

second branch of it, for even supposing that there was agency in fact on the part of the bank (notwithstanding the absence of power given by the contract), I fail to find the remotest evidence of fraudulent representations made in the course of any such agency transaction. There was no statement whatever made to Mr Howe. What he says constituted a fraudulent representation to him was the fact that he read in the newspapers a report of a meeting of the shareholders. But that was substantially a report made by the directors to the shareholders, which found its way into the newspapers as matter of information for the public. It would no doubt, if used in the course of making a contract with the bank, have become the bank's representation, but how it is possible to make it a representation by the bank to Mr Howe in the course of this agency transaction I am utterly at a loss to see. In order to succeed in a claim of this kind, by which it is proposed to make Mr M'Ewen responsible for the act of an agent, a representation must be shown to have been made with reference to the transaction in the course of the agency, and resulting in the sale. There was no representation made to Mr Howe at all, and certainly no representation made in the course of the agency, and with reference to the transaction, in which the bank gave their assistance, and on that ground I am clear that the case fails.

It was not seriously maintained in the argument on the proof that there could be any case of concealment. The only persons that Mr M'Ewen came into contact with were Murdoch and Wardrop, and there is no suggestion that either of them had the least reason to doubt the truth of the reports. I can see no ground in any view for the suggestion that they were bound to make any statements to the pursuer in regard to the condition of the bank. And so I think it is clear that there is no case against Mr M'Ewen.

It is, I think, even more clear that there is no case in a question with the bank. There was no contract with the bank. The reports of the directors to the shareholders are no doubt held to be the reports of the company if they be used in the making of any contract by the company, and are thus adopted by the company, but there was no contract of purchase with the company, and the representations therefore are not the representations of the bank, but the representations only of directors to the partners.

In the next place, if it be said that the bank has incurred responsibility from *de facto* acting as agents, the answer is conclusive that in so far as they did anything of that kind there was no authority for it under the contract of copartnership. Neither the manager nor the directors had any power whatever to carry through an agency transaction between third parties which could in any way affect the bank or its shareholders, because no such power was given by the contract. And accordingly on that ground it is clear that as there is no case against Mr M'Ewen, equally there is no case against the bank.

Something was said about the fact that Mr Howe's name had been put on the register after the bank closed its doors, but that is of no consequence in this case, for the simple reason that if Mr Howe's name had not been on the register now, Mr M'Ewen would have been entitled to have his name put there instead of his own—it having

been proved that a contract of sale had been entered into, and that the requisite documents had been transmitted to the bank, and ought to have been recorded at the time they were so transmitted.

In the action of reduction the Court assolizied the defenders, and they refused the prayer of the petition.

Counsel for Pursuer—Dean of Faculty (Fraser)—R. V. Campbell. Agents—Fyfe, Miller, Fyfe, & Ireland, S.S.C.

Counsel for the Liquidators—Kinnear—Balfour—Graham Murray. Agents—Davidson & Syme, W.S.

Counsel for M'Ewen—Trayner—Dickson. Agents—Graham, Johnston, & Fleming, W.S.

Friday, July 4.

## FIRST DIVISION.

[Lord Rutherford-Clark, Ordinary.]

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.*

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 (diss. Lord Shand)* 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.

*Observed (per Lord Deas and Lord Mure)* that the case was ruled by that of *Addie v. The Western Bank*, June 9, 1865, 3 Macph. 1865—H. of L. May 20, 1867, 5 Macph. 80.

*Opinions reserved by the Lord President (INGLIS), Lord Deas, and Lord Mure* as to whether the pursuer would have a good claim for repetition of the price he was induced to pay for the stock, upon the plea that to the extent of that price the bank took benefit by the fraud of its agents.

*Opinion (per Lord Shand)* that the case was not ruled by that of *Addie*, there being the distinction that in that case the pursuer was a party to a conversion of the company from an ordinary joint-stock company to an incorporation, and that although the remedy of restitution by maintaining an action to rescind was not now possible, the pursuer might nevertheless sue an action of damages against the corporation in respect of the loss and injury sustained by him owing to the bank's liabilities as at the date of his purchase, the rule for estimating the damages to be the difference between the purchase money and what would have been a fair price for the stock.

In February 1877 Mr Arthur Hooton Houldsworth purchased from the City of Glasgow Bank stock of the bank to the amount of £4000, at the price of £9000. He was registered as a partner and drew dividends upon the stock up to the date of the failure of the bank. He was put by the liquidators upon the list of contributories, and claims were made upon him in respect of the stock. On December 21st 1878, about two months after the liquidation had commenced, Mr Houldsworth raised an action of damages against the City of Glasgow Bank and its liquidators concluding for decree against them "to make payment to the pursuer of the sum of £9046, 5s. 3d. sterling, being the loss and damage originally sustained by the pursuer by and through his purchase from the defenders, the said City of Glasgow Bank, of £4000 consolidated stock of the said company at the price of £9000 sterling, with £46, 5s. 3d. sterling of stamp-duty and fee paid by him upon the said purchase; and the said defenders ought and should be decerned and ordained, by decree foresaid, to free and relieve the pursuer of the sum of £20,000 sterling, being the further loss and damage sustained by him by and through the first call made in the said liquidation upon the said stock; and further, the said defenders ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £200,000 sterling, or such other sum as shall be ascertained by our said Lords in the process to follow hereon to be the loss and damage sustained or to be sustained by the pursuer by and through the further calls to be made in the said liquidation; or otherwise the defenders should be decerned and ordained, by decree foresaid, to relieve the pursuer of such further calls as the same may fall due, besides making payment of the sums concluded for in respect of damage already accrued." . . .

The pursuer, after narrating the circumstances under which he was induced to purchase the stock in question, and stating the nature of an interview between a friend of his and Mr Stronach, the manager of the bank, and Mr Potter, one of its

directors, with a view to the purchase, further averred—" (Cond. 4) . . . At the time when these inquiries were made by Mr Somerville, and for some years prior thereto, the City of Glasgow Bank was insolvent, and had lost the whole of its capital and any reserve fund that may have existed, and had besides contracted liabilities to its creditors to a very large amount, which at the period in question amounted to a sum not far short of the ultimate declared deficiency of £5,000,000 sterling. These losses and the true financial condition of the bank were fraudulently concealed from Mr Somerville by Mr Potter and Mr Stronach on the occasion of his said interview when he proposed to negotiate a purchase on behalf of the pursuer. . . . (Cond. 6) . . . At the time of the said purchase, which was finally carried out on or about 20th February 1877, but which had been intimated to Mr A. F. Somerville on behalf of Mr Houldsworth by Mr Stronach on the 8th of February, the said stock was of no value, the capital of the bank being entirely lost, and liabilities to the extent already mentioned having been contracted. The bank and its shareholders, the owners of stock sold to the pursuer, have profited by the false and fraudulent representations and concealment of the manager, and of Mr Potter, who was a leading director, and that to the loss and damage of the pursuer. (Cond. 7) The company of the City of Glasgow Bank being in liquidation under the supervision of the Court, a call has been made upon the pursuer of £500 for each £100 of stock, amounting to £20,000. The estimated amount of future calls, as stated by the liquidators in claims which they have lodged in the sequestrations of certain shareholders, is £5000 per £100 of stock, and according to this estimate the pursuer's contingent liability, over and above the call already made, amounts to £200,000. The pursuer has sustained loss and damage by and through said purchase of stock, induced by the fraud of the authorised agents of the bank in the said sale, to the extent of the price thereof, of the said call of £20,000, and the contingent claim against him in respect of future calls, for all which he is entitled to reparation from the company, now represented by the liquidators."

The defenders in their statement of facts averred, *inter alia*,—" (Stat. 13) Since 1877, when the pursuer purchased the stock in question, many of the parties who were then shareholders of the bank have ceased to be shareholders, and many other parties have become shareholders. The shareholders of the company are now in numerous instances different parties from those who were shareholders of the company when the pursuer purchased his stock; and if the pursuer were relieved of the responsibility of the stock in question it would be a serious loss and injury to parties who had no connection with the bank at the time he became a shareholder. Very many of the present shareholders who have become such since the pursuer purchased his said stock, purchased or otherwise acquired their stock not from the bank or anyone acting on its behalf, but from other shareholders who sold or transferred the same in *bona fide*, and who, assuming that the allegations of the pursuer as to the state of the bank's affairs are true, were in ignorance of the true position of matters. (Stat. 14) The bank, which has carried on business

since 1877, incurred large losses, which eventually caused its stoppage. The debts due by the bank at the time of the stoppage exceeded its assets by £5,000,000, and these debts were incurred in the prosecution of its business after the pursuer became and while he was a partner. The ultimate insolvency of the bank, which caused the stoppage, was not in respect of the debts due at the dates at which the pursuer acquired his stock. The debts which were due by the bank at the respective dates at which the pursuer purchased his stock have long ago been paid, and the obligations which the bank was then under have long ago been satisfied and discharged. (Stat. 15) In so far as any untrue representations were made by the directors, or manager, or agents of the bank in reference to its affairs, these were altogether unauthorised by the bank or its shareholders, or by the contract of copartnery. (Stat. 16) The pursuer raised the present action on 21st December 1878, being after the commencement of the winding-up. Until the raising of the present action the pursuer did not avoid or repudiate or take any steps for avoiding or repudiating the contract by which he became a partner. (Stat. 17) The pursuer does not offer, and is incapable of making *restitutio in integrum* or any restitution in the matter of the said stock."

The pursuer pleaded, *inter alia*—“(1) In respect of the fraudulent misrepresentations of fact and fraudulent concealment practised by the said manager and director, or one or other of them, as agents or agent of or otherwise representing the bank in the matter of the sale of its stock, the pursuer is entitled to reparation for the loss which he has sustained through the sale and transfer thereof to him. (2) In respect of the fraudulent representations contained in the annual reports and balance-sheets of the bank during the period condoned on, and the fraudulent concealment therein of the losses sustained by the company, the defenders are responsible for the loss sustained by the pursuer through the said sale and purchase, and are liable in payment of the sum concluded for. (3) Alternatively, in respect of the said fraudulent misrepresentations and concealment by the accredited agents of the bank, and by the directors in their annual reports and balance-sheets, the pursuer is entitled to recover the price of the stock and calls for which he is liable, and to be relieved from further contribution, or to be indemnified by the defenders against the amount of such further contribution as he may be called upon to make to the assets of the company.”

The defenders pleaded, *inter alia*—“(2) The false representations alleged to have been made by the officials of the bank for the purpose of inducing the pursuer to take shares cannot subject the defenders in damages, such representations having been unauthorised and contrary to the contract of copartnery. (3) It being impossible to effect restitution *in integrum* between the pursuer and the bank, the pursuer cannot maintain the present action to the effect of recovering the price paid for his shares. (4) The pursuer is barred by his own actings as a partner from insisting in the conclusions of the action. (5) The present position and circumstances of the company differ so materially from when the pursuer became a partner, that he cannot maintain the present action.”

