacity to sue Mc Kenzie for the arrears.

Now, my Lords, the question arises, whether the Company be bound by the communications which Mr. Gilmour then made to Mr. Burnes respecting their commercial affairs and their commercial prosperity; for, if they are not, we need not consider the weight and effect of the representations then made. My Lords, I am of opinion that, in making these representations, he was not acting within the scope of his authority from the directors or the Company. He was employed by them only as a lawyer to demand and sue for a debt from a shareholder, and he had no authority to make any disclosure respecting the concerns or the condition of the Company to a stranger, who contemplated the purchase of shares in the Company.

It was hardly contended at the bar that the Company are bound by what Mr. Gilmour said or did on this occasion, merely because he was the law agent of the Company; but it has been most strenuously argued, that the Company are bound by all that he said and did, on the ground that he was himself a shareholder in the Company. We are told that a joint stock company (at least if not incorporated, and only empowered by a public Act of Parliament as this is, to sue and be sued by its officers) is in the same situation as any mercantile partnership consisting of two or three individuals carrying on business jointly under an ordinary deed of partnership, or by a parole

BURNES *v.* PENNELL AND OTHERS.—16th July, 1849.

agreement among themselves of which the world is ignorant; in which case, what is said or done by any one partner respecting the partnership business affects all the partners, although in violation of their agreement *inter se*. But why is this so? Because, carrying on business jointly under a common firm, they hold out to the world that each of them has authority to manage the partnership concerns. Therefore, all are bound by what each does in conducting the parnership business. All the members of the firm are liable to the *bonâ fide* holder of a bill of exchange drawn, accepted, or indorsed, by any one of them. But supposing that A. B. and C. entering into partnership, it is expressly stipulated that A. shall not draw, accept, or indorse bills in the partnership firm, and this stipulation is known to X., I apprehend that he would have no remedy against B. and C. on a bill of exchange which he induced A. to draw, accept, or indorse. Therefore, on the principles which regulate the liability of common partners, a distinction must be made between a member of a common mercantile partnership, and a shareholder in a joint stock company. No one will contend that a joint stock company would be liable on a bill of exchange drawn, accepted, or indorsed by any one shareholder. Why? Because it is known that the power of carrying on the business of the company, and of drawing, accepting, and indorsing bills of exchange is vested exclusively in the directors. This shows, that although a joint stock company is a partnership, it is a partnership of a different description, and attended with different incidents and liabilities from a partnership constituted between a few individuals who carry on business jointly, with equal powers and without transferable shares. All who have dealings with a joint stock company know that the authority to manage the business is conferred upon the directors, and that a shareholder, as such, has no power to contract for the company. For this purpose it is wholly immaterial, whether the company be incorporated or unincorporated.

Here, it is not alleged that Mr. Burnes knew that Mr. Gilmour was a shareholder; or that in respect of his being supposed to be a shareholder, he gave any faith to his representations. Mr. Burnes knew, or might have known, that there were nine directors appointed to manage the business of the Company. He knew that Mr. Gilmour was not one of them; and he dealt with Mr. Gilmour merely as the law agent employed to recover the arrears due from Mc Kenzie. The doctrine contended for would lead to the conclusion, that a joint stock company is liable on any contract entered into by any shareholder within the scope of the business, for carrying on which the Company is established; and that any contract regularly entered into with the directors may be vitiated by anything said or done by any shareholder, without the authority or privity of the directors. Considering the important transactions now carried on through the medium of joint stock companies, this doctrine is very alarming; but it rests on no principle, and no authority has been cited to support it. The case relied upon, of Stainbrook *v.* Fernley, 9 *Sim.*, 556, I entirely approve of; but that was a bill filed by the purchaser of shares in a joint stock company against his vendor, who was alleged personally to have deceived the plaintiff by a false statement of material facts; and there, without affecting the interests of the company, the plaintiff sought repayment of the purchase-money with interest, on re-transferring the shares to the defendant. The Vice-Chancellor of England, therefore, rightly held that the plaintiff stated a case entitling him to relief.

We now come then to the allegations respecting the acts of the directors themselves; and if the Plaintiff has been deceived and defrauded by them, and induced by them to purchase the shares by their false representations, the interlocutor must be reversed. I do not think it necessary, even, that the representations should have been made personally to him. If the

directors have made false representations for the purpose of fictitiously enhancing the price of shares for their own benefit, and the Appellant has thereby been deceived and induced to purchase shares greatly beyond their value, the transfer of the shares, although executed, ought to be set aside. But the transfer having been executed, a clear and strong case of fraud ought to be established, and it must be shewn that the purchaser of these shares was induced to purchase them by the deceit of the directors.

