

by the defender's violence, and I consider I am entitled to take this into account in granting decree of separation. I think, however, that provision must be made for the maintenance of the wife, and decree has been granted on the pursuer's undertaking to afford his wife alimony at the rate of 3s. per week."

Counsel for the Pursuer—Dove Wilson.
Agent—R. G. Bowie, W.S.

Tuesday, November 10.

OUTER HOUSE.

[Lord Stormonth Darling.

HONEYMAN v. DICKSON AND
OTHERS.

Company—Directors—Fraudulent Concealment and Statements in Prospectus—Relevancy.

A party applied for and obtained shares in an insurance company on the faith, as he alleged, of the original prospectus, and afterwards, on a new issue being made, obtained further shares on the faith of a new prospectus, and on a third issue being made, obtained a third allotment on the faith of the first annual report by the directors and of a third prospectus. The company turned out a failure, and the shareholder brought an action of damages against the directors on the ground that he had been induced to take the shares by fraudulent misrepresentations made by them in the said prospectuses and report. Averments of fraud and concealment held (by Lord Stormonth Darling) irrelevant to support the conclusions of the action, as being either (a) of concealment of matters not affecting the truth of the statements made in the prospectus, (b) of sanguine prophecies as to the future of the company, or (c) criticism of the directors' system of bookkeeping in preparing the company's balance-sheet.

This was an action of damages at the instance of John Honeyman, Elmwood, Cupar, against James H. Dickson and others, directors of the Employers Assurance Company of Great Britain, now in liquidation, and concluding for damages to the amount of £4354, 19s. 5d., being the amount of calls paid by him on his shares in the company, with interest thereon, on the ground that he had been induced to become a shareholder by fraudulent misrepresentations made by the said directors in certain prospectuses and in a report of the company.

The company was registered on 6th July 1887 under the name of The Glasgow Employers Insurance Company, and assumed its present name by minute of the Board of Trade, duly registered on 20th July 1888. The capital was £250,000, divided into 50,000 shares of £5 each. In December 1888 a

prospectus inviting application for these shares was sent to Honeyman, who applied for and was allotted 200 shares. With regard to this prospectus Honeyman alleged that it contained the statement that "From the auspices under which this company is formed . . . its shares are confidently recommended to investors seeking a safe and at the same time remunerative investment," and that "it concealed the fact that the company had been registered for nearly eighteen months, during which time it had changed its name and had been unable to place its shares, and led the pursuer to believe that the company had just then been formed under auspices favourable to success."

In August 1889 the directors of the company made a further issue of capital, in respect of which they issued a new prospectus, and of which Honeyman applied for 300 shares. With regard to this prospectus he founded on the statement—"The directors are satisfied that the business already secured is of a very profitable kind, and that it has been got at exceptionally low cost, while the loss ratio has been insignificant. As the business is now in full operation throughout the United Kingdom, and is being conducted on what the directors are confident is a sound and profitable basis, it has been decided to issue the additional shares at a premium of 3s. per share. The prospects of the company are of the best kind, and should make its shares an exceptionally good investment."

In May 1890 a third issue of shares was made. The prospectus which was sent to Honeyman referred to the first annual report of the company, which announced a dividend of 4 per cent., and contained general statements (which it is unnecessary to quote) with regard to the success and prospects of the company. Of this issue Honeyman applied for and obtained 500 shares. With regard to the report and prospectus he made the following allegations:—"The whole of the material statements contained in the said prospectuses and report and balance-sheet before referred to, on the faith of which the pursuer was induced to take shares as aforesaid, were untrue and misleading, and further were false and fraudulent, and the pursuer was deceived thereby. The directors of said company were aware of the falsehood of said material statements at the time of issuing the same, and, in any event, they made said statements recklessly and with culpable negligence, without sufficient or reasonable inquiry as to their truth, and had no reasonable grounds for believing them to be true. The recklessness and negligence with which the said statements were made were so gross as to amount to fraud upon the pursuer. The company did not earn the dividend of 4 per cent. paid in February 1890, for the ten months ending 31st December 1889, nor any dividend. The business had been carried on at a loss from the first, and the said dividend was paid out of capital. The revenue account and balance-sheet issued with said report for 1889 were grossly

