Mr. Anderson.—I am informed that that is quite incorrect. It is not admitted. It is preposterous.

LORD ST. LEONARDS.—What do you say to the course that you should divide the sum? Let half of the sum be considered as the amount that should be properly awarded for severance, and let there be no costs below on either side, and no costs of this appeal.

Sir F. Kelly.—If it followed that we should be entitled to half the costs, supposing the law gives them to us, I should have no objection to that course. We feel satisfied of the fact that £60 only was given for severance.

LORD ST. LEONARDS.—You are not answering it as I put it. Are you willing to enter into an agreement on both sides to meet the justice of the case, in order to stop the litigation from Scotland which we see constantly in this House, and which calls for considerable reprobation, and there ought to be a check put upon it?

Sir F. Kelly.—What I am content to do is this. The verdict for the land actually taken was £360; that, I presume, neither party seeks to disturb; and the verdict for severance and level crossing was £560. Now, my Lord, I have no objection to halve that, and to let the verdict stand for £360, plus the half, which would be £280. That would make together an entire verdict for £640.

Mr. Anderson.—That is £200 less than they offered us before we went to the trial.

LORD ST. LEONARDS.—I recommend you, Mr Anderson, to accede to that proposal.

Mr. Anderson.—My client is not here.

LORD ST. LEONARDS.—You had better act for your client.

Mr. Anderson.—If it were put to me, it is a very unreasonable proposition on the part of my learned friend. Their offer before trial was £850.

Sir. F. Kelly.—But we know that railway companies invariably offer more than they think just, because they know that there will be great costs incurred in the event of a trial, which must fall upon them.

LORD ST. LEONARDS.—I would recommend you, Sir F. Kelly, rather than this litigation should go on, to adhere to your original offer. That would prevent all difficulty, and no costs should be allowed.

Sir F. Kelly.—I cannot do that, because it will be introducing a precedent quite fatal to the interests of the railway companies, who always offer more than they think just, because they know that large costs will be incurred in the event of a trial, which must fall upon them.

Interlocutors reversed, and cause remitted with a declaration.

Appellants' Agents.—Hope, Oliphant, and Mackay, W.S.—*Respondent's Agents.*—Inglis and Inglis and Leslie, W.S.

MARCH 9, 1855.

THE NATIONAL EXCHANGE COMPANY OF GLASGOW, *Appellants*, *v.* PETER DREW and MATTHEW DICK, *Respondents.*

Company—Fraudulent Reports—Sale of Shares—Summons—Relevancy—Issue—Fraud—*A joint stock company having sued one of their share-holders for payment of advances made by the company as brokers to enable him to purchase more shares of the company's stock, he denied liability, on the ground that the company had induced him to transact by fraud, concealment, and misrepresentation as to the true state of their affairs.*

HELD (affirming judgment), *that this was a relevant defence—1. Because it alleged that the loan and the purchase were one transaction, and induced by the fraudulent reports of the company. 2. Because the fraudulent reports of the directors bound the company as between the company and third persons.*[1]

The pursuers appealed, maintaining that the judgment of the Court of Session should be reversed—1. Because the respondents, while they admit the truth of the appellants' averments, at least to an extent supporting the conclusions of the action, have not relevantly averred facts, sufficient to obviate their legal effect. 2. Because they have made no allegations in point of fact to support, as relevant, either their first or second plea in law; and as regards their third plea, the alleged overcharge has been removed by the appellants' abandonment of the charge for commission, and restriction of the rate of interest. 3. Because the allegations of the respondents, so far as they shew any cause of complaint, relate to the conduct of individuals

[1] See previous reports 12 D. 950; 22 Sc. Jur. 417. S. C. 2 Macq. Ap. 103: 27 Sc. Jur. 356.

only, and do not affect the appellants, who constitute the body of the company, with any fraud or misconduct. 4. Because the appellants, having made advances for the respondents, are entitled to recover the amount without regard to the motives which may have caused the respondents to become the purchasers of the shares, the price of which was paid by those advances.

