Friday, March 12.

(Before the Lord Chancellor (Cairns), Lord Hatherley, Lord Selborne, and Lord Blackburn.)

CITY OF GLASGOW BANK LIQUIDATION —(*HOULDSWORTH'S CASE*)—HOULDSWORTH *v.* LIQUIDATORS OF THE CITY OF GLASGOW BANK.

Public Company—Partnership—Stock Purchased through Fraudulent Misrepresentations of Directors—Rescission of Contract after Liquidation Commenced—Damages.

Held (*aff.* judgment of the First Division of Court of Session) that a man induced by the fraudulent misrepresentation of agents of a company to take shares in the company, cannot, after he discovers the fraud, elect to retain the shares and to sue the company for the fraud.

A party bought stock in a bank of unlimited liability from its manager and directors. Some two years afterwards the bank failed, and calls were made upon him in respect of the stock which he had purchased. A month after the liquidation commenced he raised an action of damages against the bank on the allegation that he had been induced to purchase the stock by the fraudulent misrepresentations of the manager and directors. The action concluded for payment of the original price of the stock, damages for the loss suffered by the payment of the first call, and for payment of a sum of money to meet future calls. With a view to obtain this he asked either for a *pari passu* ranking with the creditors of the company, or for relief (after the creditors had been paid) out of the surplus assets of the company or out of the private estates of those partners of the company who might then be solvent. *Held* (*aff.* Court of Session) that as the only remedy which would have been open to the pursuer if the bank had still been carrying on business would have been an action for rescission involving *restitutio in integrum*, and as that remedy was now impossible owing to the insolvency of the bank, the pursuer's claim resolved into a demand, not against the incorporated company, but against the individual corporators, who were asked to relieve him of his liabilities after the ordinary creditors had been satisfied, and that as such it could not be maintained.

Case of *Addie* v. *The Western Bank of Scotland*, June 9, 1865, 3 Macph. 899, H. of L. May 20, 1867, 5 Macph. 80, *considered.*

This was an appeal in an action by Mr A. H. Houldsworth against the liquidators of the City of Glasgow Bank, claiming reparation in respect of a purchase of £4000 of stock made from the bank in February 1877. It was alleged that the purchase had been induced by the fraudulent representations and concealment of the directors, and the action concluded for (1) £9046, 5s. 3d., the price of the shares with certain charges; (2) £20,000, the amount of the call already made; (3) £200,000, the anticipated amount of future calls. The Lord Ordinary (RUTHERFURD CLARK) assoilzied the defender, and in a reclaiming note the First Division (*diss.* Lord Shand) adhered on July 4, 1879, 16 Scot. Law Rep. 700, 6 Rettie 1164.

Houldsworth appealed to the House of Lords.

Counsel for the respondents were not called on.

At delivering judgment—

LORD CHANCELLOR—My Lords, in this case the appellant bought from the City of Glasgow Bank £4000 of its stock in February 1877, paying £9000 for it. He was registered as a partner, received dividends, and otherwise acted as a partner. When the bank went into liquidation in October 1878 he was entered on the list of contributories, and has since then paid very large sums for calls. On the 21st of December 1878 he commenced the present action against the liquidators to recover damages in respect of the sum he had paid for shares and the moneys he has since paid for calls, and he founds his right to relief upon the ground of fraudulent misrepresentations made by the directors and others connected with the bank, for whose representations he alleges the bank was answerable.

As the question is one of relevancy, I will assume that the allegations of fraudulent misrepresentation are such as that if the bank had been a going concern the appellant would have been entitled to rescind his contract and to have recovered back all sums paid in respect of his shares. The Court of Session was of opinion that even although the averments amount to what I have stated, still they afford no ground for an action against the liquidators, and they have dismissed the action with costs. In my opinion the Court was right.

It was admitted before your Lordships—as indeed it could not be denied—that after the winding-up of the company commenced it was too late for the appellant to repudiate his stock, and that he must remain, as the liquidation found him, a partner in the bank, and a contributory as such. It also came to be admitted in the course of the arguments at your Lordships' bar that, if the appellant, remaining a partner, had a right to raise an action for damages against the liquidators after the winding-up, he must also have had a right before the winding-up to have remained a partner, and also then to have brought an action for damages. It appears to have been contended in the Court below that the appellant might be unable to maintain the present action as a claim in the liquidation to be satisfied *pari passu* with other creditors, and yet might be able to maintain it as a claim against the company, or against shareholders in the company, after all other creditors were satisfied. In the argument at your Lordships' bar I think it was felt to be impossible to maintain this theory of a deferred or secondary right of action against the company. I am satisfied there is no foundation for it. The winding-up Act has no provisions for the payment of claims against the company except the claims of creditors. Creditors are supposed to be paid *pari passu*, and there is no provision, after they are paid, for opening up fresh claims by a contributory against the company. There are, indeed, provisions which, after the debts are paid, enable any inequalities in the contributions of the contributories to be set right, but that is quite a different matter.

