same mode in which she dealt with that which she already possessed. My opinion is, that the interlocutor of the Inner House ought to be affirmed.

LORD WESTBURY.—My noble and learned friends who have preceded me have stated their reasons for affirming this interlocutor so fully, and to my mind so satisfactorily, that it is unnecessary that I should weary your Lordships by a repetition of them. I concur entirely in affirming the interlocutor.

LORD COLONSAY.—My Lords, I entirely concur in the conclusion at which your Lordships have arrived. The attempt in this case to put on the word "conquest" the particular construction which the appellants contend for, is, to my mind, a perfect novelty. The word "conquest" here occurs in a marriage contract, and it is introduced into that marriage contract with two accompanying circumstances, which prevent me from giving to it the interpretation, that the appellants contend for. In the first place, it has reference to what may be acquired by the wife. That in a marriage contract is a novelty, and it would be very difficult of application—I would say almost impossible of application—if the word "conquest" be taken in the sense in which it is understood in reference to a provision of "conquest" in a marriage contract. In the second place, it is an immediate conveyance to trustees to be operative during the subsistence of the marriage. That again is entirely inconsistent with an ordinary provision of conquest in a marriage contract. These two circumstances seem to me to take the word "conquest" out of the interpretation which the appellants contend for. I am not quite certain, whether the appellants contend for the interpretation of "conquest" in this marriage contract in the same sense in which "conquest" provided by a husband is understood, or in the limited sense in which the word conquest is held to be applicable to heritable rights; but it is necessary for their case to put upon the word "conquest" the meaning for which they contend; and they endeavour to make that particular meaning of the word "conquest" communicate itself to the next word "acquire," so that the word conquest is to have this extraordinary, unusual, and unprecedented application in a marriage contract, and it is to destroy the ordinary meaning of the word that next follows it. I think these considerations are sufficient to shew, that the word "conquest" here was not used in the sense for which the appellants contend. Indeed, I think the use of the word here was simply a mistake, because, in the strict technical sense, it would lead to a construction contrary to all precedent, contrary to law, and it might, I think, lead to contending for impossible consequences. But if you get rid of the technical meaning of the word, the meaning of the contract itself, and the purposes and objects of the parties, are perfectly plain. It was intended to carry whatever was acquired by the wife during the subsistence of the marriage. I therefore think, that the judgment of the Court below was perfectly right.

Sir Roundell Palmer.—Will your Lordships permit me, as you have said nothing about expenses, to recall to your recollection the fact, that the Court below thought this a case in which no expenses should be given, and no expenses were given.

LORD WESTBURY.—My Lords, it has never been your Lordships' habit to give encouragement to appeals; and such encouragement would be given if, where no costs were given in the Court below, your Lordships adopted the course of not giving expenses on appeal. I think you ought not to do so. This is not a case of ambiguity arising on a will. And, certainly, I do not think that encouragement should be given to appeals, as would be done by the relaxation in such a case as this of the ordinary rule, that, unless under very exceptional circumstances, the costs follow the judgment.

LORD CRANWORTH.—My Lords, I concur with my noble and learned friend.

Interlocutors affirmed, and appeal dismissed with costs.

Appellants' Agents, A. Morison, S.S.C.; W. Robertson, Westminster.—*Respondent's Agents*, Morton, Whitehead, and Greig, W.S.; Martin and Leslie, Westminster.

MAY 20, 1867.

THE WESTERN BANK OF SCOTLAND, *Appellants*, *v.* ROBERT ADDIE of Viewpark, *Respondent; et è contra.*

Company—Misrepresentation—Restitution—Repetition of price of Shares—Manager and Directors as Agents—*A. raised an action against the liquidator of a joint stock banking company to reduce a purchase of shares, and claiming restitution on the ground of fraudulent representations contained in the reports of the directors, by which he was induced to purchase, or alternatively claiming damages. The liquidator pleaded, that A. had duly become a shareholder, that the*

alleged misrepresentations were not authorized by the company, that A. had for years received dividends, paid calls, taken part in annual meetings, and consented, like other shareholders, to a resolution to wind up the company, and therefore was barred from insisting in such action.

HELD (reversing judgment), *That the pursuer had not stated matter relevant to entitle him to issues; because* (1.) *A. had not brought home the fraud to the company*: (2.) *if the purchase had been procured by fraud of the company's agents, it was voidable only, and not void, and A. had not taken steps to avoid it in time;* (3.) *that though, if a company take the benefit of a contract procured by the fraud of its agents, the party defrauded may claim* restitutio in integrum, *still he can only do so while things are entire, and it is too late after the company has been wound up, or the shares have been annihilated or changed in nature.*

An action of damages for deceit cannot be maintained against a company, but only against the individual directors who actually used the deceit.

If directors of a company make statements which they have no reasonable ground to believe to be true, this alone does not amount in law to a fraud.—Per LORD CRANWORTH.[1]

These were appeals against certain interlocutors. The first appeal was against the interlocutor, disallowing certain exceptions. The second appeal was against the interlocutors, finding that the pursuer had stated matters relevant to entitle him to go to trial; there was a cross appeal to the second appeal as to the form of issues.

The facts relating to the actions were substantially as follows:—In 1859 the action of reduction, repetition, and relief was raised by Mr. Addie of Viewpark, coal and iron master, against the Western Bank. The condescendence set forth, that, prior to 1855, the pursuer was proprietor of fifteen shares in the bank, and half of other thirty shares, and was a customer of the bank: In November 1855 he bought from the bank, through nominal parties acting for them, 135 shares of capital stock at the price of £76 per share, amounting to £10,260, and he paid that amount, and obtained deeds of transference: That in the reports of the bank from 1851 to 1855, the business of the bank was represented as highly satisfactory and flourishing, that a large sum had been set aside as a guarantee fund or rest, and that the profits had been so large as to enable a dividend of 7 per cent. on the paid up capital stock to be paid therefrom. By the contract of copartnery, dividends could only be paid out of profits, and, in consequence of the annual reports published and circulated, the shares of the bank sold at a high premium; and at the time of the sale to the pursuer they were at £76: That the statements in the said reports regarding the affairs of the bank were false, and that no profits had been made, but, instead thereof, a series of heavy losses through bad debts had occurred: That the manager, Mr. John Taylor, knew the said statements were false, and the directors also knew the same, or, if they were ignorant, that this arose from gross and culpable neglect of duty on their part: That, in particular, the said Taylor had in November 1855, for the fraudulent purpose of effecting a sale of the shares, caused Thomas Torrance, agent for the bank at Coatbridge, falsely to represent to the pursuer, that a purchase of such shares would be a good investment: That the pursuer had relied on the said reports, not having any means of knowing the true affairs of the bank, and had bought the shares on the faith of the truth of such reports: That about November 9, 1857, the said bank stopped payment, and a loss of £3,000,000 had been incurred. In consequence of such purchase, the pursuer had lost the money paid for his shares, and £16,875 besides, being calls made thereon; and he now claimed repetition of all those sums.

The defenders, the Western Bank, in their answers, made various statements as to the proceedings of the bank and the shareholders, and set up the defence, that the pursuer's averments were not relevant to support the conclusions of the action: That the alleged false statements of the manager and directors did not bind the bank: That the pursuer was a shareholder, and had acquiesced, and was thus himself a party to the fraud.

Lord Ordinary (Kinloch) appointed issues to be prepared, and reported the cause to the First Division, who ordered parties to lodge cases on the whole law of the case.