The respondents, pleading that there was issuable matter for a jury, supported the judgment on the following grounds :—1. Because the appellants, or those, for whom they are responsible, fraudulently induced the respondents to enter into the contract by which they became shareholders; and such fraud bars the appellants from insisting for payment of money advanced on behalf of the respondents. Hovenden on Frauds, i. 194; 3 Burn, 1905; Holt, C. J. *Hern* v. *Nichols*, 1 Salk. 289; *Schneider* v. *Heath*, 3 Camp. 506; *Everett* v. *Desborough*, 3 M. & P. 204; *Richardson* v. *Mellish*, 2 Bing. 243; *Murray* v. *Mann*, 2 Exch. 539; Ashurst, J. in *Fenn* v. *Harrison*, 3 T. R. 760; *Pickering* v. *Busk*, 15 East, 43, 55; *Cornfoot* v. *Fowke*, 6 M. & W. 358; *Rex* v. *Gutch*, 1 Moody & M. 433; *Advocate-General* v. *Grant*, 15 D. 980; *Graham* v. *The North British Bank*, 12 D. 907; *Wontner* v. *Shairp*, 4 Railway Cases, 542; *Burnes* v. *Pennell*, 6 Bell Ap. 541. 2. Because the appellants, in violation of their duty as brokers, misrepresented or concealed the facts in regard to the condition of the company, whose shares they were employed to purchase.

Sir F. Kelly and *Willes*, for the appellants.—The record shows no valid defence to the action, which is one simply to recover money lent. The fact that we acted as brokers in buying the shares can make no difference, for the shares were bought in the open market, in the usual way, from those having shares to sell. There being nothing doubtful as to the fact of our acting as brokers, there should have been no issue as to that, for the fact is quite immaterial. But that issue proceeds on a false statement of the law; for it assumes the duty of a broker to be to disclose to his principal the nature or quality of the article which the principal has instructed him to buy. Such a doctrine exists neither in the law of Scotland nor of England. There is no such duty cast on a broker by common law.—*Wilde* v. *Gibson*, 1 H. L. Cas. 605. Then comes the question of relevancy. Fraud is attempted to be set up as an answer to the action. But the fraud is not properly alleged; and even if it was, it was in no way incident to the contract of loan, which is the contract libelled on. Nothing is better settled than that allegations of fraud must be specific.—*Irvine* v. *Kirkpatrick*, 7 Bell's Ap. 186; *Wilde* v. *Gibson*, 1 H. L. Cas. 605. Here the allegations are quite vague and loose. The most important one is, that the annual reports made by the directors to the company were "delusive;" but it does not set forth the report, nor does it allege that the report made was false to the knowledge of the party making it, which is an essential allegation.—*Cornfoot* v. *Fowke*, 6 M. & W. 358. Moreover the reports were made, not *by* the company, but *to* the company. The company themselves were the deceived. The manager or directors had no authority to make false statements, and therefore anything he or they may have stated falsely could not bind the company. It is not enough to bind the principal that the agent has been guilty of fraud—*North of England Banking Company re Dodgson's case*, 3 De G. & Sm. 85—though the agent is no doubt personally liable. Innocent shareholders cannot be bound by the directors fraudulently representing the shares to be of great value. The directors were not the agents of the company to sell the shares.

[LORD ST. LEONARDS.—Still the company had a double character of bankers and brokers. This was not a mere purchase by itself, but it was a purchase on the representation of the directors, and on the inducement of money being advanced by the company to effect their own object, viz., to raise the price of the shares.]

[LORD BROUGHAM.—If the company directly profit by the fraud of their agents, will they not be liable in an action?]

No; for how can the fraud be brought home to the innocent shareholders who never authorized the fraud? Many cases may be conceived where the benefit may accidentally enure to the principal, and yet no action be competent against him, for it must always be alleged that the representation was false to the knowledge of the person making or authorizing it.—*Gerhard* v. *Bates*, 2 E. & B. 476. This was a case of simple loan, which is an implied contract to repay, and nothing can defeat that contract, unless the company were guilty of misrepresentation and fraud in effecting the loan. It is not enough to say that there is fraud in some collateral matter. Further, the defenders do not offer to give up their shares, but seek to retain them, and yet not pay the price. At all events, they seek to set off against the amount of the company's claim the damages they allege to be incurred in respect of the misrepresentation in purchasing the shares. Their only remedy, however, is a cross action for deceit against the manager and directors who have deceived them, when they may recover such damages as will meet their loss; but it is incompetent to set off an unliquidated claim of damages against a liquidated sum. That would be too wild a kind of justice. The position of the respondents resisting this action is altogether anomalous and irreconcileable with the law of England, for, by their own statement, they, as members of the company, are themselves responsible for the very fraud which they set up as a defence; and if the shareholders are guilty, they themselves must be equally so.