The question, therefore, mainly argued at your Lordships' bar, and upon which the decision of this case must, as I think, depend, was this—

Can a man induced by the fraudulent misrepresentations of agents of a company to take shares in the company, after he discovers the fraud, elect to retain the shares and to sue the company for damages?

There is no doubt that according to the law of England a person purchasing a chattel or goods, concerning which the vendor makes a fraudulent misrepresentation, may, on finding out the fraud, retain the chattel or the goods and have his action to recover any damages he has sustained by reason of the fraud. I will assume, although no distinct authority has been produced, and I do not wish to express a decided opinion upon it, that the law of Scotland in the case of a chattel or of goods is the same as that of England.

But does the same rule apply to the case of shares or stock in a partnership or company? We are accustomed to use language as to such a sale and purchase as if the thing bought or sold were goods or chattels, but this it certainly is not. The contract which is made is a contract by which the person called the buyer agrees to enter into a partnership already formed and going, taking his share of past liabilities and his chance of future profits or losses. He has not bought any chattel or piece of property for himself; he has merged himself in a society, to the property of which he has agreed to contribute, and the property of which, including his own contributions, he has agreed shall be used and applied in a particular way, and in no other way.

Does, then, the principle which in the case of a chattel admits of an action for damages, apply to the case of a partnership contract such as I have described?

It may go some way to answer this question to observe, that although during the last quarter of a century actions in every shape and form have been brought or attempted to be brought arising out of dealings in shares alleged to have been fraudulent, no case could be mentioned at the bar in which an action for damages has been sustained, the plaintiff retaining his position in the company. A few dicta were referred to, but they were of so vague and hypothetical a character that they are not deserving of further examination.

I will, however, ask your Lordships to look at the case on principle.

A man buys from a banking company shares or stock of such an amount as that he becomes, we will say, the proprietor of one-hundredth part of the capital of the company. A representation is made to him on behalf of the company that the liabilities of the company are £100,000 and no more. His contract, as between himself and those with whom he becomes a partner, is that he will be entitled to one-hundredth part of all the property of the company, and that the assets of the company shall be applied in meeting the liabilities of the company contracted up to the time of his joining them whatever their amount may be, and those to be contracted afterwards, and that if those assets are deficient the deficiency shall be made good by the shareholders rateably in proportion to their shares in the capital of the company. This is the contract, and the only contract, made between him and his partners, and it is only through this contract and through the correlative contract of his partners with him that any liability of him or them can be enforced.

It is clear that, among the debts and liabilities of the company to which the assets of the company and the contributions of the shareholders are thus dedicated by the contract of the partners, a demand that the company—that is to say, those same assets and contributions—shall pay the new partner damages for a fraud committed on himself by the company—that is, by himself and his copartners—in inducing him to enter into the contract which alone could make him liable for that fraud, cannot be intended to be included. Any such application of the assets and contributions would not be in accordance but at variance with the contract into which the new partner has entered.

He finds out, however, after he joins the company, that the liabilities were not £100,000 but £500,000. He is entitled thereupon, as I will assume, to rescind his contract, to leave the company, and to recover any money he has paid or any damages he has sustained; but he prefers to remain in the company and to affirm his contract—that is to say, the contract by which he agreed that the assets of the company should be applied in paying its antecedent debts and liabilities. He then brings an action against the company to recover out of its assets the sum, say £4000, which it will fall upon his share to provide for the liabilities, over and above what his share would have had to provide had the liabilities been as they were represented to him. If he succeeds in that action, this £4000 will be paid out of the assets and contributions of the company. But he has contracted, and his contract remains, that these assets and contributions shall be applied in payment of the debts and liabilities of the company, among which, as I have said, this £4000 could not be reckoned. The result is he is making a claim which is inconsistent with the contract into which he has entered, and by which he wishes to abide. In other words, he is in substance, if not in form, taking the course which is described as approbating and reprobating—a course which is not allowed either in Scotch or English law.

My Lords, whatever differences may be pointed out between this case and the case of *Addie* v. *The Western Bank* in this House, I think the *ratio decidendi* in that case would go far, if it did not go the whole way, to decide the present appeal. But I entertain no doubt, for the reasons I have stated, that on principle, irrespective of authority, the decision of the Court of Session was right. I will move your Lordships to dismiss the appeal with costs.

Lord Selborne—My Lords, the principle on which the cases of *Barwick* v. *The English Joint-Stock Banking Company*, May 18, 1867, L.R., 2 Exch. 259; *Mackay* v. *Commercial Bank of New Brunswick*, L.R., 5 P.C. 394; and *Swire* v. *Francis*, 3 P.C. App. Ca. 106 (relied upon by the appellant) were decided was thus stated by Mr Justice Willes in the former of those cases, and repeated (from his judgment) by the judicial committee in the two latter—"The master is liable for every such wrong of his servant or agent as is committed in the course of his service and for the master's benefit," because, although the master may not have authorised the particular act, "he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." To the principle so

stated no exception can, in my opinion, be taken, though the manner in which the master is to be answerable, and the nature and extent of the remedies against him, may vary according to the nature and circumstances of particular cases.