The issues proposed by the appellant for the trial of the cause were the following:—"It being admitted, that in or about November 1855, the Western Bank of Scotland sold to the pursuer 135 shares of the capital stock thereof, at the price of £76 per share, and that in terms of said sale the bank caused to be transferred to the pursuer the said 135 shares by two transfers, each dated 30th November and 4th December 1855, by Robert Aitken, accountant in Glasgow, to the pursuer, being Nos. 10 and 11 of process; and that the pursuer accepted of the said transfers, and paid to the said Bank, on 4th December 1855, the sum of £10,313 2*s.* 10*d.* as the price of the said shares and expenses connected with the transfer thereof: It being also admitted, that the pursuer paid on 1st March 1858 the sum of £1687 10*s.*, on 1st June 1858 another sum of £1687 10*s.*, and on 10th November 1858 a sum of £13,500, being the amount of calls on said shares made by the liquidators of said bank: 1. Whether the pursuer was induced to make the

[1] See previous report 2 Macph. 809: 37 Sc. Jur. 473 S. C. L. R. 1 Sc. Ap. 145; 5 Macph. H. L. 80: 39 Sc. Jur. 437.

said purchase under essential error as to the affairs of the bank, caused by the misrepresentations of the said bank, or of parties acting or entitled to act therefor; and whether, in respect thereof, the defenders are resting owing to the pursuer the sums contained in the schedule hereunto annexed? 2. Whether the pursuer was induced to make the said purchase by the false and fraudulent representations made by the said bank, or by its authority, as to the state of its affairs; and whether, in respect thereof, the defenders are resting owing to the pursuer the sums contained in the schedule hereunto annexed? 3. Whether the pursuer was induced to make the said purchase under essential error as to the affairs of the bank, caused by the misrepresentations of the said bank, or of parties acting and entitled to act therefor, to the loss, injury, and damage of the pursuer? Damages laid at £26,000. 4. Whether the pursuer was induced to make the said purchase by the false and fraudulent representations made by the said bank, or by its authority, as to the state of its affairs, to the loss, injury, and damage of the pursuer? Damages laid at £26,000."

The issues settled for the trial of the cause were as follow :—(Admissions as above.) "Whether the pursuer was induced to make the said purchase by false and fraudulent representations made by the said bank as to the state of its affairs; and whether the defenders are resting owing to the pursuer the sums contained in the schedule hereunto annexed, or any part thereof? Or, whether the pursuer has barred himself from repudiating the said purchase?"

The trial took place, and the Lord President (M'Neill) directed the jury, who found for the pursuer on both issues. A bill of exceptions was tendered to the ruling of the learned Judge as follows.—"The Lord President charged the jury; and in reference to explanations and directions asked by the counsel for the pursuer, the Lord President stated :—'That in submitting to the shareholders a report on the affairs of the bank, and the result of its business for the past year, the directors have a duty to perform, and it is part of their duty not to put forth any statement as to the affairs or prosperity of the bank which they have not reasonable ground to believe to be true. There is implied in their report a representation to the effect, that they have reasonable ground to believe in the truth of what they assert, and those to whom it is addressed or circulated are entitled so to understand it. This does not mean, that it is incumbent on the directors personally to go through the books and test the accuracy of them, or of the results brought out in them. It is not to be expected or supposed, that the directors have done so, and their report is not to be taken as importing or implying, that they have done so. They are entitled to rely on the information furnished to them by the officials to whom the details of the business are committed, and in whom confidence is placed. That affords reasonable ground for the directors believing in the truth of the results so brought out, and of the inferences reasonably deducible from them. And if it should unfortunately turn out, that the information so furnished to the directors was false by reason of the negligence or fault of those whose duty it was to furnish correct information, the directors who honestly believed it, and were themselves deceived by it, cannot be held to have practised any fraud on the shareholders or the public. But if the case should occur of directors taking upon them to put forth in their report statements of importance in regard to the affairs of the bank, false in themselves, and which they did not believe or had no reasonable ground to believe to be true, then, inasmuch as the embodying of such statements in the report imports a representation by the directors, that they had reasonable ground to believe them to be true, that would be a misrepresentation and deceit, and in the estimation of law would amount to a fraud practised on those persons, if any, to whom the report may have been communicated officially by the bank, or its manager acting as the agent and in the interests of the bank, he being cognisant of the untruth, with a view to induce the purchase of shares from the bank, if such persons shall have been thereby deceived and induced to make such purchase.' To which direction the counsel for the said defenders excepted; and the counsel for the said defenders did call upon the said Lord President to give the following directions to the jury :— 1. That the pursuer was not entitled to repudiate the purchase referred to in the issues on the ground, that he was induced to make it by false and fraudulent representations as to the state of the bank's affairs made by the directors to the shareholders, of whom he was at the time one. 2. That if the representations which induced the pursuer to make the purchase were made in pursuance of the contract of partnership, and without fraud by the directors to the shareholders, of whom the pursuer was at the time one, the pursuer was not entitled to repudiate the purchase, although the said representations were untrue in fact, and were fraudulent on the part of the manager. 3. That upon the evidence before the jury the action is not maintainable in law, and the defenders are entitled to a verdict on the pursuer's issue. 4. That upon the evidence before the jury, the pursuer had in law barred himself from repudiating the purchase, and the defenders are entitled to a verdict on the counter issue. But the said Lord President declined to give the said directions to the jury."

About the same time, the Court had given judgment in the case of *Colonel Graham* v. *The Western Bank*, 2 Macph. 559; 36 Sc. Jur. 304, and reference was made to that case, which was very similar. On the bill of exceptions in the present case being argued, the Lords disallowed the exceptions; but, inasmuch as Mr. Addie had been himself a shareholder, and was thus a

party to the fraud in a certain sense, they directed a new trial, because on that point the verdict was contrary to the evidence. The Western Bank now appealed against that part of the interlocutor which disallowed the exceptions taken at the trial, believing that, if those exceptions were allowed, there would be no necessity for a new trial. A new trial had also been ordered in *Colonel Graham's case.*

Mr. Addie also appealed against some of the interlocutors as to the framing of issues, and both appeals were ordered to be heard together.

The appellants, the Western Bank, in their *printed case*, gave the following reasons for reversing the interlocutor, disallowing the exceptions:—1. Because the direction given by the presiding Judge to the jury was erroneous, inasmuch as it imported, that if the jury were of opinion, that the directors of the Western Bank put forth in their reports statements of importance in regard to the affairs of the Bank false in themselves, and which they had no reasonable ground to believe to be true, though they did, in fact, believe such statements to be true, that would be deceit, and in the estimation of law would amount to a fraud; and because what was said by the learned Judge amounted to a direction, that the jury might affirm the respondent's issue if they thought that the directors had committed gross error in judgment, though they were not of opinion that the directors had committed fraud in making such statements; 2. Because the respondent was not entitled to a verdict, in respect he was himself a shareholder at the date of the purchase of the said shares, and because the fraud of the directors could not be imputed to the Company or the shareholders in a question with him; and therefore the presiding Judge should have given the first direction asked; 3. Because it was not sufficient for the respondent's case to prove that the representations of the directors were untrue in point of fact and fraudulent on the part of the manager, and because the respondent was not entitled to a verdict unless fraud on the part of the directors was proved; and therefore the presiding Judge should have given the second direction asked; 4. Because the respondent was not entitled to the remedy of reduction and of *restitutio in integrum*, and therefore was not entitled to a verdict, in respect—(1.) The transaction sought to be reduced had been completed; (2.) the respondent could recover no more than the amount by which the company had been benefited by the transaction; (3.) the respondent was not in a position to give restitution; (4.) because of the time which had elapsed since the date of the purchase, during which time the respondent was a shareholder, and because facts were established before the jury about which there neither was nor could be dispute, in respect of which the action was not maintainable in law; and therefore the presiding Judge should have given the third direction asked; and 5. Because facts were established before the jury about which there neither was nor could be dispute, in respect of which the respondent had in law barred himself from repudiating the purchase; and therefore the presiding Judge should have given the fourth direction asked.

The appellants also gave the following reasons for reversing the interlocutor, sustaining the relevancy of the pursuer's allegations:—1. Because the transaction sought to be reduced was not null *ab initio*, and the respondent was a partner of the Western Bank from the date of the said transaction till the stoppage of the Bank; 2. Because in respect he was himself a shareholder at the date of the representations complained of, he cannot recover from the company, or the shareholder, on the ground of the fraudulent reports of the directors; 3. Because the contract cannot be rescinded after it has been completed; 4. Because the appellants cannot be made liable in respect of the said transaction except to the extent to which they have taken benefit from the same, and they have taken no benefit; 5. Because the respondent cannot maintain the conclusions for restitution *in integrum*, in respect it is admitted he cannot give restitution *in integrum;* 6. Because he is barred from insisting in the present action by facts admitted on the record, and in respect of the time which has elapsed since the date of the said transaction.