Solicitor-General (Bethell), and *Anderson*, Q.C., for the respondents.—It is a mistake to say that a shareholder cannot resist such an action, because he, being one of the company, is necessarily one of the pursuers. By the law of Scotland the company is a separate person, and is as much a stranger to each of its partners as any third person is. The main question is—Whether there is here a relevant defence on the record. The pleadings are no doubt loose, but the effect of them is, that the parties seeking to recover were guilty of fraud in inducing the defenders to enter into the contract out of which the alleged debt arose. Though the appellants seek to make out that the contract of loan was distinct from that of sale, we contend they were one and the same transaction, and it was superinduced by fraud. It is said the manager could not bind the company by any fraudulent misrepresentation, but the company, being both bankers and brokers, and the manager having authority to sell and lend, must be held to have acted within the scope of his authority, or in the course of his dealing. The company could not, in the nature of things, carry on this business in person, but must employ agents, and if the agent, in the course of his dealings, by fraudulent misrepresentation, procure a benefit to the company, the latter cannot be allowed to profit by it, and yet repudiate the agency and its consequences. The misrepresentation partly consisted of statements made in the annual reports by the directors to the company; but, as it was the duty of the directors to make these reports correctly, and as the company adopted them at their half yearly meetings, the company must be held bound by the misrepresentations therein contained. If it were once admitted that a company could not be bound by the misrepresentations of its agents when dealing with the public, there would be no protection against the grossest frauds. This is not a case where the company are sought to be made personally liable for the fraud of its agents, but where they are trying to recover the money. These doctrines are assumed in *Ranger* v. *Great Western R. Co.* 5 H. L. C. 72; *Langridge* v. *Levy*, 2 M. & W. 519; 4 M. & W. 337; *Wontner* v. *Shairp*, 4 Rail. Cas. 542. So in a case somewhat resembling this, viz. *Gerhard* v. *Bates*, 2 E. & B. 476. In *Burnes* v. *Pennell*, 6 Bell's Ap. 541, the doctrine is also assumed; for though there the law agent of the company was held to have no authority to bind the company, if he had been a director it would have been different. In short, the broad rule may be laid down, that if a principal take the benefit of a contract made by the agent's misrepresentation, he thereby adopts the act of the agent, and makes the fraud his own. The case of *Cornfoot* v. *Fowke* was a strong one, and if it were not that the decision turned chiefly on the form of the plea, it could not be upheld as sound. In *Fuller* v. *Wilson*, 3 Q. B. 58, it was held that the party defrauded may maintain an action against the principal, though the agent did not know the representation he made to be false, and for that purpose the principal and agent were identified. The cases of *Brown* v. *Syme*, 12 S. 536; *Graham* v. *North British Bank*, 12 D. 907; *Advocate-General* v. *Grant*, 15 D. 980, all proceed on the same principle, and go further than the law of England in making a principal liable for the misrepresentation of the agent. It is said our remedy is a cross action against the director and manager; but as the Court of Session is a Court of equity as well as law, complete justice may be done in the same action.

Sir F. Kelly replied.—We rely on this, that there is no allegation that the manager made any representation which he knew to be false; far less that the company made such a representation. The facts set forth rather shew that the company believed their reports to be true. The cases cited on the other side do not apply. No answer has been given to the argument, that the defenders seek to keep the shares, and yet refuse to pay the price.

[LORD ST. LEONARDS.—The Court of Session is a Court of law and equity, and could set aside the contract, and make it a condition that the defenders should transfer the legal interest. A defendant seeking equity must do equity.]

But that could not be done on this record. An action of reduction would be necessary to set aside the contract. The shares still belong, in point of law, to the defenders. Moreover, it is sought to set off the damages against the liquidated demand, which is incompetent, and yet the respondents do not ask the contract to be set aside.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—My Lords, this was was an action brought in the month of August 1848 by certain members of the National Exchange Company, to recover from the defenders the sum of £600, with interest, and certain small charges, being, as they allege, money advanced by them, in order to enable the defendants to purchase 240 shares in the company of the appellants. 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, the company, 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 in the Court below to this claim, and the question is, whether those defences made a relevant case of defence. Beyond deciding that that was a relevant case of defence, certain issues were proposed to be tried, as the result of the defenders having stated that *primâ facie* case. Whether these were proper issues or not is not the question for your Lordships to decide. The single question upon which your Lordships are called to adjudicate is this, whether the Court of Session were right in holding that the statements put in by the defenders constituted a relevant defence to the case made by the pursuers.