That principle received full recognition from this House in *The National Exchange Company* v. *Drew*, 2 Macq. 103; and *New Brunswick Railway Company* v. *Conybeare*, 9 Clark H. of L. Cases 711; and was certainly not meant to be called in question by either of the learned Lords who decided *Addie* v. *The Western Bank of Scotland*, H. of L. 5 Macph. 80. It is a principle, not of the law of torts, or of fraud or deceit, but of the law of agency, equally applicable whether the agency is for a corporation, in a matter within the scope of the corporate powers, or for an individual, and the decisions in all these cases proceeded, not on the ground of any imputation of vicarious fraud to the principal, but because (as it was well put by Mr Justice Willes in *Barwick's* case) "with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." It is of course assumed in all such cases that the third party who seeks the remedy has been dealing in good faith with the agent, in reliance upon the credentials with which he has been entrusted by the principal, and had no notice either of any limitation (material to the question) of the agent's authority, or of any fraud or other wrongdoing on the agent's part at the time when the cause of action arose.

In the greater number probably of cases of this kind, the question whether the fraud or other wrongful act of an agent could itself properly be imputed to the principal is not material, the liability of the principal to the third party, when properly measured by damages, being practically the same whether he was privy to the wrongful act or not.

Sir Montague Smith in *Mackay* v. *Commercial Bank of New Brunswick* criticised (perhaps justly) some expressions which fell from Lord Cranworth in this House in the two cases of *Conybeare* and *Addie*, particularly in the latter case, in which Lord Cranworth said that "an incorporated company cannot in its corporate character be called on to answer in an action for deceit." The sequel of Lord Cranworth's words appears to me to show that in using these expressions, perhaps technically inaccurate, he had substance and not form in view. In the old forms of common-law pleading, fictions were not seldom allowed, but not so as in the result to make the rights or remedies of the parties depend on the fiction rather than on the law applicable to the real facts, which were allowed under those forms of pleading to be given in evidence. In *Barwick's* case a corporation was directly charged with fraud upon the pleadings (no mention being made of agency), and an objection taken on that ground was treated by Mr Justice Willes as technical. "'If,' he said, 'a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the wrong of the person who is sought to be made answerable in the action.' And all that was laid down by Sir Montague Smith in *Mackay's* case itself was, that there might be cases in which, to work out the appropriate remedy against a principal who had profited by the fraud of his agent, the form of action technically called "an action of deceit" might be either necessary or convenient—that very learned Judge saying expressly that "the time had passed when much importance was attached to mere forms of action," and that "an action of deceit might be maintainable in which the fraud of the agent might be treated for purposes of pleading as the fraud of the principal."

In equity, one of the main heads of which has always been the redress of fraud, the constructive imputation of fraud to persons not really guilty of it has never been treated as the ground of relief, though the law of agency was administered according to the same rules in equity as at common law, and though in equity as well as at law an innocent principal might suffer for the fraud of an agent. Vice-Chancellors Knight-Bruce, and Parker, and Lord Chancellor Campbell (all very eminent Judges) said (as Lord Cranworth and Lord Chelmsford also said in this House) that the law does not impute the fraud of directors to a company, and the same proposition would, I apprehend, be equally true, in the sense in which they intended it, if the principal whose agent was guilty of fraud were not a corporation but an individual. The real doctrine which Lord Cranworth in *Addie's* case meant, as I understand him, to affirm was one of substance and not of form. "An attentive consideration," he said, "of the cases has convinced me that the true principle is that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the fraud of those agents to the extent to which the companies have profited by those frauds, but that they cannot be sued as wrongdoers by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally."

The words in this passage, "to the extent to which the companies have profited by those frauds," may perhaps require some enlargement or explanation, but, subject to that qualification, I am of opinion that this doctrine is in principle right, and that the present case is one in which (as in the case of *Addie*) there would be a miscarriage of justice if the distinction which it involves were not attended to. This is not a case of parties at arm's length with each other, one of whom has suffered a wrong of which damages are the simple and proper measure, and which may be redressed by damages without any unjust or inconsistent consequences. For many purposes a corporator with whom his own corporation has dealings, or on whom it may by its agents inflict some wrong, is in the same position towards it as a stranger, except that he may have to contribute rateably with others towards the payment of his own claim. But here it is impossible to separate the matter of the pursuer's claim from his status as a corporator, unless that status can be put an end to by rescinding the contract which brought him into it. His complaint is, that by means of the fraud alleged he was induced to take upon himself the liabilities of a shareholder. The loss from which he seeks to be indemnified by

damages is really neither more nor less than the whole aliquot share due from him in contribution of the whole debts and liabilities of the company, and if his claim is right in principle I fail to see how the remedy founded on that principle can stop short of going this length. But it is of the essence of the contract between the shareholders, as long as it remains unrescinded, that they should all contribute equally to the payment of all the company's debts and liabilities.