And the appellants, as to the cross appeal by the pursuer, gave the following reasons for affirming the interlocutor, refusing the pursuer's issue as to essential error:—1. Because the respondent having insisted in the conclusions of this action for reduction and for restitution or repetition, it was proper and convenient, that issues should be adjusted in the first instance for the trial of that part of the case. 2. Because the respondent was not entitled to an issue limited to essential error, but was bound in the issue to undertake proof of fraudulent misrepresentation on the part of the directors of the bank; and 3. Because the issues which were adjusted by the Court were the appropriate issues for the trial of the cause, on the assumption, that the respondent had stated a case on record which entitled him to go to trial.

The respondent (Addie) in his *printed case* gave the following reasons for affirming the interlocutor disallowing the exceptions:—1. Because the law is correctly laid down in the portion of the Lord President's charge to which the first exception relates, in respect that statements made in the reports by the directors to the shareholders imported a representation, that the directors had reasonable ground for believing the said statements to be true, and that they had used reasonable means for obtaining information in regard to the matters to which the said statements related. 2. Because the failure of persons in the situation of the directors of the Western Bank to have reasonable ground for their belief as to the affairs of the bank, respecting which it falls

within their province to report, and respecting which they do report, implies gross negligence equivalent to fraud. 3. Because none of the directions asked by the appellants could be given consistently with the previous judgments in the cause. 4. Because the first direction asked was unsound in law, in respect that the fraud alleged by the respondent being a fraud by the company, or persons representing the company in its separate *persona*, it is immaterial, that the respondent was at the date of the fraud a shareholder in the company. 5. Because the second direction asked was erroneous, in respect, that representations made by the manager in regard to matters and in transactions in which he was authorized to represent, and did represent, the bank, were in law representations of the bank, and, if fraudulent on the part of the manager, infer liability as for fraud on the part of the bank. 6. Because the third and fourth directions were rightly refused, in respect, that a contract induced by fraud is null, as in a question with the party defrauded. 7. Because it is not a condition precedent, that the party defrauded claiming restitution, shall be able to give restitution, and because the inability of the respondent to restore the shares in the condition in which he obtained them, if such inability exists, is not attributable to the fault of the respondent. 8. Because the respondent cannot be debarred from obtaining the remedy of restitution by any acts done by him while he remained in ignorance of the fraud. 9. Because the acts founded on by the appellants, as constituting a bar, were induced by and flowed as consequences from the same fraud whereby the respondent was led to purchase the shares in question. 10. Because no right or interest of the bank or of the shareholders was prejudiced or injuriously affected by any act of the respondent. 11. Because there were disputed facts material to the issues, with reference to which evidence was adduced at the trial, proper for the determination of the jury, and which would have been withdrawn from the consideration of the jury had the presiding Judge given the third and fourth directions asked by the appellants. 12. Because the directions craved were erroneous, both in form and substance, and the whole exceptions were rightly disallowed by the Court below.

The respondent (Addie) gave the following reasons for affirming the interlocutor finding his averments relevant :—1. Because the respondent was induced to purchase the shares in question by the fraud and misrepresentation of the bank, or of parties acting for and entitled to act for the bank. 2. Because the respondent has sustained loss and damage by and through the purchase of the shares in question, induced by false and fraudulent representations made by the bank, or by parties acting and entitled to act for the bank. 3. Because the whole statements made by the appellants in their defences are irrelevant, and their whole pleas, and in particular their pleas of bar, are untenable in law.

The appellant (Addie) in his *printed case*, gave the following reasons for reversing the interlocutor, rejecting his proposed issues :—"Because the contract entered into under essential error is null, or at least reducible, and the appellant having relevantly averred upon record, that in making the purchase of the shares in question he was under essential error produced by the misrepresentations of the bank, or of parties acting for and entitled to act for the bank, he was and is entitled to an issue of essential error applicable to the conclusions for reduction and restitution. 2. Because the appellant having relevantly averred upon record, that he has suffered loss and damage, through having been induced to make the said purchase under essential error, induced as aforesaid, he was entitled to an issue of essential error applicable to the conclusions for damages. 3. Because an issue or issues applicable to the conclusions for reduction and restitution, and an issue or issues applicable to the conclusion for damages, ought to have been and to be sent to trial at the same time, inasmuch as the evidence which would be adduced in support of both classes of issues would be the same, and such simultaneous trial would be the most expedient course for arriving at a speedy settlement of the questions at issue. 4. Because the respondents have not set forth upon record any relevant statement entitling them to a counter issue, and their pleas in defence are unfounded and untenable. 5. Because the issue allowed to the respondents is improperly framed, and does not raise any question of fact for the determination of a jury. 6. Because, in so far as appealed against, the said interlocutors are erroneous, and contrary to law.

The Attorney General (Rolt), *Sir R. Palmer* Q.C., and *A. B. Shand*, for the appellants, the Western Bank.—The main appeal in this case is against the interlocutor which found the pursuer's case to be relevant ; the other appeals follow of course. The appellants rely on four points—1. There was no essential error in the transaction. 2. There was no fraud which is imputable to the company. 3. Even if there were fraud, the respondent was himself a *particeps criminis*. 4. The respondent's acquiescence prevents his claim from restitution.

1. There is no essential error such as will entitle to the remedy of *restitutio in integrum*. That doctrine relates only to land and specific chattels, but not to shares in a company having an uncertain value. The shares sold being duly transferred, the utmost remedy the purchaser can have is an action for deceit or misrepresentation. The effect of fraud is not to avoid the contract, but merely to give the purchaser an option to set it aside. Such is the rule in English law—*per* LORD CAMPBELL, *Mixer's case*, 4 De G. & J. 575. The rule is the same in Scotch Law—1 Bell, Com. 241, 289, 297 ; *Elliot* v. *Wilson*, 4 S. 429 ; *Baird* v. *Neill*, 13 S. 927 ; *Williamson* v. *Sharpe*, 14 D. 127 ; *Davidson* v. *Tulloch*, 3 Macq. Ap. Ca. 789 ; *ante*, p. 930. 2. There was no fraud

which is imputable to the bank, that is, to the shareholders generally. The directors have no implied power to commit frauds on behalf of the company. The shareholders as a body were entirely innocent, and were deceived as much as the pursuer could be. It is only the persons who committed the fraud individually who are liable. It has never been held, that a manager's misrepresentations bind the company—*Burnes* v. *Pennell*, 6 Bell, Ap. 541 ; *Barrett's case*, 3 De G. J. & S. 30 ; *Holt's case*, 22 Beav. 48 ; *Duranty's case*, 26 Beav. 273. It is true, that it has been said, if the company take the benefit of a contract procured by the fraud of their agents, they will be liable—*National Exchange Co.* v. *Drew*, 2 Macq. App. 124 ; *ante*, p. 482; *New Brunswick Co.* v. *Conybeare*, 9 H. L. C. 736. But the liability is avoided if they gain no benefit by the contract, and here they have gained none, nor is it shewn, that the fraud was by any agent of the company. But, at all events, the pursuer could only recover the benefit got by the sale, which is the surplus paid for the shares beyond the just price. 3. But even if there were fraud, and the company or the whole shareholders are liable, then the pursuer is one of the shareholders and equally liable. He cannot separate his case from that of other shareholders in the same situation. He is in effect seeking to sue himself ; whereas his only remedy must obviously be against his agents, the directors personally. 4. He cannot have the remedy of restitution, because he cannot restore his shares ; they are gone. This impossibility of restoring the thing is a bar to such a remedy —*Clarke* v. *Dickson*, *per* LORD CAMPBELL, E. B. & E. 148 ; *Nicol's case*, 3 De G. & J. 387 ; *Bernard's case*, 5 De G. & Sm. 283 ; *Mixer's case*, 4 De G. and J. 575 ; *Davidson* v. *Tulloch*, 3 Macq. App. Ca. 783 ; *ante*, p. 930. The interest of third parties has intervened, and prevents restitution *in integrum*—*Stevenson* v. *Newnham*, 13 C. B. 302 ; *Clarke* v. *Dickson*, E. B. & E. 148 ; *Mixer's case*, 4 De G. & J. 575. The pursuer was, moreover, a party to changing the shares in 1853, and again in 1857, by agreeing with the other shareholders to register the company under the Joint Stock Banking Company's Act, 1857, so that he destroyed the identity of the shares which he bought in the first instance. Moreover, he is suing a different company altogether from that in which he took shares ; for the company has since, with his acquiescence, been converted into a Joint Stock Banking Company, registered.