inaccurate in many particulars, and the credit balance of £3668, 6s. 5d. appearing in the revenue account was arrived at by falsely and fraudulently swelling the income and suppressing the liabilities incurred at the date of closing the accounts. In particular, the income was made to appear larger by including a sum of £85, 16s., received for premiums on issue of new shares, which sum was really capital. Claims which had been incurred prior to 31st December 1889, but which had not been actually settled, were suppressed to the extent of £420. No provision was made for bad debts or cancellments of premiums outstanding, and no provision was made for setting aside any sum to meet the claims which would arise under current policies. The sum required to meet such claims, that is to say, the proportion of unexpired premiums which ought to have been set aside to meet risks under policies current at 31st December 1889, was not less than £2800, and the allowance required for bad debts and cancellments was not less than £380. At the date when said balance-sheet and report were issued the directors knew, or had the means of knowing, the extent to which the then outstanding claims had eventuated in payment, and they were well aware that until proper provision was made for same and for the unexpired risks on current policies, it was impossible to ascertain whether any profits had been earned out of which a dividend could properly be declared. They, however, deliberately refrained from stating the proportion of the alleged credit-balance which had already been absorbed by payment of claims intimated prior to 31st December 1889, and the amount which required to be set aside as a provision for future claims, as such statement would have prevented the public from subscribing for shares in said company. The pursuer and the public generally were thereby led to believe that the company had actually earned profits far in excess of the sum required to pay the dividend of 4 per cent. when in fact it had not earned money to pay any dividend at all. Further, in the balance-sheet at said date the investments and office furniture were all stated on the 'assets' side at their cost price, notwithstanding the fact that they had shrunk in value. If the assets had been stated at their true value, as they ought to have been, and if the directors had made reasonable and proper provision for risks under current policies, bad debts, and cancellments and claims actually incurred but not paid, the said revenue account and balance-sheet would have shown that the company had incurred a loss, or at all events that it was not able to write off any part of the preliminary expenses, nor to pay any dividend whatever."

The company fell into liquidation in 1895, and calls were made on the shareholders. Honeyman brought the present action and pleaded—“(1) The pursuer having been induced to apply for, take, and hold the shares in question in consequence of the false and fraudulent representations of the defenders,

and having thereby suffered loss, all as condescended on, is entitled to decree against them as concluded for.”

The directors pleaded—“(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons.”

On 10th November 1896 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor—“Finds that the pursuer has not set forth a relevant case; therefore dismisses the action and decerns: Finds the comparing defenders entitled to expenses.” &c.

Opinion—“The pursuer is the holder of one thousand shares in the Employers Insurance Company of Great Britain (Limited), now in liquidation. Two hundred of these were allotted to him in December 1888, three hundred in September 1889, and the remaining five hundred in May 1890. He says in this action that he was induced to take these shares by the false and fraudulent representations of the directors, and he sues them for damages accordingly. He derives no aid from the Directors Liability Act of 1890, for the prospectuses of which he complains were all issued before its date. The action is laid entirely on fraud, and fraud in this matter, as defined in the leading case of *Derry v. Peek*, 14 App. Ca. 337, means that the false representation has been made with knowledge of its falsehood, or without belief in its truth. I need hardly add that an action laid on so serious a ground must be very precise in its averments.

“The pursuer begins by complaining of a prospectus issued in December 1888 wanting subscriptions to a first issue of shares. It is in the nature of such a document to be sanguine about the future, and the pursuer does not seriously challenge its mere prognostications. His sole complaint is that ‘it concealed the fact that the company had been registered for nearly eighteen months, during which time it had changed its name and been unable to place its shares.’ I greatly doubt whether these were material facts; if they were, the pursuer might have learned them by inspecting the memorandum and articles of association at the office of the company's solicitor, as the prospectus itself warned him to do. But mere concealment even of a material fact will not ground an action for fraudulent misrepresentations, unless, in the oft-quoted words of Lord Cairns in *Peek v. Gurney*, 1873, L.R., 6 Eng. and Ir. App., at p. 403—‘the withholding of that which is not stated makes that which is stated absolutely false.’ I look in vain for any statement in this prospectus which is falsified by the non-disclosure of these two not very important facts. Accordingly, with regard to this prospectus, I think the pursuer's averments irrelevant.

“Against the next two prospectuses, which led to the pursuer's second purchase of shares, there is nothing said except that they described in favourable terms the nature of the business which had been already secured, whereas the business of the company was never profitable, and it was carried on at a loss from the first.