Your Lordships will observe, that the misconduct imputed to those directors resolves itself into misconduct as between them and the shareholders. The directors are not charged with any design to raise the value of shares in the market fictitiously, for the purpose of obtaining a high price for shares to be sold on behalf of the Company, or which they themselves held individually. Nor is any connection alleged between the supposed misconduct of the directors and the purchase of the shares by the Appellant. Their acts of imputed misconduct begin years before he had purchased or entertained any intention of purchasing shares; and surely, it cannot be contended that the purchaser of shares in a joint stock company, when sued for calls, may get rid of his liability by shewing that at some past period the directors have misconducted themselves. Assuming that the accounts rendered by these directors to the shareholders were erroneous or false, there is no allegation that they were ever brought to the notice of the Defendant except by Mr. Gilmour; or that he knew anything of their contents before November 1842; or that they were ever made public or exhibited except at a meeting of the shareholders. Suppose that an action were brought by Mr. Burnes against the directors for a deceitful representation, whereby he was induced to purchase the shares at a fictitious value, what facts are alleged upon this record to support the action? Mr. Burnes himself attributes his unlucky purchase entirely to what passed

between him and Mr. Gilmour, for which the directors are not answerable.

But looking to the accounts, they really cannot be said to be false or fraudulent. It is not enough to bestow such epithets upon them, if upon examination they cannot be charged with falsehood. But the accounts rendered in June 1841, and June 1842, do not state what is false. There is in them no falsification of figures. They give a true statement of the premiums received, and the adjusted losses. In a balance-sheet only liquidated items can appear either on the debtor or creditor side. The complaint, that the balance-sheet contained no statement, and made no estimate of pending risks, is absurd. Such a statement could not be introduced into a balance-sheet; and if the business were prudently conducted, the greater the amount of the pending risks the more prosperous was the condition of the Company. No estimate could be made of losses thereafter to accrue, unless the directors had been endowed with the faculty of second sight, and could have discovered the shadows of coming shipwrecks and captures.

The grave part of the charge against the directors, really resolves itself into the supposed fictitious dividends of 15 per cent. ordered in June 1841, and of 7 per cent. ordered in June 1842. I repeat what I threw out during the argument (and for which I had the high sanction of my noble and learned friend), that it is most nefarious conduct for the directors of a joint stock company, in order to raise the price of shares which they are to dispose of, to order a fictitious dividend to be paid out of the capital of the concern. Dividends are supposed to be paid out of profits only; and when directors order a dividend to any given amount, without expressly saying so, they impliedly declare to the world that the Company has made profits which justify such a dividend. If no such profits have been made, and the dividend is to be paid out of the capital of the concern, a gross fraud has been practised, and the directors are not only

civilly liable to those whom they have deceived and injured, but in my opinion they are guilty of a conspiracy, for which they are liable to be prosecuted and punished. I am one of those who think that Lord Cochrane was unjustly convicted of conspiracy by false rumours to raise the price of the public securities for his own advantage, and to the injury of the King's subjects who were deceived; but no one has gravely doubted, that the offence imputed to him amounted, in point of law, to a misdemeanor. There can be no doubt, therefore, that a conspiracy by falsehood (as by a fictitious dividend), to raise fictitiously the market value of shares of a railway company, or any other joint stock company, that the Queen's subjects may be deceived and injured, and that at their expense a profit may be made by the conspirators, would be an indictable offence.

But setting aside the objection, that here there is no sufficient allegation to connect the supposed fraud with the act of the Appellant in purchasing the shares, how can it be said that the dividend was paid out of capital? The capital of the Company consisted of the 10,000*l.* paid up of the 100,000*l.* of capital subscribed. The 1500*l.* set aside for payment of the 15 per cent. in June 1841, and the 700*l.* for payment of 7 per cent. in June 1842, were taken from premiums which had been received to a vastly greater amount. It might be imprudent to order those dividends, but it does not follow that they were ordered fraudulently; and there is no allegation that they were ordered in contemplation of the sale of any shares, either for the benefit of the Company, or for the benefit of the directors. There is no surmise even that the dividends were connected with any traffic in the shares of the Company. I may observe, that in such a concern as this there must be infinite difficulty in fixing a fair dividend. In railroad companies it must be comparatively easy, for there is no risk to calculate (except, perhaps, that of killing a certain number of Her Majesty's subjects, for which there ought to be a handsome

reserve). The directors have only to take an account of receipts and outgoings, and striking a balance to ascertain according to Cocker how much is to be ascribed to each share. But the directors of a Marine Insurance Company must look to the probabilities of war and peace, and take into consideration accounts of distant tempests to which ships insured by them may have been exposed. If lives are insured they must attend to the approach of the cholera and the sanitary precautions adopted to meet it. This month there may seem grounds for a good dividend, and the next month a call may be indispensable.

