LORD CRANWORTH.—The order will be without prejudice to any application you may make for the payment of your costs.

Mr. Daniell.—It will be a personal order upon the official manager, without prejudice to any application he may make under the Winding up Acts.

Interlocutors affirmed, and appeal dismissed with costs, without prejudice to any application which the appellant may make under the Joint Stock Companies' Winding up Acts, in respect of the payment of costs out of the assets of the said Bank and the calls under the said Acts.

For Appellant, H. Harris, Solicitor, London.—*For Respondents*, Robertson and Simson, Solicitors, London.

FEBRUARY 23, 1860.

PATRICK DAVIDSON and Others, Trustees and Executors of the late Duncan Davidson, *Appellants*, *v.* The Reverend GEORGE TULLOCH and Others, Executors of the deceased Dr. John Tulloch, *Respondents*.

Reparation—Damages—Fraud—Sale of Shares—Joint Stock Company—Fraudulent Reports of Directors—Liability of Executors of Director—Relevancy—Title to Sue—*The representatives of a deceased shareholder A in a joint stock bank brought an action after his death, (which took place in* 1851,) *against the executors of B, a director, (who had died in* 1849,) *concluding for repayment of the price paid by A for shares of the stock of the bank purchased by him in the market in* 1834, *on the ground that A had been induced to purchase by false and fraudulent representations made, and reports issued, by B and his co-directors, and alternatively for reparation for the loss and damage sustained by A through the wrongous actings of the directors during the period A held stock of the bank.*

HELD (affirming judgment), (1) *That the averments on the record were relevant and sufficient to support the action;* (2) *That the action, being grounded on fraud and misrepresentation, was competently directed against the executors and representatives of B, the deceased director;* (3) *That a single shareholder was entitled to pursue for reparation of the wrong alleged, without the concurrence of the company or the other shareholders;* (4) *That the damages were measured by the difference between the price paid and what would have been the fair price of the shares at the time of purchase; and* (5) *Form of issues approved of to try the case.*[1]

A company, called the "Banking Company in Aberdeen," had carried on business there prior to 1828. In the end of 1827, a new contract of copartnery was entered into for twenty-one years, from 1st January 1828. It provided that the business of the company should be confined to banking; that regular and distinct books should be kept and balanced on the 1st of March yearly; and that the majority of the partners present at the subsequent general meeting of the company, to be held on the first Tuesday of April yearly, should have it in their power to declare such a dividend from the free nett profits as they should think proper, and order payment thereof according to the respective shares of the partners in the capital. Two annual general meetings were to be held; a governor and twelve directors to be annually chosen, four of them to be a quorum; and the business of the governor and the directors was to be to superintend and direct the cashier, accountant, and others employed in the office of the company.

The 18th article of the contract provided, that if it should appear, upon bringing the affairs of the company to the yearly balance, that one twelfth part of the capital stock of the company had been lost in the prosecution of the business, in that case it should be in the power of a majority of the partners at the next general meeting of the company, or at any other subsequent general meeting called in terms of the contract, to insist that the partnership should be forthwith dissolved, and that the said meeting should be obliged thereupon to declare accordingly, by a minute to be entered and engrossed in the sederunt book.

In October 1834, the late Professor Tulloch, whose executors the pursuers are, purchased ten shares of the stock of this bank, which was discovered to be insolvent in 1849.

The present action was raised by Professor Tulloch's executors, against the representatives of the deceased Duncan Davidson, advocate in Aberdeen, who had been one of the directors of

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[1] See previous reports 20 D. 1045, 1319: 30 Sc. Jur. 635, 747. S. C. 3 Macq. Ap. 783: 32 Sc. Jur. 363.

the bank; and it concluded, in the first place, for payment of the sum that Professor Tulloch had paid for his shares, with interest thereon from the date of his purchase, and of certain sums paid by him as calls, also with interest, but under deduction of certain dividends acknowledged to have been received by him; and in the second place, alternatively, for the sum of £3000, or such other sum as might be ascertained as the amount of loss and damage sustained by the pursuers and their author.