The Lord Ordinary (RUTHERFURD CLARK) assolizied the defender, and appended the following note to his interlocutor:—“*Note*.—The Lord Ordinary thinks that this case is ruled by the decision of the House of Lords in *Addie v. The Western Bank*.”

The pursuer reclaimed, and argued—The claim made was alternative, either for a *pari passu* ranking with the general creditors of the company, or, if that were not allowed, for relief after the other creditors had been fully paid out of the surplus assets of the company, or, looking to the fact that the liability of the bank was unlimited, from the funds of such other creditors as still remained solvent. A body such as the bank was liable for the fraud of its officials to the extent by which it had profited, or even further to the extent of which the defrauded party had suffered. The fact of liquidation did not extinguish a claim to damages in respect of the fraud of the officials of the bank prior to the liquidation, and the fact that the person defrauded was a shareholder, he having been induced to become so by fraud, did not of itself extinguish such a claim.

Authorities—*Gibbs and West's case*, L.R., 10 Eq. 312; *Grissell's case*, L.R., 1 Ch. App. 528; *Cowan v. Gowans*, Jan 25, 1878, 5 R. 581; *Clydesdale Bank v. Paul*, March 8, 1877, 4 R. 626; *Traill v. Smith's Trustees*, June 3, 1876, 3 R. 770; *New Brunswick Railway v. Conybeare*, 9 Clark H. of L. Cases, 711; *Barwick's case v. English and Joint Stock Bank*, May 18, 1867, L.R., 2 Ex. 259; *Mackay v. Commercial Bank of Brunswick*, L.R., 5 P.C. 394; *Swire v. Francis*, 3 P.C. App. Ca. 106; *National Exchange Company v. Drew*, 2 Macq. 103; *Stone*, November 27, 1877, L.R., 3 C.P. 282; *Lindley on Partnership*, 1203; *Stair*, i. 9, 10.

Argued for defenders—*Addie's case* was in point, and the principles there laid down had never been contradicted in decision though possibly in *dicta*. If the bank had still been carrying on business, the pursuer might no doubt have had a remedy against fraud carried on by its agents. But the fact that he had been induced to take shares by such fraud did not invalidate the contract, though the contract might be rescinded. Till that was done it was perfectly valid. That had not been done, and could not now be done. *Restitutio in integrum* was impossible. The rescission of the contract being now impossible, what the pursuer asked would come to this, that a party who had become a partner under a deed of sale would be entitled to call upon his partners to relieve him of his liabilities. Two classes of contributories would then exist, one class consisting of those who had bought from the bank, the other of those who had bought from third parties, and the latter would have to relieve the former from all losses.

Authorities—*Addie v. Western Bank*, June 9, 1865, 3 Macph. 1865—H. of L. May 20, 1867, 5 Macph. 80; *Swift v. Winterbottom*, 1873, 8 L.R., Q.B. 244; *Jewsbury*, 1874, 9 L.R., Q.B. 301; *Udell v. Atherton*, 30 L.J., Exch. 337; *Tulloch v. Davidson*, July 17, 1858, 20 D. 1319—Feb. 1860, 8 Macph. 783; *Clark v. Dickson*, 1858, Ellis, Black, and Ell. 148.

At advising—

LORD PRESIDENT—In the month of February 1877 the pursuer purchased £4000 City of

Glasgow Bank stock from the bank itself at the price of £9000. He was registered as a partner in due course, has continued to be a partner ever since, drawing dividends on his stock, and exercising his privileges as a partner in common with the other partners of the bank, and is now in respect of the said stock entered as a contributory on the list of contributories made up by the liquidators and sanctioned by the Court.

On the 21st of December 1878, a month after the commencement of the liquidation, the pursuer raised this action of damages against the bank and the liquidators, alleging that he had been induced to purchase the stock in question by the fraudulent representations and concealment of the directors and manager of the bank, and concluding for reparation of the loss and damage he has thereby sustained, which he estimates at £9046, 6s. 6d., being the price of the shares with sundry charges paid by him, £20,000, being the amount of the call already made on him as a contributory, and £200,000 as the anticipated amount of further calls to be made for the purpose of paying the debts of the bank.

It was explained to us in the course of the argument that the pursuer's claim is intended to be alternative (though that does not appear from the record), either for a *pari passu* ranking with the creditors of the company, or for a total relief and indemnification (after the creditors have been fully paid) out of the surplus assets of the company, or out of the private estates of those of his fellow partners who then remain solvent.

As regards the first alternative, it is needless to say more than that it is opposed to the most elementary and well-settled principles applicable to the winding-up of joint-stock companies.

The second alternative was supported by much ingenious argument, the greater part of which, however, was directed to establish certain legal propositions, which the defenders have no occasion to controvert, and which it would, in the present day at least, be very difficult to impugn, viz.—

(1) That a principal is liable for the fraud of his agent while acting in the principal's business, and within the scope of his authority, for the principal's benefit.

(2) That this rule applies to the case of an incorporated company acting through the agency of its ordinary directors and manager. Among the Scotch authorities on the subject it is enough to refer to *Jardine v. Carron Company*, 2 Macph. 1101; *National Exchange Company of Glasgow v. Drew & Dick*, 2 Macq. 103; *Trull v. Smith's Trustees*, 3 Ret. 770; *Clydesdale Bank v. Paul*, 4 Ret. 626; while in England the same doctrine has received most instructive illustration in the recent cases of *Barwick v. The English Joint Stock Bank*, L.R., 2 Exch. 259, and *Mackay v. Commercial Bank of New Brunswick*, L.R., 5 P.C. App. 394.

If the City of Glasgow Bank were still carrying on business, the pursuer might no doubt have a remedy against the bank for the fraud committed by their agents. But it is too clear to admit of argument that his remedy would in that case have been, not an action of damages *ex delicto*, but an action for rescission of the contract induced by the fraud, involving a *restitutio in integrum*. If he had been induced by the fraud alleged to pay money or to accept or endorse or retire some bill which he was not under any true obligation to

retire, and that payment, acceptance, or the like, though in favour of some third party, enured to the benefit of the bank, he would have a remedy of the kind here sought. But 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. I do not at all doubt that the pursuer has a good action for damages against the directors and manager, as the actual perpetrators of the fraud, as in *Tulloch v. Davidson*, 20 D. 1319. What I have said applies only to the action for deceit against the incorporation.

Having accepted the transfer and been registered as a shareholder, the pursuer became a partner of the incorporated company to all effects. No one indeed can become a partner of such a company to any limited extent, or on any other conditions than the other partners. The fact that he was induced to accept the shares by fraud does not invalidate the contract, or *eo ipso* liberate him from any of the obligations he has undertaken. He is no doubt entitled to rescind the contract *dum res sunt integrae*; but until the contract is rescinded, it is to all effects as valid as if there had been no fraud.

In the present case the contract has not been rescinded, and cannot now be rescinded, and the consequence is logically inevitable that the pursuer remains a partner of the company to all effects. Now, the obligations of a partner of a bankrupt company, and in like manner of an incorporated company in liquidation, are, that he shall contribute *pro rata* with his copartners to provide the necessary funds to pay all the debts of the company, and shall also relieve his copartners of any superadvances they have made for that purpose, so that in the end each partner shall contribute his full share, and no more than his full share, according to the extent of his interest in the company, to discharge its obligations.

If the claim of the pursuer to be restored against the fraud of the company's agents had been made while the company was carrying on business, the claim would have been directed against the corporation, and would have fallen to be satisfied out of the estate of the corporation; and if the claim made had resolved itself into a right to demand payment of a sum of money in name either of debt or damages, while the corporation was still carrying on business, the pursuer would probably have been entitled to rank *pari passu* with the other creditors of the company on the corporate estate; for he would by rescinding the contract have ceased to be a partner, and the company would have been his debtor for payment of the sum necessary to restore him against the consequences of the fraud. But when the corporation is in liquidation, the corporate estate becomes exclusively appropriated to payment of those who are creditors at the commencement of the liquidation, which, as a necessary consequence of the above reasoning, the pursuer was not.

If, again, it were doubtful whether the corporation will in the end prove insolvent, a different question might arise when the corporation came to have the reversion of its estate restored to it. But there is no possibility of such a question arising here, because the balance of indebtedness

of the bank over the most sanguine view of the value of its assets is such as is too well known to involve the ruin of most of the corporators. Every shilling therefore of the corporate estate belongs to the creditors, of whom the pursuer is not one, and there can be no corporate estate to satisfy the claim of the pursuer if now constituted against the corporation.

The claim of the pursuer therefore is nothing less than a demand that after the creditors of the company have been paid in full his copartners shall relieve him of the liabilities he undertook by becoming their copartner under a contract of sale which, though induced by fraud, cannot now be rescinded or set aside in any way. If there should be no surplus assets after paying the creditors, his claim could be satisfied only out of the private estates of those of his partners who then remain solvent. If there should be surplus assets, these would in ordinary course be divided among the partners in a due course of accounting, having regard to the rateable liability of each partner and the extent to which any of them may have been made to contribute more than his rateable share of liability. To give the pursuer a preference on such surplus assets is nothing else in practical effect than to relieve the pursuer of his rateable share of liability at the expense and out of the private estates of his copartners.

By the time that this alternative claim of the pursuer emerges—that is to say, at the close of the liquidation—the liquidators will have distributed the whole assets of the company among the creditors who, *ex concessis* of the alternative claim, are preferable to the pursuer. All that in any event can remain is a surplus of assets, which if it had been sooner available would have been in like manner distributed, and would have prevented the necessity of making calls on the contributories to so large an extent as has been done. But the calls have been made and answered for the speedy payment of the creditors of the company under an implied agreement between the liquidators and the contributories that the former shall pay over to the latter these very surplus assets at the close of the liquidation.

The demand of the pursuer, though in form made against the incorporated company, is in reality to be enforced, not against the incorporation, but against individual corporators, after the incorporation is practically, if not formally, dissolved, and to be satisfied out of funds and property which never belonged to the incorporation. This would be, not to make the incorporated company answerable for the fraud of its agents, but to make one class of contributories in a liquidation answerable to another class of contributories in the same liquidation for the fraud of those who were not their agents—a proposal entirely novel as far as I know, and not a little startling.

The pursuer says that he has yet another and more limited view of his claim to present, to the effect that he is at all events entitled to repetition of the price which he was induced to pay for the stock by the fraud of the directors and manager, because to the extent of that price the bank took benefit by the fraud of its agents.

As the claim so stated is not covered by the conclusions of the summons, and is not supported by any appropriate averments or pleas, it is not desirable that we should express any opinion in regard to it. Whatever might be said of it at

present could be only *obiter dictum*, for the nature of the action and the state of the record preclude the possibility of our pronouncing any judgment one way or the other which should be *res judicata*. I shall therefore only remark in conclusion that in adhering to the Lord Ordinary's interlocutor we shall not in my opinion prevent the pursuer from raising the question to which I have adverted in another action, in which the grounds both of fact and law on which it is to be based may be distinctly alleged.