Lastly, the pursuer has barred himself from this remedy by acquiescence. He has lain by for years, having the means of knowledge, on the chance all the time of making a profit—*Nicol's case*, 3 De G. & J. 387 ; *Sutton's case*, 3 De G. & Sm. 262 ; *Dodson's case*, 3 De G. & Sm. 85 ; *Sanderson's case*, 3 De G. & Sm. 66 ; *Davidson* v. *Tulloch*, 3 Macq. App. Ca. 789, *ante*, p. 930. He has also been a party to the winding up order which for ever put an end to restoring the shares.

The interlocutor disallowing the exceptions was wrong. The first exception was right, because it is not law, as the Judge told the jury it was, that, if the directors had no reasonable ground to believe their statements as to the affairs of the bank to be true, therefore they were fraudulent ; making, in fact, an error of judgment equivalent to fraud. The right directions in such a case are given in *Dobbie* v. *Johnston*, 23 D. 1139.

The second direction asked by the defenders ought to have been granted because it was sound law, that if the directors made the representations without fraud, even though untrue in point of fact, the pursuer was not entitled to repudiate the purchase. The mere fact of the manager fraudulently misleading the directors does not make the company responsible to third parties, for the company can only be bound by their own agents, the directors—*Per* LORD CRANWORTH, *National Exch. Co.* v. *Drew*, 2 Macq. App. Ca. 124 ; *ante*, p. 482 ; *New Brunswick Co.* v. *Conybeare*, 9 H. L. C. 736 ; *Burnes* v. *Pennell*, 6 Bell's App. Ca. 541.

The first, third, and fourth directions asked by the defenders ought also to have been granted by the Judge, because they affirmed the sound propositions, that, as the pursuer's purchase of shares was not null, and he had not repudiated them, but became a partner and had acquiesced, therefore the action was not maintainable. To allow such an action as this would lead to confusion and injustice. It is an action by one partner against all the other partners, many of whom are in precisely the same situation as himself, and were equally imposed on.

Dean of Faculty (Moncreiff), *Giffard* Q.C., and *Balfour*, for the respondent.—The respondents maintain four propositions :—1. That this was a fraudulent misrepresentation by the company; 2. That it is immaterial as regards his remedy, that the pursuer was a shareholder ; 3. That his remedy of restitution was not lost, so long as he was ignorant of the fraud ; 4. That he had not lost his remedy by acquiescence or otherwise.

This was a fraud on the part of the company. In the law of Scotland a company has a legal *persona* separate from that of its shareholders—2 Bell's Com. 619. And it is bound by the fraud of its agents—*National Exch. Co.* v. *Drew*, 2 Macq. App. 113, 126 ; *ante*, p. 482. And the manager was one of its agents—*Cullen* v. *Thompson*, 4 Macq. App. Ca. 424 ; *ante*, p. 1143. The manager was agent, because he was expressly charged with the duty of preparing the reports —*Per* LORD ST. LEONARDS, *National Exch. Co.* v. *Drew*, 2 Macq. App. Ca. 143 ; *ante*, p. 482 ; *Ranger* v. *Gr. West. R. Co.* 5 H. L. Ca. 72 ; *New Brunswick Co.* v. *Conybeare*, 9 H. L. Ca. 736 ; *Cornfoot* v. *Fowke*, 6 M. & W. 358 ; *Advocate General* v. *Grant*, 15 D. 980. And the

company having taken the benefit of the contract obtained by the fraud of their manager, they thereby adopted his acts, and are responsible in this action.

A contract entered into by means of fraud is not only voidable, but is null—Voet. iv. 3, 3; Stair, i. 9, 9; i. 9, 14; Ersk. iii. 1, 16; iii. 3, 8; *Chrysties* v. *Fairholmes*, M. 4896; *Dunlop* v. *Crookshanks*, M. 4879; *Newall* v. *Mitchell*, M. 4944; *Sandieman* v. *Kempt*, M. 4947. Bell (2 Bell's Com. 241, 289,) states the law differently, but without authority, and is self-contradictory. Though it is usual in English law to say, that the contract is voidable only at the option of the defrauded party, this seems only a difference in language.

In case a contract has been entered into by fraud the remedy is *restitutio in integrum*—Voet. iv. 1, 1; iv. 1, 22; Brissonius de verb. "Restituere;" Ersk. iii. 3, 10; Domat, i. 2, 11; Pothier Tr. de Vente, II. i. 4, 4; *Duthie* v. *Carnegie*, 21 Jun. 1815, F. C. And it is no answer to the remedy, that the subject has been lost or destroyed—*Ibid.*; *Hill* v. *Pringle*, 6 S. 229; *Dickson* v. *Kincaid*, 15th December 1808, F. C.; *Graham* v. *North British Bank*, 12 D. 907; *National Exchange Co.* v. *Drew*, 12 D. 950; 2 Macq. App. Ca. 123; *ante*, p. 482. English authorities on this subject have no application, but there are cases in England to the same effect—*Brockwell's Case*, 4 Drewry, 205; *Ayre* v. *Deposit Co.*, 25 Beav. 527; *per* Turner, L. J. in *Conybeare* v. *New Brunswick Co.* The remedy of *restitutio in integrum* lies against a company which takes the benefit of a contract obtained by fraud of its agents—*Per* LORD ST. LEONARDS, *National Exchange Co.* v. *Drew*, 2 Macq. App. Ca. 147; *ante*, p. 482.

The respondent has not been barred of his remedy of restitution. He cannot be barred from this remedy by mere lapse of time. Nor is he barred by anything done before he became aware of the fraud—Ersk. iii. 3, 37; iii. 3, 48; Bell's Pr. § 27. When the respondent drew dividends and consented to the capital of the company being altered, and up to and including the resolution to wind up, he was not aware of the fraud; nor had he the means of discovering it till the stoppage. Nor is the respondent barred of his remedy by the mere deterioration of the thing sold, especially if the deterioration was the result of causes in operation at the time of the purchase. He has not transferred or converted the shares, and is willing to leave them with the company. It is no answer to the respondent's action, that the partners have changed, for the action is against the separate *persona* of the company. But if there are other partners in the same situation as the respondent, then they have the same remedy as he has. The identity of the company was not altered by the mere fact of the company being incorporated. And there is no inconsistency according to the law of Scotland in one partner suing the company.

The direction of the Lord President was right, in so far as he laid down the rule, that statements made by directors without reasonable ground for believing them to be true are fraudulent—*Smout* v. *Ilbery*, 10 M. & W. 9; *Jarret* v. *Kennedy*, 6 C. B. 322; *Jenkins* v. *Hutchinson*, 13 Q. B. 747; *Pawson* v. *Watson*, Cowp. 788; *Schneider* v. *Heath*, 3 Camp. 508; *Pulsford* v. *Richards*, 17 Beav. 87; *Haycraft* v. *Creasy*, 2 East, 103; *per* LORD WESTBURY in *New Brunswick Co.* v. *Conybeare*, 9 H. L. Ca. 736. The directions asked for by the defender were unwarranted, because they would have had the effect of withdrawing the case from the jury.

The interlocutor refusing the issues proposed by the pursuer was wrong. The pursuer was entitled to an issue of essential error; for on that ground alone, even though fraud is not alleged, he would have been entitled to a verdict either of restitution or for damages—Stair, i. 10, 13; Bell's Pr. § 11; *Adamson* v. *Glasgow Water Works*, 21 D. 1012; *Wilson* v. *Caledonian Railway Co.*, 22 D. 1408. And there was nothing to prevent the parties going to trial on issues both of fraud and of essential error.

Cur. adv. vult.

LORD CHANCELLOR CHELMSFORD.—My Lords, this is an appeal against interlocutors of the First Division of the Court of Session in an action instituted by the respondent against the Western Bank of Scotland and the official liquidator appointed to wind up the affairs of the bank.