The case made by way of defence is, that this advance of money was made by the company under circumstances which disentitled the pursuers to take it as having created any debt due to them from the defenders; for they say, 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 insolvent, or nearly so. The statements upon that subject are as follow:—"At the first annual meeting, held on the 17th September 1846, (the transaction in question being in October 1847,) 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 by the supplementary contract, had resolved to declare a dividend of £8 6*s.* 8*d.* per cent., which was accordingly paid." "The second annual meeting was held on the 16th September 1847, (which was shortly before the transaction in question,) when 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 £5500." The statement goes on to say—"this report was entirely delusive." In fact the statement amounts to this, that that was a fraudulent misrepresentation.

Then the defenders say, that that fraudulent misrepresentation having been made shortly before their advance, that the affairs of the company were in this flourishing state, whereas they were insolvent—that being a fraudulent and concocted report upon the part of the company, it 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, and that they would not enforce payment till the shares could be sold at a profit.

Now the question is, whether any relevant defence is stated by means of this statement on this record? The Court of Session held that there was, and proceeded to settle the issues. I have already remarked that we have not to decide as to the issues, but only 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. I need not travel to other countries; but 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—First, because the fraud alleged was not a fraud leading to the contract sued on, that is, the loan. What is sued on is the loan; whereas the plaintiffs say, that the fraud, even if there were a fraud on the part of the plaintiffs, was not a contract leading to the loan, but a contract inducing the persons who had borrowed to apply the money in purchasing something at an exorbitant price, in consequence of a fraudulent representation, supposing the price not to be exorbitant, which they would not have done, had it not been for the fraudulent representation. But they say that does not affect the loan; that was an independent transaction, which was unconnected with the fraud. Secondly, they say that no fraud is alleged against the plaintiffs, but only against the directors, which was a fraud *upon* the plaintiffs, and not a fraud *by* the plaintiffs. And, thirdly, they say, supposing those 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.

Now, in order to consider the first proposition, namely, that there is a relevant case of defence stated, independently of any allegation of fraud, I wish to consider the case as it would have stood, if these pursuers, instead of being a joint stock company, had been a mere association of two or three individuals, or a single individual or banker. Then is there any relevant defence if he had been sued?

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 not that there was a loan at all. The whole transaction must be stated together. What really took place was this, that the plaintiffs (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 matters in the market which may be purchased, and which are worth 50*s.* a share.

Now, I will assume it was very much for their own interest that they 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 it, 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.

I think that is the legitimate construction of the following statement by the defenders:—"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 (*i. e.*, 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, 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, that may seem a short cut to a conclusion in this case, but I confess, that, having thought the thing over and over again, I can see no answer to it. 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 these 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.

Then this would seem to render it unnecessary to consider the other matters which have been so elaborately argued, if I am right in saying that the whole was one transaction; that there never was really a loan, in the ordinary sense of the word; that there was merely a purchase as agents for the defenders, upon a special contract for being repaid only in a particular manner, which does not constitute a loan to warrant this action. But I should be extremely reluctant to let the case fall through, as it were, upon that short and summary statement, without explaining, to some extent, what my views would have been in this case, and what they are, supposing that were not a relevant defence.

Now upon this part of the case I have also had, from time to time, the greatest fluctuation of opinion. The defences which have been insisted upon are, first, that the contract sued on was not a contract arising out of the alleged fraud and misrepresentation. I quite 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 to say, that as to the contract in question, if the pursuers were right in saying that the loan 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 quite accede to that argument. I think, that if I fraudulently represent to another that something in the market is worth £100, 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*. The proper remedy in such a case would have been, that the party who lent the money should recover the loan, and 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. I think that course would certainly 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, and I want some money for some other purposes; if you will lend me £1000, I will make that purchase"—that would have been equally a fraudulent misrepresentation, and a fraudulent misrepresentation that, in one sense, led to the loan. But nobody could say that the lender could not recover any portion of the £1000 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 nor 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, and there being no question at all of the damage, it would be monstrously unjust, or might be monstrously 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 entirely collateral matter, in respect of some damage on account of which he may have a right of action for a fraudulent misrepresentation, 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, of any other country.