**LORD DEAS**—In February 1877 the pursuer Arthur Hooton Houldsworth purchased through his friend Mr Archibald F. Somerville from the directors of the City of Glasgow Bank £4000 stock of that bank, belonging to the bank itself, at £225 per cent., being £9000 in all.

A transfer in Mr Houldsworth's favour was duly executed by the directors and delivered to him, and upon his own application his name was entered in the transfer book and stock-ledger of the bank as a partner to the extent of the stock so transferred, and a certificate granted to him of his having become the registered holder.

All this took place in February 1877. Between that date and the stoppage of the bank in October 1878 three or thereby half-yearly dividends had been declared and drawn by the pursuer, at the rate I think of 11 per cent. upon the capital stock of the bank.

On 2d October 1878 the bank stopped payment. On 5th October an extraordinary general meeting was convened for the 22d of that month to pass resolutions for a voluntary winding-up, and on the last-mentioned day resolutions to that effect were passed accordingly.

It was ascertained by the report laid before the meeting of the 22d that the whole capital of the bank had been lost, and that the bank was owing debts beyond its assets to the extent of five millions or thereby. It followed of course that the deficiency would fall to be made up by calls on the shareholders.

It is fixed by a judgment of this Court in the case of *Alexander Mitchell*, affirmed by the House of Lords in May last, that from one or other of the above three dates in October 1878—I should say from the first of them (but for the purposes of the present case it is of no moment which of them)—the bank, except for the purposes of winding-up, ceased to exist.

The pursuer took no steps for impugning the fairness or equality of the contract by which he became a partner of the bank till 21st December 1878, when he raised the present action setting forth that he had been induced to make the purchase of his shares by the fraud of the bank and its directors. The fraud is alleged in the record to have consisted in false and fraudulent reports issued to the shareholders prior to the date of the pursuer's purchase, and in false and fraudulent representations as to the solvency and prosperity of the bank made to him, through his friend Mr Somerville, by Mr Stronach, the manager, and Mr Potter, one of the directors of the bank, and which representations, the pursuer alleges in the record, were well known to both of these parties to be false and fraudulent. Had it not been for these false and fraudulent statements, printed and verbal, the pursuer says explicitly he would not have made the purchase. He further alleges that

he was totally ignorant of the fraud which had been practised upon him till in his character of a shareholder he received on the 19th October 1878 a copy of the report presented to the meeting of the 18th, which revealed the true state of matters as they then stood and had previously existed. By this time, the pursuer states in his condescendence, "the bank had suspended payment, and its credit was entirely destroyed."

In these circumstances the pursuer concludes in his summons that the bank and its liquidators should be decreed and ordained "to make payment to the pursuer of the sum of £9046, 5s. 3d. sterling, being the loss and damage originally sustained by the pursuer by and through his purchase from the defenders, the City of Glasgow Bank, of £4000 consolidated stock of the said company, at the price of £9000 sterling, with £46, 5s. 3d. sterling of stamp-duty and fee paid by him upon the said purchase," and "to free and relieve the pursuer of £20,000, being the further loss and damage sustained by him by and through the first call made in the said liquidation upon the said stock," and "to make payment to the pursuer of the sum of £200,000 sterling, or such other sum as shall be ascertained by our said Lords in the process to follow hereon to be the loss and damage sustained or to be sustained by the pursuer by and through the further calls to be made in the said liquidation; or otherwise, the defenders should be decreed and ordained by decree foresaid to relieve the pursuer of such further calls as the same may fall due, besides making payment of the sums concluded for in respect of damage already accrued."

I quote these conclusions in order to introduce the observation I shall immediately have to make, that the whole sums sought to be recovered by the pursuer are sued for on one and the same footing, as damages resulting from the fraud. This further appears from the different articles of the pursuer's condescendence. In article 6 he states that, induced by the false and fraudulent representations already mentioned, he purchased the £4000 stock, "and paid for it the sum of £9000, together with the stamp-duty set forth in the summons." The item of £9046, 5s. 3d. is thus claimed as the first item of damage; the first call, amounting to £20,000, is stated as the second item of damages; and the third item, £200,000, is stated to be the amount estimated by the liquidators themselves as the probable amount of future calls for which the pursuer is contingently liable.

The only words in the record that can be said to indicate in any way that the transaction had been to the profit of the bank are the following words:—"The bank and its shareholders have profited by the false and fraudulent representations and concealment of the manager and of Mr Potter, who was a leading director, and that to the loss and damage of the pursuer." If these words were intended to suggest any substantial difference between the ground of action for the item of £9046, 5s. 3d. and the ground of action for the item of £20,000 (being the amount of the first call), they are certainly very vague and insufficient words to be used for that purpose. They slump together the stamp-duty, which did not go into the coffers of the bank, with the price which did, and the pursuer immediately afterwards resumes the different

items of his claim as coming within one and the same category, and he says—"The pursuer has sustained loss and damage by and through said purchase of stock, induced by the fraud of the authorised agents of the bank in the said sale, to the extent of the price thereof, of the said call of £20,000, and the contingent claim against him in respect of future calls, for all which he is entitled to reparation from the company now represented by the liquidators." The pursuer's pleas-in-law are framed on the same principle. The only mention made in them of the price paid for the stock is in the third plea, and there the claim to recover the price is placed precisely on the same ground with the claim to recover the amount of the calls made and to be made. The words of the plea are—"The pursuer is entitled to recover the price of the stock and calls for which he is liable, and to be relieved from further contribution, or to be indemnified by the defenders against the amount of such further contribution as he may be called upon to make to the assets of the company."

I do not make these observations for the purpose of suggesting that the pursuer can have no claim for repetition of the price paid for the stock upon grounds different from those upon which he claims damages to cover the amount of the calls made and to be made. We had an able argument at the bar—particularly from Mr Mackay—in favour of such a distinction. I fear it will be very difficult, both on principle and authority, to state a relevant case in support of such a distinction, but if the pursuer thinks he can do so in any appropriate form of action, our judgment dismissing this action will not be *res judicata* against him. All I say upon this point here is, that in this summons and record it appears to me that the price is stated as a mere item of damage on a ground common to that item with the other items, and particularly with the item of £20,000, being the amount of the call paid, and that supposing it to be competent, it would not be expedient to attempt by way of amendment to introduce into this record a separate ground of action as to the price, which will be much better raised and dealt with if it is to be seriously insisted on under a new summons and record deliberately prepared for the purpose.

To come, however, to the ground of action libelled, I have to observe that although in the record it is not distinctly averred that the whole of the directors knew the misrepresentations in the reports sanctioned by them to be false and fraudulent, I think the case falls to be dealt with upon the same footing as if that averment had been expressly made. The proof adduced in several cases in the liquidation after the record in this case was closed, as well as the proof in the trial before the High Court of Justiciary which resulted in the conviction of all the directors, were facts too notorious not to have led to an amplification of the averments in the record, had it not been assumed on both sides that their notoriety rendered this unnecessary, and that there was no room for contending in this case, as had been contended in some previous cases, that the parties guilty of the falsehood and fraud were not the proper representatives, or at least not the whole of the proper representatives of the bank in the ordinary conduct of its business.

A joint-stock company can only conduct its business by means of a representative body, and

I assume that the whole members of that body were here knowingly and wilfully parties to the fraud whereby the pursuer was induced to make his purchase. I further assume for the purposes of this case that if the contract of sale had been judicially challenged on the ground of that fraud while the bank was a going concern, the pursuer might have been entitled to redress, not only against the guilty parties individually, but also against the bank itself, or, in other words, against the general body of shareholders. I do not see how the case of the pursuer can be taken upon a footing more favourable for him than this.

But the fraud which in this view would have been held to be the fraud of the bank and its shareholders would only have been imputed fraud, and the observation forcibly occurs that the same principle which imputes to them that fraud at and prior to the pursuer's purchase imputes to the pursuer and his co-shareholders (many of them new) the continuous frauds committed by the manager and directors in the course of the period which intervened between the pursuer's becoming a shareholder and the stoppage and commencement of the winding-up of the bank. The period which intervened between the sale and the raising of the present action was no doubt comparatively short, and the changes which intervened were fewer in number than they seem to have been in previous cases of the kind. But these changes were nevertheless important. Amongst them was the change by which the bank ceased to be a bank, and the materiality of that change cannot well be doubted.

The sale by the bank to the pursuer was not a nullity, as it would have been had it been a sale to a pupil or to a person insane. It was a valid contract, unless and until the pursuer should exercise his option to challenge it. The new transactions during that period—the sanction given to previous transactions, the contraction of new obligations, and other acts—are all attributable to the pursuer and his partners, many of them, as I have said, new partners, who are to be held as having been assumed by himself. The whole partners, old and new, were and are equally innocent with the pursuer of personal fraud. The discovery that there had been fraud which makes them liable for some five millions of debt was equally a surprise to them as to him, and how he can turn round upon them after the bank has ceased to exist and claim to be relieved of his share of the losses incurred I find it very difficult to apprehend. It is true that the bank subsists for the purpose of winding-up, but that purpose can only be accomplished by taking the rights and liabilities of the partners *inter se* as they stood when the bank stopped for the purpose of winding up, otherwise the extrication of that purpose would be interminable.

It is well settled that a party defrauded, although he has the option of voiding the contract, cannot do so unless he gives *restitutio in integrum*. If that cannot be done, it is held to be his misfortune, and rightly so, for great injustice as well as inconvenience might be occasioned if in all kinds of transactions, however speculative and tempting for the chance of gain, the party defrauded might lay bye for any length of time till the result was known, and then plead ignorance of the fraud or not, according as the result of the speculations had been favourable or unfavourable.

In many instances the state of mind of that party while the result yet remained doubtful might be incapable of being ascertained otherwise than by his oath of reference, and uncertainty would thus be introduced into the ordinary affairs of life which it is the policy of the law to prevent, according to the adage *vigilantibus non dormientibus jura subveniunt*.

The summons in the present case contains no conclusion for reduction of the contract of sale; and if it had contained such a conclusion, the answer to it would have been, that there can be no reduction where there cannot be *restitutio in integrum*, which in this case is impracticable, because not only have the new parties come into the partnership with new rights and new liabilities, to whom the pursuer does not propose to give restitution, but the subject of the contract of sale has ceased to exist.

If, then, we have here a case in which reduction is excluded because restitution can no longer be given, it seems to me necessarily to follow upon principle, apart from all authority, that a claim of damages is inadmissible and incompetent, because that would just be to give the party his remedy—and in many cases it would be a more advantageous remedy—in the shape of damages which the policy of the law refused to him in the shape of reduction. I need hardly say that I am here speaking with reference to cases of shares in a trading company. *Graham's* case and *Addie's* case were both cases of that kind, and how far the same principle might or might not admit of modification in cases of a totally different description did not require in these cases, and does not require here, to be considered.