The statements in the condescendence included the following :—

"*Cond. Art.* 10.—Throughout the entire subsistence of the contract of copartnery in question, from 1st January 1828 to 1st January 1849, Mr. Davidson, in concurrence with the respective parties, during the respective periods after mentioned, designedly abused the power which he possessed as a director of the said company, and in wilful and culpable disregard and violation of his duty to the shareholders, as well as in violation of the terms of the contract of copartnery, he fraudulently and illegally, in his actings as a director of the said bank, promoted the private interest and objects of himself, and his friends and connexions above mentioned, to the loss, injury, and damage of the company and its partners. This he did during the foresaid period from 1828 to 1849 inclusive, in concurrence with the other directors before named, members of the said committee of management, or in concurrence with several of their number, by making, or allowing to be made, advances to a very large extent out of the funds of the bank to the parties before and after mentioned, without any security being given therefor, and that at a time when he and the said other directors knew them to be unable to meet large debts already due by them to the bank, and were well aware, or had sufficient reason to believe, that the pecuniary circumstances of the parties were such that the advances so made would not be recovered. And this the said Duncan Davidson, and other directors foresaid, did fraudulently and *in malâ fide*, for the purpose of promoting the private interests and objects of the parties to whom the advances were made; and not only in utter disregard of the interests of the bank and its partners, but where they were fully aware and knew that loss and damage would accrue to these interests. At the same time Mr. Davidson, and the said other directors, not only knowingly and wilfully concealed from the shareholders all knowledge of the large amount of the debts incurred, and of the insecure advances which were being made, as well as of a large amount of losses known to have been, from time to time, incurred otherwise, but also falsely and *in malâ fide* misrepresented to them, year after year, the state of the bank's affairs, he and they being at the time in the full knowledge of the real state of the facts,—all as after mentioned. More particularly, during the period of the subsistence of the said contract, advances were made, in the manner and with the objects already stated, out of the funds of the said banking company, with the knowledge and authority of Mr. Davidson and others of his co-directors, as after mentioned, to the following parties before named, who had accounts with the bank, viz. :—1. Mr. William Pirie, 2. Mr. Patrick Pirie, senior, 3. Mr. Alexander Bannerman, 4. Messrs. Thomas Bannerman and Co., and 5. Messrs. Milne, Cruden, and Co.

"*Cond. Art.* 18.—Notwithstanding the complete knowledge by Mr. Davidson and his co-directors foresaid, members of the said committee of management, of the true position of the bank's affairs, of the losses which had occurred, and of the inability of the parties before named to meet their obligations to the bank, he and they presented to the shareholders at their annual general meetings in April of 1828, 1829, 1830, 1831, 1832, 1833, and 1834, reports of the most flattering character, falsely representing the bank as in most prosperous circumstances, and as having realized large profits annually; and upon these statements, they recommended the payment of dividends, as out of realized profits, varying from 6 to 7 per cent, with a bonus in 1828 of two per cent. Dividends at these rates were accordingly declared and paid to the shareholders. During the same period, Mr. Davidson trafficked largely in the shares of the bank, realizing considerable profits thereby.

"*Cond. Art.* 19.—Relying on the truth of the foresaid reports, which were publicly made known and circulated by Mr. Davidson and his co-directors, and in consequence thereof, and of the said dividends declared and paid, the late Dr. John Tulloch, Professor of Mathematics in the University and King's College of Aberdeen, the pursuer's author, was induced to purchase shares in the said bank. He accordingly, upon 3rd October 1834, purchased ten shares of £100 each of the company's stock at the price of £1910 in whole, being the ordinary current price at which the company's stock was then selling in the market, and having paid that sum, the shares were transferred to him. Dr. Tulloch was in total ignorance at the time of his purchase, of any losses incurred by the bank, and of the conduct of Mr. Davidson and his co-directors above set forth, and had no means of becoming aware of the circumstances of the concern, excepting from the directors' reports, and the company's resolution before mentioned. The reports above mentioned by Mr. Davidson and his co-directors to the shareholders, were false in their statements, and were made fraudulently and *in malâ fide*, in order to mislead the shareholders and the public, and with a view to enable Mr. Davidson and his co-directors to employ the funds of the bank in the promotion of the private interests of themselves and of their friends, and particularly of the parties before named, debtors to the bank, by continuing to make advances to

them. It was untrue that any profits had been realized by the bank during any of the years above mentioned, or that the affairs of the bank were in a prosperous and improving state, and this was well known to Mr. Davidson and his co-directors before named, members of the said committee of management. He and they well knew the large amount of the ascertained losses before mentioned, and the circumstances of the bank's debtors before named, and that these parties alone were owing to the bank an amount exceeding its whole capital, and that without security. In point of fact, by the year 1834, Mr. Davidson and his co-directors, members of the said committee of management, knew that losses had arisen, and bad debts had been incurred, to an extent which almost, if not entirely, exhausted the nominal capital of the company at that time.

"*Cond. Art.* 20.—During the years subsequent to 1834, and particularly at the annual meetings in April of each year from 1834 to 1840 inclusive, reports of the most flattering character, representing the bank as in most prosperous circumstances, and as having realized large profits, annually continued to be submitted by Mr. Davidson and his co-directors, above mentioned, from time to time to the shareholders; and in consequence of these reports, and in reliance on the truth thereof, increased dividends, varying from 7 to 7½ per cent, (in addition to a bonus in 1836,) were declared and paid to the shareholders, as out of realized profits. These reports were, as before, false and fraudulent, and purposely intended to mislead. No profits had been realized, and the losses had gone on largely to increase. Further, in order to conceal the true state of matters and particularly the losses which had occurred, and the large debts due to the bank, as well as to obtain funds for farther advances to the parties before named, Mr. Davidson and his co-directors, Messrs. Pirie, Bannerman, and Garioch, had recourse, secretly and improperly, to the disposal of the capital stock of the company, which consisted of £110,000 Bank of England stock, then standing in the books of the bank of the value of £241,804 11*s.* In December 1838, they sold £60,000 thereof, producing £131,595; and again in May following, (within three days after payment of a dividend of 7½ per cent,) they farther sold £45,000 of the remaining £50,000, producing £88,034 12*s.* 6*d.* The stock thus disposed of was sold at a considerable loss, and the sale concealed from the shareholders. