THE NATIONAL EXCHANGE COMPANY OF GLASGOW, } . APPELLANTS.
PETER DREW & MATHEW DICK, . RESPONDENTS.

1855.
27th February
1st, 2nd, 5th, & 9th
March.

Rigging the Market—Fraudulent Representation.—A tottering Joint Stock Company, with a view to raise its shares in the market, represent the concern as most prosperous, and offer money to two of their shareholders to buy *further* shares, saying: "You shall not be called upon for any contribution till the stock can be sold at a profit." The shares become valueless; the Company sues for repayment of the money advanced. *Defence*, that the Company had been guilty of fraud: that defence held good.

Objection: That the fraud was not in the loan, but in the representations which induced the purchase. Answer, by the Lord Chancellor: That the transaction was not properly a loan; by Lord Brougham: That he, with difficulty, agreed with the Chancellor; by Lord St. Leonards: That it was a loan, but that the loan and the purchase were one and the same transaction.

Objection: That the two shareholders were themselves members of the Company, and, as such, could not complain of a fraud by the Company. Answer by the Lord Chancellor: That by Scotch law, the identity of a shareholder was distinct from that of the Company.

Objection: That the fraud was a fraud *on* the Company, not *by* the Company. Answer by the Lord Chancellor: That the Company, an abstraction, could only act by its Directors and Managers, and a fraud by them was a fraud by the aggregate body; by Lord Brougham and Lord St. Leonards: That the Company had the benefit of the fraud.

Objection: That the representation must not only be false, but known to be false by the party making it. Answer by the Lord Chancellor: That the general interests of society required that representations by Directors should bind the entire corporation, although the individuals composing it might be ignorant of the representation and of its falsehood.

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Fraudulent Reports of Directors—Effect of their Adoption by assembled Shareholders.—Statement by the Lord Chancellor and by Lord St. Leonards of the legal obligations which arise from adopting a report made by Directors to an assembly of Shareholders.

Pleading in Scotland.—Remarks by the Lords on the state of pleading in Scotland.

Per Lord Brougham: A pleading ought not to be rhetorical or metaphorical.

Cornfoot v. *Ffolkes*, 6 Mees. & Wel. 358, explained by the Lord Chancellor and commented on by Lords Brougham and St. Leonards.

THE summons, dated the 14th August 1848, was by the National Exchange Company of Glasgow, and by certain persons the individual partners of the said Company, for their own right and interest, and on behalf of and as representing the said Company, and the whole other partners thereof; and it stated that Peter Drew and Mathew Dick, the Defenders, having, in or about the month of October 1847, purchased from one or more parties, holders thereof, 240 shares of the stock of the said Company, the said Company advanced and paid for the Defenders' behoof, the purchase money of the said shares; that the sellers, upon receiving the said purchase money, signed the transfers in favour of the Defenders, and the Defenders signed the said transfers on the said 10th day of November 1847, in token of their acceptance thereof; that the said shares had become unsaleable; that for the said cash advances and payments, and for commission and interest thereon, there was due to the Pursuers 618*l.* 17*s.* 9*d.* sterling, of which the Company claimed payment.

The plea in law of the Pursuers stated, "that the "Defenders being debtors to them in the amount sued "for, they ought to be ordained to make payment "thereof, with interest and expenses."

The defence stated that the National Exchange Company was established for making advances on railway stocks and other securities, and for discounting bills, and carrying on every kind of banking business, and that in order to swell their profits, they afterwards added sharebroking to their other business, so that they acted in the double capacity of bankers and sharebrokers, and that one John H. Barlow was appointed manager of the Company in June 1845; that the Defenders had become joint proprietors of 1,130 shares of the said Company; that at an annual meeting, held on the 17th September 1846, the shareholders were presented with a report, asserting that the Company's affairs were in a prosperous state, and that the directors had resolved to declare a dividend of 8*l.* 6*s.* 8*d.* per cent., which was accordingly paid; that at a second annual meeting, on the 16th September 1847, a report was submitted representing that there were funds sufficient to pay a dividend of 8 per cent., leaving reserved profits to an amount exceeding 5,500*l.*; that this report was entirely delusive, and the shareholders were kept in entire ignorance of the true state of the Company's affairs, which were represented to be in the most prosperous state when they were actually insolvent; that about the month of October 1847, before the shareholders were aware of the true condition of the Company's affairs, the Defenders were urgently solicited by Mr. Barlow, the manager, to purchase additional shares of the Company's stock; that at that period the shares had begun to fall in the market, and the directors were most anxious to keep them up, as rumours unfavourable to the stability of the concern were beginning to get into circulation; that the manager assured the Defenders that the Company would advance the necessary funds for purchasing the shares, and that the stock would be held till it could be sold at a profit, without

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the Defenders being called upon for any contribution in money, the Company being secure by the large amount of stock held upon joint account; that the Defenders had relied upon the representations given by the directors in their reports, and the assurances of Mr. Barlow, the manager, who prevailed upon them to accept 240 shares of the stock, in addition to those formerly held by them, upon the footing of the Company advancing the price; that the Company, through their manager, Mr. Barlow, acted as the brokers in purchasing these shares, and paid the price, and the transfers had been taken in favour of the Defenders jointly, and were still in the Company's hands; that this transaction was based on gross fraud and misrepresentation; the reports of the directors and the statements of their manager were a tissue of falsehoods, and at the time when the Company undertook to act as brokers for the Defenders, and to advance the price of the stock, they concealed the fact that the affairs of the Company were utterly desperate, and that the stock which they professed to purchase was of no value, and might entail a serious loss on those who acquired it.

The pleas in law of the Defenders were,—

1. That in the circumstances above stated, the National Exchange Company were not entitled to make any claim against the Defenders for the advances said to have been made by them in purchasing the shares of the stock in November 1847; and,

2. That the Company had acted as brokers for the Defenders in purchasing the stock, and had prevailed upon them to do so by gross fraud, concealment, and misrepresentation.

The *Lord Ordinary* (Lord *Ivory*) by his Interlocutor of the 22nd December 1849, found that no sufficient allegations had been made by the Defenders

to support their pleas, and he therefore repelled the defence.

But the Lords of the First Division, on the 31st May 1850, recalled the *Lord Ordinary's* Interlocutor, and remitted the cause in order to have issues prepared.

Against this decision of the First Division, the Company appealed to the House of Lords, on the following grounds:—In the first place, that the Defenders, while they admitted the truth of the Pursuers' averments to an extent sufficient to support the conclusions of the action, had not relevantly averred acts sufficient to obviate or repel their legal effect.

Secondly, that the Defenders had made no allegations in point of fact sufficient to support, as relevant, their pleas in law.

Thirdly, because the allegations of the Defenders related to the conduct of individuals only, and did not affect the Appellants, who constituted the body of the Company; and,

Fourthly, because the Appellants, having made advances for the Respondents, were entitled to recover the amount without regard to the motives which might have caused the Respondents to become the purchasers of the shares, the price of which was paid by those advances.

Sir *Fitzroy Kelly* (with whom was Mr. *Willes* (*a*)) for the Appellants: Fraud is not alleged against the Company in the aggregate. The shares were bought through the medium of the Defenders' own brokers. They were not purchased from the Company, but from the shareholders in the course of the public market.

The reports alleged to have been deceptive were made not *by* the Company, but *to* the Company. The allegations here are vague. They ought to have been specific, so as to go to proof, and admit of being met

(*a*) Now Mr. Justice Willes.

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by the other side. *Irving* v. *Kirkpatrick* (*a*), *Wilde* v. *Gibson* (*b*), *Shedden* v. *Patrick* (*c*).

So far as principle is concerned, this case is precisely the same as that of *Cornfoot* v. *Ffolkes* (*d*), where Mr. Baron *Rolfe* says, that if an agent makes a representation, it must appear that he knew the representation to be false, before the principal can be affected. Here, the fraud is alleged to have been by certain directors, but they are not named, so as to enable us to ascertain whether they knew their representation to be false. Where is it stated that Barlow knew that what he said was false?

[The LORD CHANCELLOR (*e*): In *Cornfoot* v. *Ffolkes*, the plea was that the Defendant had been induced to enter into the agreement sued on by the fraud and covin of the Plaintiff. The evidence proved nothing to support that plea; for the Plaintiff had merely put the house into the hands of an agent to be let at a

(*a*) 7 Bell, 186. (*b*) 1 House of Lords Ca. 605.

(*c*) *Suprà*, vol. 1, p. 535.

(*d*) 6 Mee. & Wel. 358. In this remarkable case, the Defendant, Sir William Ffolkes, Bart., being in search of a town residence for the purpose of educating his children, one of them a daughter seventeen years of age, applied to Mr. Clarke, a house agent, who informed him of a house rented at four hundred guineas. Sir William called, and asked, "Pray, is there anything objectionable about the house?" To which Mr. Clarke replied, "Nothing whatever." Sir William took the house. In a few days he discovered that the *adjoining* house was a brothel of the worst description, and that families in the neighbourhood of it were obliged to leave their houses, and others who let lodgings were unable to get occupants. Cornfoot, the owner of the house, was fully aware of this; but it did not appear that the agent knew of the objection when he answered the inquiry. Cornfoot neither made the representation, nor knew that it had been made. The Court of Exchequer held (Abinger, C.B., dissenting), that in order to support the defence, it was not enough that the representation turned out to be untrue. It must be proved to have been made fraudulently. The mere knowledge of the owner and the mere representation of the agent, were not sufficient to constitute together a defence. Judgment therefore went for Cornfoot.

(*e*) Lord Cranworth.

stipulated rent. He had neither himself stated, nor authorized the agent to state, anything false or deceptive. The Court held that the plea was not made out by evidence, which merely showed the agent to have stated (what he believed to be true), namely, that there was no objection attaching to the house.]

[The Lord BROUGHAM: In *Cornfoot's case non constat* that the employer had not told the agent and desired him to apprize the purchaser. It was the over zeal of the agent for which the principal was not to suffer.]

But we contend that this action can be defeated only by showing that the Company committed the fraud alleged. The action is by the Company. The answer is an alleged fraud, not *by* the Company, but in fact *on* the Company.

The contract here is a contract of loan. The object is to recover back the money lent. Fraud in *this* contract is not alleged, but in another contract with which the Company had no concern. The fraud averred is that the agent, Barlow, had induced the Defenders to purchase shares. This was done collaterally. The Defenders ought to come on those who deceived them. They do not deny the receipt of the money, but they say, "An agent of yours has deluded us into making an imprudent investment." It ought to have been alleged and shown that the Company had been guilty of a fraud. In *Dodgson's case* (*a*) it is laid down that although directors fraudulently inducing a person to buy shares may be personally liable to him, yet they cannot be considered as the body of shareholders to commit a fraud.

[The Lord CHANCELLOR: The directors here do not appear to have had authority to act as agents of the Company to sell shares.]

They cannot certainly be the agents of the Company to commit a fraud.

(*a*) De Gex & Smale, 85.

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[The Lord BROUGHAM: Aye; but here it was for the benefit of the Company; by raising up the value of the shares.]

[The Lord ST. LEONARDS: If you will buy, I will lend you the money.]

Still; such an act legally will not bind the Company. It is not said that the Company lent the money for the purpose of getting the Defenders to buy shares with it:

[The Lord BROUGHAM: If I lend you 40*l.*, and advise you to give that sum for a horse not worth 20*l.*, am I not to recover back payment of that loan?]

The Defenders were themselves members of the Company. The demand should have been against the directors. The case of *Dodgson*, already cited, is confirmed by the *North of England Bank* (*Bernard's case*) (*a*). There it was held that a shareholder was not relieved from his obligations by the inaccurate representation of the manager, however fraudulent. Here, the Plaintiff may have the benefit of the fraud, and yet he can enforce the contract, as in *Cornfoot's case*. Under Railway Acts, the directors are really the Company, but here this is not so. There is here no contract with the Company, except for the loan of money. The law is well stated by Lord *Campbell* in a case before the Queen's Bench, *Gerhard* v. *Bates* (*b*).

There must appear to have been authority to make the representation before any principal can be bound by an agent's representation.

There is no instance to the contrary on record.

[The Lord ST. LEONARDS: The question is whether this was a separate transaction. Were those who made the loan the same persons as those who induced the purchaser to buy?]

Even supposing them one and the same, it would come but to this,—that the Company have, by a false representation of their solvency, induced the Defenders

(*a*) 5 De Gex & Smale, 238. (*b*) Ellis & Blackstone, 476.

to buy at an over-value. Still this action would lie, because the doctrine of false representation would not apply. The Defenders may recover from those who have deceived them the difference between the real and false value.

[The Lord BROUGHAM: There is the element of the benefit to the Company by the result of the purchase; otherwise the case would have been the same as that of the horse which I put.]

[The LORD CHANCELLOR: In short the contract which is the subject-matter of litigation is not the contract in which the fraud occurred.]

[The Lord ST. LEONARDS: Here the loan is made for the very purpose of raising the shares.]

The loan was legal and unimpeachable; the fraud collateral.

[The Lord BROUGHAM: I have an estate adjoining another, and I tell a man to buy the other for 500*l.*, and I say to him if he has not the money I will lend him. He buys. The property is not worth 50*l.* I however sell my own property at the enhanced value. Would that bar my demand for the repayment of the 500*l.*?]

Certainly it would not. The cases have never gone so far. In this country there are numerous decisions to the same effect, both at law and in equity. They are all collected by Mr. Smith (*a*) (beginning with *Pasley* v. *Freeman*, and concluding with *Ashton* v. *Taylor*). The law, therefore, is quite clear, and we trust that your Lordships will not, by affirming this decision, disturb it.

Mr. *Willes*, with Sir *Fitzroy Kelly*: No fraud is attributed to the bulk of the shareholders constituting the Company. Why did not the Defenders, as shareholders, inquire into Barlow's authority? In his misrepresentations he cannot be presumed to have been

(*a*) 2 Leading Cas. 55.

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the agent of the shareholders. These shareholders refuse to repay a loan made to them from the Company. There must have been doubts raised in their minds. They do not aver that they did not know the fact that the shares had fallen, and that they were trying to keep them up—rigging the market, as the phrase is.

[The LORD CHANCELLOR: I never heard of the phrase "rigging the market."]

One of several persons borrows money belonging to the whole of them, and embarks with it in a speculation recommended by a person equally employed by all of them. Is the borrower not bound to repay? Can the fraud of the person who acted for all—that is, for the borrower as well as the others—be any answer to the demand? Baron *Parke*, in *Cornfoot's case*, qualifies the doctrine by saying that the fraud must *be in making the contract.* There is a distinction between fraud by statement and by concealment.

[The LORD CHANCELLOR: Rather reticence.]

The fraud by the agent must be in the business of his agency and it must be in the contract sued upon. Now, Barlow in making this contract of loan mis-stated nothing. It is in the option of the person defrauded to stand by the contract, but if he acquiesce he will be bound. The alleged *dolus* will not warrant a claim to set the contract aside, because it is not *dolus dans locum contractui.*

The *Solicitor General* (*a*) and Mr. *Anderson* for the Respondents: The Company divided the brokerage charges with persons named Buchannan and Kerr, as their subordinate agents. The Company, moreover, were themselves actually agents for the Defenders. Again, the report of the directors was adopted by the Company. The payment of the dividend shows this. It is not necessary to establish that the Company were

(*a*) Sir Richard Bethell.

participant in the fraud. The circumstances show authority. There is, first, the representation contained in the report; secondly, the representation to the directors; but, thirdly, here is an allegation of representations by Barlow. These together support and establish the defence. A cross action for deceit in such a case is not necessary by the law of Scotland, although the rules of the English common law might require it, and minds manacled by those rules might deem it indispensable.

[The LORD CHANCELLOR: What I have seen of Scotch law does not induce me to regard with any regret the superior strictness of English pleadings.]

That strictness is confined to the common law tribunals; it does not hold in equity. Sir *Lancelot Shadwell* did not hesitate to give relief in *Stainbank* v. *Fernley* (*a*), where the directors of a joint stock company, in order to sell their shares to advantage, represented in their reports and by their agents, that the affairs of the company were very prosperous, when they were, in fact, insolvent. A person who had been induced by those means to purchase shares, filed his bill to be repaid his purchase money, and a demurrer for want of equity was overruled. The two things attempted to be distinguished are really one.

In *Langridge* v. *Levy* (*b*), doctrines are laid down which show that the excessive strictness contended for on the other side is not always enforced at common law; and the decision there was affirmed in the Exchequer Chamber.

Representations by Directors will bind the Company. This was the precise decision of your Lordships in *Burnes* v. *Pennell* (*c*). The same principles are adopted by Lord *St. Leonards* in his concise view of

(*a*) 9 Sim. 556. (*b*) 2 Mee. & Wel. 519.
(*c*) 2 House of Lords Cas. 497.