The fact is alleged and not denied, that there having been a dividend ordered of 7 per cent. in June 1842, in the month of July following a call was ordered of 10 per cent. The conduct of the directors in ordering a call so soon after a dividend, has been severely animadverted upon; but it might be perfectly justifiable from the varying circumstances of the Company, and, at any rate, Mr. Burnes has no right to complain of it as a ground for the reduction of the transfer, for he himself admits that he was fully aware of it in November 1842, before he had purchased the shares and before the transfer was executed. If such a coincidence of *dividend* and *call* be conclusive proof of insolvency, then he wittingly became a member of an insolvent company, and there is no pretence for saying that he was deceived. But, in truth, he was perfectly satisfied with his bargain till the subsequent calls were made for which the original action was brought. I believe that his bargain was a very bad one, but he had to blame only his want of caution in entering into it. If he had made inquiries of the directors or the actuary, their authorized agent to give information, he probably would have found that heavy losses had lately arisen which would not have been properly introduced as items in any preceding balance-sheet; but he was probably pleased with the amount of premiums, and calculated that these would all turn out to be pure profit.

BURNES *v.* PENNELL AND OTHERS.—16th July, 1849.

However this may be, I concur in the unanimous opinion of the first division of the Court of Session that he has not averred any facts which entitle him to be released from the engagement into which he deliberately entered as a shareholder of this Company.

Some rather harsh remarks have been made upon the learned judges, as if they had confounded *allegations* and *evidence*. But giving a fair construction to the language they use, although it is sometimes a little rhetorical, I think the import of their opinion is, that looking to the facts which the Appellant avers, and taking those facts to be true, without regarding merely vituperative epithets, they do not make out any case of fraud practised upon him, and that he must be left to suffer the effects of his own imprudence.

For these reasons, my Lords, I move your Lordships that the interlocutor appealed from be affirmed, with costs.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend in the conclusions at which he has arrived, and after the very able and elaborate manner in which he has gone into all the points of this case, both into the less important technical matters with which he prefaced his argument, and into the merits of the case itself as to the allegations and as to the facts proved, I so entirely go along with him in his view (with one exception, indeed, with which I am about to qualify my assent), that it is unnecessary for me long to detain your Lordships.

My Lords, in the first place, with respect to the preliminary objection which was taken at the bar, which appears to me to have no force, I wish to state that I am not for reversing this decree in respect of that preliminary objection; I mean the objection that both actions were not competently before the Court when they gave their judgment. My Lord Fullerton uses a very strong expression (I think it is at the top of a right-

hand page in his judgment), and upon that expression of Lord Fullerton, in his most able judgment, the argument for the Appellant at the bar has been principally rested.

My Lords, I do not think it is necessary in support of the judgment below, or in support of our affirmance of that judgment, to say that the effect of a reclaiming petition was to bring both actions before the Inner House as if they had been conjoined. Conjoining two actions is *pars judicis*, as is often said in the Scotch law and practice, and therefore I am unwilling to say what the effect of a reclaiming note is, and whether that might be supposed to supply the defect of an interlocutor conjoining the two. It is quite unnecessary to state that, because I think this is fatal to it, which my noble and learned friend has already remarked, and upon which I rest my opinion as being a sufficient ground in itself, that this was not objected to at the proper time and place. This objection ought, past all doubt, to have been taken in the Court below, where it was not taken; and whether the reclaiming note had so large an effect or not, at all events the reclaiming note brought both interlocutors (as I understand) before the Inner House; and with the reclaiming note the Court had to deal. The reclaiming note was the ground upon which the Court were called upon to decide; it was upon the reclaiming note that the judgment proceeded. Then I say that it is quite enough for me, in order to enable me to dispose of this merely technical objection to say that it was not taken at the proper time and place.