It is no doubt a possible case that the bank and the body of its partners may incur a debt to an individual partner. I stated my opinion to that effect in the case of *Graham*, 8th March 1865, 3 Macph. 617, and in the case of *Addie*, 9th June 1865, *ib.* p. 899. But I likewise stated my opinion in both and each of these cases to the same effect as I have done now as to the nature of the circumstances which would be sufficient to bar an action of reduction and damages at the instance of the defrauded shareholder. In particular, I noticed the rule that the contract was not void, but only voidable; that there would be great difficulty in finding out after a considerable lapse of time whether the defrauded party had or had not known of or suspected the fraud before he chose to declare his option; that the effects of subsequent trading, including the assuming of new shareholders, to which he had been a party, was to expose him to the same charge of imputed fraud which he attributed to the other equally innocent shareholders, and that great injustice as well as inconvenience would result if it were a general rule that after a company had avowedly lost all its capital, and in a state of declared and hopeless insolvency was in the course of winding-up, the same redress was still open and competent to the party defrauded against the other shareholders as might have been open and competent to him while the company was a going concern. I may refer particularly to pp. 636-7-8 of the report (in 3 Macph.) of my opinion in *Graham's* case, and to pp. 905-6-7 of the report in the same volume of my opinion in *Addie's* case. The views I there expressed, although not gone into in the same detail, appear to me to be confirmed

by the opinions delivered in the House of Lords in *Addie's* case, to a sufficient extent to encourage me to apply them to the present case, so far at least as regards the second or third items of the pursuer's claim of damages, and to the first item also so long as it is allowed to stand upon the same common ground with the others, as it does in this summons and record.

The conclusions and grounds of action both in *Graham's* case and *Addie's* case were substantially the same with those in the present case.

In *Graham's* case the conclusions were for reduction of the deeds of transference and contract of sale, and—whether these should be reduced or not—1st, for £4304, 7s. 7d. as the price paid for the shares and half the expense of transfer; 2d, for £750, being two instalments of a call paid by the pursuer—under deduction of £1591, 18s. 9d. of dividends received by him; 3d, for relief of all calls, loss, and damages he might thereafter sustain in consequence of the sale, and for that purpose to make payment to him of £7000, or such other sum as he might be compelled to pay to the liquidators or creditors; or otherwise that the bank and liquidators should be ordained to make payment to him of £10,000 of damages, with interest from the date of citation.

In *Addie's* case the conclusions were—1st, for reduction and *restitutio in integrum*; 2d, for repayment of the price paid for the shares; 3d, for repetition of calls paid, subject to deduction of the amount of dividends drawn; and lastly, alternatively, for £26,000 of damages.

*Addie* had held 15 shares of the bank from 1848, and in 1855 he had bought 135 shares additional from the bank. *Graham* had purchased 60 shares from the bank in 1850 without having been a previous holder, but that difference in their position at the outset is not necessary to be gone into here, and does not seem to have been deemed material to the result. The registration and incorporation for the purposes of winding-up, in pursuance of the resolution of a general meeting, had been obtained in *Addie's* case, on 8th December 1857, and liquidators appointed. The action was not raised till November 1859, and these having been the circumstances, it will be difficult enough for the pursuer, consistently with the result of that case, to distinguish his claim for repayment of the price from his claim for repayment of calls, even after all the debts are paid.

Be this as it may, I think *Addie's* case as decided in the House of Lords (1 L.R. Scotch and Div. App. 145) is decidedly adverse to the relevancy of the whole three items of the pursuer's claim, as these are libelled and set forth in the present action.

The Lord Chancellor (Chelmsford) observed in that case, that where a purchase of shares is induced by the fraud of the directors acting in name of the company, the contract cannot be enforced, because the company cannot retain the benefit they have got; and on the same principle, in an action to rescind the contract, the fraud of the directors will be imputed to the company, so that the defrauded shareholder may be in equity entitled to succeed so long as there has been no change in the character or condition of the company to bar that challenge. But if the person defrauded, "instead of seeking to set aside the contract, prefers to bring an action of damages for the deceit, such an action cannot be main-

tained against the company, but only against the directors personally. The action of Mr *Addie* is for 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" (p. 158). His Lordship expresses considerable doubt (which I do not entertain in the present case) whether the pursuer had sufficiently connected the directors with the fraud, and he then says (p. 159)—"But on the question whether the pursuer was not deprived of his right to rescind the contract by the change in the character and condition of the company, which appears from his condescendence and admissions, I have no doubt that the relevancy of his case altogether failed."

His Lordship throughout recognises the doctrine that there can be no reduction without *restitutio in integrum*. Whether the mere change from unincorporated to incorporated was of itself sufficient to render *restitutio in integrum* impracticable, he says is a question which, if it were necessary to determine it, he would wish to consider more carefully. This is evidently on the footing that the other changes were enough to bar the reduction. Accordingly he says that the Lord President ought to have directed the jury at the trial "that the pursuer had in law barred himself from repudiating his purchase" (p. 163, top); and he concludes by saying, "his action being against the company for the fraud of the directors, the pursuer could only recover in such action if he were entitled to rescind the contract. If his claim rested on damages, he ought to have proceeded against the directors, who would alone have been liable to him in that form of action" (p. 164).

Lord Cranworth's opinion I read as substantially to the same effect, with the explanation, that in place of not being prepared to decide as to the effect of the incorporation, he holds that change to be itself enough to make *restitutio in integrum* impracticable, and consequently to exclude reduction. He says—"This new company is now in the course of being wound up; but even if that were not so—if it still were carrying on the business of bankers—*restitutio in integrum* would have been impossible." I look upon this as the statement of an *a fortiori* reason for holding such a change of itself conclusive in the case of a company which had ceased to be carrying on business, but by no means as implying that there were not other changes in the circumstances of the case sufficient to have operated the same result. Accordingly he says—"The view which I thus take of this case makes it unnecessary to consider whether there are not other grounds excluding this particular relief."

His ground of judgment is that a change which makes *restitutio in integrum* impracticable, excludes reduction, so that to come within the principle of his judgment we have only to consider whether there have or have not been changes in the present case sufficiently important to operate that result. Upon that point I have already said enough, and I do not therefore resume it. If the changes are such as to prevent *restitutio in integrum*, he puts the question whether Mr *Addie* might not recover compensation in damages, "and so obtain relief as beneficial as that from which he is thus barred?" And to that question he answers—

"But here too I am of opinion the appellant must fail. He comes too late" (p. 166).

He then lays down the general doctrine that "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." Obviously he does not mean that the subsequent acts and dealings must necessarily consist in the incorporation of a company which was not incorporated before. Nor did his opinion that that particular change was of itself sufficient prevent him from fully concurring in the judgment, the terms of which (as given *ad longum* 5 Macq. H. of L. Cases, p. 933), taken in connection with the opinions, appear to me to afford a direct authority in the present case.

The recent affirmance by the House of Lords of the judgment of this Court in *Tennent's* case has also an important bearing upon the principles applicable to this case—particularly in recognising the great difference between a going company and a company which has stopped payment and is in course of winding-up.

The pursuer was not a speculator, but a party seeking a legitimate investment for his patrimony, and I greatly sympathise with the unfortunate position into which he has been drawn by what I have no doubt was the grossest possible fraud, without any fault or even what can be called imprudence of his own. But justice is blind, and I have not been able to find any legitimate ground for giving him the relief he asks. I am therefore of opinion that his action must be dismissed as irrelevant.

LORD MURE—I concur with the Lord Ordinary in thinking that this case is ruled by the decision of the House of Lords in *Addie v. The Western Bank*, the leading features of which appear to me to be substantially the same as those which here occur.

During the discussion some doubts were raised as to the precise effect of that judgment on a case like the present, and as to the precise import of that decision, in consequence of the opinions expressed in one or two English decisions, and more particularly in *Mackay v. The Commercial Bank of New Brunswick* (L.R., 5 P.C. 394). I thought it right, therefore, when considering this case, to examine very carefully the proceedings and opinions in the case of *Addie*, and am now satisfied that the Lord Ordinary is right in the conclusion he has come to. In that case Mr Addie had purchased a considerable number of shares from the bank in November 1855, and continued to hold the shares and draw the dividends upon them till the stoppage of the bank in November 1857. In the course of the liquidation it was found that losses to the extent of several millions had been incurred by the bank, and calls were made upon and paid by Mr Addie to the amount of about £16,000. These calls were paid under protest, because he had come to be satisfied from disclosures made in the course of the investigation that he had been induced to purchase the shares in consequence of false representations made to him by the manager and directors as to the condition of the bank, which was known to them to be insolvent at and for some time before the date of his purchase. An action was thereafter insti-

tuted by him against the bank and the official liquidators to set aside the transaction on the ground of fraud.

The leading conclusion of the summons was for reduction and restitution *in integrum*. That was followed by a conclusion to the effect that, whether decree of reduction was pronounced or not, the bank and the liquidators were bound to make payment, 1st, of £10,300, being the price of the shares, and, 2d, of about £16,000, the amount of the calls paid, but under deduction of the dividends received; and there was alternatively a conclusion for damages to the amount of £26,000, being a sum fixed apparently as sufficient to cover the purchase price of the shares and the amount of calls, less the dividends received between 1855 and 1857, when the bank stopped payment. The circumstance that the conclusions for repayment of the price of the shares and of the calls is so put as not to be dependent upon the success of the conclusions for reduction and restitution, appears to me to be of considerable importance in dealing with the present case; for it shows distinctly that whenever it was decided that the time had arrived when the contract could not be rescinded, the sole question which the House of Lords had to determine was whether an action for repayment of the price and repetition of the calls, or alternatively for damages, could be maintained against the company; and that is substantially the question raised under the present action.

The main ground on which the above conclusions for reduction and payment were rested was that "the agreement to purchase the shares was induced by the fraud of the bank, or of parties acting and entitled to act for the bank." The bank, on the other hand, while denying the fraud and pleading that the action was not relevantly laid, appear from the pleadings to have defended themselves mainly on the ground that as it was "impossible to effect restitution *in integrum* between the pursuer and the bank, the pursuer cannot maintain this action." In this Court the pleas stated for the bank were not given effect to, but issues were adjusted, and the case sent to trial before a jury, when a verdict was returned for the pursuer. The case then came before the Court on a bill of exceptions at the instance of the bank, and on a motion by them for a new trial, when a new trial was granted, but the exceptions were disallowed. The interlocutor disallowing the exceptions was at once taken to appeal, and a second appeal having thereafter been presented against the interlocutors allowing and approving of the issues, the whole questions of law and relevancy were thus brought before the House of Lords.

In delivering judgment the Lord Chancellor, after explaining the nature of the case and the state of the pleadings, and examining the leading decisions on the question how far a company is bound by the representations of its managing body, laid down the law applicable to the case in the following terms (5 Macph. H. of L. 85):—"The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this—Where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors in the name of the company seek to enforce that contract, or the person who has been deceived institutes a suit against

the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally. The action of Mr Addie is for the reduction of the deeds of transference of the shares, and alternatively for damages. But as it is brought against the company, it will follow from what has been said that he cannot recover unless he is entitled to rescind the contract."