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the Law of Vendors and Purchasers (*a*). His Lordship holds that *Cornfoot's case* is "open to much observation." His remarks, at the same place, on *Fuller* v. *Wilson* (*b*), decided by the Court of Queen's Bench, favour our argument. The rule laid down by Lord *St. Leonards* is consonant with natural justice. What induced the borrowing in this case? Why, the false representation as to the shares. Therefore *dolus malus dans locum contractui* is established. *Brown* v. *Syme* (*c*), *Graham* v. *North British Bank* (*d*). But the most remarkable illustration of this doctrine was exhibited in a recent Scotch case, where a clerk to a distiller sold a cask of whiskey to a person who had no licence to sell spirits, and at the request of the purchaser he sent it to him with a permit in the name of another person. This, under the Excise Acts, was an offence punishable by a fine; but it was held, nevertheless, that the employers were liable for the acts of their clerk.

Sir *Fitzroy Kelly*, in reply: The way in which *Cornfoot's case* has been dealt with by the Courts shows that the reasoning of the *Solicitor General* is untenable. That case has never been shaken. On a collateral representation, set up as a defence, you must show it not only to be false, but false to the knowledge of the party making it. Mr. Smith's (*e*) notes on *Pasley* v. *Freeman* state the law most accurately. The agent was innocent in *Cornfoot's case;* so was the principal. Then what are the facts alleged on this record? Are the statements collateral to the contract? If they are, they cannot be relevant, although

(*a*) P. 178. (*b*) 3 Q. B. 58. See *Evans* v. *Collins*, 5 Q. B. 804.
(*c*) 12 Sh. & Dun. 536. (*d*) N. S. 907.
(*e*) Of Mr. Smith's Notes on Leading Cases, Sir Fitzroy Kelly observed that he believed there was not an error to be found in them from beginning to end.

shown and known to be false. The Defenders had no communication except with Barlow, and it is not alleged that he made any representation true or false. He merely said that the Company would advance the money. There is no suggestion that the Company confirmed the reports. The *Solicitor General* mis-stated the evidence here. The Directors made the report to the assembled shareholders. It does not say that they knew it to be false, still less that the aggregate shareholders knew it to be so.

No question can exist that there were separate brokers, namely, Buchanan and Kerr; but it is said there was a secret understanding that the Company should have a half of the commission, although this is not shown or alleged to have been known to the Defenders. With respect to the suggestion which was thrown out by one of your Lordships (*a*) that the Court below might order a transfer of the shares back to the Company, and that parties might thus be remitted to their original position, the case of *Rawson* v. *Samuel* (*b*), before Lord *Cottenham*, shows that the mere existence of cross demands will not be sufficient to induce a Court of Equity to interfere.

Wilde v. *Gibson* has indeed been found fault with by Lord *St. Leonard's* (*c*); but it is law. Finally, we submit that the circumstance of the Defenders having been themselves shareholders makes this Case different from all others, and renders it inevitable that this decision must be reversed.

Lord Chancellor's opinion.

The LORD CHANCELLOR:

My Lords, this was an action brought in the month of August 1848, by certain members of the National Exchange Company, of Glasgow, to recover from the

(*a*) Lord St. Leonards. (*b*) Craig & Phil, 161.
(*c*) Sir Edward Sugden's Law of Property, p. 614.

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Defenders the sum of 600*l.* with interest and certain small charges, being, as they allege, money advanced by them in order to enable the Defenders to purchase 240 shares in the company from third parties, strangers.

Lord Chancellor's opinion.

My Lords, there is no doubt that the purchase of these shares was made by the Company; that it was made upon the account of the Defenders, and made out of the funds of the Company; and the simple case made by the Pursuers, the now Appellants, is, that this was a loan of money, or in the nature of a loan of money, by them to the Defenders, and that that money has never been repaid; and therefore the Company seek to recover the repayment of that money with interest and certain expenses. Inasmuch as there is no doubt that the advance of money was made, the Case so stated undoubtedly presents a *primâ facie* case on the part of the Pursuers.

Defences were put in to this claim, and certain issues were proposed to be tried. Whether those were proper issues, is not the question for your Lordships to decide. The single question upon which the House is called to adjudicate is, whether the Court of Session were right in holding that the statements put in by the Defenders constituted a relevant defence to the Case of the Pursuers.

My Lords, the main ground of defence is, that this advance of money was made by the Company under circumstances which disentitled the Pursuers to treat it as having created any debt due to them from the Defenders, for the Defenders aver that shortly previous to the advance, the Company, by their Directors, had fraudulently represented to the Defenders that the affairs of the Company were in a flourishing state, whereas they were really insolvent or nearly so.

The Defenders' statements upon that head are, that "at the first annual meeting, held on the 17th Sep-

tember 1846, the Shareholders were presented with a report, bearing that the Company's affairs were in a prosperous state, and that the Directors, availing themselves of the discretion allowed them by the contract, had resolved to declare a dividend of 8*l.* 6*s.* 8*d.* per cent., which was accordingly paid." The next statement on the same head is, that "the second annual meeting was held on the 16th September 1847, when a report was submitted, representing that there were funds sufficient to pay a dividend of eight per cent., leaving reserved profits to an amount exceeding 5,500*l.*," adding, "this report was entirely delusive." The statement is, in effect, that this was a fraudulent misrepresentation.

Lord Chancellor's opinion.

Next the Defenders say that this fraudulent misrepresentation was a concocted report upon the part of the Company, which induced them to enter into this transaction, into which they would not otherwise have entered. And, secondly, they say that the Company, by their Manager, urged the Defenders to make the purchase, and offered, if they would do so, to advance the money, and to take the shares as a security for the repayment, which they would not enforce till the shares could be sold at a profit.

Now the question is, whether a relevant defence is stated. Undoubtedly, if the contract sued on was obtained by fraudulent misrepresentations on the part of the Plaintiffs, no Action can be sustained either in Scotland or in this country, or indeed in any country governed by any known system of law. Certainly, in this country and in Scotland, a contract obtained by fraud may be treated as being no contract at all.

The Plaintiffs say, however, that no such case is made, because the fraud, even if there were a fraud on their part, was not a fraud leading to the contract sued on, that is, the loan. They say that the loan

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was an independent transaction, unconnected with the fraud. Secondly, they say that no fraud is charged against the Pursuers, but only against the Directors, which was a fraud *upon* the Pursuers, and not a fraud *by* the Pursuers. And, thirdly, they say, Supposing these difficulties were all removed, still that the alleged fraud is not stated with sufficient precision, and is merely a general allegation of falsehood, which it is impossible to meet.

I must confess this case is one in which my opinion has fluctuated from time to time very much in the course of the arguments; but I have, after much deliberation, come to the conclusion that, quite independently of this statement of fraud, a relevant defence is here stated, which entitles the Defenders to resist the demand, even supposing that there had been no question of Directors, no question of Manager, but that this had been a single suit by a single person carrying on business. I come to that conclusion for this reason: I think that the real result of this statement is, that there was no loan at all. The whole transaction must be stated together. What really took place was this, the Pursuers (I will suppose they were merely two individuals carrying on business in partnership as bankers and as brokers) say to the Defenders, There are certain shares in the market which may be purchased and which are worth 50*s.* a share. I will assume it was very much for the interest of the Pursuers that these shares should be purchased—but, whether they made any misrepresentation or not, what they really say to the Defenders upon this statement is this, If you wish to purchase these shares, we have such confidence in their value, that if you like we will as your agents make the purchase, advance the money, take the shares ourselves and hold them, and not call upon you for payment until they can be sold at a profit.

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My Lords, I think that is the legitimate construction of the ninth statement, which is this: "About the month of October 1847, before the Shareholders were aware of the true condition of the Company's affairs, the Defenders were urgently solicited by Mr. Barlow, the Manager, to purchase additional shares of the Company's stock. At that period the shares began to fall in the market, and the Directors of the Company were most anxious to keep them up, and counteract certain rumours unfavourable to the stability of the concern which were beginning to get into circulation. The Manager (which I take it must in this case be the same as the Company) "assured the Defenders that the Company would advance the necessary funds for purchasing the shares, and that the stock would be held" (that is, would be held by the Company who advanced the money) "until it could be sold at a profit without the Defenders being called upon for any contribution in money." Well, what does that amount to? I wish to induce you to purchase certain shares; in order to do that, so great is my confidence in the value of those shares, that if you will let me, as your agent, make the purchase, I will make the purchase for you out of my money, and not call upon you for repayment, but take the shares and keep them till they can be sold at a profit, when, of course, they would pay for themselves, and whatever was the profit would go to the purchaser.

