

the object of the fifth regulation is to limit the liability of the members of the company. But the regulation throws light on the position of the policy-holders and on what they can claim under their policies. The fifth indorsed condition or regulation in effect provides that the funds of the company, "after satisfying prior claims and charges according to the provisions of the deed of settlement and bye-laws of the company for the time being, shall alone be liable for the payment of the moneys payable under the policy, and that no shareholder, member, director, or other officer of the company shall be liable to any demand in respect of the policy beyond or otherwise than out of the payment in the manner and at the times provided for by the deed of settlement and the then bye-laws of the company of the amount thus remaining unpaid of the shares held by him." The reference to the deed of settlement and bye-laws for the time being is all important, for the bye-laws determine how the profits of the company are to be disposed of, and those bye-laws are subject to alteration from time to time by an extraordinary meeting of the shareholders of the company (see clauses 9, 24, 56 of the deed of settlement). The policy-holders are not shareholders, and have no voice in making or altering bye-laws; but the sum payable under any policy, in addition to the fixed sum mentioned in it, is made by the policy itself to depend upon what the directors may have ordered to be added to such sum, and that depends upon their practice for the time being. The practice of the directors in its turn depends on how the profits are to be ascertained and divided in accordance with the bye-laws, which may be altered from time to time as above pointed out. I am quite unable to adopt the view taken by the Courts below as to the inability of the company to alter their bye-laws as they have done, and, *inter alia*, to make a sinking fund without the consent of the policy-holders. I can find no contract to that effect. A collateral contract so wholly opposed to the contracts contained in the policies is not, in my opinion, established by the evidence in the case. Of course the powers of altering bye-laws, like other powers, must be exercised *bona fide*, and having regard to the purposes for which they are created and to the rights of persons affected by them. A bye-law to the effect that no creditor or policy-holder should be paid what was due to him would in my opinion be clearly void as an illegal excess of power. But in this case it is conceded that the alteration contemplated and sought to be restrained is fair, honest, and businesslike, and will, in the opinion of the directors and shareholders of the company, be beneficial as well to the policy-holders as to the shareholders. The sole question is whether such an alteration infringes the rights of the policy-holders. In my opinion it clearly does not. I am of opinion that the appeal should be allowed, and that the action should be dismissed, and that the respondents should pay the costs of the

action and of the appeals both here and below.

Judgment appealed from reversed.

Counsel for the Appellants—Levett, K.C.—Whinney.

Counsel for the Respondent—P. O. Lawrence, K.C.—Gatey. Agents—H. Gover & Son, Solicitors for all Parties.

## HOUSE OF LORDS.

Friday, December 15.

(Before the Lord Chancellor (Halsbury),  
Lords Robertson and Lindley.)

CALTHORPE v. TRECHMANN.

MACLEAY v. TAIT.

(ON APPEAL FROM THE COURT OF  
APPEAL IN ENGLAND.)

*Company—Liability of Directors—Prospectus—Non-Disclosure of Contracts—Fraudulent Prospectus—Action for Damages—Necessary Proof—"Knowingly Issuing"—Mistake—Clause of Waiver—Companies Act 1867 (30 and 31 Vict. cap. 131), section 38.*

Section 38 of the Companies Act 1867 provides that every prospectus of a company shall specify certain particulars of any contract entered into by the company before the issue of the prospectus, and that any prospectus which does not do so "shall be deemed fraudulent" on the part of the directors "knowingly issuing the same as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

In an action for damages for fraud brought against the directors of a company who had issued a fraudulent certificate within the meaning of the above section, by a person who had taken shares on the faith of the certificate, held (1) that to succeed he must prove (a) that had he known of the omitted contract he would not have become a shareholder; (b) that he had suffered damage; (2) that the omission having been due to an innocent mistake of the directors they were in any case protected by a clause of waiver waiving any fuller compliance with sec. 38 than that contained in the prospectus.

*Per Lord Lindley*—"The language of the statute in terms applies to directors and others who knowingly issue a prospectus which does not disclose such a contract as is mentioned in the first part of the section, whether they knew of its existence or not. But it can hardly be supposed that the Legislature meant to brand with fraud a director who knowingly issued a prospectus but never knew of the existence of a contract which ought

to have been disclosed. I cannot, however, think that the section can be properly restricted so as not to apply to a director who knew of a contract such as is described in the first part of the section but forgot all about it when he issued a prospectus not referring to it."

These were appeals from two decisions of the Court of Appeal (VAUGHAN WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.), who had affirmed decisions of JOYCE, J., in favour of the plaintiffs.