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, is the lender of the money to take to the whole? In short, it appears to me to be conclusive, that, neither upon principle nor upon authority, could there be anything to warrant such a course as that. Therefore I am of opinion, that if the loan and the purchase had been independent transactions, then 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, that, 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 not a fraud by the company; that in fact the company were not deceivers, but were deceived. Now upon that subject 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, and 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. I do not see that that portion of the deed is quoted, but I take it for granted that there can be no doubt about it, 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. Now, for the present purpose I will assume that, in order to raise the value of the company, and of the particular shares held by the company, they 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, my Lords, 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 of the company. The company, as an abstract being, can represent or do nothing. It can only act by its managers in its ordinary transactions, or by its directors or agents, where there are duties to be performed by the directors in other matters. 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 that 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 kind 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 never so false and never so fraudulent, and yet, nevertheless, that the company may and must benefit by these representations, without being at all capable of being in fact told, That is your fraud; because the company can act in no other way than by its directors.

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 be shareholders, just 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—*Burnes* v. *Pennell*. With 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 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 shewing correctly the state of the company. It was no duty of Mr. Gilmour, in that case of *Burnes* v. *Pennell*, to make any representation at all—as to that which he did represent, he was a mere law agent or solicitor of the company. He, therefore, was speaking quite *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 very gross injustice.

I think, therefore, that even if there had not been the grounds 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.

Now it was said that the persons imposed upon were 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 1100 odd shares in the company previously to this purchase. 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 on 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 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 could 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, (whom 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 the 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 your Lordships are called upon to adjudicate upon the rights of parties, half your 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 was not relevantly

stated. But, after all, your Lordships have always been in the habit of saying, that on matters which are rather matters of practice than of law, your Lordships are very reluctant to interfere with the decisions of the Judges of the Court of Session, who, it is idle to deny, must be more familiar with what is their own practice than your Lordships can pretend to be. And in this case the Judges seem to me to have been decidedly of opinion, without any sort of hesitation upon this point, that this is relevantly pleaded.

Now the mode in which it is stated is this. I will not allude to the statement at the meeting of 1846, for that was so long before the purchase that it may be dismissed. But it is stated, 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 £5500, 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. Then comes the statement, which I have already mentioned, as to the inducement to these persons to purchase, and then it is said, "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, undoubtedly, 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 dealt with. 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 readily grapple with. At the same time, I confess that I do not feel sufficient confidence in my notion, that this is at least a very inexpedient mode of stating the case, to oppose the finding of the Judges below unanimously upon that subject—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, because I think the ground of defence made upon the 9th statement is sufficient, independently of all these considerations. Having, as I fairly confess, 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 write upon it, and considering it, to see in what way this case ought to be put, I confess I convince 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 these other considerations. I think that, independently of these, 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.

LORD BROUGHAM.—My Lords, I, as well as my noble and learned friend, have had very grave doubts, to say the least of it, 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, would reverse their judgment upon the ground of these 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 pleadings as the practice in the Court below, and when various instances of that 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 these cases exist in books—and no doubt in these 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 the 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 misrepresentation 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 that we are told "the report was entirely delusive, no sufficient allowance having been made for bad debts," and so on, giving some 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 report of the directors and the statements of their manager were a tissue of falsehoods." Pleadings ought not to be rhetorical or metaphorical; they 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 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 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, viz., 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)—take 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 interlocutor 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 and odds, 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 worth £50 in the market, and they represent to the party that they are worth £100; but they lend him the £100, 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 shares which proved in reality not to be worth more than £50.

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 to be 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? He is told they are worth £100, whereas they are only worth £50. The company lend 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 held that no loan took place. But is he to retain the shares worth only £50, and not to pay back the moneys which the company advanced him in order to enable him to puchase them? My noble and learned friend's view of the case is calculated to

get over that difficulty, because, though he does not, on 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.

It is said in the defenders' statement:—"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, not "without calling upon the borrower to repay the money lent," but "until the shares could be sold at a profit, 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 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." However, I incline to think, upon the whole, that, though we could not set off the claim made against the company for misrepresentation, whereby he had been damnified by being made to purchase what was not worth so much as they represented, yet, that we may set off that in this view of the case as against the company, when calling upon him to make repayment of the loan.