The summons in the action demands a reduction and restitution *in integrum* against two deeds of transference of 135 shares in the bank, and the repayment of the sum of £10,313 10*s.* 2*d.*, being the price of the said shares; and also the sums of £1685, £1686, and £13,500, being the amounts respectively of three calls made upon such shares, and alternatively it demands damages in respect of the transaction.

The following are the facts stated by the pursuer in his condescendence, and admitted by him in answer to the defenders' statement:—The defenders are a joint stock banking company established in 1832, which carried on business in Glasgow and elsewhere down to November 1857, when it stopped payment; the paid up capital amounted to £1,500,000 divided into 30,000 shares of £50 each. By the deed of copartnership the business and affairs of the company were to be regulated, conducted, and carried on by a governor and deputy governor, six extraordinary and six ordinary directors, who were constituted the representatives of the company, and to whom the whole management of the business and affairs of the company were intrusted, and the

ordinary directors, together with the manager, or failing him or in his absence, the cashier of the company, were to constitute the ordinary board of directors and committee of management of the company, and by one of the articles of the deed it is declared, that it shall be lawful for the directors to purchase for behalf of the company any of the shares of the capital stock which may either be offered for sale by private bargain or shall come to be publicly sold.

Prior to the year 1855, the pursuer was the proprietor of 15 shares in the bank, and interested to the extent of one half in 30 shares belonging to a dissolved firm of Addie and Company. He was also a customer and kept his private account with a branch of the bank at Coatbridge. In November 1855, the directors sold to the pursuer 135 shares belonging to the bank at the price of £76 per share, amounting in all to the sum of £10,200, which were transferred by two separate deeds of transference, dated respectively the 30th of November and the 4th of December 1855. The transaction of the sale of these shares was conducted through Mr. John Taylor, the manager of the bank.

In the June of each year meetings were held, when the directors submitted to the shareholders reports as to the state of the affairs of the bank for the year ending in the previous month of May. By the terms of the copartnership deed no partners except the ordinary board of directors were entitled to examine the books of the company. The reports submitted by the directors to the different meetings of the shareholders, held from the year 1851 to 1855 both inclusive, represented the business of the bank as highly prosperous, and that its affairs were in a satisfactory and flourishing condition. In particular, the report for the year 1855 stated, that for the year ending May 1855 the business of the bank had been eminently successful, and that its affairs were in a sound and satisfactory condition; that after providing for bad and doubtful debts the profits for the year available for dividend were upwards of £153,000.

These reports were untrue. Not long after its institution the bank sustained heavy losses through bad debts, and in 1851 had lost half its capital. In May and June 1855 the bad debts had reached the amount of £1,360,000, and the bank had at that time lost £1,000,000 of its capital, or more than one half thereof. The result brought out in the report for the year 1855 was obtained by taking as good assets of the bank the whole of the bad and irrecoverable debts. The reports were prepared by Taylor, the manager, and, as the pursuer alleges in his condescendence, were submitted to the shareholders for the fraudulent purposes of concealing from them the actual condition of the bank, and inducing a belief, that it was in a sound and prosperous state, and of keeping up the price of the shares, and inducing the shareholders and others to purchase the shares belonging to the bank.

The pursuer further alleges in his condescendence, that, in November 1855, Taylor, for the fraudulent purpose of effecting a sale of part of the shares belonging to the bank, caused Thomas Torrance, the agent for the bank at Coatbridge, falsely to represent to the pursuer, that a purchase of shares in the bank would be a good investment, Taylor well knowing that it would not. That the pursuer had no means of knowing the true state of the bank except from the information, communicated to the shareholders at the annual meeting, by the reports of the directors, and by the declarations and payments of dividends. And that, relying on the truth of these reports, and, in particular, on the report of 1855, and on the fraudulent representations made to him by Taylor through Torrance, the pursuer purchased and paid for the 135 shares, and accepted transferences thereof. That instead of the shares being worth £76 per share, they were worthless, or at least of inconsiderable value.

Subsequently to his purchase of the shares, the pursuer received the following dividends upon them—£270 on the 27th of December 1855; £283 10*s.* on the 12th July 1856; 283 10*s.* on the 24th December 1856; and £294 17*s.* 9*d.* on the 10th of July 1857; amounting in the whole to £1131 17*s.* 9*d.*

During the period of the bank's carrying on business, it was an unincorporated company, but having stopped payment on the 9th November 1857, it was resolved by the shareholders to wind up voluntarily under the Joint Stock Companies Act, 1856; and on the 8th December 1857, the company was registered and incorporated under the Joint Stock Companies Act, 1857. In the course of the liquidation, in which the pursuer took part as one of a committee to assist the liquidators, it was found that losses to the extent of £3,000,000 had been incurred, and in consequence two calls were made upon the shareholders, which the pursuer paid to the amount of £16,875 under protest.

Upon this state of facts, the pursuer, by two of his pleas in law, alleged, that he was entitled to the decree of reduction and payment as concluded for—1. In respect that the directors and manager of the bank made false representations to him as to the condition of the bank, and that he was thereby induced to buy the shares in question; 2. that essential error was produced by the misrepresentation of the bank.

The defenders, by their pleas in law, alleged, that the pursuer's averments were not relevant or sufficient in law; that the statements and representations of the directors or agents of the company were unauthorized by the company; that the pursuer being a shareholder, the representations complained of were made by the directors on behalf of himself and the other shareholders;

that restitution *in integrum* being impossible, the pursuer could not maintain the action ; and that he was bound by acquiescence.

The record having been closed, and the defenders having been heard before the Lord Ordinary on their objections to the relevancy, his Lordship appointed the pursuer to give in issues. Issues having been lodged, the Lord Ordinary reported the cause to the First Division of the Court of Session. After hearing counsel, their Lordships pronounced an interlocutor, appointing the parties mutually to lodge cases on the whole questions of law and relevancy involved. Cases for both parties were accordingly lodged, and the pursuer having proposed certain issues, and the defenders a counter issue, the Lords pronounced an interlocutor, that the pursuer has stated on record matter relevant to entitle him to go to trial, and that as the pursuer insisted in the conclusions for reduction and for restitution or repetition, the case, as regarded those primary conclusions, should be tried and disposed of, and that the issue proposed by the pursuer was the appropriate and suitable issue.

Against this interlocutor the defenders have appealed ; and the first question that your Lordships have to consider is, whether the case stated by the pursuer is a relevant case or not ?

In determining the relevancy of a pursuer's case the Court must look not only to the cause of action stated in his condescendence, but also to any admissions made by him upon the defenders' statement of facts which are thereby adopted by him, and become part of his own case.

Upon the statements and admissions of the pursuer, two questions arose—*1st*, Whether he was entitled originally to rescind the contract for the purchase of the shares in question ? and *2ndly*, whether he was debarred of his right by the change which had taken place in the condition of the company at the time when his action was brought ?

Upon the first question the Court had to determine how far a company is bound by the misrepresentations of its managing body, upon which there are numerous irreconcilable decisions. In *Dodgson's case*, (3 De G. & Sm. 85,) Vice-Chancellor Knight Bruce held, that directors cannot be the agents of the body of shareholders to commit a fraud, and that the directors only were liable for their conduct. This opinion was adopted by Vice-Chancellor Parker in *Bernard's case*, (5 De G. & Sm. 289,) where he said, "*Dodgson's case* shews, that the directors cannot be the agents of the company to commit a fraud ; and therefore, even if Mr. Bernard had been induced to take shares by the misrepresentations of the directors, there was no reason why he should be a contributory." But in *Brockwell's case*, (4 Drewry, 205,) where the directors of the Royal British Bank, in their published reports, misrepresented the state of the company, and Brockwell, relying upon the truth of the reports, purchased some new shares which were issued by the company, upon which it was sought to make him a contributory, Vice-Chancellor Kindersley held, principally upon the authority of the case of the *National Exchange Company* v. *Drew*, decided in this House, (2 Macq: App. Ca. 103 ; *ante*, p. 482,) that reports made by directors to a company, if they get into circulation, must be considered as reports of the company, and Brockwell was removed from the list of contributories. The words "if they get into circulation," mean if they are designedly published, for the Vice-Chancellor could never have intended to hold, that if reports addressed to the shareholders, and to them alone, get into the hands of third persons by private and unauthorized circulation, they must be taken to be reports, for which the company are responsible.

This case of *Brockwell* was overruled by LORD CAMPBELL, LORD CHANCELLOR, and the Lord Justices, in *Mixer's case* (4 De G. & Jo. 575,) which was also a case connected with the British Bank. The LORD CHANCELLOR, in his judgment, said, "Clearly there was fraud, and gross fraud, on the part of the directors ; and I have no doubt, that Mixer was induced by fraud to take his shares. I think, however, it was a fraud on the part of the directors which cannot be attributed to the company," and the appellant was continued upon the list of contributories.

In that case the true reason was given why, even if the purchase of shares was induced by the fraud of the company, the person defrauded could not resist his liability to contribute as a shareholder. "It is a settled rule," the LORD CHANCELLOR said, "that a contract obtained by fraud is not void, and that the party defrauded has a right to void it, if he does so while matters remain in their former position." If, therefore, a person, who has been induced by fraud to become a shareholder in a company, has not relieved himself from the contract at the time of its being wound up, he cannot afterwards divest himself of his liability.

In the case of the *National Exchange Company of Glasgow* v. *Drew*, opinions were expressed as to the responsibility of a company for the fraudulent misrepresentations of its directors, which are entitled to the highest consideration. My noble and learned friend, LORD CRANWORTH, said, "What is the consequence of the company receiving a report 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 discharge of their duty, fraudulently, for the purpose of misleading others as to the state of the concern 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." And LORD ST. LEONARDS said, "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."

These opinions received the sanction of LORD WESTBURY, LORD CHANCELLOR, in the case of the *New Brunswick and Canada Railway Company* v. *Conybeare*, 9 H. L. C. 725, where he said, "I certainly am not at all disposed to advise your Lordships to throw any doubt upon this doctrine, that if reports are made to the shareholders of a company by their directors, and the reports are adopted by the shareholders at one of the appointed meetings of the company, and these reports are afterwards industriously circulated, misrepresentations must undoubtedly be taken after their adoption to be representations and statements made with the authority of the company, and therefore binding upon the company."

My noble and learned friend LORD CRANWORTH, in this last case, adhering to the opinion which he had expressed in the cases of *Ranger* v. *The Great Western Railway Co.* and *The National Exchange Company* v. *Drew*, suggested a distinction as to the effect upon the company of misrepresentations by the directors being misrepresentations of a company, and misrepresentations of directors being binding upon a company. And to place the question upon its true ground, my noble and learned friend said, "The principle of making a company responsible for the misrepresentation of the directors, cannot be taken to the wild length that I have heard suggested, namely, that you can bring an action against the company upon the ground of deceit, because the directors have done an act which might render them liable to such an action. That I take not to be the law of the land, nor do I believe it would be the law of the land, if the directors were the agents of some persons not a company. The fraud must be a fraud, that is either personal on the part of the individual making it, or some fraud which another person has impliedly authorized him to be guilty of."

The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this,—where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally.

The action of Mr. Addie is for the reduction of the deeds of transference of the shares, and alternatively for damages; but as it is brought against the company, it will follow from what has been said, that he cannot recover unless he is entitled to rescind the contract. The question then arises, does he shew upon the statement of his case, that the false reports of his directors, and particularly the report of 1855, were the proximate and immediate cause of the purchase of the shares by the pursuer? I do not think it is necessary, that they should be the sole cause; for to repeat what I said in *Nicol's case*, supposing, that the reports of the directors formed a material part of the inducement to take the shares without which the purchase would never have been made, I cannot think, that the effect of them is destroyed because other influences were at the same time at work, which contributed to the success of these false representations. But where fraudulent reports are made the ground for rescinding a contract for the purchase of shares, the fraud is not to be established by impressions received from these reports at some former period however distant, but they should be clearly shewn to be in the mind of the person at the time of the negotiations for the purchase, and to have been one of the causes leading to the contract. Apart from these reports, there is no statement of any representations made to the pursuer by the directors or by their authority. That the directors knew of Taylor's endeavours to induce the pursuer to take shares in the bank is nowhere alleged. Although merely agents of the company themselves, and therefore, according to the well known rule, they could not depute any other person to act for them, yet if they had employed Taylor to make false representations of the stability of the bank to the pursuer, it would, in my opinion, have been of the same effect as if they had been made by themselves. But not only is there no statement in the case of any such delegation of authority to Taylor, but it is not even shewn upon the record, that Taylor had any personal communication with the pursuer. Taylor (it is stated) employed Torrance, the agent of the bank at Coatbridge, where the pursuer kept his account, to endeavour to get him to take shares, but it is not alleged, that Taylor instructed Torrance to speak of the prosperity of

the bank, and to tell the pursuer, that he considered it to be a good investment for his money, nor that Torrance did not at the time believe in the stability of the bank.

Therefore, though this was a case in which, as the pursuer was seeking to rescind a contract from which the company had derived benefit, his action was maintainable, yet I entertain considerable doubt whether in his statement he connected the directors sufficiently with the alleged misrepresentations to make them imputable to the company, and whether he did not fail to state a relevant case upon the record on this ground.

But on the question, whether the pursuer was not deprived of his right to rescind the contract by the change in the character and condition of the company, which appears from his condescendence and admissions, I have no doubt that the relevancy of his case altogether failed.

Whether the change of the company from an unincorporated to an incorporated banking company, for the purpose of more conveniently winding up its affairs, under the Joint Stock Companies' Act 1856, so changed the nature and character of the shares purchased by the pursuer, as to render a *restitutio in integrum* impracticable, is a question which, if it were necessary to determine, I should wish to consider more carefully. It was undoubtedly one of the grounds upon which the case of *Clarke* v. *Dickson* was decided. In that case a mining company was, with the plaintiff's assent, registered as a company with limited liability, and was wound up under the Winding up Act. In an action for money had and received, to recover back the amount paid for the purchase of the shares, the Court held, that the action was not maintainable. Mr. Justice Erle said, "He has changed the nature of the article; the shares he received were shares in a company on the cost book principle; the plaintiff offers to restore them after he has converted them into shares in a joint stock corporation;" and in this opinion Mr. Justice Crompton agreed.

It is clear, however, upon the authorities, that after the crisis had arrived of the failure of the company, and the order for winding it up had been made, the time for rescinding the contract was gone. This, as I have already shewn, was the ground of the decision in *Mixer's case*. That was a case between an alleged shareholder and the creditors of the company; and it may be thought, that different considerations will apply where the question arises between a company and the person who has been fraudulently induced to become a shareholder, but the case of *Clarke* v. *Dickson* shews, that there is no distinction between the cases. There the action was against three directors of the company to recover back money paid by the plaintiff for shares which he was induced to purchase by the false and fraudulent representations of the defendants. In that case the company was being wound up under the Winding up Act, and it was during the process of winding up, that (as in this case) the plaintiff for the first time discovered, that the representations by which he was led to make the purchase were false. The Court held, that the plaintiff was not entitled to recover.

Mr. Justice Crompton, after adverting to the rule of law, that "a contract induced by fraud is not void, but voidable at the option of the party defrauded," said, "It seems to me to follow, that when that party exercises his option to rescind the contract he must be in a state to rescind; that is, he must be in such a situation as to be able to put the parties into their original state before the contract."

It may seem to be a hardship on the pursuer, that he should be compelled to keep the shares because, in ignorance of the fraud practised upon him, he retained them until an event occurred which changed their nature, and prevented his returning the very thing which he received. But he is not without remedy. If he is fixed with the shares, he may still have his action for damages against the directors, supposing he is able to establish, that he was induced to enter into the contract by misrepresentations for which they are responsible; but in his present action the pursuer could not have recovered damages against the company, and therefore, both on the claim in his summons for restitution and repayment, and also for damages, the pursuer stated no relevant case upon the record; and the first interlocutor, "finding that the pursuer has stated on record matter relevant to entitle him to go to trial," ought not to have been made, and no issues ought to have been directed.