My Lords, the next point that was made in this case raised a doubt with respect to a decision of this House in a case which I heard, and in which I moved your Lordships to give judgment, reversing the decision of the Court below, the case of Mc Donald *v.* Mackie, to which my noble and learned friend has alluded, and to which I have had an opportunity of referring both during the argument at the bar and subsequently. There

is no doubt whatever as to that decision, and I hold by that still, and there can be no doubt whatever that it cannot be shaken. It was an appeal from the Court of Session, the pursuer having stated the facts on which he founded in his summons and condescendence. I go along with my noble and learned friend in his praise of the able statement of my Lord Murray in his valuable tract upon the subject. I go along with him in greatly regretting that the summons and condescendence separate the two matters; that the summons is partly writ and partly declaration, and the condescendence supplies what is wanting, and that without having the condescendence *plus* the summons, you do not see the whole of the pursuer's case. I greatly regret that the summons should not be a mere writ, and the condescendence a declaration. It is much better to keep the two apart; but be that as it may, the mere writ bringing into Court is not the office of the summons. It goes a great deal further. In that case, it was held that the pursuer having stated the facts upon which he founded in his summons and condescendence which brought the whole case into court, and which the defenders had lawfully and explicitly answered, it was too late for them to deny the relevancy of the facts. Therefore the case was remitted to the Court of Session with instructions; because after you have pleaded issuably upon the merits, it is too late to demur generally. In my observation I therefore say, "In the first place their Lordships have mistaken "the shape in which it was brought forward; secondly, they "have mistaken their office in dealing with the answer and "the condescendence at that stage; and last of all, even if they "had been right in the period of time, of so dealing with it, if "it had been a motion in arrest of judgment, or a motion for "entering up judgment *non obstante veredicto*, or an argument "upon demurrer, yet in the third place they have confounded "two utterly distinct subjects of consideration, namely, the "question of law whether or not the pursuer's averment

" amounted to a claim in law, with the question of fact, whether " this averment was true or not?" There can be no doubt how to deal with a case of that sort. But it does not affect this case in the smallest degree, and no support can be gathered for the Appellant's contention in this case from that undoubted position.

As to the third technical point also, I entirely concur with my noble and learned friend.

Now, my Lords, we come to the argument upon the merits. There is a very great difference, as my noble and learned friend has pointed out, between a matter executory and a matter executed. Thus, for instance, if you have a bill for a specific performance, much less misrepresentation and fraud may be necessary to answer that bill, and to call upon the Court to refuse to decree specific performance, than would be required after the execution of the contract to set it aside. After the contract is executed, it would require a great deal more stringent proof of fraud, *dolus dans locum contractui*, to set aside an executed contract than would be required to prevent specific performance, if the matter had rested *in fieri*, and had been executory merely.

That was very distinctly stated in a celebrated case in this House, celebrated on account of the length of the litigation and its importance, and also on account of the eminence of the parties; namely, Harris *v.* Kemble, which was heard by Lord Plunkett, and Lord Eldon and myself, I think, in the year 1831. In that case that principle was very fully illustrated. But it is a matter past all doubt, and requiring no further argument or consideration.

But here was a contract executed. Mr. Burnes had purchased the shares, and he resists the calls made upon him by force of that contract. Under these circumstances, it would require a very strong case of fraud,—it would require not merely a general averment that there had been irregular conduct on the

part of the directors,—not only a general averment that they had behaved trickily (if I may so speak), but there must be legal fraud; it must be *dolus dans locum contractui.* It is not enough for a man to say, "If you had not given such an appearance of the flourishing state of affairs,—if you had not, by paying dividends out of capital, and by making the public believe that you were paying them out of profits, given this flourishing appearance to the concern by your own acts and deeds, I should not have bought my shares." That I say is not enough. You must show that there has been some specific fraudulent contract on the part of those directors,—some grossly fraudulent conduct which gave rise to the particular contract in question. It is not a general averment of *dole.* It must be *dolus dans locum contractui.* That is the language of the civil law which all nations have followed, and the general principle of which in all matters of personal contract is the law of all Europe at this moment. Now here there is no averment of any such fraud as that; and as my noble and learned friend has well pointed out, if there had been such an averment, there is a failure of truth; because, take the instance of the 1500*l.* which was paid, and of the 700*l.* afterwards, both these dividends were paid out of the premiums. It will not do to say, "If you had set down the premiums on the one side and the losses on the other, the gains and the losses would have so counterbalanced each other, that, striking a balance between the two at that particular moment when those two dividends of five and seven per cent. were declared, they could not have paid them out of premiums." That is not enough; that is not sufficiently fraudulent conduct, happening before the contract, and not connected in any way with the contract, to vitiate the proceedings to which the party may be said to have been so induced.