The plaintiffs in each case were shareholders in, and the defendants were directors of, the Standard Exploration Company, Limited. The plaintiffs' case was that they had taken shares in the company on the faith of a certain prospectus issued by the directors in which the latter had failed to disclose a certain contract entered into by the company prior to the date of the prospectus. They contended that under section 38 of the Companies Act 1867 the prospectus was fraudulent and that they were entitled to damages. (Section 38 of the Act of 1867 has been repealed by the Companies Act 1900, and its place taken with certain modifications by sec. 9 *k* of that Act).

The facts of the case and the arguments of parties are sufficiently set forth in the opinions of their Lordships, and in particular in that of Lord Lindley.

At the conclusion of the arguments their Lordships took time to consider their judgment.

LORD CHANCELLOR (HALSBURY)—Both these actions are actions for damages brought by the respective plaintiffs, who complain that they have been injured by the fraud of the defendants, and claim damages for the loss which they have sustained by the fraud of which they complain. As the actions are identical in their merits I will in what I have to say hereafter treat the matter as if their were one plaintiff and one defendant. But for the 38th section of the Companies Act 1867 it is certain that neither of these actions would have been brought; and the real question to be debated is whether that section does, or rather did, more than enact where a contract which ought to have been inserted in a prospectus is omitted that such omission shall be held to be fraudulent. That is what the section in terms enacts, and I think that it decides no more. Now in order to entitle the plaintiff to recover damages where he sues for damage suffered by reason of a fraud upon himself, he must prove that he sustained them, and as one step towards that proof he must show that he acted on the faith of that fraudulent statement. It is an old judicial observation that fraud without damage or damage without fraud will found no action. Now, in this class of case, where misstatements are made in a prospectus and people have been led to take shares the taking of which has led to loss, I have often said that it is quite a fair inference to draw—if the prospectus is calculated to induce people

to take shares and they do take shares—that the prospectus, tainted with falsehood as it is, is to be acted on as a whole—that people cannot be expected to analyse their own mental sensations so minutely as to be able to explain what particular statement has induced them to become subscribers; but the question under this section is a very different one, and I think to enable a plaintiff to recover damages that he must convince the tribunal before whom the question comes that if he had known of the omitted contract he would not have become a shareholder. That is what he must prove. Now in this case I do not believe for a moment, for the reasons to be given by Lord Lindley, that there would have been the smallest difference in the plaintiff's conduct if the contract in question had been disclosed as it ought to have been. I have had the opportunity of reading what Lord Lindley has written on that part of the subject, and I entirely concur with him. I also agree with him as to the waiver clause. Where a clause of that sort has been inserted as part of the machinery for fraud, it will, of course, afford no protection to its contrivers, but where, as in this case, it is a perfectly honest slip, why should it not be a protection? I know no reason. I move therefore that both appeals be allowed, and that both actions be dismissed with costs both here and below.

LORD ROBERTSON—It is in my opinion quite clear that the statute, by declaring a prospectus to be fraudulent does not dispense the person founding on the fraud from proving that damage has resulted from the fraud. That is plain on principle, and if it were needed there is good authority for it. On the other hand, the vice of the prospectus being an omission, the question whether if that omission had not taken place the result would not have been the same—that is to say, the shares would have been taken—is one requiring cautious and delicate handling. I do not think it an insoluble question, as has been suggested. But even for the person whose election to take or not to take is in debate, and supposing him to speak with absolute candour, it requires a mind of singular clearness to decide how he would have acted if the omitted contract had been named, and it has to be borne in mind that it is not how he ought in reason to have decided, but how he, the particular individual, would have decided, that has got to be ascertained. Accordingly, one has to make full allowance for all sorts of considerations and prejudices—that the contract made one too many, and the thing too complicated, or that he did not like the names of the people, and so on. Now, applying this view to the present case, I cannot join in any emphatic assertions about the conclusiveness of the evidence. But I take into account the nature of the omitted contract, and the account given by this gentleman of his views of the enterprise, and I think it safe to infer that the omission of this contract did not affect

his decision to apply for shares, and that he would not have acted otherwise if it had been mentioned. On this ground I agree in the reversal proposed.