But the case can hardly be left here, considering the proceedings which have since taken place. The issues approved by the Court were afterwards tried by the Lord President and a jury, and a verdict was found for the pursuer. A bill of exceptions was tendered to his Lordship's summing up, both on the ground of misdirection and nondirection. A rule was afterwards granted to set aside the verdict as contrary to evidence, and for a new trial. This rule, and the bill of exceptions, came on for argument at the same time, when the Court of the First Division pronounced two interlocutors of the same date, one of them disallowing the exceptions, which is appealed from, and the other setting aside the verdict and granting a new trial, which, by the 8th section of the 55 Geo. III. chap. 42, is "final and conclusive, and not liable to be questioned anywhere."

But it would not be right to pass by the other parts of the case which were brought before us in the argument.

The issues ultimately approved of by the Court were:—1. Whether the pursuer was induced

to make the purchase by false and fraudulent representations made by the bank as to the state of its affairs, and whether the defenders are resting owing to the pursuer the sums contained in the schedule hereunto annexed, or any part thereof? 2. Whether the pursuer has barred himself from repudiating the said purchase?

In his charge to the jury, the Lord President told them, that, if the case should occur of directors taking upon them to put forth in their report statements of importance in regard to the affairs of the bank false in themselves, and which they did not believe, or had no reasonable ground to believe to be true, that would be a misrepresentation and deceit. The counsel for the defenders excepted to this direction so far as it related to the directors having no reasonable ground to believe the truth of the statements in the reports; and they also called upon the Lord President to direct the jury, that, upon the evidence before them, the action was not maintainable in law, and that the defenders were entitled to a verdict upon the first issue; and that, upon the evidence, the pursuer had in law barred himself from repudiating the purchase, and the defenders were entitled to a verdict on the second issue. The Lord President declined to give these directions, and the bill of exceptions was tendered. The interlocutor, as already mentioned, disallowed all these exceptions.

I agree in the propriety of this interlocutor so far as it relates to the exception on the ground of misdirection. In the argument upon this exception the case was put of an honest belief being entertained by the directors, of the reasonableness of which it was said the jury upon this direction would have to judge. But supposing a person makes an untrue statement which he asserts to be the result of a *bonâ fide* belief of its truth, how can the *bona fides* be tested except by considering the grounds of such belief? And if an untrue statement is made, founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see, that it is not fairly and correctly characterized as misrepresentation and deceit.

The other exceptions upon the refusal of the Lord President to direct the jury to find for the defenders on both the issues, may be disposed of by reference to what I have already said upon the appeal against the first interlocutor on the subject of relevancy.

I expressed a doubt, whether upon the record there were proper allegations to connect the directors with the representations which induced the pursuer to purchase the shares. At the trial the evidence upon this point was equally deficient. Taylor was not called, and no authority was shewn to have been given to him by the directors for the employment of Torrance to persuade the pursuer to purchase shares. The pursuer himself did not prove, that he had any communication with Taylor. But as he swore, that he "purchased on the faith of the reports, and what Torrance told him," I do not think, that the Lord President could have withdrawn the case from the jury upon this first issue, because if the reports formed a material part of the inducement to the purchase, then, whether Torrance's representations were brought home to the directors or not, there were sufficient misrepresentations proceeding directly from themselves which were proper for the consideration of the jury.

But it will be recollected, from what I have already said, that the exception on the ground of the Lord President having refused to direct the jury, that the pursuer had in law barred himself from repudiating his purchase, was a good exception. The exception is not, perhaps, worded with exact precision, but I think it is sufficiently so to have required the Judge to give the proper direction to the jury. The defenders evidently pointed to some act of the pursuer by which he had barred himself from rescinding the purchase of the shares, referring, probably, to his receipt of dividends, and to the part he took in assisting the liquidators in the winding up. But without any of these acts, the pursuer would have been barred by the mere fact of the winding up of the company having found him with the shares in his possession, and it would not be incorrect to say, that he had barred himself by retaining the shares until the company was brought into this condition.

As this exception ought to have prevailed, the interlocutor disallowing all the exceptions cannot be maintained.

There are one or two other points which were raised in the course of the argument which deserve a short notice. It was said, if the fraud is imputable to the company from the representations of the directors, as the pursuer was a shareholder at the time, the representations are his own, as one of the company, to himself through his agent. I think the fallacy of the argument lies in this:—In a suit instituted against a company to rescind a contract to purchase shares which the purchaser was induced to enter into by the misrepresentations of directors, the misrepresentations are not regarded as actually made by the company, but they are not permitted to retain the benefit of a contract which has been fraudulently obtained for them by their agent. But although according to the strict rules of common law a man cannot be a plaintiff and a defendant at the same time, yet in a court of equity (and equity as well as law is administered in the Scotch courts) it could not, in my opinion, be a valid objection to a suit to set aside a contract for fraud, that the complainant was a member of the company, by the fraud of whose agents technically imputed to the company he was drawn into the contract.

Another objection which was urged against the right of the pursuer to be relieved from his

contract was, that it would prejudice the interest of other innocent shareholders who had acquired shares after the pursuer became possessed of those in question. In answer to this argument, I would only observe, that these subsequent shareholders either bought their shares under circumstances which compel them to hold them, or they also were induced to join the company by false representations. If they are bound to continue to be shareholders, I do not see upon what principle they can contend, that their purchase of shares prevents the contract of the pursuer being impeached for fraud, and if they, like the pursuers, have been deceived into the purchase of their shares and abstain from taking proceedings to exonerate themselves from liability, there is no reason why their forbearance should hinder the pursuer from taking steps to rid himself of a contract into which he has been drawn by a similar fraud.

It only remains to observe, that although the interlocutors directing the issues ought to be reversed on the ground, that the defenders were entitled to judgment on the question of relevancy, yet upon the pursuer's cross appeal, it appears to me, that upon the record there ought to have been no issue with respect to his claim to damages. His action being against the company for the fraud of the directors, the pursuer could only recover in such action if he were entitled to rescind the contract. If his claim rested in damages, he ought to have proceeded against the directors, who would alone have been liable to him in that form of action. Upon a review of the whole case, I must advise your Lordships, that all the interlocutors appealed from ought to be reversed.

LORD CRANWORTH.—My Lords, the respondent, who is pursuer in this action, sought relief on one of two grounds. First, he claimed the right of repudiating altogether the contract for the price of the 135 shares, on the ground, that he was induced to enter into that contract by the fraud of the directors, which he alleges ought to be treated as the fraud of the company. Or, secondly, if, from lapse of time or from the mode in which he had after the purchase dealt with the shares, he is precluded from that relief, then he claimed to recover from the appellants compensation to the full extent to which he had been damaged by having been fraudulently led to enter into the contract. The extent of relief would in fact be the same on whichever ground it might be made to rest.

Relief under the first head, which is what in Scotland is designated *restitutio in integrum*, can only be had where the party seeking it is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into. Indeed this is necessarily to be inferred from the very expression *restitutio in integrum*, and the same doctrine is well understood and constantly acted on in England.

The question therefore on this head of relief is, Whether, assuming the existence of the fraud alleged by the respondent, and that it was a fraud which he was warranted in imputing to the company for whom the directors were acting, the facts alleged are such as entitled him to relief by way of *restitutio in integrum*—whether a relevant case is stated warranting that relief? The learned Judges below were of opinion, that they ought not to pronounce any judgment on this point until the facts had been investigated by a jury trial, and they accordingly framed issues for that purpose. But, with all deference to them, I think no such trial was necessary, because on the facts stated and admitted on the record, no relevant case is stated entitling the pursuer to relief against the appellants.