But vague general statements of that kind will not sustain a charge of fraud. They are statements which point rather to its having been discovered *ex post facto* that the views of the directors had been too sanguine and their management bad. If it was to be shown that the directors in describing the prospects of the business as they did, were guilty of actual fraud, they ought to have been told much more precisely in what respect.

“But the main attack of the pursuer is directed against the first report and balance-sheet issued to the shareholders in February 1890, and the prospectus of May following which led to his third and largest purchase of shares.

“Now, I take leave to observe with regard to the report that in the case of a new company doing insurance business, it is utterly impossible to tell, within the first ten months of its existence, whether the business is to be profitable or not. The period is much too short. There are the premiums out of which a dividend may be paid, but what proportion of these premiums represents profits cannot be ascertained for some time, and the utmost that can be done is to make some sort of estimate on a conservative basis, so as to retain a safe margin for losses without entirely sacrificing the interests of existing shareholders. Anyone reading such a report is bound to know that these are the necessary conditions under which it is framed.

“The pursuer’s first charge against the report is that it carried a sum of £85, being the amount of premiums on the issue of new shares, to the credit of revenue account. This may or may not have been bad bookkeeping, but it was certainly not fraud, for it was disclosed on the face of the balance-sheet. Next, it is said that claims which had been ‘incurred’ prior to 31st December 1889, but had not been actually paid, were ‘suppressed’ to the extent of £420. I assume, of course, at this stage, that claims to that amount had become due, and that the directors knew it, but I do not see that the mere omission to mention the precise figure could have any appreciable effect on the mind of a reader of the report when it was distinctly stated that the whole balance of £3668 at the credit of revenue account was ‘subject to future claims arising under current policies.’ What the amount of these claims might be was, rightly enough, left vague, and that it might be large was sufficiently indicated by the fact that the directors proposed to appropriate only a sum of £295 for writing off preliminary expenses, and a sum of £341 to pay a dividend at the modest figure of 4 per cent., thus leaving over £3000 to be carried forward to next account. If the claims already ‘incurred’ (to use the pursuer’s phrase) had been so large as to exhaust the greater part of the available balance, it would not have been honest to pay any dividend at all, but with the figures as they stand on the pursuer’s own showing, it is vain to say that at the time there was anything like a paying of dividend out of capital. There is a further allegation that

the directors knew the extent to which outstanding claims had eventuated in payment between the close of the year and the date of issuing the report, but I fail to see the relevancy of that unless the pursuer was prepared to aver that these were of so exceptional an amount as to upset all the estimates on what the report was based. In short, when Cond. 8 is analysed, I think it comes to no more than this—that in the light of subsequent events the directors were wrong in paying any dividend, because the business had never been a paying one. But that is very different from saying that they were in possession of this and that fact, which made their conduct in issuing the report and balance-sheet false and fraudulent at the time.

“I say nothing about the prospectus of May, because, apart from mere puffing of the business, it is not challenged except as being founded on the report and balance-sheet. It is said that an extract from the report giving the balance of £3668 on revenue account made no reference to the fact that it was subject to future claims arising out of current policies. But this could not possibly deceive the pursuer, who was already in possession of the report containing a notice to that effect.

“The remaining articles of the condescence deal with the subsequent management of the company, and have no bearing on the inducements which led the pursuer to become a shareholder. My opinion is that he had not stated a relevant case of fraud, and that the action should be dismissed.”

Counsel for the Pursuer — Salvesen.
Agents — Hamilton, Kinnear, & Beatson,
W.S.

Counsel for the Defender — Chree.
Agents — Morton, Smart, & Macdonald,
W.S.

Friday, November 13.

OUTER HOUSE.

[Lord Kyllachy.]

A. B. AND OTHERS, PETITIONERS.

Process—Law-Agent—Notary Public—Law-Agents (Scotland) Act Amendment Act 1896 (59 and 60 Vict. cap. 49), sec. 3.

Procedure to be followed in a petition by a notary-public who has been in practice for not less than seven years, for admission as a law-agent without examination, under section 3 of the Law-Agents (Scotland) Act Amendment Act 1896.

This was one of several petitions by certain notaries public who had been in practice as such for not less than seven years, praying for admission as law-agents without examination, under the provisions of the Law-Agents (Scotland) Act Amendment Act 1896.

By section 3 of that Act it is provided—“After the passing of this Act any notary-public may at any time present a petition