Now, suppose, there were no other defence than that,—I confess, having turned the thing over and over again in my mind,—I think that is a relevant defence, because, in truth, it negatives the assumption, which has been proceeded on all along, that this was a loan. A loan means, in ordinary parlance, an advance of money upon a contract to repay it at the will of the lender. There was no such contract at all here,

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because the real meaning of this was (assuming the statement to be accurate), not that there should be a right on the part of the persons who made the purchase, the Company, to call for the repayment of the money when it should be their pleasure so to do, but that they should hold the shares which, by their representation, they were confident would rise and sell at a profit, and then sell them, putting so much money into the pocket of the persons for whom they were thus acting as agents. Now, to the conclusion at which I thus arrive by this short cut, I confess, having thought the thing over and over again, I can see no answer. It appears to me that, independently of the questions which have been raised about fraud, and as to how far the Company are bound by any representations by the Directors, and how far there are proper averments of fraud, I say, quite independently of those questions, the statements contained in the defence constitute, as it appears to me, a good, valid, and relevant defence to the action.

If I am right in saying that there never was a loan, in the ordinary sense of the word, that there was merely a purchase as agents for the Defenders upon a special contract, to be repaid only in a particular manner, it would seem unnecessary to consider the other matters which have been so elaborately argued. But I should be reluctant to let the case fall through, as it were, upon that summary solution, without explaining to some extent what my views would have been, supposing that the short point I have stated were not of itself a relevant defence.

I agree, that in order to vitiate a contract and to make it a nullity by reason of fraud, it must be a fraud according to the language which has been so often quoted, *dans locum contractui.* That is, if the Pursuers were right in saying that the loan

Lord Chancellor's opinion.

was one independent transaction, and the purchase another independent transaction, the circumstance that the Defenders had been induced by the fraud of the lenders to make the alleged fraudulent purchase, would not vitiate the transaction of the loan. I accede to that argument. I think that if I fraudulently represent to another that something in the market is worth 100*l.* when I know it is not worth 100 pence, and he says, Upon the faith of your representation, I will make the purchase, but I have not the money; and if I say, Very well, I will lend you the money; I do not think that upon that loan of money, when the time came at which I was entitled, according to the contract respecting the loan, to sue for the money, the party who had borrowed could say as a defence to my action, I should not have borrowed this money of you, if you had not told me that the mode in which I was going to apply the money was a lucrative, instead of being a disastrous purchase. I think that would not have been a *dolus dans locum contractui*. In such a case, the party who lent the money might recover the loan, but the person who had borrowed would have a right of action to recover by way of damages against the lender whatever damage he had incurred by having been fraudulently induced by his falsehoods to invest the money in an improper mode. That course would do complete justice. I do not think any other course would do complete justice in such a case, because, supposing that instead of a loan of the exact sum, the purchaser had said, This will cost 600*l.*, and I want some money for some other purposes; if you will lend me 1,000*l.* I will make that purchase: that would have been equally a fraudulent misrepresentation, and a fraudulent misrepresentation that, in one sense, led to the

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loan. But nobody could say that the lender could not recover any portion of the 1,000*l.* in such a case. There are no means that I can see of apportioning the loan so made. The answer would have been, in that case, as in this, if they had been separate transactions, You, the lender, will recover your money, and the person who was fraudulently led by you to invest that money in a mode in which he would not have invested it but for your fraud, must recover in an action of fraud or an action of that nature against the person who so deceived him.

Now, that I take to be the law both of Scotland and of England, and I should think of most civilized countries. It was urged by the learned *Solicitor General* that justice might be done by forcing the contract upon the person who had lent the money. I do not think that would be the correct mode. I know no principle or authority that could enable him to do that. It would be setting off against a liquidated demand something that may be recovered of the nature of unliquidated damages. I think, that not only by the law of England and of Scotland, but by the law of other civilized countries, that cannot be done; the inconvenience of it would be excessive. If a person has an actual liquidated money demand, which he seeks to enforce, the amount undisputed, it would be unjust, or might be unjust to him, to involve him in a question whether the person who is bound to pay him that liquidated sum may or may not have a right of action against him upon some collateral matter in respect of some damage on account of which he may have a right of action, for a fraudulent representation, or for an assault, or for a trespass, or any other of those various wrongs which may be inflicted upon the man, and for

which he may be entitled to compensation. It is clear, in my opinion, that that cannot be the case either by the law of England, or the law of Scotland, or, as I believe, by the law of any other country.

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Again, to attempt to force the lender of the money to take to the purchase, as it is said, might cause the greatest injustice. There might be cases in which that might do justice, but there might be cases in which it would be very unjust. Suppose, for instance, the purchase had been of a much larger quantity, and suppose the person had only borrowed a portion of the money; suppose that, in this case, he had borrowed only 300*l.*, is the lender of the money to take to the whole? Neither upon principle nor authority, is there anything to warrant such a course as that.

Therefore I am of opinion, that if the loan and the purchase had been independent transactions, I should have agreed with the Appellants, that the *dolus* was not a *dolus dans locum contractui.* But, as I have already stated, I think there was no loan independently of the purchase. I think that the transaction cannot be properly described as a loan. The Company wished to induce the Defenders to purchase the shares, and for that purpose they made a fraudulent misrepresentation, under which they offered to make the purchase for them on the terms I have already mentioned. I think that this makes the advance of money not an independent loan, but a part of the machinery for giving effect to the fraud.

But then it was said, taking that to be so, still there was no fraud on the part of the Company; the fraud, it was said, was a fraud by the Directors, and

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not a fraud by the Company; that, in fact, the Company were not deceivers, but were deceived.

Now, upon that point I will remark, that the Directors of this Company appear on this record to have had the duty of superintending, directing, managing, and transacting the whole business and concerns of the Company. Part of that duty was to make an annual report as to the state of the concern. I say it was a part of their duty, and they are stated to have done it, as we know it is the invariable custom. I must assume that it was a part of their duty to make annual reports respecting the state of the concern, and, of course, to make correct and honest reports.

For the present purpose, I will assume that, in order to raise the value of the shares, the Company fraudulently misrepresented the real state of the concern, the real amount of its assets, and the real amount of the demands upon it. The question is—what is the consequence of the Company receiving such a report (if you can separate the Company from the Directors), and publishing it to the world? I confess that, in my opinion, from the nature of things, and from the exigencies of society, that must be taken, as between the Company and third persons, to be a representation by the Company. The Company, as an abstract being, can represent or do nothing. It can only act by its managers. When, therefore, the Directors, in the discharge of their duty, fraudulently (for I assume this to be so) for the purpose of misleading others as to the state of the concerns of the Company, represent the Company to be in a different state from that in which they know it to be, and the persons to whom the representation is addressed act upon it in the belief that it is true, I cannot think that society can go on

without treating that as a misrepresentation by the Company. Otherwise, companies of this sort would be in this extraordinary predicament, that they might employ, nay, must employ, agents to carry on their concerns, and that those agents might make representations, be they ever so false, and ever so fraudulent, and yet, nevertheless, that the Company might, and must, benefit by those misrepresentations, without being at all liable to be told, That is your fraud.

It was plausibly urged, that these reports were not made *by* the Company, but *to* the Company. In form, that is so. No doubt they are reports made to the Company. But I assume, for the present, that they were made to the Company under such circumstances, that what they so report is known and intended to be known, not only to the shareholders, but to all persons who may be minded to become shareholders, just the same as if they were published to the world. I repeat, that I think the exigencies of society demand that the reports so made, and so circulated, should be deemed to be the reports of the Company.

It was pressed upon us, that the contrary doctrine had been held in a case decided by your Lordships, of *Burnes* v. *Pennel*. To every word of that decision I most entirely agree, as it would be my duty to do even if I did not go along with the reasoning. But I do go along with the reasoning. There the representation was made by a person who knew the subject-matter he was representing, but had no duty to perform towards the Company, he being just in the same position towards the Company as if he had been a mere stranger. It was the duty of the Directors to make a report showing correctly the state of the Company. It was no duty of Mr. Gilmour, in the case of *Burnes* v. *Pennel*, to make any representation at all as to that which he did represent; he was the mere law

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agent or solicitor of the Company. He, therefore, was speaking *ultra vires* when he made any such representation; and to have bound the Company by what he so said would have been an act of gross injustice.