Such an action of damages as the present is really not against the corporation as an aggregate body, but is against all the members of it except one, viz., the pursuer; it is to throw upon them the pursuer's share of the corporate debts and liabilities. Many of those shareholders (as was observed by Lord Cranworth in *Addie's* case) may have come, and probably did come, into the company after the pursuer had acquired his shares. They are all as innocent of the fraud as the pursuer himself; if it were imputable to them, it must on the same principle be imputable to the pursuer himself as long as he remains a shareholder, and they are no more liable for any consequences of fraudulent or other wrongful acts of the company's agents than he is. Rescission of the contract in such a case is the only remedy for which there is any precedent, and it is, in my opinion, the only way in which the company could justly be made answerable for a fraud of this kind; but for rescission the appellant is confessedly too late.

I will not enlarge further upon the reasons for this conclusion, which I know will be more fully explained by others of your Lordships; but I must add that I think the Court of Session was right in holding the present question concluded by *Addie's* case. The only difference between *Addie's* case and the present is this, that the Western Bank of Scotland was formed under the Act 7 Geo. IV. cap. 67, by which it was enabled to sue and liable to be sued (upon all causes of action for which the shareholders for the time being were answerable) by its public officer, and it continued in that state till after the alleged frauds had been committed, so as to give a cause of action to the pursuer Mr Addie. The subsequent registration under the Act 20 and 21 Vict. cap. 49, sec. 8, was in my judgment sufficient to transfer from the unregistered to the registered company all liabilities upon any cause of action whatever for which the unregistered company might have been sued by its public officer immediately before the registration. I do not understand that there was really any difference between Lord Chelmsford and Lord Cranworth in that case; both appear to me to have founded their judgments upon those views of the law of agency on the one hand, and of fraud on the other, to which I have already referred. One expression, indeed, of Lord Cranworth, in that part of his judgment which relates to the question of damages ("He comes too late"), might possibly, if it were not qualified by the subsequent context, have been taken to mean, that even if the unregistered company had been liable to be sued for damages by its public officer down to the time of registration, that liability would not have been among the "debts, obligations, and contracts" transferred by the Act 20 and 21 Vict. cap. 49, sec. 8, to the registered company. Lord Cranworth was, I think, too good a lawyer and too accurate a thinker to have placed any such narrow (I had almost said unreasonable) construction upon such words in such a statute. He made, to my mind, his real meaning plain by what he went on to say, from which it is apparent that if the Western Bank had been incorporated before and not after the frauds then in question, the corporation would not, in his opinion, have been liable for those frauds in an action of this kind for damages. And that, my Lords, is precisely the present case.

Lord Hatherley—My Lords, I agree in the conclusions that have been arrived at by those of your Lordships who have addressed the House in this case.

I think that the following points may be considered as concluded by authority; at all events, I shall assume them so to be for the purposes of the case before the House—(First) That an agent acting within the scope of his authority, and making any representation whereby the person with whom he deals on behalf of his principal is induced to enter into a contract, binds his principal by such representation to the extent of rendering the contract voidable if the representation be false, and the contracting party take proper steps for avoiding it whilst a *restitutio in integrum* is possible. (Secondly) That a corporation is bound by the wrongful act of its agent no less than an individual, and that such misrepresentation by the agent being a wrongful act, the result of such misrepresentation must take effect in the same manner against a corporation as it would against an individual. (Thirdly) That if there cannot be a *restitutio in integrum*, the contract cannot be rescinded, but must remain in force, whatever right may exist in regard to damages for injury sustained by the party deceived.

My Lords, in this case it may be assumed for the present purpose that the contract is one which was obtained by fraudulentmis representation on the part of an agent or agents of the City of Glasgow Bank, whereby the appellant was led to purchase shares in that bank as though it were a profitable going concern, whereas it was in fact hopelessly insolvent, purchasing the privilege of becoming a shareholder, if it were a privilege, or, rather, as it turned out, acquiring that unfortunate position, for the sum of £9000. In about a year and a quarter after this purchase had been made, the bank was in liquidation, and the appellant alleges that he has already contributed £20,000 towards the debts of the company, and also that he is liable to an extent which he puts in his condescendence as being possibly about £200,000 more in respect of the debts of the concern. He asks as a remedy to recover the sum that he paid for his shares, less certain small deductions mentioned in the case, and also to be indemnified as to the payment of the £20,000 and the possible future liability. This remedy he asks for as against the company, of which at the time of the bank going into liquidation he was a member or partner, and from which partnership he has never been discharged.