Upon the whole, 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 am so far with him as not to object to that judgment of affirmance.

LORD ST. LEONARDS.—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.

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.

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 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.

The case has been so fully stated, that I will simply refer to the case as it stands in regard to the allegations referred to. It is stated in the defences:—"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 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 realized—you will have the benefit of them, and no loss will ever come upon you. But the concluding part of the 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 those 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 realized; 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 misrepresentations. Then they state why. Now there is a distinct allegation, general, no doubt, but clearly a distinct allegation, of gross fraud and misrepresentation. The actual pleas which were pleaded in law upon these statements include 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. In the condescendence the statement is 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 at a profit. The second plea also is the same 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 shew 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 January 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 representation, or if their manager made a representation which binds them, he acting as their agent, the company were to have the benefit of that representation, 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 the representation, that benefit would throw upon them the obligation which attaches to persons who make false representations to those with whom they deal.

Now, what was the situation of the company? The company were bankers, money lenders, and brokers. They acted in all these capacities, 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 advance the money, and with the assurance that it was all profit and no loss, that the company would be perfectly 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 be 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 these brokers, and the shares were bought. The company charged 8 per cent. upon their advances, besides charging ½ 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 former account, which is the account of the purchases for the defenders by the company, the charge of commission of £3 was a charge of brokerage, but it was no such thing. The transaction was exactly this—(His Lordship here referred to details). 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. If you want to account for the £3 commission, you will find that it is, precisely what it purports to be, ½ per cent. upon the whole advance of money upon all the shares. That, therefore, shows clearly, that the £3 commission which has been given up, and the £2 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 themselves have founded upon:—"Debtor. Messrs. Peter Drew and Matthew 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 advance of money for the purchase of those shares. Is not that an adoption by the company of the whole transaction? Do not they, by the allowance of half of the commission, shew that they were acting as brokers for these persons? Do not they shew that they were acting as agents for the purchase, and as upon an advance of money? It shews 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 never were 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 never have 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 these shares would impose upon them, whilst they were making 8 per cent. for the money, they advanced the money and got ½ 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 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 must certainly have come to this conclusion, that if representations are made by a company fraudulently, for the purpose of enchancing 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 this report was read? The very 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 ably upon representations by agents. I think we need not embarrass ourselves much with that question here, because I consider that here it is made out that the representations were 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 point upon which everything turns. He was the person who advanced the money; he was the person who conducted the brokerage. Then I find that the agent who has all these powers is the manager of the bank; is the person who has the power of advancing money; is the person who has to direct the brokerage;—if I find him acting as the broker 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 of *Cornfoot* v. *Fowke*, 6 M. & W. 358, upon which I will say a word with regard to misrepresentations of 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 the brothel, 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 non-performance of the contract. Upon the trial, the jury, under the direction of Lord Abinger, C.B., 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, but who had not mentioned this fact to his agent. There was no fraud upon the part of the agent, because he was not aware of the circumstance. One had not got the mutton, and the other had not stolen it; and consequently the gentleman was fixed with the contract.

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 further. I should say, that if in that case fraud had not been alleged, but it had been put upon misrepresentation, and the facts were, that a man, knowing that there is so serious a nuisance affecting a house so as to diminish its value in such a way that no man of respectability could live in it, and he takes care himself not to make the contract, but leaves it to an agent who 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 in fact it was false, and false to the knowledge of the principal, although the agent did not know it, it ought to bind the principal. 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, it would bind the principal, and thus impeach the validity of the contract.

The 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 it has been pressed very much upon the doctrine of set off, and upon the impossibility of reducing, as it is called, this transaction in this particular case. Now I think the law of 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. 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 a liquidated 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 friend for saying that it is,) that this is 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, after the defence which has been put into this action, if it be unsuccessful? Clearly and 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 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 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 possession. They can burn them if they please; and that, probably, would be the best way of disposing of them. They have them in their own possession. 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 transaction, therefore the 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 on 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.

There are two cases which have been referred in the Court of Session in Scotland. One is *Brown's case*, 12 S. 536. There an acting director, who was a partner in a joint stock company, brought an action against a purchaser of shares in his own name, just as here, and the defendant 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 that there was any ground of set off, or any difficulty, such as has been suggested in this case.

Then with regard to the case of *Graham* v. *North British Banking Co.*, 12 D. 907, there was a fraud there by the bank upon sales of shares for which bills were given there 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.