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I think, therefore, that even if there had not been the ground to which I have already adverted, it must be taken that the representation of the state of the Company made by the Directors in their reports, supposing them to have been circulated by the authority of the Company, that is, by the Directors, (for they were the very persons to decide what was to be done with the reports,) must be taken as being a representation made by the Company to any person to whom such representation was made by the Directors. Therefore, if it be a fact to be collected from these statements that there were fraudulent misrepresentations made by the Directors in their annual reports to the Company, and they were (as they may be assumed from these pleadings to have been) circulated so as to mislead the Defenders, I think that must be taken as being the fraud of the Company.

It was said that the persons imposed upon are the Company,—that the Company were the parties imposed upon, and not imposing, and, that these particular Defenders were themselves part of those persons who were so imposed upon, because they were themselves the owners of 1,100 odd shares in the Company previously to this purchase. My Lords, I do not think that even by the law of England, the circumstance that the person was already a shareholder would have made any difference in a transaction of this sort. I do not wish to bind myself upon that subject conclusively with respect to the law of this country—but, certainly, by the law of Scotland, a shareholder, even in an ordinary partnership, is considered as having a distinct identity from the partnership. We see

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continually in pleadings in actions that both the partnership and the individuals sue, or are sued, as being independent parties. It is quite clear to my mind that the individual shareholders, or partners, have a right in a transaction of this sort to treat themselves as something different from the Company, even if that would not have been the case according to the law of England. Therefore, I come to this conclusion, that if the Directors in the discharge of their duty of making these annual reports, and giving a correct representation as to the state of the funds of the Company, fraudulently, and with a view to raise the value of the shares of the Company in their annual reports, misrepresent what the state of the Company is, under such circumstances, that third persons, or even shareholders, (who for this purpose we may treat as third persons,) are deceived and act upon that misrepresentation, the persons so deceived and so acting have a right to treat themselves as having been fraudulently deceived by the Company.

Then that brings me to the last question in this case, which is this,—whether or not the fact of this fraud is sufficiently stated, so as to constitute a relevant defence? I wish I could satisfactorily come to the conclusion that it would be safe for your Lordships to decide that it is not relevantly stated, because I must remark upon this case, as I have frequently had occasion to remark in other cases, that it is most lamentable that the pleadings in Scotland are conducted in so very loose and vague a manner, that when the House is called upon to adjudicate upon the rights of parties, half its time is occupied, not in deciding what the law is, but in deciding whether the facts are so stated that your Lordships have before you the means of deciding what the law is. I wish I could come satisfactorily to the conclusion that this

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was not relevantly stated. But your Lordships have been constantly in the habit of saying that on matters rather of practice than of law you are very reluctant to interfere with the decision of the Judges of the Court of Session; and in this case they seem to me to have been decidedly of opinion without any sort of hesitation that this is relevantly pleaded.

The mode in which it is stated is this, namely, that on the 16th of September 1847, about a month before the transaction in question, when what took place may be reasonably supposed to have influenced the parties in their estimate of the value of the shares, a report was submitted, representing that there were funds sufficient to pay a dividend of 8 per cent., leaving reserved as profit an amount exceeding 5,500*l*. And that report, they go on to say, was entirely delusive; that no sufficient allowance had been made for bad debts, and so on. Then it is stated that the shareholders began to suspect that there was some fraud. "The Defenders were prevailed upon to enter into this transaction by gross fraud and misrepresentation. The reports of the Directors and the statements of their Manager were a tissue of falsehoods, and at the time when the Company undertook to act as brokers for the Defenders, and to advance the price of the stock, they concealed the fact that the affairs of the Company were utterly desperate, and that the stock which they professed to purchase was of no value, and might entail a serious loss on those who acquired it.

Now, popularly reading that, you would have no hesitation in saying, this is clearly represented to be a fraud, because it is said that the Directors represented the state of the concern to be flourishing, and that this statement was a tissue of falsehoods, and that they concealed the fact of the insolvency of the Company, knowing it to be insolvent, and pretending that

the shares were of value when they knew them to be of no value, and that thereby the Defenders were induced to make the purchase. I feel that that would not be a mode in which in this country we should like to see allegations of fraud made. It would be infinitely more satisfactory to have it distinctly alleged what it was that they stated, and what it was that was untrue, because then you would have something which you could grapple with. At the same time I confess that I do not feel sufficient confidence in my notion to oppose the finding of the Judges unanimously upon that subject below, that it was a sufficient mode of stating the case. But, in the view which I have taken of this case, I need not repeat to your Lordships that it will be unnecessary for me to go into all these questions. Having at first been strongly of opinion that this was not sufficiently stated, and, moreover, very much doubting whether the Company could be bound by the statement of the Directors; yet upon sitting down quietly to consider in what way this case ought to be put, I confess I convinced myself that, independently of the view which I have already stated to your Lordships, I should be prepared to decide against this Appeal, even if there had not been those other considerations. I think that, independently of those, the Court of Session came to a correct conclusion. So that if there had not been that ground upon which to rest my judgment, I still should think that this is a case in which the decision of the Court of Session ought to be affirmed. And I therefore move, your Lordships, that this Appeal be dismissed.

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The Lord BROUGHAM:

Lord Brougham's opinion.

My Lords, I, as well as my noble and learned friend, have had very grave doubts, to say the least of it,

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during the course of the argument and since it closed, in considering the result of it as to whether this decree of the Court of Session could be affirmed. In the first place, I go along with my noble and learned friend in lamenting that this lax course of pleading should still be persisted in by the Court below. It is, no doubt, to be taken somewhat as a matter of practice, (according to the remark of my noble and learned friend,) and when you find the Court below unanimously approving, or at least not disapproving of the course which the pleadings have taken, it would be going far to say that we, in a matter which is very much a matter of practice, no doubt, reverse their judgment upon the ground of those pleadings being radically defective. At the same time, permit me to add, in entire agreement with the opinion of my noble and learned friend, that if it is the practice below, it is *mala praxis*. And this is not the first nor the tenth time that we have here complained of the laxity of those pleadings below. Indeed, I well remember a case, that occurred somewhere about five years ago, of *Irvine* v. *Kirkpatrick*, when we were referred to a course of pleading as the practice in the Court below; and when various instances of that course having been pursued were pressed upon our attention, upon examining those instances we found that there was not one of them supported by any judicial decision, or even by any judicial dictum in the Court below, much less in the Court above. We were referred to cases—no doubt those cases exist in books, and no doubt in those cases it was to be found that that course of practice and pleading had been pursued—but we found not one single authority, even in the dictum of a Judge, sanctioning the practice in those cases to which we had been referred.

I take it, however, that we are now in this case to

be satisfied with the allegations as being sufficiently distinct, because the Court below have held that they are not open to objection, and that, in effect, fraud is to be alleged thus: not by stating that representations were made by A to B, which form the ground of the contract between them, and that they were so-and-so, (stating the substance of the misrepresentation,) and that the said representation was untrue, because, in truth and in fact so-and-so took place, or so-and-so was the fact, instead of that which was stated. Instead of such specific allegations we are told that "This report was entirely delusive; no sufficient allowance had been made for bad debts,"—and so on, giving no particulars upon which they ground the averment that it was delusive. And "the Defenders were prevailed upon to enter into this transaction by gross fraud and misrepresentation." "The reports of the Directors and the statements of their Manager were a tissue of falsehoods." Pleading ought not to be rhetorical or metaphorical; it ought to be strict and accurate. Language ought to be used other than the language of metaphor; "and at the time when the Company undertook to act as brokers for the Defenders, and to advance the price of the stock, they concealed the fact that the affairs of the Company were utterly desperate." That is also a metaphor, not a strictly accurate expression. It is more or less fanciful and metaphorical, "and that the stock which they professed to purchase was of no value, and might entail a serious loss on those who acquired it." However, we shall take this as the Court below have taken it, to amount to a sufficiently specific charge of fraudulent, wilful misrepresentation —misrepresentation in part and concealment in part. I pass by the other doubt, which at different times pressed upon my mind during the course of the argument, as to how far the representation which is stated

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to have been made, be it vague or be it specific, is stated distinctly to have been made by the parties. It is not distinctly stated; but taking it altogether, namely, that the report was made to the meeting, that the report was made by the Directors, and that the Manager made a representation (it is rather from what is said by the Manager than from what is said to have passed at the meeting, that I conceive this to be brought home to the parties), taking it altogether, I will assume with my noble and learned friend that the statement or misstatement, be it vague or be it specific, is brought home by averment to the parties.