His Lordship then proceeds to examine the statements on the record in order to see how far the pursuer had set out averments of misrepresentations relevant to affect the company, and after expressing some doubt as to whether that had been done goes on to give a very decided opinion on the question whether the pursuer was not deprived of his right to rescind the contract by the change in the condition of the company since the shares were bought, when he says (5 Macph. H. of L. 86)—"It is clear, however, from the authorities that after the crisis had arrived of the failure of the company, and the order for winding-up had been made, the time for rescinding the contract was gone. This, as I have already shown, was the ground of decision in *Mixer's* case." And after some further observations on the cases bearing on that question, his Lordship adds (pp. 86, 87)—"It may seem to be a hardship to the pursuer that he should be so compelled to keep the shares because in ignorance of the fraud practised upon him he retained them until an event occurred which prevented him returning the very thing which he received. But he is not without a remedy. If he is fixed with the shares he may still have his action of damages against the directors, supposing that he is able to establish that he was induced to enter into the contract by misrepresentations for which they are responsible. But in his present action the pursuer could not have recovered damages against the company, and therefore, both on the claim in his summons for restitution and repayment and also for damages, the pursuer has stated no relevant case upon record."

From the opinions thus expressed Lord Cranworth does not appear to differ in any material respect. His Lordship, on the contrary, seems to me substantially to concur in them, and more particularly when he says (p. 89) that "what in Scotland is designated *restitutio in integrum* can be had only where the party seeking it is able to put those against whom it is asked in the same situation as that in which they stood when the contract was entered into;" and when he further says (p. 90) that "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."

In these substantial respects both noble Lords appear to concur; and the only difference that I can discover between their opinions is that Lord Cranworth seems to rest his opinion as to restitution being in the circumstances impossible

mainly upon the fact that the bank since the stoppage had been changed from an unincorporated to an incorporated company, whereas the Lord Chancellor carefully guards himself as to this, for he says (p. 86)—"Whether the change of the company from an unincorporated to an incorporated banking company for the purpose of more conveniently winding-up its affairs under the Joint-Stock Companies Act 1856 so changed the nature and character of the shares purchased by the pursuer as to render a *restitutio in integrum* impracticable, is a question, if it were necessary to determine, I should wish to consider more carefully;" and rests his opinion on more general grounds, and principally on those expressed by Lord Campbell in the cases of *Clarke v. Dickson*, 27 L.J., Q.B. 223, and of *Mixer*, 4 De Gex and Jones, 586. In the latter of these cases Lord Campbell, when Lord Chancellor, says—"Supposing it to have been a fraud on the part of the company, I do not think the appellant is now entitled to avail himself of it and rescind the contract. It is a settled rule that a contract obtained by fraud is not void, but that the party defrauded has a right to avoid it if he does so while matters can be replaced in their former position. In each case we must look to see whether the contract has been acted upon. If it has been acted upon by the party defrauded, so that others who are interested cannot be restored to their former rights, the contract cannot be rescinded, and nothing remains to the party defrauded but a reparation in damages. In the present case Mr Mixer acted on the contract; he executed the deed, he received dividends which were called interest, and in some sense might properly be called so, and thus he derived a benefit from his contract. He obtained his certificates, which he might have sold, and, if the concern had been prosperous, sold at a profit."

On these grounds, which appear to me to apply with equal force in the circumstances of the present case as in the case of *Addie*, it was held that the contract in that case could not be rescinded; and that being so, the opinions of the Lord Chancellor and Lord Cranworth in the case of *Addie* are equally distinct to the effect that an action of damages for fraud will not lie against the company, but only against the wrongdoer personally, that is, against the directors guilty of the fraud. Holding this to be the law applicable to questions of this description, as laid down by the highest authority on questions of Scotch law, viz., the Court of last resort, it appears to me to be impossible that the pursuer can, consistently with that authority, succeed in the present action as laid. He does not seek to rescind the contract, and he does not offer restitution, both of which are essential to his success in an action against the company. But, as has been shown by Lord Deas, this action consists of a demand, under the name of damages against the company and its liquidators similar to that made in the case of *Addie*, but rejected, for repayment of the price of the shares and repetition and relief from the calls.

With reference to the more limited demand, made during the discussion for repetition of the price of the shares, on the ground that the company had to that extent taken benefit by the fraud, I agree with your Lordships that that question is not properly raised under this record. It is not unimportant to observe that the same

question, though not raised in the record in the case of *Addie*, appears from the report of that case to have been argued at the bar in the House of Lords (1 L.R. Scot. App., 150), and although no express decision was given on the point, the fact that it was not alluded to in giving judgment shows pretty conclusively, I think, that it was not considered one which could be dealt with in an action of this description. I agree with your Lordships that it cannot, and that instead of assailing the defenders from the conclusions of this action, the better course will be simply to dismiss the action.

**LORD SHAND**—Mr Houldsworth, the pursuer of this action, asks a decree or order against the liquidators of the City of Glasgow Bank for payment of three sums—(1) the sum of £9046, 5s. 3d. paid by him as the price of £4000 stock sold to him by the bank in February 1877, and relative charges; (2) the sum of £20,000, being the amount of the first call on his stock paid by him in the liquidation; and (3) the sum of £200,000, or such other sum as he may be required to pay in respect of further calls. Since the action was raised he has been required to pay a sum of £90,000 in respect of a second call on his stock, repayment of which is claimed under the general demand last noticed.

The conclusions of the summons are not limited or qualified in any way so as to indicate that the order or decree asked is to be operative only in a question with the other contributories of the bank, and after the debts due to the ordinary creditors of the bank have been paid. It was conceded, however, on the part of the pursuer, that he could not dispute his liability as a contributory to these creditors for the full amount of their debts; and that on that ground it might be held that any decree he could obtain should be qualified by the condition that it should only receive effect in the second stage of the liquidation, viz., in the adjustment of the rights of contributories *inter se*, and after the ordinary debts of creditors were paid. If the claim be to any extent well founded, even to this effect the pursuer is entitled to have it constituted. To stop the action now might be to deprive him of important evidence which might be lost by the lapse of time, and even if it should be held that he is not entitled to a ranking with the ordinary creditors, there appears to be no good reason for refusing to entertain the action and to allow it to proceed while the liquidators are in the course of paying the ordinary debts of the company.

The action is based on fraud. The pursuer alleges that he was induced by the fraudulent representations of the officials of the bank to purchase from the bank the stock in respect of which he stood registered as a partner when the liquidation began; and for the purpose of deciding the general question raised in defence I assume that a relevant case of fraudulent representation on the part of the bank's agents who negotiated the sale of the stock in question has been made, sufficient to sustain an action against the bank for rescission of the contract of sale, and at least to have the case sent to trial had such an action been brought immediately after the sale was concluded.

In the conclusions of the action each of the sums sued for is described as "loss and damage

sustained by the pursuer" in consequence of his purchase, and the first and second pleas-in-law present the claim as one of damages. The third plea seems to have been intended to present an alternative view, but the ground of this is not clearly stated. I shall afterwards make some observations as to how far it appears to me an alternative ground of claim may be open to the pursuer, and is competent in this action, but will in the first instance deal with the claim as one of damages made against the incorporated company, as that is obviously the case which the pursuer presents in the first instance, if not exclusively, for the decision of the Court.

The Lord Ordinary in his brief note has stated that he thinks "the case is ruled by the decision of the House of Lords in *Addie v. The Western Bank*." If I were of that opinion I should concur with his Lordship in holding that decree of absolvitor should be granted in favour of the defenders. But after very careful consideration of the grounds of judgment in that case I have come to entertain a clear opinion that it does not rule the present.

It cannot be disputed that the case of *Addie* presented features in many respects the same as those disclosed by the record in this action. Mr Addie had purchased his shares from the Western Bank of Scotland, his purchase was induced by the fraud of the bank's representatives acting for the bank, the bank was in liquidation, and Mr Addie as a contributory had been compelled to pay the calls due on his shares. The question in dispute arose for decision after the debts were paid, and on a claim made by him practically against his fellow contributories, although in form against the incorporation. Mr Addie sued for rescission of the contract, repetition of the price paid for his shares, and relief of calls paid. Alternatively he claimed damages as the pursuer does in this action, and it is true it was found that none of these claims could be maintained. But an examination of the grounds of judgment shows that Lord Cranworth, one of the two learned Lords by whom the case was decided, rested his decision on a peculiarity which does not exist in this case, viz., the fact that before Mr Addie made any claim either for restitution or damages he had been a party to an entire change in the nature and constitution of the company by its conversion from an ordinary joint-stock company to an incorporation. His Lordship was of opinion that the new incorporation had not taken over or incurred liability for claims of damages against the former company founded on the fraud of its officials, and so far as regards the claim of damages his judgment was rested on that speciality.

His Lordship said with reference to the conclusion for restitution—The pursuer "cannot insist on *restitutio in integrum* unless he is in a condition to restore the shares which he so purchased. But this is impossible. The purchase was made by him in 1855, and in 1857 he was party to a proceeding whereby the company from which the purchase was made was put an end to. It ceased to be an unincorporated and became an incorporated company, with many statutable incidents connected with it which did not exist before the incorporation. This new company is now in course of being wound up, but even if that were not so—if it still were carrying on the business of bankers—*restitutio in integrum* would have been impossible. The re-

spondent might in that case have given up 135 shares of the new company, and these shares might have been as valuable, or even more valuable, than the shares which he was induced to purchase, but they would not have been shares in the same company; and unless he was in a position to restore the very thing which he was fraudulently induced to purchase he cannot have relief by way of *restitutio in integrum*. The time had gone by during which the respondent could repudiate the contract. The circumstances were so changed that he could not put the appellants in the condition in which they were before the fraudulent sale to him. . . . What in fact took place was not a depreciation but a destruction of the thing purchased; the unincorporated company in which he had been induced to purchase shares no longer existed. The view which I thus take of this case makes it unnecessary to consider whether there are not other grounds excluding this particular relief."

As to the alternative claim of damages, the grounds of Lord Chelmsford's opinion that such a claim against the company was excluded do not very clearly appear, and indeed are not stated. It may perhaps, however, be fairly inferred from what is said that his Lordship was of opinion that because the claim of restitution was excluded it followed that the remedy of a claim of damages was also incompetent. But certainly Lord Cranworth's judgment cannot, I think, be so read or construed. His Lordship said—"But although the respondent is excluded from redress in this form, it remains for consideration whether he may not recover compensation in damages, and so obtain relief as beneficial as that from which he is thus barred. But here too I am of opinion that the respondent must fail. The appellants are not the persons who were guilty of the fraud; and although the incorporated company is, by the express provisions of the statute under which it was incorporated, made liable for the debts and obligations incurred before the incorporation, I cannot read the statute as transferring to the incorporated company a liability to be sued for frauds or other wrongful acts committed by directors before the incorporation"—L.R., 1 Sc. and Div. Ap. 165-6. These words give the grounds of his Lordship's judgment on this part of the case.