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 parties 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, with costs.

Appellants' Agent, J. F. Wilkie, S.S.C.—*Respondents' Agents*, Wotherspoon and Mack.

APRIL 3, 1855.

JOHN FLEEMING and JAMES FORRESTER, *Appellants*, *v.* JOHN ORR, *Respondent.*

Reparation—Culpa—Negligence—Liability for dog worrying sheep—*Some sheep belonging to A having been killed by a dog, the property of B, then in the keeping of C, an action was brought by A for recovery of the loss against both B and C.*

HELD (reversing judgment), *that it was not enough to allege mere ownership of the dog, but it must also be alleged and proved that the owner or keeper of the dog knew that it was a dog of vicious habits and dangerous to sheep, and did not take care to secure it: or at all events must allege some negligence in the keeping of the dog.*[1]

This was an action to recover the value of 18 sheep belonging to the respondent, alleged to be worried by two dogs, a collie and a foxhound, the latter the property of the appellant Fleeming. The foxhound was a puppy seven months old kept by Forrester, a tenant of Fleeming's farm. The dog was allowed to go at large.

The Court of Session held that the owner of the dog was liable, and that it was unnecessary to allege that the owner knew its propensity was to worry sheep.

The defenders appealed, arguing in their case that the judgment of the Court of Session should be reversed—"1. Because no relevant ground of action had been libelled, in respect the summons contained no allegation that the dog was of a vicious disposition and dangerous to sheep, and that this was known to the appellants, or either of them. 2. Because the respondent was bound to have averred *culpa* or negligence on the part of the appellants, or either of them, as the ground of liability sought to be enforced. 3. Because the Court below had, by their judgment, sustained as a sufficient ground of the appellants' liability, the proof of the fact that the respondent's sheep were worried or destroyed by a dog, the property of the one appellant, at the time in the charge and custody of the other appellant; whereas, in order to entitle the respondent in law to recover, he was bound to have alleged and proved that the dog was of vicious habits and dangerous to sheep, and that this was known to the appellants; or, all events, that the dog was of a fierce and savage disposition, and that the appellants were aware of it.—Ersk. iii. 1, 13; Stair, i. 9, 5; Exodus xxi. 28 and 29; *Turnbull* v. *Brownfield*, Dec. 6, 1735, Elchies, *voce* Reparation, i. 1; *ibid.* ii. 1; *Todridge* v. *Andrew*, Fountainhall, iii. 223; *Brown* v. *Stewart*, 3 S. 187; *Gray* v. *Brassey*, 15 D. 135; Buller's Nisi Prius, p. 77."

The respondents maintained—"1. The judgment pronounced by the Court below is only subject to appeal in so far as it depends on, or is affected by, matter of law; but, in so far as it relates to facts, it must be held to have the force and effect of a special verdict of a jury, conclusively fixing the several facts specified in the interlocutor.—6 Geo. IV. c. 120, § 40. 2. The sheep having been destroyed by a foxhound belonging to the appellant Fleeming, while under the charge, or in the keeping, of the other appellant Forrester, both of these parties are liable in law for the value of the sheep.—Ersk. iii. 1, 13, and Bell's Prin. § 553. 3. Due effect being given to the averments of parties and evidence, the judgment of the Court is warranted, even on the principles of law contended for by the appellants."

Rolt Q.C., and *Wood*, for the appellants.—We admit we are bound by the facts as they are found in the Sheriff Court, for the Court of Session merely repeated these findings of the Sheriff. It, however, nowhere appears throughout the proceedings, that the dog was ferocious, or was kept negligently. The question therefore arises—Whether the bare ownership of a dog subjects the owner in liability for whatever damage it does, without any negligence on his part? for negligence is only another mode of saying that he knew that the dog had vicious habits, and yet took no precautions to protect the public. There is no difference between the law of England and Scotland on this subject. It is established in England, that an action on the case cannot be sustained without an averment of negligence on the part of the owner—in other words, the *scienter* is of the essence of the action.—Buller's Nisi Prius, 77 a; *Judge* v. *Cox*, 1 Stark. Rep. 285; *Beck* v. *Dyson*, 4 Camp. 198.

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[1] See previous report 15 D. 486; 25 Sc. Jur. 297. S. C. 2 Macq. Ap. 14; 27 Sc. Jur. 364.