We then come, assuming these preliminary difficulties to be got over, to what the substance of the case is. Now, if my opinion had not been shaken by the statement of my noble and learned friend, who also originally held the opinion that I did with respect to the contract of loan being separate from the contract of purchase, if I had continued to be of that opinion, and if the new view of the case taken by my noble and learned friend had not struck me as being correct, I should then have found myself unable to concur in the proposition that the interlocutors appealed from should be affirmed; for I take the case to have been this:—The Company, being minded to have the value of its shares in the market kept up by the purchase of shares by the present Respondent, suggest to him that he ought to go into the market and buy those shares; and in order to remove any difficulty from his way in making that purchase, they offer to advance him a sufficient fund, 600*l.* and odd, by way of loan, wherewithal he might be able to make the purchase which the Company, for their own interest, in order to keep up the price of the shares, were desirous that he should make. They make a misrepresentation of the value of the shares; they are really

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worth 50*l.* in the market, and they represent to the party that they are worth 100*l.*; but they lend him the 100*l.*, or whatever may be the sum required to make the purchase, in order to facilitate the transaction, and it turns out that they deceived him for their own purposes. That, however, is immaterial; they deceived him, and he bought for 100*l.* shares which proved in reality not to be worth more than 50*l.*

Lord Brougham's opinion.

Now, it is quite clear that he had an action against them for that false representation. It is quite clear that for the *quantum damnificatus* by that false representation, and by the purchase which the false representation induced him to make, he has, past all doubt, an action against those who made the misrepresentation. But is he not to repay the loan of money which they lent him? Did he not voluntarily take that loan from them for the purpose of enabling him to purchase the shares? No doubt he bought the shares owing to their misrepresentation, and suffered a loss. But he borrowed the money from the Company. And is he not bound to repay that loan, though he may have an action against the Company for their misrepresentation? If the Company bring their action against him for the repayment of the loan, he cannot set off in tort against the Company any claim that he may have against them for their misrepresentation in having deceived him. But is he not bound to repay the loan? That is the question. No doubt, if the whole is mixed up together, and taken to be one transaction, it may be liable to a different construction. But then this occurs. Is he to retain the shares worth 50*l.*? He is told they were worth 100*l.*, whereas they are only worth 50*l.* The Company lends him enough to purchase them. That loan, it is said, is part of a fraudulent transaction, and is to be taken as not having been made. It is to be

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held that no loan took place. But is he to retain the shares worth only 50*l.*; and not to pay back the monies which the Company advanced him in order to enable him to purchase them? My noble and learned friend's view of the case is calculated to get over that difficulty, because, though he does not, upon the whole, deny that the judgment below may stand upon the ground upon which alone, be it observed, it is put, and upon which alone, I rather think, upon examining the pleadings, it could be put, yet, my noble and learned friend, though not denying the possibility of affirming the judgment below upon that ground, holds that this is the real nature of the transaction, and thereby, I admit, if this view is well founded, it, to a certain extent, no doubt, gets over the difficulty that I have stated with respect to retaining the shares, such as they are, whatever their real value may be.

Lord Brougham's opinion.

It is said, "The manager assured the Defenders that the Company would advance the necessary funds for purchasing the shares, and that the stock would be held until it could be sold at a profit." Now, if it had stopped there, I should have had no doubt whatever that my noble and learned friend would have had a right to put it in the way he did, that it was an undertaking upon the part of the Company in lending the money not to call upon them for the repayment until that event took place—"until the shares could be sold at a profit." But I am afraid that what follows renders that somewhat doubtful, for, after the statement "that the stock would be held until it could be sold at a profit," it goes on to say, "without the Defenders being called upon for any contribution in money, the Company being secure by the large amount of stock held upon joint account." That seems to me to be an undertaking, not to the effect that they will not call upon the

party borrowing for repayment of the money until a rise in value took place, but only an undertaking that he should be saved harmless from any call upon him in respect of those shares, "the Company being secure by the large amount of stock held upon joint account."

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Upon the whole, my Lords, I retain very considerable doubts upon this subject. Had it not been for the view taken by my noble and learned friend, those doubts would have been so strong as to have prevented me from concurring in the Judgment of Affirmance. But, upon the view taken by my noble and learned friend, I go so far with him as not to object to that Judgment of Affirmance.

The Lord ST. LEONARDS:

Lord St. Leonards' opinion.

My Lords, I shall be very short in the observations which I have to address to your Lordships, after the very elaborate manner in which this case has been discussed by my noble and learned friends. My opinion is in favour of the Respondents.

My Lords, I entirely agree with the observations which have been made as to the laxity in the Court of Session with regard to their pleadings. It has arisen, in a great measure, I take it, from their allowing relevant and irrelevant defences, and also from the mixture of law and equity, which some persons are so anxious to introduce into this country. When they do so, I hope they will be kind enough to adopt some machinery which will prevent us from falling into the errors to which that combined system has led in Scotland.

Lord BROUGHAM: That is quite necessary.

Lord ST. LEONARDS: My Lords, the first question is, whether there is a relevant defence? We have to decide that. We have not the issues to settle; that remains for the Court of Session. But is there a

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relevant defence? I entirely concur in this view, that if this were a case in this country, I should be very slow to think that there was a relevant defence. We do not admit of general charges of fraud as even a defence, but we expect a party to set forth what is the precise ground upon which he makes out the fraud. For example, in a Court of Equity, a man cannot simply say that he has been deceived and defrauded, but he must tell the Court how he has been deceived and defrauded; and then the Court is enabled to form its own judgment whether the facts alleged do make out the alleged fraud or not.

Now, if I understand the law of Scotland, the Courts of Scotland have adopted a different rule, and there are many cases in which general allegations have been deemed sufficient to let in a defence, so that there might be issues upon the particular facts. And it is upon that ground that I think that in this case the general allegations are sufficient to form a relevant defence.

It is stated in the defence to the summons, "About the month of October 1847, before the shareholders were aware of the true condition of the Company's affairs, the Defenders were urgently solicited by Mr. Barlow, the manager, to purchase additional shares of the Company's stock. At that period, the shares began to fall in the market," and so on. I do not quite go along with my noble and learned friend who spoke last, as to the construction of this part of the sentence, although there is a portion of it which is undoubtedly ambiguous. "The manager assured the Defenders that the Company would advance the necessary funds for purchasing the shares, and that the stock would be held till it could be sold at a profit, without the Defenders being called upon for any contribution in money." That makes it perfectly clear to

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my mind what the representation was—"You shall never be called upon for any money at all in regard to this purchase of shares. We think there will be sure to be a profit, and we will keep them until that profit is realised; you will have the benefit of them, and no loss will ever come upon you." But the concluding sentence, I confess, I do not understand: "The Company being secure by the large amount of stock held upon joint account." Now, that does not allude to a general call upon the Defenders to add to the joint stock of the Company, but it alludes here to an advance of money in respect to these shares which have been thus purchased. But that concluding passage I do not understand. However, the representation is, that they were to purchase for him the shares, which were sure to produce a profit; that they will keep them till the profit is realised, and that he never shall be called upon for any contribution. The allegation then, after stating that the Defenders relied upon these representations, and so on, goes on in general terms to say: "This transaction was based upon gross fraud and misrepresentation." Then they state why. Now, there is a distinct allegation, general, no doubt, but clearly a distinct allegation, of gross fraud and misrepresentation.

Now, if you will turn to the actual pleas which were pleaded in law upon these statements, one of them is this: "More particularly as the National Exchange Company acted as the brokers for the Defenders in purchasing the stock, and prevailed upon them to do so by gross fraud, concealment, and misrepresentation, the Pursuers are barred from claiming payment of any advances on account of these shares." That is a clear plea, which would have to be proved at law, and which goes upon fraud against the Company.

My Lords, you will find again, in the condescend-

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ence, the statement repeated of the representation that they were not to be called upon to pay, but that it should be held till it could be sold to a profit. You will find that, upon the case as it was originally made up, and again in the second plea, you have the same plea as I have already read. And, therefore, in point of fact, as the record was made up ultimately by the *Lord Ordinary*, there was a plea in law which would make it a defence, that the Company had acted as brokers and otherwise in this purchase, and had acted fraudulently in so doing. It appears to me, therefore, that by the law of Scotland (though I wish it were otherwise) this record does show a relevant defence.

We are, then, brought necessarily to the real facts of the case, which lie in a very small compass indeed. Independently of the questions which arise upon the representations made by the Company in their reports, (upon which my noble and learned friend on the woolsack has already so much enlarged,) there were specific representations made by the Company, or by their manager, to these particular Defenders. And, for the moment, I will put it out of sight that the Defenders themselves were shareholders in the Company. Now, with respect to these reports, in which very often Directors have indulged their fancy considerably, and not always consulted the exact facts, it is one thing to say how far the representation so made is to affect third persons, and how far it is to affect the Company. This is not a case in which the question is whether a dealing between two third parties could be affected by the representations in their report, which I am clearly of opinion it could not—that is to say, if John, believing the representations of the Company, had gone into the market and bought of Thomas shares which Thomas had to sell, John

could never have been relieved from his contract because he had believed the representations of the Company that they were flourishing and paying properly a dividend out of profits, and not as it might turn out, and as often has been the case, out of capital. This is not that case; but this is a case in which, if the Company made a misrepresentation, or if their manager made a misrepresentation, which binds them, he acting as their agent, the Company were to have the benefit of that misrepresentation; and, therefore, it is a case in which, if the Company put forth representations which were false, in order to keep up the value of their shares, and if dealing with these Defenders they were to reap a benefit by those false representations, that benefit would throw upon them the obligation which attaches to persons who make false representations to those with whom they deal.

Lord St. Leonards' opinion.

Now, what was the situation of the Company? The Company were bankers, money-lenders, and brokers—they acted in all those capacities of bankers, money-lenders, and brokers, and they particularly had a power to lend money upon shares. The allegation therefore is this: You, the Company, in these various characters, have induced me, the Defender, to buy shares in a falling market, representing to me that they were of value, when you knew they were valueless; and in order to induce me to do so, you said you would advance me money in your capacity as money-lenders to buy them; and, further, in order to carry on this transaction you told me that, in your capacity as brokers, you would buy the shares for me in the market, acting as my brokers; and, consequently, I fell into this trap (for such it must be considered to be). I said I will take these shares if you will advance the money, and, with the assurance that it was all profit and no loss, that the Company would be perfectly

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secure in some way which I do not understand, and that they therefore said, We will take upon ourselves that risk. Now, what was the way in which they attempted to carry the transaction into effect? First of all, the brokerage was carried on through other brokers, and, therefore, at first it appeared to me that it would have been difficult to maintain that these persons, the Company, had acted as brokers. I will presently show your Lordships that it admits of no doubt; but it appears that they did ostensibly act through other brokers, although it was their own act through those brokers, and the shares were bought. The Company charged 8 per cent. upon their advances, besides charging half per cent. for commission for their advance; they did not mean to damnify themselves very much in this transaction. No doubt, ultimately, they have withdrawn both those charges in the course of the litigation. Ultimately in the Court of Session there was no claim for the 8 per cent., and there was no claim for the commission, but that was the transaction as it took place.

Now, what was the real transaction? No doubt the Defender was induced to write to the brokers, and he writes to them to buy certain shares. We were a good deal puzzled by the accounts, but upon looking at them they are very easily explained: You have two accounts, one of which is very damaging to the Company, and there is another account, which is the broker's account. Now, it was asserted that in the account of the purchases for the Defenders by the Company, the charge of commission of 3*l.* was a charge of brokerage, but it was no such thing. The transaction was exactly this: The Defenders bought of T. G. Buchannan and L. M. Kerr, accountants and brokers, 200 shares; you will find that the whole charge for the purchase, with the expenses and the com-

mission of 5*l.*, was 504*l.* 2*s.* 2*d.* They then give credit in that account for half the commission; if you deduct that, it explains the transaction at once. The brokers were employed by this Company, who were themselves brokers and bankers. The brokers, therefore, in the common market charged them one half commission; that is, they divided the commission with the bankers who employed them, consequently they deduct that half of 5*l.*, 2*l.* 10*s.* Now, if you turn to the other account, you will find that the exact sum paid for the 200 shares and the sum charged to the Defenders by the National Exchange Company is 501*l.* 12*s.* 2*d.* If you deduct that sum from the 504*l.* 2*s.* 2*d.* you will find there is a balance of 2*l.* 10*s.*, which is precisely half the brokerage which was deducted in that account.

The result of that, therefore, is this, that the Exchange Company did not charge the Defenders with more than they paid for brokerage; which proves that they were buying themselves as brokers for the parties. Then, if you will look at the end of the account, if you want to account for the 3*l.* commission, you will find that it is precisely what it purports to be, half per cent. upon the whole advance of money upon all the shares—just exactly 3*l.* That, therefore, shows clearly that the 3*l.* commission, which has been given up, and the 2*l.* 10*s.* were not charged to the purchasers. Then look at the heading of this account, which is the account sued for, which the Pursuers have founded themselves upon,—"Debtor, Messrs. Peter Drew and Mathew Dick, in account with the National Exchange Company, creditor." What does that account consist of? Of all the purchases of these shares by the brokers employed, and the advances of money for the purchase of these shares. Is not that an adoption by the Company of the whole transaction? Do not they, by the

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allowance of half the commission, show that they were acting as brokers for these persons? Do not they show that they were acting as agents for the purchase? Do not they show that they were acting as upon an advance of money? What does it all show? It shows simply and only one transaction. Therefore, I cannot say that I participate in the doubts expressed by my noble and learned friends. I always feel the greatest respect for any doubts which they entertain, but I have not entertained those doubts; I have looked throughout at this case as a case in which it was one transaction. The measure of the value of the property is the measure of the money advanced; they are co-equal. They were never of that actual value one knows, but they were the representatives of that value. The whole sum is a sum advanced which is called a loan, and that loan constituted the purchase. If there had been no loan there would have been no purchase—it never would have taken effect. The purchase and the loan are precisely one transaction, although consisting of two parts; I have never been embarrassed by considering the loan as a separate transaction. The Company would never have lent these Defenders five shillings upon any separate transaction without security. They would not have advanced them five shillings for any collateral purpose. But in order to keep the shares up in the market, and to throw upon the Defenders the liability which those shares would impose upon them, whilst they were making 8 per cent. for the money, they advanced the money, and got half per cent. commission upon the advances. That was a transaction the temptation to which they could not resist; it was a transaction founded upon misrepresentation and fraud. What do they themselves say in their own summons? In the very summons for this money, by way of excuse in pursuing the Defenders for the whole of the money

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advanced, which in point of fact represented the whole of the purchase money, they proceed to say that the shares are not saleable in the market, that is to say, in other words, the shares are valueless. That is their excuse for pursuing the Defenders, whom they induced to make this purchase, for the whole of the purchase money.

Now, I have certainly come to this conclusion, that if representations are made by a Company fraudulently for the purpose of enhancing the value of their stock and they induce a third person to purchase stock, those representations so made by them for that purpose do bind the Company; I consider representations by the Directors of a Company as representations by the Company, although they may be representations made to the Company; it is their own representation. What is the first act which takes place at any such meeting as that at which the report was read? The first act which takes place at every such meeting in Scotland and in England is, that if there is not a rejection there is an adoption of the report; then I say the report is the act of the Company and not simply of the Directors. It does not stand as the simple statement of the Directors. It becomes the act of the Company by the adoption of the report, and sending it forth to the world as a true representation of their affairs; and if that representation is made use of in dealing with third persons for the benefit of the Company, it subjects them to the loss which may accrue to the party who deals, trusting to those misrepresentations. I therefore come to a very satisfactory conclusion in my own mind upon that simple point.

The cases have been very much discussed, and a good deal of argument has turned very learnedly and ably upon the general question of representations by agents. I think we need not embarrass ourselves

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much with that question here, because I consider that here it is made out that the representations were made by the Company. There is no doubt about this, that Mr. Barlow was the manager, that Mr. Barlow was acting in conformity with the views of the directors, that Mr. Barlow was the man who had the power to advance the money; and that is the main pivot upon which everything turns. He was the person who advanced the money, he was the person who conducted the brokerage. Then, if I find that the agent who has all these powers is the manager of the bank, who has the power of advancing money, is the person who has to direct the brokerage; if I find him acting as the broker; if I find him acting as the lender of the money, and that his management leads to this transaction, then I can have no doubt in my own mind that the act of such an agent, so acting with all this authority, taking it all as one transaction, is binding upon the Company.