My Lords, to illustrate the proposition that it is not every false representation by acts and deeds, whether by the conduct

of an owner of property, or by the conduct of a body such as a railway company, represented by the directors, that would vitiate any contract that may be made, because those false representations by the proprietor or by the Company may be said to have supplied a motive for the party contracting with them. To illustrate that proposition, I will put this case. But, first of all, let me say that I beg to be understood as entirely going along with those who view with the greatest severity the conduct of railway directors in declaring dividends to be paid out of capital, because I consider that that is of itself a most vicious and fraudulent course of conduct. It is telling the world that their profits are large, when it may be that their profits are *nil*, or that their losses are large, with no profits. It is a false and fraudulent representation by act and deed, much to be reprobated; and I go the full length of what my noble and learned friend has laid down, that it would be a just ground, if a course of conduct of this sort were pursued, coupled with such circumstances as clearly to show a fraudulent intent, for proceedings of a graver nature against these parties. I entirely go along with my noble and learned friend in that proposition, as well as in the illustration which he made use of; namely, that there was a clear ground in law for indicting my Lord Dundonald, then Lord Cochrane, and his relative, Mr. Butt, and others, for a conspiracy, but that the verdict was wrong; because I think the verdict was not borne out,—I mean so far as Lord Cochrane was concerned. Mr. Johnson fled, and there is no doubt that he was guilty; but Lord Cochrane and Mr. Butt, in my opinion, were not guilty, and they were erroneously convicted. I was counsel in the cause, and therefore I may be said to have viewed it with prejudice at the time; but I have since fully considered it; and I was one who gave the advice to His late Majesty to restore Lord Cochrane to his rank, as having been erroneously convicted. I never should have given that advice to my Sovereign, notwithstanding the illustrious services of that noble Lord,

if I had not believed that he had been wrongly convicted. But that there was in law a conspiracy for which a judgment of an infamous nature might pass upon the parties who were guilty in point of fact, I have no doubt any more than my noble and learned friend.

But, my Lords, I was just going to illustrate the point by this case. Suppose that a landlord, in order to make it appear that his tenants are very flourishing, and that his estate is very valuable, remits privately rent to his tenant;—suppose he enables that tenant to live very comfortably, and even luxuriously, in a comfortable farm-house;—and supposing all the while that this is owing to his remitting the rent, and perhaps even out of his capital doing something more for his tenant;—and suppose that in consequence Lord A's or Sir John B's tenants are supposed to be very flourishing, and his estate to be very valuable;—and suppose the consequence of that is that after they have got this name in the world for five or six years, a man comes forward and bids for the estate, or a tenant comes forward to bid for and take the farm, it would be a very strong case to say that this little manœuvre of the landlord to make things appear comfortable and better than they really were, would be such a fraud as would entitle the tenant who had taken the farm, when he was called upon to pay his rent, to say, "Oh, it was all owing to my seeing my predecessor in such comfortable circumstances that I was induced to become your tenant; therefore I will not answer your call—(the rent being in the nature of the call here).—I will not answer your call for my instalment,—my next half year's rent. It is a fraud you have committed; and, therefore, though I have executed the contract, you have yourself to blame." I do not know if there were a bill for a specific performance of a lease which had not actually been taken by the tenant, how far that would be an answer to that bill, but I am confident that no court of equity would set aside a contract or a lease which had been executed under those circumstances.

BURNES *v.* PENNELL AND OTHERS.—16th July, 1849.

My Lords, upon the remaining parts of this case, my noble and learned friend having so elaborately argued them, I do not think it necessary to dwell. I agree entirely in the conclusions at which he has arrived, and I am of opinion, first, that there is no such fraud relevantly alleged as would be a sufficient answer to the action: and, secondly, that there is a total absence of proof of such fraud as would entitle this party to have this contract set aside. I therefore entirely agree with and support the motion of my noble and learned friend.

It is ordered and adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of be, and the same are hereby affirmed. And it is further ordered, That the Appellant do pay, or cause to be paid to the said Respondents, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk-assistant. And it is also further ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

S. & T. WEBSTER—CHARLES LEVER.

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