LORD LINDLEY—Both these appeals turn on the true construction of section 38 of the Companies Act 1867, and of the application of that section to the facts of the cases which have to be considered. Before attempting to apply the section to those facts it will be convenient to examine the section itself, and the construction which has been judicially put upon it. The section consists of two parts. The first states that a company's prospectus must contain certain particulars, the second declares that a prospectus which does not contain those particulars "shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same as regards any person taking shares on the faith of such prospectus, unless he shall have had notice of such contracts." The particulars which are required to be stated "are the dates and names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof before the issue of such prospectus." The section says no more. When the section has to be applied to any particular case, *i.e.*, when a plaintiff sues a defendant for damages for a breach of duty imposed by this section, the following questions necessarily arise, *viz.*, (1) Is the document to which the plaintiff says no reference is made in the prospectus such a contract as is described in the first part of the section? If it is not such a contract, there is an end of the case. If it is, and if it is not disclosed, then it is necessary to inquire (2) whether the defendant was a promoter, director, or officer of the company; (3) whether he knowingly issued the prospectus; (4) whether the plaintiff took shares on the faith of the prospectus; (5) whether he had notice of the undisclosed contract before he applied for his shares? Assuming that all these questions are answered in the plaintiff's favour, there are still other questions as to which the section is wholly silent, *viz.*, what is the plaintiff's remedy, and what more must he prove to entitle himself to damages? These matters are left to be dealt with by the judicial tribunals of the country, and they have nothing to guide them except the established principles applicable to actions for fraudulent misrepresentations—*Twycross v. Grant*, 2 C.P. Div. 469, decided that section 38 of the Companies Act 1867 could hardly apply to all contracts which fell within its words, but certainly included all contracts by the persons named in the section which might be material to be known by applicants for shares. Bramwell, L.J., and Kelly, C.B., thought that the words "any contract" ought to be still further restricted, but this opinion did not prevail. In *Twycross v. Grant* the jury found as facts that the plaintiff took his shares on the faith of the statements of the prospectus, and that if the contracts there in question had been disclosed or referred to in the prospectus

the plaintiff would not have taken the shares. They also found that the defendant *bona fide* believed that the contracts need not have been set forth. The jury found a verdict for the plaintiff, and gave him as damages the full amount which he had paid for his shares, although he might have sold them at a premium before he brought his action. The case came before the Common Pleas Division and the Court of Appeal, and the verdict was upheld. The construction put on section 38 in *Twycross v. Grant* by the Common Pleas Division has, I believe, been accepted as sound ever since it was decided, *viz.*, 1877; and on the question of damages, and also on the immateriality of the defendants' belief that section 38 did not apply, the decision in *Twycross v. Grant* was approved, and followed by this House in *Shepherd v. Broome* (1904), A.C. 342. *Twycross v. Grant* did not raise, and therefore did not settle, the very important question whether section 38 does more than make non-disclosure equivalent to actual fraud in the cases to which the section applies. On proof of the non-disclosure of a contract required to be disclosed, the section declares that the prospectus is to be deemed fraudulent on the part of the persons named in the section. No evidence, therefore, of evil intention on their part is required to be given by the plaintiff, and, on the other hand, the section renders proof by them that they had no evil intention immaterial. But an action for damages based on fraud, or on what is to be deemed fraudulent, can only be maintained by a person who can prove that the fraud, or what is to be deemed fraud of which he complains, has caused him damage, and the question is raised how is this principle to be worked out when applied to actions based on section 38? The section in terms gives no remedy or cause of action, but it is a remedial section for the protection of applicants for shares against the wiles of promoters and others. It is noteworthy that what is deemed to be fraudulent is the prospectus, and not merely non-disclosure of a contract required to be referred to. The language of the section is consistent with the view that anyone who is induced to take shares by a prospectus which, although honest and true in all its statements is to be deemed fraudulent, and has lost his money by so doing, can maintain an action for damages even although he was not in fact misled in any way whatever. He may have relied only on statements which were true, and the non-disclosed documents may be such that he would have attached no importance to them if he had known of them. The language of the statute is open to such a construction; but if so construed it leads to a result which is so unjust and so inconsistent with the principles which govern actions for damages occasioned by fraud that some other interpretation consistent with the language of the section and with established principles ought to be sought for, and if found ought to be adopted. The difficulty has been observed and commented upon in several cases. In *Sullivan v. Mitcalfe*, 5 C.P. Div. 455,