The main point in the case is, whether he should be allowed to proceed further in such an action—that is to say, the question arises on relevancy in reference to the remedy which this gentleman seeks to obtain with regard to the injury which

he says has been done to him. The Lord Ordinary held that the case was concluded by *Addie's* case, and the same view was entertained by three of the Judges in the Court of Session. The principal difference between the present case and that of *Addie* is that in *Addie's* case the company was not incorporated at the time of the purchase, but became so before the liquidation, whereas in the present case the company was incorporated before the time when the purchase was made by the appellant and he became a shareholder. In the view which I take of the case, I do not consider that difference to be one which should render relief possible in this case if it was proper to withhold it in the case of *Addie*. It appears to me to be fatal to the appellant's right to the relief he asks that he is still, or was at the date of the liquidation, a shareholder in the company against which he asks it. No case has been cited in which such a remedy as that sought by the appellant in the present case has been allowed to take effect by any court either in Scotland or in England.

What became the position of the appellant when he had paid his money in respect of the transfer of shares into his name? He thereby became, on the one hand, entitled to any profits made by the employment of the capital of the company according to the proportion which his shares bore to all the other shares in the company; and at the same time he undertook to bear a like aliquot share of all the debts and liabilities of the company incurred or to be incurred in respect of the business which the company was carrying on. Amongst these debts would be (if the appellant be right) the debt due to himself in respect of the damage sustained by him through the wrongful act of the company in inducing him by misrepresentation to place himself on the list of shareholders. It appears that he did draw dividends (I think three) of alleged profits out of the concern.

Now, suppose—and I fear from other cases that have come before your Lordships' House the supposition is by no means an improbable one,—suppose, I say, that there should be some ten or twelve other shareholders in a like position with the appellant with regard to purchasing shares under misrepresentation on the part of the company's agents, some of them having purchased shares before him and others after him, those ten or twelve shareholders would each of them have the same claim in respect of damages against the company (except in each case the party sueing) as is now claimed by the present appellant. The present appellant would by his partnership contract have to bear his aliquot share of the damages that might be claimed by other misled shareholders who had been placed on the list by the same course of misrepresentation as himself. What end would there ever be to the interlacing claims on the part of misled shareholders *inter se* as to dividends received, whereby the fund which might have been applied towards recouping and making good the debts of the company, including the damages claimed by the appellant, was diminished? How could they be retained by the appellant as against his fellow-sufferers? He would clearly have to account for them as between himself and his fellow-sufferers, who would be claiming relief on the same grounds as himself.

In truth, the appellant is trying to reconcile two inconsistent positions, namely, that of shareholder and that of creditor of the whole body of shareholders including himself. As has been observed already by those of your Lordships who have preceded me, amongst the various cases which have been brought before the courts in respect of dealings with joint-stock companies, no case can be adduced in which a person so claiming to be a shareholder has at the same time successfully asserted his claim against a company in liquidation for such a debt as this, namely, one in which he is himself a co-debtor with all his fellow-shareholders to himself, and is himself in common with them responsible again to them individually for like liabilities in respect of representations made by their common agent.

Some clauses in the Companies Act 1862 were cited in the course of the argument as showing the rights *inter se* on the part of shareholders of a company by which they were all to be brought into equality, one with another, when the settlement took place, and arrangements for winding-up were made by the liquidators. Those provisions as to liquidation, for the purpose of equalising the contributions of contributories *inter se*, do not appear to me to authorise such a scheme or contrivance as would be necessary in this case to effect the object proposed by the pursuer. Having omitted to obtain a rescission of the contract, he would have to make a complicated inquiry such as I have described as between himself and other shareholders who could put themselves in the same position as himself as regards misrepresentation by the common agent, and nothing has been pointed out in the Act which leads to the supposition that any such inquiry as that was contemplated. What has really happened is this—he has had the misfortune, together with others, as I have said, in all probability, though that is not in evidence in this case, of being misled by the representations of the agent of the company. If your Lordships were to establish a precedent in his case, there would probably be other claimants also, each of whom would have a claim which, it appears to me, could not be dealt with after the time for the rescission of the contract had gone by. If the appellant obtains the relief he has sought, every other shareholder in the same position as himself might come forward to claim a similar relief. What has really happened is, that both he and those other shareholders in a like position have suffered from the misfortune of having employed a dishonest agent. As between third parties to the company and the appellant, he might well be entitled to rescission of the contract whereby he became a shareholder, but if time and circumstances have prevented that remedy, and he must remain a shareholder, I do not see how he can escape the burden occasioned by the common misfortune of himself and many of the other shareholders in having employed dishonest agents. I therefore feel that whatever rights this gentleman may have acquired in the first instance, his case has been rendered hopeless by what has taken place since, by reason of which it has been placed beyond his power to put things in such a position that his name can be struck off the share-list altogether, in which case he would, according to some of the authorities which have been cited, have stood in the position of a stranger with

reference to misrepresentations made by agents of the company.