Lord Chelmsford's judgment was not rested on the fact that Mr Addie had been a party to the registration and incorporation of the company. "Whether," his Lordship said, "the Act of incorporation so changed the nature and character of the shares purchased by the pursuer as to render a *restitutio in integrum* impracticable is a question which, if it were necessary to determine, I should wish to consider more carefully;" and he found other grounds for his decision. In the result, the change effected in the nature of the company by incorporation between the date of Mr Addie's purchase and the claims made by him was essential to the judgment. The judgment of Lord Cranworth was rested, not mainly, I think, as has been suggested by one of your Lordships, but solely on this.

In the present case that specialty does not occur. The subject of the pursuer's purchase was stock in an incorporated company, and he now holds the same stock in the same incorporation. There has been no new incorporation

created on behalf of which it can be pleaded that obligations of a certain class which bound the old company do not attach to it. I am therefore satisfied that the judgment in the case of *Addie* does not rule the present case. Expressions used in the opinions of the two learned Lords by whom the case was decided are no doubt of authority on the general question here raised, and to these I shall advert. In the meantime I must add that the view now stated of the ground of Lord Cranworth's judgment, and at which I have arrived without much difficulty, though differing from the Lord Ordinary and Lord Deas and Lord Mure, was adopted by the Privy Council in an elaborate judgment delivered by Sir Montague Smith in the important case of *Mackay v. The Commercial Bank of New Brunswick*, 1874 (5 L.R., P. C. Ap. 394)—a decision which has been followed and approved of in other cases, as I shall have occasion to show. I refer particularly to pp. 413 and 414 of the report.

The question for decision now, which is undoubtedly one of great importance, and which I hold is as yet an open question in the law of Scotland, is, Whether a member of an incorporated company in liquidation, who is himself liable as a contributory to pay the ordinary debts of the company, can maintain an action against the incorporation for damages in respect he was induced to purchase his stock from the company through the fraudulent representations of its officials? After the best consideration, I have come to the conclusion that such an action is competent, and may be maintained in certain circumstances, even where the remedy of rescission of the contract is no longer open; and as the result, I am of opinion that the pursuer is entitled to have the case sent to proof or trial. For reasons to be afterwards stated, I think the claim of damages cannot however be maintained to the effect of entirely relieving the pursuer of the calls made or to be made upon him as a contributory, or indeed carried beyond the amount of the price of £9046 paid by the pursuer for his stock, having regard to the particular way in which the claim is laid in this action, unless an amendment of the conclusions of the action were made with the sanction of the Court or with the consent of the defenders.

The purchase occurred in February 1877, and if a claim had been made within a short time afterwards, and while the company was still carrying on business, the pursuer would have been entitled to rescind the contract to the effect of getting back from the incorporation the price of the stock paid to them and being relieved by the other partners of all responsibility as a shareholder; and this would have been his right, even although new responsibilities to creditors had been in the meantime incurred. The case of *Smith v. The Reese River Company* (Law Reports, 4 E. and I. Apps. 64) is a clear authority to that effect, even in a question with creditors, for the remedy of rescission was there given even after the company was in liquidation, the demand having been judicially made before the liquidation began.

It is equally clear, however, that if a claim to rescind the contract be not made until after a liquidation has begun, and although the partner was until that time in ignorance of the fraud committed on him, the remedy of rescission of

the contract is no longer competent in a question with creditors, who are entitled to have all the partners made contributories to meet the debts due to them—*Henderson v. The Royal British Bank*, 7 E. and B. 356; *Oakes v. Turquand*, Law Reports, 2 E. and I. Apps. 325; *Stone & Collins v. The City and County Bank, Limited*, L.R., 3 Com. Pleas Div. 282; and *Tennant's* case in this liquidation.

It remains for consideration—(1) Whether a person in the pursuer's position is not entitled to the remedy of restitution in a question not with creditors but with fellow contributories, or with the incorporation, for whose obligations fellow contributories are liable, and (2) failing this, is not entitled to maintain a claim of damages in respect of his having been induced by fraud to purchase his stock from the company? These questions are not settled by the case of *Oakes v. Turquand*, and the other cases of that class, for the ground of decision in these cases is the right of creditors, who are entitled to say, whatever remedy there may ultimately be *inter socios* on the ground of fraudulent inducement to purchase, the party complaining must continue to be a partner or contributory in a question with them, and till the debts are paid.

The pursuer does not here attempt to obtain rescission of the contract and restitution, even in a question *inter socios*. By his form of action he appears to concede that this is not open to him. It was not maintained that in the circumstances he could avail himself of this remedy; and it appears to me that an action to rescind the contract is excluded by what has taken place since he became a partner of the bank. He is unable to give restitution, even *inter socios*, and cannot insist on being restored to the position in which he was before he bought his stock, with the result of making his fellow partners bear all the losses incurred after he joined the partnership, and sustained in the course of the winding-up. The point is no doubt a different one from what occurs in a question with creditors who are entitled to have the pursuer as a contributory on the simple ground that he was one of the partners on the register on whose responsibility they were entitled to rely. He had given his consent to become a partner under a contract not void but voidable merely, and which could only be declared void in a question with them if the demand were duly made before the insolvency occurred.

The answer to any demand for restitution, when made in such circumstances as the present, is the same as was made in the case of *Addie*, with this difference—most important in the view of Lord Cranworth—that here there has been no new incorporation, for the company was an incorporation at the time of the purchase, and is the same incorporation now. But other changes have taken place of a kind so material as to preclude the remedy of restitution. The company after the pursuer's purchase continued to carry on a great banking business over a period of a year and eight months, in the course of which many and important liabilities were necessarily contracted. Even assuming that he was induced by fraud to become a partner, he had during this time a voice in the management of the business in the same way and to the same extent as his fellow partners through directors and officials,

and material changes necessarily occurred in the business, in the relation of the bank to its customers, and in the incurring of many fresh liabilities by new debtors. In the course of the business so carried on, three half-yearly dividend warrants were issued and paid to the shareholders, including the pursuer; and finally the bank declared itself insolvent, and went into liquidation with enormous liabilities, no doubt, to a considerable or material extent at least, the result of trading after the pursuer became a partner of the company. The stock bought was that of a going company; its business was thereafter materially changed. The pursuer could only now offer back by way of restitution stock of the company after this change, and not only so, but after the declared insolvency, stoppage, and liquidation, and when the possession of stock of the bank had become merely a ground of enormous liability. He cannot restore parties to their original position, and is not entitled to throw on his fellow partners his share of the losses consequent on the trading of the company during the last year and eight months of its existence, and the loss and expense always attending a liquidation. It appears to me that in these circumstances he cannot give restitution, and that he is therefore precluded from the remedy of rescinding the contract. This result is supported by the authority of the case of *Clark v. Dickson* (E. B. and E. 148, and 27 L.J., Q.B. 223), and particularly by the opinions of Erle, J., and Lord Campbell—a case which was referred to with approval by Lord Chelmsford in the case of *Addie*, in support of his Lordship's opinion that the remedy of rescinding the contract was no longer available in that case. It is also in conformity with the view stated by Lord Campbell in the case of *Tulloch v. Davidson* (3 Macq. 783), and particularly on page 789 of the report.

In the present case declared insolvency had occurred and liquidation had begun before the pursuer claimed redress. But I am not satisfied that, even if the demand had been made shortly before the stoppage of the bank had occurred, the remedy of rescission of the contract would have been open. On the contrary, my opinion is, that after such material changes in the position of the company and in the state of its affairs as must have taken place during the time when the pursuer was a partner, he was precluded from setting aside the contract, because restitution was no longer possible, and because he was not entitled to throw his share of losses accruing while he was a partner on his fellow shareholders. It must be observed, from the terms of the concordance, that it is in substance conceded that the ultimate deficiency of £5,000,000 was partly the result of the later trading, and it is impossible to doubt that this was so to a material extent. If this view be sound, it enters deeply into the question whether an action of damages will not lie against an incorporation carrying on its business where restitution has become impossible, and so may not be equally competent in such circumstances as here occur where liquidation is going on. The case of *Smith v. The Reese River Company* is not an authority to the effect that a person who has been a partner for some time while trading has been going on may still rescind the contract and get restitution, for in that case the pursuer, who was held entitled to

restitution, had been no party to subsequent trading, or to any acts resulting in a material change in the company. The pursuer Mr Houldsworth was a partner for a year and eight months. Suppose he had been a partner for five years, and then for the first time discovered that he had been induced to buy his shares from the bank by statements of a fraudulent kind, not having the means of making that discovery sooner, I cannot believe that the remedy of rescission of his contract of purchase would be open, even in a question with a going company. Restitution would be impracticable, and I think he could not be held to be entitled to throw the results of five years' trading to which he had been a party entirely on his fellow partners. The difference between five years and one year and eight months should not, I apprehend, affect the result.

The case of *Rawlins v. Wickham*, 3 De Gex and Jones, 304, has been founded on as being to a contrary effect. But assuming that case to have been well decided, it is clearly distinguishable from such a case as I have supposed. The original fraud was not that of an agent for the partners, but was that of the partners themselves. The Lords Justices—at least Lord Justice Knight Bruce—seem to have held that the pursuer was practically excluded from the management of the continuing business, and from all interference or acquaintance with it by the partners, of whose statements he complained; and both of the learned Judges relied strongly on the absence of any averment of acts of the plaintiff which caused prejudice in the carrying on of the business after he became a partner. In a joint-stock company like the City of Glasgow Bank the acts of the manager and directors in the ordinary conduct of the business are truly the acts of all the partners, and not of a section only.

It is next maintained by the defenders—(1) that as an action to rescind the contract is excluded in a question with the incorporation, even after the claims of creditors have been met, it follows that an action of damages is also excluded; (2) that indeed such an action cannot be maintained at all against an incorporation, and (3) that at all events it cannot be maintained when the capital has been exhausted, to the effect of compelling partners to contribute to pay to one of their own number the loss and damage sustained. To these propositions I am unable to assent, and I shall deal with each of them separately.

And first, while it may be taken that according to the law of Scotland the rule in the contract of sale—except in a case against the actual wrongdoer (as to which see *Stair*, i. 9, 14, and *Annan v. Handyside, &c.*, 1865, 3 Macph. 526, and *Dobbie v. Duncanson*, 10 Macph. 810)—is that a purchaser who has ground of complaint and is entitled to redress is, in ordinary circumstances, confined to the remedy of rescission of the contract and restitution, and is not entitled to hold by the contract and claim damages, yet that rule is in my opinion not absolute and applicable in all circumstances. It does not follow that if, from any cause whatever, restitution has become impossible, and so the remedy of rescission of the contract is excluded, an action of damages will not lie. If the rule were carried to that length, it would be unreasonable, and would frequently operate extreme injustice. It is, I think, a question of circumstances whether a

claim of damages is or is not excluded when owing to supervening occurrences an action for restitution can no longer be maintained.