The company by whose direction the fraud is alleged to have been committed was an unincorporated banking company carrying on business under the provisions of 7 Geo. IV. c. 67, with a capital of £1,500,000 divided into 30,000 shares of £50 each. Assuming, that this company by its directors fraudulently induced the respondent to purchase 135 of these shares so as to entitle him to relief against the company, he cannot insist on *restitutio in integrum*, unless he is in a condition to restore the shares which he so purchased; but this is impossible. The purchase was made by him in 1855, and in 1857 he was party to a proceeding, whereby the company from which the purchase was made was put an end to. It ceased to be an unincorporated and became an incorporated company with many statuteable incidents connected with it which did not exist before the incorporation. This new company is now in course of being wound up; but even if that were not so, if it still were carrying on the business of bankers, *restitutio in integrum* would have been impossible. The respondent might in that case have given up 135 shares of the new company, and these shares might have been as valuable as, or even more valuable than, the shares which he was induced to purchase, but they would not have been shares in the same company, and unless he was in a position to restore the very thing which he was fraudulently induced to purchase, he cannot have relief by way of *restitutio in integrum*. The time had gone by during which the respondent could repudiate the contract. The circumstances were so changed that he could not put the appellants in the condition in which they were before the fraudulent sale to him. I agree with the learned Judges below, that the circumstance, that the shares from mismanagement or otherwise had become depreciated in value subsequently to the purchase by the pursuer, would of itself be of no importance. He might still have been able to restore that which he was fraudulently induced to purchase. But what in fact took place was not a depreciation, but a destruction, of the thing purchased. The unincorporated company in

which he had been induced to purchase shares no longer existed. The view which I thus take of this case makes it unnecessary to consider, whether there are not other grounds excluding this particular relief.

But although the respondent is excluded from redress in this form it remains to consider, whether he may not recover compensation in damages, and so obtain relief as beneficial as that from which he is thus barred. But here too I am of opinion, that the respondent must fail. My noble and learned friend has explained the ground on which, and the extent to which, an incorporated company may be made responsible for the frauds of its agents. An incorporated company cannot in its corporate character be called on to answer in an action for deceit. But if, by the frauds of its agents, third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by those frauds.

If it is supposed, that in what I said when the case of *Ranger* v. *Great Western Railway Company* was decided in this House, I meant to give it as my opinion, that the company could in that case have been made to answer as for a tort in an action for deceit, I can only say I had no such meaning. In that case I came to the conclusion without hesitation, that no fraud had been committed, and therefore the question of liability of the company on account of the suggested fraud did not arise. The allegation of Ranger was, that by the fraud of Mr. Brunel, the company's engineer, he had been induced to contract to do, and had done, works for them at a price grossly below their real costs, say for £20,000 instead of £40,000. The company got the full benefit of what he had so done, and in what I said I merely wished to guard against its being supposed, that I assented to the argument, that there would be no means of reaching the company, if the fact of the fraud had been established. By what particular proceeding relief could have been obtained is a matter on which I did not intend to express, and indeed had not formed, any opinion. It was unnecessary that I should do so.

An attentive consideration of the cases has convinced me, that the true principle is, that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited from those frauds, but that they cannot be sued as wrongdoers by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally.

It is not out of place here to point out, that the principles insisted on for the respondent would, if adopted by your Lordships, lead to great injustice. Here the fraud is alleged to have been committed not by the incorporated company now in process of being wound up, but by the persons who were trading in November 1855 as an unincorporated company under the Banking Act, 7 Geo. IV. c. 67. It is true, that many, I suppose most, of the persons who were responsible, so far as they were responsible for the acts of the directors in 1855, became members of the new incorporated company; but they did not thereby transfer to the new company the liability to be sued in consequence of frauds previously committed by the agents of the unincorporated company, still less could they make other persons, who were not members of the unincorporated partnership when the fraud was committed, liable to be sued because they joined with them in procuring an incorporation under the Joint Stock Company Act.

On these short grounds I have come to the conclusion that no relevant case is stated on this record entitling the respondent to relief against the appellants, either by way of *restitutio in integrum* or by way of damages. The consequence is, that no issue ought to have been directed, and therefore the interlocutors of the 2d of February 1864, and the 9th of February 1864, must be reversed.

This being so, the trial and all connected with it necessarily falls to the ground. We are, however, bound to dispose of the interlocutor of the 9th of June 1865, disallowing the exception to the ruling of the Lord President at the trial, and against which the appellants have appealed. His Lordship told the jury, that if the directors put forth in their report important statements which they had no reasonable ground to believe to be true, that would be misrepresentation and deceit, and, in estimation of the law, would amount to fraud. I confess that my opinion was, that in what his Lordship thus stated he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they *bonâ fide* believe to be true, I cannot think they can be represented as guilty of fraud because other persons think, or the Court thinks, or your Lordships think, that there were no sufficient grounds to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to shew, that they did not really believe in the truth of what they stated, and so, that they were guilty of fraud. But this would be the consequence not of their having stated as true what they had not reasonable ground to believe to be true but of their having stated as true what they did not believe to be true.

On this ground I should have thought, that the exceptions ought to have been allowed, and so,

that the interlocutor of the 9th of June 1865 must be reversed. But my noble and learned friend is of a different opinion, and I readily yield to him.

It is hardly necessary to advert to the cross appeal, but it is due to Mr. Addie to say, that if a relevant case had been stated on the record on both heads on which relief is asked, and it had been necessary to direct issues, I think he is right in his contention, that those issues ought to have been so framed as to exhaust the whole case, so as to make it impossible that it should be necessary at a future time to frame further issues and incur the delay and expenses of another trial.

LORD COLONSAY.—My Lords, as I did not hear the whole of the arguments for the appellants in this case, I take no part in the deliberations upon it and the judgment which is about to be given, but as an appeal has been made to me on the point of the form of the proceedings, I may say, if the interlocutor of relevancy is reversed it will follow from that, that the cause will be dismissed, and then all that followed after that interlocutor falls to the ground. There will be no occasion for dealing with the matter of the new trial or the exception or anything else, for the whole will fall. Perhaps the form of the judgment should be, that the interlocutor should be reversed, with a declaration, that the Court should have sustained the objection to the relevancy, and dismissed the action, or some such direction so as to make it clear that nothing which followed from the interlocutor of relevancy is to stand.

Interlocutors reversed with declaration.

Appellants' Agents, Davidson and Syme, W.S.; Loch and Maclaurin, Westminster.—*Respondent's Agents*, Gibson Craig, Dalziel, and Brodies, W.S.; Grahames and Wardlaw, Westminster.

JUNE 4, 1867.

THE WESTERN BANK OF SCOTLAND and LIQUIDATORS, *Appellants*, *v.* JOHN BAIRD and Others, *Respondents*.

Same Appellants, *v.* JAMES BAIRD, *Respondent*.

Process—Appeal—Interlocutory Judgment—Action for Negligence—Enumerated Cases—Jury—48 Geo. III. c. 151, § 15—*The liquidator of a bank, which was in course of being wound up, raised an action against B., alleging that B., while director, had grossly neglected his duties, and caused a loss to the bank of large sums, and concluding for payment of those sums. The Court before answer remitted to an accountant to report what sums had been lost in the way alleged. B. at once appealed without leave:*

HELD, *This being an interlocutory judgment not on the whole merits of the case, it was not appealable to the House of Lords at that stage.*[1]

These were two appeals against judgments of the Second Division. Two actions involved the same facts. The liquidator of the Western Bank in January 1863, raised an action against James Baird, concluding for payment of a sum of £863,618, the amount of loss and damage due by him to the bank as at June 1856, with interest and expenses. The condescendence set forth the history and stoppage of the bank. The main facts alleged were, that the bank was established in 1837 as a joint stock company, and in 1857 was registered under the Joint-Stock Banking Companies Act. The defendant, James Baird, became a shareholder in 1837, and in 1852 was elected a director, and acted till 1856, and during that period he grossly neglected his duties by failing to make proper inquiries, and by allowing the managers, without control, systematically to make advances at their own discretion, on insufficient security; that by such reckless advances, which it was the duty of the directors to prevent, the shareholders had lost sums amounting to £863,618, and it was for this sum the action was brought.

The other action concluded for a sum of about £263,000 from the trustees of the late William Baird, another director, under similar circumstances.

The defenders set up, among other pleas, that there was no title to sue, and that the averments of the pursuer were irrelevant. The Lord Ordinary held, that the action was relevantly

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[1] See previous report 4 Macph. 1071; 38 Sc. Jur. 557. S. C. L. R. 1 Sc. Ap. 170; 5 Macph. H. L. 93; 39 Sc. Jur. 453.