I agree with the order which has been proposed to your Lordships by my noble and learned friend.

Lord Blackburn—My Lords, I also think that it is not necessary to hear the counsel for the respondents, as after carefully considering the judgments below and the arguments of the appellant's counsel I have come to the conclusion that the interlocutor appealed against was right, and that the appeal should be dismissed with costs.

The Lord Ordinary based his judgment on this short ground—"The Lord Ordinary thinks that this case is ruled by the decision of the House of Lords in *Addie* v. *The Western Bank;*" and that, if correct, was a sufficient ground for his decision. For when it appears that a case clearly falls within the *ratio decidendi* of the House of Lords, the highest Court of Appeal, I do not think it competent for even this House to say that the *ratio decidendi* was wrong. It must, however, in my opinion, always be open to a party to contend that the differences between the facts in the case then under discussion, and those in the case on which the decision in the House of Lords proceeded, are so material as to prevent his case from falling within the *ratio decidendi* of the House, even though the opinions of the noble and learned Lords who decided the case in the House are so worded as to seem to apply equally to the facts in the case then under discussion; for unless those differences in fact did exist in the case in this House, or at least the possibility of their existence was prominently brought forward, I think the House cannot be taken to have decided that such differences in fact might not make a material distinction in law.

I think, therefore, that it is important to inquire what are the differences of fact between this case and that of *Addie* v. *The Western Bank*, and then to determine whether they do make a material distinction in law.

The Western Bank was a copartnership carrying on the business of banking in Scotland under the provisions of the Act 7 Geo. IV. c. 67. Whilst this was so, Addie entered into a contract with persons who were, though he did not know it, agents for the Western Bank, to purchase shares in that bank. Addie paid to the agents of the bank the agreed consideration, and accepted shares, which in fact belonged to the bank, and in respect of them became a partner on the terms contained in the partnership deed of the Western Bank. Some time elapsed, and the Western Bank becoming insolvent stopped payment. Then advantage was taken of the provisions of the Joint-Stock Banking Companies Act 1857 (20 and 21 Vict. cap. 49), sec. 6, and it was resolved by a majority of the shareholders to register the Western Bank as a company, other than a limited company, under the provisions of that Act. Addie was a party to this resolution. The Western Bank after registration was wound-up. Addie was made a contributory, and he and such of the other contributories as were solvent paid calls, by means of which all the creditors were paid, and some surplus existing had to be returned to the contributories who had paid. Then, and not till then, Addie commenced his action in the Court of Session.

The interlocutor appealed against, which was reversed, was that of 2d February 1864—"That the pursuer had stated matter relevant to go to trial."

The following appear to me to be the material statements in the case now before this House:—The City of Glasgow Bank was originally like the Western Bank—a copartnership carrying on business in Scotland under the provisions of the Act 7 Geo. IV. c. 67. The deed of copartnery of this bank did not in any material respect differ from that of the Western Bank. But whereas the Western Bank was registered under the provisions of the Joint-Stock Banking Companies Act 1857, after Addie had entered into the contract in respect of which he raised his claim, the City of Glasgow Bank was registered under the Companies Act 1862, on the 29th November 1862, several years before the date of the transactions in respect of which the pursuer raises his claim; and the pursuer knew that he was purchasing shares the property of the bank, and dealing with the agents of the bank, whilst Addie was not aware of these facts; and this action was commenced earlier than that of Addie. It was commenced after the liquidation had begun, but before it was ascertained how much the solvent contributories would have to pay, or who would be solvent contributories.

I do not observe any other differences between the statements in the case now under discussion and the statements in the case of *Addie* v. *The Western Bank*. And as I think that those differences of fact make no distinction in law, and as the interlocutor appealed against in this case seems to me identical in effect with that pronounced by this House, I agree with the Lord Ordinary that this case is ruled by the decision of the House in *Addie* v. *The Western Bank*.

But one very important question was raised by the judgments in the Court of Session, and argued by the counsel at your Lordships' bar, which, if ever it becomes necessary to decide it, may require much consideration. The contract with a joint-stock company to take shares in that company is a very peculiar one. Whether the company be, as the Western Bank was, a banking copartnership in Scotland under the Act 7 Geo. IV. c. 27, having such a deed of copartnership as that bank had, or a joint-stock company registered under the Companies Act 1862, the contract equally is in substance an agreement with the company to become a partner in the company on the terms that the partner shall, in common with all his copartners for the time being, contribute to make good all liabilities of the copartnership, as if this incoming partner had been a member of the partnership from the beginning. Further, he consents that anyone of his copartners may, by procuring a person to take his share, get rid (at least *inter socios*) of his liability, substituting that of the incoming shareholders. I know of no other contract which in these respects resembles this contract.