which arose on demurrer, Thesiger, L.J., after approving the decision in *Twycross v. Grant* on sec. 38, said that "no person can be said to have taken shares on the faith of a prospectus except a person who can prove to the satisfaction of a jury that he took his shares on the faith of there being no such contract as that omitted to be disclosed, and that if such contract had been disclosed to him he would not have taken his shares." Bramwell, L.J., adhered to the opinion which he had expressed in *Twycross v. Grant*, and on the construction of the first part of sec. 38 did not agree with Thesiger, L.J. But on principle I think that Thesiger, L.J., was right. Lord Blackburn, in his well-known judgment in *Smith v. Chadwick*, 9 A.C. 187, pointed out that a plaintiff who sues for damages by reason of having been induced by a fraudulent prospectus to take shares in a company must prove both fraud and damage to himself occasioned by such fraud. *Smith v. Chadwick* did not turn on sec. 38, but that section says no more than that a prospectus shall be deemed fraudulent against certain persons if it does not disclose certain documents. But proof that a document is fraudulent is not all that a plaintiff must prove in order to recover damages. He must further prove damage occasioned to himself by the fraud of which he complains. Proof that he applied for shares on the faith of a prospectus which is to be treated as fraudulent by sec. 38, and that he obtained them and paid for them and lost his money, is *prima facie* evidence, but only *prima facie* evidence, of damage by fraud on himself. *McConnel v. Wright* (1903), 1 Ch. 546, goes no further than this. But if the plaintiff is challenged on this point he must go a step further and prove that he was misled by what makes the prospectus fraudulent, *i.e.*, the omission to disclose some document which ought to have been disclosed. This was the view taken in *Nash v. Calthorpe* (1905), 2 Ch. 237, which in my opinion was correct. And it is noteworthy that Romer, L.J., agreed with the decisions of the Court of Appeal in *McConnel v. Wright*, and also in the later case of *Nash v. Calthorpe*, which was not decided until after the cases before your Lordships came on for trial. Another question which has been much discussed is the meaning of "knowingly issued" in the second part of sec. 38. It is necessary to prove that the defendant knowingly issued the prospectus; and this has been held to mean issued the prospectus knowing of a contract such as is described in the section, and knowing that the prospectus did not disclose it. The fact that a defendant honestly but erroneously believed that the section did not apply to a particular contract of which he knew will not protect him from liability. This was decided in *Twycross v. Grant*, and by this House in *Shepherd v. Broome*. The language of the statute in terms applies to directors and others who knowingly issue a prospectus which does not disclose such a contract as is mentioned in the first part of the section, whether they knew of its

existence or not. But it can hardly be supposed that the Legislature meant to brand with fraud a director who knowingly issued a prospectus but never knew of the existence of a contract which ought to have been disclosed. I cannot, however, think that the section can be properly restricted so as not to apply to a director who knew of a contract such as is described in the first part of the section but forgot all about it when he issued a prospectus not referring to it. Whether such a director could be properly convicted on an indictment for fraud, or for something short of it, is quite another question which your Lordships have not to consider. I have already pointed out that no intent to deceive is necessary to support a civil action for damages based on section 38. I will merely observe that in common parlance persons talk of knowing perfectly well what for the moment is not present to their mind, and even what they cannot at the moment recal to their memory. With these observations on the construction and legal effect of section 38, I pass to its application to the cases before your Lordships. The Standard Company was promoted by the Globe Company, and the prospectus of the Standard Company stated that in the formation and issue of that company there were no promoters' profits in any shape or form whatever. This statement has been proved to be true. But there was a contract dated the 27th October 1898 and made between the Globe Company and the Standard Company, by which the Globe Company agreed to transfer to the Standard Company 5000 fully paid-up deferred shares of £1 each in the Austin Friars Syndicate; and in consideration of this transfer the Standard Company was to allot and issue to the Globe Company 40,000 fully paid-up shares of £1 each of the Standard Company. This agreement was unfortunately not disclosed in the prospectus of the Standard Company. But I cannot doubt for a moment that it fell within the first part of section 38 of the Companies Act 1867, and ought to have been referred to in the prospectus. It was a contract which any prudent applicant for shares in the Standard Company would have desired to understand before he took shares in the Standard Company, and was in that sense to that extent material, as explained in *Twycross v. Grant*. Every judge who has had to consider this question has come to the same conclusion, and to my mind this part of the case is so clear that it is unnecessary to say more about it. The prospectus was not issued until May 1899, and the defendants were directors when it was issued and when shares were allotted to persons who were induced by it to apply for shares in the Standard Company. All the plaintiffs in these actions did so apply. How it came about that the contract of the 27th October 1898 was not disclosed is by no means clear; but whatever the real explanation may be it was certainly not intentionally omitted by any of the defendants to these actions. It is clearly proved, and is now admitted, that whether legally liable or not, they are all innocent