If the remedy of restitution has become incompetent because the party claiming it has acquiesced in the contract, and in what has followed on it, with knowledge of the fraud, or has wilfully shut his eyes to the means of information, while, in a case of partnership, actings have been going on, it would follow that any claim of damages must equally be excluded. The ground on which in such circumstances the remedy of restitution would be excluded would in reason and justice apply with the same force to any claim for redress, whatever might be the form or remedy resorted to. When, however, the remedy of restitution has become inapplicable or incompetent, without any acquiescence, adoption, or wilful default of the pursuer, who has made his demand as soon as he became aware of the fraud committed, but in consequence of his *bona fide* dealing with the subject of the contract while in ignorance of the fraud, in a way which prevents the return of it in the same condition, it appears to me that reason supports the view that he should not thereby be deprived of another form of remedy by which justice may yet be done, viz., an action of damages for the loss sustained through the fraudulent representations which induced the contract.

If it were otherwise, it would only be necessary in order to success in such frauds that the seller or his manager or agent should, if possible, induce the unsuspecting purchaser so to deal with the subject of the contract—it might be in the ordinary use of it, for the purpose for which it was sold—as to preclude restitution before allowing him the means of discovering the fraud, which might thereafter be disclosed with complete safety. There must be many cases in which great injustice might thus be done, when no good reason exists for refusing a suitable form of redress. A fraudulent sale of seed purchased and sown in the ground on the faith of the seller's representation that it had been saved in a particular season, or by a person specified, or was of a certain superior kind, but which was not so saved, or was worthless in quality, would in that view give no remedy by way of damages, because the purchaser by an act done in ignorance of the fraud had made restitution impossible. An article sold might be mixed with other substances in the course of manufacture by the buyer to his serious loss, or it might be shipped to a distant port, and the discovery then made, when restitution had become impossible, that a fraud had been committed; and even in the case of a purchase of an heritable estate large expenditure might be made in the erection of buildings or otherwise, with the view of fitting the property for some very special use that the buyer had in view, before the discovery that he had bought on a fraudulent representation as to the rental, or on some other matter material to the contract. In all of these cases—and such instances might be multiplied—restitution has become impossible through the innocent actings of the buyer; damage has however resulted and ought to be compensated; and it is obvious that injustice would be done to the buyer if the remedy of an action of damages were refused. The seller, on the other hand, cannot say that any injustice

would be done to him by sustaining an action, for he is asked only to repair the wrong which by himself or his agents he has committed.

It thus appears to me to be no good reason against the competency of a claim of damages that restitution has in such circumstances become impossible. On the contrary, I think an action of damages becomes competent if and when restitution has become impossible through an act or acts of the purchaser done while in excusable ignorance of the fraud committed on him.

Nor, in the next place, and assuming that such an action will lie against an individual, do I think there is any good reason for holding that such an action will not lie against an ordinary trading company acting by a manager or agent, or against an incorporated company, in respect of the fraudulent representations of its agents, made in the execution of the business of the company, entered into for its behoof, and within the scope of the agency. Expressions in the opinions of Lord Chelmsford and Lord Cranworth in the case of *Addie v. The Western Bank of Scotland* have been founded on as authority against the competency of such an action against an incorporation. For the reasons already pointed out, I think these expressions cannot be taken as giving the ground on which the case was decided; and while Lord Cranworth no doubt is reported to have said that "an incorporated company cannot in its corporate character be called on to answer in an action for deceit," it must be observed that he added, without indicating any other form of remedy which he had in view—"But if by the fraud of its agents third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by these frauds." In such a case as a fraudulent sale of seed or the like, I cannot suppose that a claim of damages would be incompetent against an ordinary company whose manager or salesman had committed a fraud, or against a joint-stock trading company of nurserymen and seedsmen registered as an incorporation, whose agent or managers had committed a similar fraud. Actions founded on the fraudulent representations of agents have been repeatedly sustained against companies and incorporations in the Courts of this country; but 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*, Law Reports, 2 Exchq. 259; *Swift v. Winterbottom*, Law Reports, 9 Q.B. 301; *Mackay v. Commercial Bank of New Brunswick*, Law Reports, 5 Privy Council Appeals, 394; *Swire v. Francis*, Law Reports, 3 Privy Council Appeal Cases, 104; *Stone & Collins v. The City and County Bank, Limited*, Law Reports, 3 Com. Pleas Div. 283; *Weir v. Bell*, L.R., 3 Exch. Div. 240. I say nothing of the case of *Udell v. Atherton*, 7 H and N. 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. In the cases of *Barwick* and

*Mackay* it was so treated. In conclusion, on this part of the case, it is worthy of notice that the learned Lord Justice Bramwell, one of the two Judges whose opinion in the case of *Udell v. Atherton* was against the competency of an action of damages against the principal for the fraudulent representations of his agent, in the case of *Stone v. The City and County Bank* (L.R., 3 C.P.D. 306), while he concurred in dismissing an action by a contributory against a corporation in liquidation for total relief, expressed an opinion that an action of damages against the incorporated company would have been a competent remedy. His Lordship said—"I confess that I have had misgivings as to whether we ought not to amend; for I incline to think that if these actions had been brought for unliquidated damages accruing from the fraud of the defendants, committed through their general and authorised agents, the plaintiffs might have succeeded, and if they had succeeded, it is doubtful whether their claims would have been postponed to those of other creditors as being sums due to them, 'by way of dividends, profits, or otherwise,' within the meaning of the Companies Act 1862, sec. 38, subsec. 7. It is, however, unnecessary to pursue this matter further, as we have come to the conclusion that we ought not to amend." In the case of *Weir v. Bell* (L.R., 3 Exchq. Div. 244), again, his Lordship, while questioning the reasoning in the case of *Barwick*, observed that the case had been so much approved and followed that it had become part of the law, and that it was "undoubtedly a most useful and convenient rule that principals should be responsible for damages occasioned by the fraud of their agents acting within the scope of their authority, at least to the extent of the gains of the principal, especially now that so much of the world's business is carried on by corporations." The true principle of the case of *Barwick* his Lordship stated to be, that "every person who authorises another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract." In that case a prospectus issued by certain brokers had deceived the pursuer into an advance of money on debentures to his loss. Lord Justice Bramwell was of opinion that these brokers had acted, not as agents for the defender Mr Bell, one of the directors, but for the company which was incorporated under the Acts of 1862 and 1867. He said (p. 245)—"Has this director so undertaken for the absence of fraud in those who prepared and issued this prospectus? I think not. The company has. The company is subject to actions to recover the money paid to it, or to recover damages for the fraud in question."

But it is further maintained that when the capital of a company like the City of Glasgow Bank has been exhausted in payment of the debts of ordinary creditors, the shareholders are not bound to contribute to meet a claim of damages by one of their own number such as that here insisted in. The incorporation being one of unlimited and not of limited liability, however, I cannot see any ground for relieving them of an obligation to do so. If the pursuer was induced by fraud of the company's agents, for which the company is responsible, to purchase

his shares, then having paid the price to the company, he is a creditor of the company for the loss and damage thereby sustained. It can make no difference in the liability of the company or its partners that the capital is exhausted to the extent of a half, or the whole, for the liability under their contract and statute of incorporation is unlimited. The obligation which, for the reasons already so fully stated, I hold to exist is that of the incorporation. If restitution had been possible, the claim would have been against the company, and if I be right in holding that a claim of damages is open, it will also lie against the company. If after the payment of ordinary debts there be available capital unpaid, the claim must be met, and met by means of calls if necessary, and I know of no reason or ground in law for saying that this particular class of obligations ceases to exist or becomes sopited because the capital has been spent, or for saying that the members of the corporation must not contribute for its payment as they must do for other debts of the company. The suggestion is entirely novel that in the case of an unlimited company any class of claims, good against the company in ordinary circumstances, is either wiped out or no longer enforceable because it happens that the subscribed capital is exhausted; and I can discover no sound principle to support that view. It may be that outside creditors may be entitled to object to such a claim coming into competition with them, or it may be, (as Lord Justice Bramwell indicates in the case of *Stone v. Collins*) that under the Joint-Stock Companies Act of 1862 the shareholder creditor, who is himself liable for the last penny of their debts, is in the meantime entitled to rank *pari passu* with them in respect of his claim of damages against the incorporation as soon as his claim is constituted or admitted. I do not think it necessary at this stage, and particularly after the views expressed by your Lordships, to form a final opinion on that question. But when the claim is constituted or admitted, it surely must be met by the company. The partners' liability to pay it cannot be diminished or discharged by the circumstance that the capital has been exhausted, unless in the case of a company with limited liability.

It has been represented as a great hardship that the other shareholders should be obliged to contribute to meet such a claim by one of their own number, when all have been involved in a common misfortune, and that it is particularly hard that shareholders who joined the company even after the pursuer, and who bought their shares in the open market, should incur such responsibilities. These are considerations which may possibly be a good reason for legislation to the effect that such claims as between those who have become fellow partners in joint-stock companies should not be competent. On the other hand, it may be thought that such an enactment would be granting a relief from the ordinary consequences of fraud, which, so long as companies are allowed to traffic in buying and selling their own stock, might remove one of the present safeguards against fraudulent representations as to the affairs of joint-stock companies; and it would be difficult to give a reason for excluding claims of damages which would not equally apply, as between fellow partners, to claims of restitution even in the case of going companies. But, how-

ever this may be, it appears to me that sound legal principle supports such a claim as the pursuer makes. The shareholders who bought after the pursuer's purchase acquire all the rights, and take all the responsibilities attaching to the shares they bought, while those who were members of the company, and still continue to be so by themselves or their personal representatives, are persons by whose agents the fraud complained of was committed, to the loss and damage of the pursuer. Shareholders again, who like the pursuer have been able to meet the calls made by the liquidators on their shares, and continue solvent, and who are in the exceptional position of having purchased their shares from the company while still liable as contributories, will also have claims of damages if they can show that their purchases were induced by fraudulent representations of the directors or responsible officials of the bank.

On the grounds thus fully stated, I have come to the conclusion that the pursuer is entitled to maintain the present action of damages. There has been no decision directly on the question either in this country or in England, if I be right in the view I have taken of the case of *Addie*. But I am confirmed in the soundness of the judgment I have ventured to express by the opinions to the same effect of Lord Campbell in the case of *Clarke v. Dickson* already cited, and in *Mizer's* case, 4 De Jex and Jones, 586, and of Mr Justice Lindley and Lord Justice Bramwell in the case of *Stone and Collins v. The City and County Bank*, which seem to have been assented to by the Lords Justices Brett and Cotton. In the case of *Clarke v. Dickson*, Lord Campbell, while concurring in the view that the action as one involving restitution was not maintainable owing to the change in the circumstances of the company, said—"It ought to have been a special action upon the case for the fraud which has been practised upon the plaintiff, and then he might have recovered for the injury he has sustained."