It was with this peculiar kind of contract that the House of Lords had to deal in *Addie* v. *The Western Bank*, and it is with this peculiar kind of contract that your Lordships have now to deal. I do not think the House is called on now to decide whether a difference in the kind of contract induced by the fraud would make a sufficient distinction in law to prevent the decisions in *Addie's* case from governing such a case as that.

I do not think there is now any doubt that when a contract is, in the language of the English common lawyers, induced by fraudulent deceit of the other contracting party, or of one for whom he is responsible, or, in the language of the civil law, when there is *dolus dans locum contractui*, the contract is not void but only voidable. And it follows from this that though the deceived party may rescind the contract and demand restitution, he can only do so on the terms that he himself makes restitution. If either from his own act or from misfortune it is impossible to make such restitution, it is too late to rescind. But though he cannot rescind, he may, at least in English law, as against the person actually guilty of the fraud, recover damages (*Clarke* v. *Dickson*, April 26, 1858, Ellis, Blackburn, & Ellis, 148, and *Cole* v. *Bishop*, mentioned in that case by Justice Erle at page 153). The Lord President in this case says that the deceived party may rescind if the fraud inducing the contract was that of an agent acting in the principal's business and within the scope of his authority, though the principal was ignorant of the fraud and free from all moral guilt, or even being an incorporation was necessarily incapable of knowing anything except by its agents, and therefore free from all moral guilt (if such a phrase can be properly applied to an incorporated body), and so far I think the position is not disputed. But when he proceeds to say that "when the result of the fraud is the making of a contract between the party deceiving (not personally but through an agent) and the party deceived, I am not aware that any remedy is open to the latter except a rescission of the contract, or at least without a rescission of the contract" he states a proposition which is much controverted.

Lord Shand disputes it on principles and authorities of Scotch law well worthy of consideration, and then says—"The whole question has been very carefully considered in recent cases in England, in which it has been settled, on principles which I am satisfied are sound, that an incorporation will be answerable in damages for the fraudulent representations of its agents made in the course of the business entrusted to them—*Barwick* v. *English Joint-Stock Bank*, L.R., 2 Exch. 259; *Swift* v. *Winterbottom*, L.R., 9 Q.B. 301; *Mackay* v. *Commercial Bank of New Brunswick*, L.R., 5 P.C. Apps. 394; *Swire* v. *Francis*, L.R., 3 P.C. Apps. 104; *Stone and Collins* v. *The City and County Bank, Limited*, L.R., 3 Com. Pleas Div. 283; *Weir* v. *Bell*, L.R., 3 Exch. Div. 240. I say nothing of *Udell* v. *Atherton*, 7 Hurlstone and Norman 172, except that it was the decision of a Court equally divided; that it was considered in most, if not all, of the subsequent cases just cited; and that I am not aware of any judgment since its date in which it was spoken of with approval, while it has been more than once referred to as a decision to be explained and accounted for on special grounds."

Barwick v. *English Joint-Stock Bank* was decided just before the decision in *Addie* v. *The Western Bank*, and the noble and learned Lords who advised the House were not aware of that decision. I may here observe that one point there decided was, that in the old forms of English pleading the fraud of the agent was described as the fraud of the principal though innocent. This, no doubt, was a very technical question. The substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorised agent acting within his authority to the same extent as if it was his own fraud. It is not necessary now to decide whether that was right or wrong as the law stood before the decision in *Addie* v. *The Western Bank*, nor, as I think, whether it is overruled by that decision.

Mackay v. *Commercial Bank* was decided after *Addie* v. *The Western Bank*, and was distinguished from it—I do not think your Lordships need now inquire whether successfully or not.

But it seems to me that Lord Chelmsford did not lay down any general position as to all contracts. He says—"The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this—Where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors in the name of the company seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action of damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally. The action of Mr Addie is for the reduction of the deeds of transference of the shares, and alternatively for damages. But as it is brought against the company, it will follow from what has been said that he cannot recover unless he is entitled to rescind the contract."

I cannot say whether Lord Chelmsford meant to confine his observations to the particular kind of contract then before him, without deciding whether the same doctrine would apply to all kinds of contracts, or whether it was only by accident that he confined his language as he did. There are strong reasons given by the noble and learned Lords who have already spoken in this case for holding that when one has been induced by the fraud of the agents of a joint-stock company to contract with that company to become a partner in that company, he can bring no action of deceit against the company whilst he remains a partner in it. There are reasons which would not apply to every case in which a contract has been induced by fraud—as, for example, if an incorporated company sold a ship, and their manager falsely and fraudulently represented that she had been thoroughly repaired and was quite seaworthy, and so induced the purchase, and the purchaser first became aware of the fraud after the ship was lost, and the underwriters proved that she had not been repaired, and was in fact not seaworthy, and so that the insurance was void when it would be too late to rescind.