of any fraudulent misstatement or concealment. Nevertheless section 38 entitles the plaintiffs to have the prospectus treated as fraudulent, and the next question is, have the plaintiffs or any of them proved that they have sustained any damage by reason of the non-disclosure of the contract on the 27th October 1898? The plaintiffs took shares on the faith of the prospectus, and they have lost their money. This is their case; but it is at most only a *prima facie* case, and when the facts of the case are more closely investigated it is difficult to believe that a knowledge of the deed of the 27th October 1898 would have induced any of them to abstain from applying for shares. In the first place, the examination and cross-examination of the plaintiffs shows conclusively that the plaintiffs paid no attention whatever to the documents which were disclosed, and if another had been added to their number the result would have been the same. But, further, the contract of the 27th October 1898, when understood, turns out to be an ingenious but perfectly honest transaction, entered into in order to facilitate the acquisition by the Standard Company of the preferred shares of the Finance Syndicate, all the shares of which the Standard Company was formed to acquire. The contract conferred no profit whatever on the Globe Company, and, so far from disproving the statement in the prospectus that there was no promoters' profits, the contract shows that none were or could be made out of the transaction to which the contract related. In short, it is, in my opinion, plain that the non-disclosure of this contract has not caused any damage whatever to the plaintiffs or any of them. But even if I am wrong in coming to this conclusion, I am of opinion that the defendants are entitled to be protected by the plaintiffs' agreements to waive any fuller compliance with section 38 than is contained in the prospectus. This is a case in which all the defendants are honest men. If they are liable, they are so by reason of an unfortunate mistake on their part. None of them had the slightest intention of keeping back anything. Whether the same can be said of all the other directors I do not know. In most of the cases in which the effect of a waiver clause has been discussed, the clause has been unsuccessfully relied upon as a protection against trickery; but in the first of these, *Greenwood v. Leather Shod Wheel Company*, 81 L.T. Rep. 595, (1900) 1 Ch. 421, it was pointed out that although such clauses were worthless for such purposes, yet they might prove useful to protect honest men from unjust demands. These actions are instances in which the defendants can justly claim the protection of the waiver clauses contained in the prospectus and application for shares. For these reasons I have come to the conclusion that both appeals should be allowed and the actions be dismissed, with costs both here and below.

Judgments appealed from reversed.  
Actions dismissed.

Counsel for the Appellant Calthorpe—Haldane, K.C.—Gore Brown, K.C.—Cozens-Hardy. Agents—Burn & Berridge, Solicitors.

Counsel for the Appellant Macleay—Younger, K.C.—Ashton Cross. Agent—Gilbert Robins, Solicitor.

Counsel for the Respondents—Hughes, K.C.—Higgins. Agents—Richardson & Company, Solicitors.

## PRIVY COUNCIL.

Wednesday, February 7.

(Present—The Right Hons. Lords Macnaghten and Davey, Sir Ford North, and Sir Arthur Wilson.)

MONTREAL AND ST LAWRENCE LIGHT AND POWER COMPANY v. ROBERT.

*Company—Ultra Vires—Invalid Resolution—Third Party bona fide Acting upon it—Company Barred from Pleading Invalidity in Question with Him.*

Relying upon what purported to be a valid resolution of a company duly communicated by its officials, a third party in *bona fide* and with nothing to put him on his inquiry sold certain property to the company. The resolution was invalid inasmuch as the quorum prescribed by the bye-laws had not been present when it was passed.

Held that in a question with the third party the company could not plead that the resolution was invalid.

Appeal from a judgment of the Court of King's Bench for the Province of Quebec, Canada, consisting of LACOSTE, C.J., BOSSE, BLANCHET, OUMET, and TRENHOLME, J.J., who had affirmed a judgment of the Superior Court (TASCHEREAU, MATHIEU, and LORANGER, J.J.), reversing the judgment of DAVIDSON, J., at the trial.

The facts are fully set out in the judgment of their Lordships.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Their judgment was delivered by

LORD MACNAGHTEN—By deed dated the 18th July 1901, and made between the respondent Edmund Arthur Robert and the appellants the Montreal and St Lawrence Light and Power Company, Robert conveyed to the company a lot of land known as Buisson Point, situated at the Cascade Rapids on the river St Lawrence, in the county of Beauharnois and Province of Quebec, with the right of fishing in the river opposite and attached thereto. The consideration for the purchase, as stated on the face of the deed, was "one dollar, and other good and valuable consideration." The deed was prepared by and executed in the presence of Maitre Perodeau, Notary Public, who was the company's notary. It