We have had very much to consider that case in Meeson and Welsby (*a*), upon which I will say a word with regard to misrepresentation by agents. That was a very peculiar case, and, as it was explained by my noble and learned friend on the woolsack, there is no fault to be found with the decision in that case, because, there it was held that the Defendant had been induced, by fraud, covin, and misrepresentation on the part of the Plaintiff, to enter into the contract. The case was of this nature:—A house was to let, and I think it was next door to a brothel; it was a house which no respectable family could inhabit. The gentleman who was about to take it had a family growing up, of both sons and daughters, and it would have been utterly impossible for him to live in it under the circumstances. The owner was perfectly aware of

(*a*) *Cornfoot* v. *Ffolkes.*

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the circumstance, and he employed an agent, who was not aware of the circumstance. The gentleman who went to look at the house was struck at the cheapness of the house, upon which he was induced to ask the agent whether there was anything objectionable about the house; and that was admitted to include any nuisance next door. The agent, who was utterly ignorant of the nature of the occupation of the adjoining house, said that there was not, and when the gentleman retired from the contract, the owner brought an action against him for nonperformance of the contract. Upon the trial, the Jury, under the direction of the Chief Baron Lord *Abinger*, found for the Defendant. That was set aside by the Court of Exchequer, and upon this ground—that the allegation was of fraud and covin. There was no evidence of any fraud on the part of the owner of the house, who had made no false representation. There was no fraud upon the part of the agent, because he was not aware of the nuisance.

Now, supposing there had been in that case no allegation of fraud, but it had been put simply upon the ground of misrepresentation, it was not denied in the course of the Judgment, as I understand it, that if a principal, with knowledge of a fact which was material to the value of the property, employed an agent whom he knew to be ignorant of the fact, for the purpose of concealing it, he could not avail himself of that concealment, and he would be responsible. That, I think, seems to have been admitted in that Judgment. But I should take the liberty of going a good deal further. I should say, that if in that case fraud had not been alleged, but it had been put upon misrepresentation, and the fact were, that a man knowing that there is so serious a nuisance affecting a house as to diminish its value in such a way that no

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man of respectability could live in it, and he takes care himself not to make the contract, but leaves it to an agent whom he has no reason to suppose is aware of the fact; and if in the course of the treaty for the contract the agent, being asked if such a fact existed, states positively No, and the contract is executed in silence upon the point, because the purchaser or the tenant's vigilance has been lulled to sleep upon it, and he believes the representation made to him by the agent, I say in such a case as that I should be very much shocked at the law of England if I could bring myself to believe that it would not reach the case of a person so availing himself of a misrepresentation of his own agent, who might be ignorant of the fact although the principal himself knew it, and employed the agent in order to avoid making a direct representation to the contrary. I should hope that the law of England would reach a case of that sort. I should feel no hesitation, if I had myself to decide that case, in saying that although the representation was not fraudulent—the agent not knowing that it was false—yet that as it in fact was false, and false to the knowledge of the principal, although the agent did not know it, it ought to vitiate the contract. When upon a matter so material to the value of the property, he left it to his agent to make the representation without informing him of so important a fact within his own knowledge, the agent making a false representation of that fact would bind the principal, and thus impeach the validity of the contract.

My Lords, one great difficulty that has been raised in this case is with respect to the liability of the Directors. Upon that I have already stated my view; but the doctrine of set-off has been urged, and the impossibility of reducing, as it is called, this transaction in this particular case. Now, I think the law of

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set-off has not the slightest bearing upon the subject; I never could understand the force of the argument. I know the way in which it was put, but I never have been able to satisfy my mind that the law of set-off has the slightest bearing upon the case before your Lordships. The Plaintiffs in this case think fit to bring an action for the whole of the purchase money, which is, in other words, (as I have already said,) the loan which they had advanced. The defence is fraud and misrepresentation. Now, why should not that go to the whole of the loan? It is said, "Oh, you ought to have your counter action; you should bring an action for damages; then those damages could be set off against the sum due under this contract." It is also said, "Why are you to be relieved from the whole of this sum, and yet to keep those shares? How monstrous for you to keep these valuable shares, which are not saleable in the market, and to keep the money too." Now, what is the real state of the case? If the view I have submitted to your Lordships be the true one (and I have the authority of my noble and learned friends for saying that it is), that this one transaction all bound up, all depending upon the advance of money, and that money invested in this purchase, and that purchase leading to this result, where are the shares? In the custody of the Company. Have they ever been in the custody of the Defenders? Never Can they ever get them into their hands? Never. Could they, after this defence, maintain an action for them? What is the value of their standing in their names, with the power in the Company over their own shareholders, and over their dividends? Will any man represent that any action or proceeding could be maintained by these Defenders for these shares, or the produce of these shares, after the defence which has been put in to this action, if it be successful? Clearly and

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decidedly not. But supposing it were necessary that there should be a transfer of the shares, why may not one of two things take place? In the first place, I asked during the argument, and I heard no answer to my question, except that an action of reduction would have to take place (which I cannot conceive to be possible), I asked what there was to prevent the Court of Session, if the issue be favourable to the Defenders, in relieving them from their obligation to the lenders, to direct a transfer of the shares, if the Company desired, to the Company? What is there to prevent the Court of Session from exercising that power? The Court of Session is a court of law and equity (*a*). A court of equity would not hesitate a moment in giving relief in a case of this sort—in directing the Defendants, if the Plaintiffs desired it, to transfer at the expense of the Plaintiffs, the shares in question. Why should not the Court of Session do that? But supposing, even if it were necessary to bring an action, what would be the result? Why, as a matter of course, to recover those shares for the Company, if it were necessary. They do not want them; they have them in their own possession. They can burn them if they please, and that probably would be the best way of disposing of them. No action is necessary to recover them, but, if it were necessary, it is their own act which has rendered it necessary. They choose, in order to keep up the market, to buy, in effect, these shares, in the names of these persons. They advance all the money, and now they seek, in this action, to recover the whole of this money. The defence is, fraud on the part of the lenders, and the defence must go to the whole. The money represents the shares. The purchase and the loan are one and the same transactien. Therefore, the

(*a*) The Equity of the Court of Session is a Prætorian or Roman Equity. The technical Equity of England is confined to England.

defence must go to the whole. What is there to set off? There is nothing to set off, but to get rid of the obligation to pay the money. The shares are totally valueless. It is not a question of what the value of the shares is; that is utterly unimportant. Supposing I bought an estate, and I desired to be relieved from the contract upon the ground of fraud, and I filed a bill upon that ground, and proved the case, the Court would relieve me from the contract. I should have that relief without any reference to the question of what the value of the estate was; whether the estate was but one third of the value which I had given for it or worth the whole amount of the money which I had given for it, would be of no consequence at all. Supposing there was any defence to be set up, it would not be upon the question of what the value of the property was, but the question would be whether the party was entitled to make that defence as to the whole or not.

My Lords, there are two cases which have been referred to in the Court of Session in Scotland. One is *Brown's case*, in 12th Shaw and Dunlop (*a*). There an acting director, who was also a partner in a Joint Stock Company, brought an action against a purchaser of shares in his own name, just as here; and the defence set up false representations, and so on, which induced him to buy the shares. There the defence no doubt was this, that the man who was the Pursuer was himself a director, and they were his own shares. I only quote that to show that this was a case of fraud. The defence was admitted there to the whole transaction, just as in this case. There was a different ground of fraud and different parties, but not a different defence. The defence there was allowed to the whole of the demand, and nobody imagined

(*a*) P. 596.

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that there was any ground of set-off, or any difficulty such as has been suggested in this case.

Then, with respect to the case of *Graham* v. *The North British Banking Company*, which is in 12th Volume of the Court of Session Reports, p. 907, there there was a fraud by the Bank, upon sales of shares, for which bills were given, just as here. An action of reduction was brought—not a mere defence, and that action was allowed. That was therefore, although a different case in circumstances, a case in which a man had been fraudulently induced to purchase shares, and that fraud gave him a right to reduce the whole transaction. This defence is exactly of the same nature. It is a defence to the whole transaction. About that I have no hesitation whatever.

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Upon the whole I concur with my noble and learned friends in advising your Lordships to affirm the decision of the Court below. It appears to me that the Pursuers have failed to make out their case. The sum in question is a small one. That does not affect the argument, no doubt; but for such a small sum there ought not to have been the great amount of expense incurred, which this proceeding must have occasioned to the parties; and it certainly does appear to me that those costs should be borne by the Appellants.

Interlocutors affirmed, and Appeal dismissed with Costs.