Lord Cranworth uses language applicable to all contracts. I cannot say whether he meant to apply the doctrine to all kinds of contracts, however different from that with which he was dealing. I do not say that the difference of the con-

tract from that to buy shares would distinguish the case. All that I say is, that if such a case arises, the consideration of the question whether it is decided by *Addie* v. *The Western Bank* is not meant to be prejudiced by anything I now say.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for the Appellant—The Lord Advocate (Watson)—Herschell, Q.C.—Romer. Agents—Simson & Wakeford, Solicitors.

Counsel for the Respondents—Kay, Q.C.—Benjamin, Q.C.—Davey, Q.C.—Balfour. Agents—Martin & Leslie, Solicitors.

Monday, March 8.

(Before Lord Hatherley, Lord O'Hagan, and Lord Blackburn.)

SMITH *v.* POLICE COMMISSIONERS OF DENNY.

Property—Possession—Right of Police Commissioners to Repair a Well on Private Property—Public Health (Scotland) Act 1867, *sec.* 89.

The proprietor of certain lands on which there existed a well used by the inhabitants of an adjoining village for the prescriptive period, applied for interdict against the local authority constituted under the Public Health (Scotland) Act 1867, sec. 89, who had cleaned and enclosed the well, so as to protect it against alleged pollution by drainage. *Held* (1) that the facts proved had established *prima facie* a possessory right on the part of the public; (2) that the local authority as such had a *locus standi* to vindicate the rights of the community, represented by them, to the effect in question.

Observations upon the construction of the above-named section of the Act.

This was an appeal from the Second Division of the Court of Session, who had held (*rev.* Lord Adam, Ordinary—*diss.* Lord Ormidale) that Mr Smith, the proprietor of the lands of Boghead, was not entitled to interdict the local authority of Denny from interfering with a well situated on Mr Smith's land which had been used by the public of that town from time immemorial—March 19, 1879, 16 Scot. Law Rep. 464, 6 R. 858. The sections of the Public Health (Scotland) Act 1867 under which the question was raised are quoted in the opinion of Lord Hatherley, *infra*. The local authority had entered upon the land and covered up the well with an unfastened iron cover, and erected a pump thereon, so as to protect it against pollution.

Smith appealed to the House of Lords.

At delivering judgment—

Lord Hatherley—My Lords, in this case a question has been raised with reference to the powers exercisable by commissioners under certain Local Acts for the improvement of towns and for preserving the health of towns in Scotland, and the question which arises is this, whether or not the commissioners in carrying into effect the objects of their Act of Parliament, and vested with considerable powers for that purpose, have exceeded those powers?

There is one part of the case upon which I think your Lordships will have no difficulty whatever. The question has arisen (to some extent collaterally, but principally, no doubt, from the form in which the proceedings were instituted in the Scottish Courts) as to whether or not what has been done by the commissioners, and which is resisted by the proprietor of a certain well, does or does not amount to a claim of right on the part of the commissioners to the *solum* in which that well is situated. The case is this:—Mr Smith, the appellant, is the undoubted proprietor, as it appears to me (and as far as the argument at your Lordships' bar has gone, his proprietorship is unquestioned), of the property in which the well in question is situated—he sets forth his conveyance, he asserts his right of property in his pleadings, and nobody denies it. That is a most remarkable part of the case. In no part of the proceedings can you find the respondents denying the right of the appellant in the present case to the well. The right on the part of the appellant being clear, and there being, I think, equally clear evidence of his exercising his right, the inhabitants of the district called Denny, which does not appear to be an incorporated burgh, had been, from a time which according to Scottish statutes gives a prescriptive right, in the habit of exercising the privilege of dipping their vessels into this well, in order by means of such dipping of their vessels to carry the water off for use at their own homes, or in such other manner as they thought fit. That, again, though it appears to have been disputed in the Court below, can hardly be said to have been in dispute before your Lordships, because before we rose on the last occasion on which the House sat it appeared to be conceded on both sides that this particular modified privilege or right of taking water from the well, and the right of access to the well for the purpose of taking that water, and so far of traversing the *solum* and the pathway for that purpose, was established by the evidence.

But then it is said that this being so, the right which the inhabitants have had of using the water in the mode which I have described does not in any way, through the medium of the Act of Parliament creating the power of the commissioners, extend to vesting in these commissioners the power of asserting that right as representing by virtue of the Act of Parliament all those powers and privileges which the inhabitants themselves could have asserted if matters had remained in their former condition and no Act of Parliament had ever been passed; and that really comes to be the question in the case—that is to say, what is the extent of the power vested in the commissioners under the Act, and whether or not by anything that they have done in this case they have exceeded that power?

But, my Lords, in the first place, it will be desirable to ascertain what are the actual facts, and what have been the dealings of the commissioners with regard to the well in question. The well seems not to have been a very deep well. I think in answer to one question it was said that it was