The mode of estimating or measuring the damages raises another of the difficult questions involved in the case, and the difficulty has been enhanced by the way in which the pursuer's claim has been stated. He is entitled "to recover," to use the expression of Lord Campbell just quoted, "for the injury he has sustained." In the case of *Tulloch v. Davidson*, 3 Macq. 783, which was an action against the representatives of the person alleged to have made the fraudulent representation, the rule for estimating the damages resulting from a purchase of shares was laid down to be the difference between the purchase money and what would have been a fair price. The Lord Chancellor (Lord Campbell) said—"But then comes the manner in which the damages are calculated. That cannot be supported, because the damages are calculated as if Davidson was obliged to take the shares off the hands of Tulloch, and to place himself in the same situation as he would have been in if he had never been a shareholder, for that loss is calculated upon what took place after Dr Tulloch was a shareholder, and during the many years that elapsed before the company was wound-up. That cannot be the proper mode of calculating the damages. The proper mode of measuring the damages is to ascertain the difference between the purchase money and what would have been a fair

price to be paid for the shares in the circumstances of the company at the time of the purchase; and that may be made the measure of damages if a trial shall take place;" and Lord Brougham, p. 794, repeated in substance the same view. The principle of assessing damages in cases of this class laid down in the case of *Tulloch* was accepted as sound in the recent case of *Twycross v. Grant*, Law Reports, 2 C.P.D. 469, where also Sedgwick on Damages, 7th edition, 591, 592, to which I have not had access, appears to have been referred to.

Even in a question with the wrongdoer himself, the damages are not to be calculated as if he were obliged to take the shares off the purchaser's hands, and to place the purchaser in the same situation as if he had never been a shareholder, and certainly the rule cannot be made more severe against a company whose liability results from the fraud of its agents. The pursuer therefore cannot maintain his action to the extreme length of being relieved from the consequences of the trading after he became a partner, and of the liquidation, in the course of which no doubt much loss must have occurred in the realisation of the assets of the bank and its debtors which would otherwise have been avoided, and which is also attended with great expense. Such loss is not direct, but of a character so remote and consequential that it cannot be thrown on the sellers of the shares. The reasoning which results in the refusal of the remedy of restitution where subsequent trading and liquidation have followed supports the view that loss thereby sustained cannot be regarded as direct damage to be recovered from the sellers.

It follows in this case that the sums sued for in the second and third heads or branches of the conclusions of the summons cannot be recovered to the full extent; for the claim, and the only claim, which these conclusions present, is one for total relief not only of the direct injury sustained by the purchaser, but for the results which indirectly followed from the subsequent trading to which the pursuer through the servants of the company was a party, and from the liquidation. I am of opinion that, as regards these parts of the conclusions of the action as laid, the action ought to be dismissed, unless indeed an amendment of these conclusions, and an addition to the condensation, had been proposed and admitted under section 29th of the "Court of Session Act of 1868."

But as regards the first head of the claim, in which the price paid for the stock is stated as damage, I think a relevant claim of loss has been stated. The pursuer's statement in the case of *Tulloch*, as appears from the record in that case, with which I had very good reason to be familiar, was, that "by the year 1834 (the date of the purchase) the directors knew that losses had arisen, and bad debts had been incurred, which almost, if not entirely, exhausted the nominal capital of the company at that time;" and the company had gone on trading for some years after 1834. Here the pursuer avers—"At the time of the said purchase . . . the said stock was of no value, the capital of the bank being entirely lost, and liabilities to the extent already mentioned having been contracted." These liabilities are thus referred to in the previous part of the condensation—"At the time when these inquiries

were made" (being immediately before the purchase), "and for some years prior thereto, the City of Glasgow Bank was insolvent, and had lost the whole of its capital and any reserve fund that may have existed, and had besides contracted liabilities to its creditors to a very large amount, which at the period in question amounted to a sum not far short of the ultimate declared deficiency of £5,000,000 sterling." The loss and damage sustained, according to the pursuer's statement, is (1) the loss of the price paid for the stock, which was worthless, and (2) the loss sustained from the large liabilities attaching to the shares of the company, which had no funds to meet these liabilities. The first of these is, I think, well claimed in the action, and the case of *Twycross v. Grant*, in which the question was fully considered, is a direct judgment to that effect in the law of England. The pursuer might, I think, have so expressed the conclusions of the action as to claim a further sum of unliquidated damages in respect of the loss and injury sustained by him in respect of the bank's liabilities as at the date of his purchase, as distinguished from loss and injury sustained from subsequent trading and from the process of liquidation; but this, as I have said, has not been done. The second and third heads of the conclusions are to a larger and different effect, and so cannot be sustained. If your Lordships had concurred with me in the views I have taken of the case, it would have been for consideration, however, whether the large and salutary power of amendment given by the statute of 1868 might not be made available to enable the parties to have determined in this action the real question in controversy between them, particularly as any amendment would be substantially a restriction of the amount of the pursuer's claim, while the claim in its nature would still be the same a claim of damage. If amendment, however, were incompetent or refused, it would have been for the pursuer's consideration whether he would ultimately insist in the present action, or abandon it under the statute, with the view of raising a new action for a sum of unliquidated damages, embracing the two heads or items of claim which, if my views were correct, would be open to him.

There would, no doubt, be very great difficulty, in any aspect of the case, in the assessment of damages. This must be so in all cases of this class, and the point was much observed upon in the case of *Tulloch v. Davidson*; but if the principle be sound, the Court must take the best means in their power to work it out with reference to the facts of the particular case.

I noticed at the outset that there might be an alternative ground on which the present claim might be rested, and that the pursuer's third plea-in-law seemed to point at an alternative. The ground referred to is, that even if the company now in liquidation is not liable to answer in a proper action of damages, which would be competent equally whether the company took benefit by the contract or not, in respect the damage was the direct result of representations made by the company's agents within the scope of their agency, and in the execution of business on behalf of the company, yet where the company, or in other words, in this question, the fellow-partners of the pursuer, have taken benefit from the contract, an action will lie for recovery of the amount by

which the company has benefited. Even in the case of *Addie* (L.R., 1 Scotch and Div. Apps. 166) Lord Cranworth recognises the validity of such a claim, for he says—"If by the fraud of its agents third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by those frauds." And I observe an eminent writer on the law of sale (Benjamin, p. 375) has recognised this statement as sanctioning a claim, although not in the form of an ordinary action of damages. There are other authorities to the same effect. It is sufficient to refer to the opinions of the Judges in the cases of *New Brunswick Company v. Conybeare*, 9 House of Lords Cases, 711; and *Ranger v. The Great Western Railway Company*, 5 House of Lords Cases, 72, in which the question was considered as affecting joint-stock companies taking benefit under contracts, and also to the cases of *Scholefield v. Templar*, Johnson's Reports, 155, and L.J. 28 Ch. 452, and *Eyre v. Burmester*, 10 House of Lords Cases, p. 90, in England; and in Scotland to the cases of *Trail v. Smith's Trustees*, 3 Rettie 770; *The Clydesdale Bank v. Paul*, 4 Rettie 626; and *Gibbs v. The British Linen Company*, 4 Rettie 630.

On this point I shall only say, that if it were held to be necessary to adopt some other form of action than a claim of damages, there is thus weighty authority in favour of the view that an action for payment or repayment of the amount by which the company has benefited would be open to the pursuer. The present action of damages with the record as it stands is perhaps not fitted to try the question in that particular form. Assuming, however, that the shares when sold were not only worthless, but burdened with a certain measure of liability, it may be fairly represented that the benefit which the company has gained is not only the purchase price, but so much of the other sums as the pursuer has been obliged to pay into its funds on account of the liabilities which existed when he became a partner; for it may be said, if he had not purchased his stock, these sums for which the pursuer got really no consideration must have been met by the company themselves. If this be so, it looks very like the same claim, although put in a different form, or apparently on a somewhat different ground. The claim, even in this aspect, appears to me after all to partake of the nature of damages, for its basis is injury sustained, although its limit is to be measured by the benefit gained by the company. None of the learned Judges, including Lord Cranworth, who concurs in thinking that an action will lie for recovery of the benefit which a company has gained, has suggested the appropriate form of remedy, and I venture humbly to think that an action of damages is as suitable a form as any other. It appears to me that there is no sound principle for limiting the claim to the amount of benefit received; but if the claim is to be so limited, that can be quite as well effected in an action of damages as in any other form of action. On this point the following passage in the judgment in the case of *Mackay v. The Commercial Bank of New Brunswick*, Law Reports, 5 Privy Council Apps. (p. 414), appears to me to have great force. Referring to Lord Cranworth's observation already noticed, that a remedy may be had to the extent of the benefit, their Lordships said—"Upon this it may be observed that if the fraud by which the corporation benefited consisted of a misrepresenta-

tion not forming part of or leading to a contract with it, it is difficult to see how in many cases they could be made responsible except in an action for deceit. If it be suggested that an action for money had and received might lie, it may be answered, that even if that were so, the question to be tried would be in substance the same, and that the time has passed when much importance was attached to mere forms of action. If the benefit received by the corporation happened to be in the shape of a specific chattel instead of money, it is difficult to see what better title they would have to retain it, but in that case the action for money had and received would not lie, and some form of action of tort would have to be resorted to."

On the whole, I am of opinion that the case is not ruled by that of *Addie v. The Western Bank*, and that although the pursuer is precluded by what has occurred since he became a partner of the bank from the remedy of restitution and from maintaining an action to rescind the contract, he is nevertheless entitled to sue an action of damages. I think the present claim of damages is well stated as regards the conclusion for payment of the amount of the price of the shares, and I should to that extent sustain the action and allow a proof or other form of inquiry. The action however is, in my opinion, not well laid in its conclusions for other sums, and as regards these conclusions, as they are now expressed, I think it should be dismissed. At the same time, had your Lordships agreed with me in the opinion I have formed, and endeavoured to express as clearly as I could—although I regret to say at so great length—it would have been for consideration whether an amendment of the conclusions and condescendence might not have been competently made, such as would remove all ground of objection. Failing this, it would have been for the pursuer to consider whether his best course would not be to abandon the present action, and to present his claim of damages in a form which would enable him to maintain his action for a considerable sum beyond the amount of the price paid for his shares. The grounds of your Lordships' judgment however being fatal to his claim to any extent whatever, the suggestion of an amendment is excluded, and the pursuer obviously need not address himself to the consideration of any question of abandonment of the action in the view of raising another.

The Court adhered.

Counsel for Pursuer (Reclaimer)—M'Laren—Mackay—R. V. Campbell. Agents—Hagart & Burn Murdoch, W.S.

Counsel for Defenders—Kinnear—Balfour—A. G. Murray. Agents—Davidson & Syme, W.S.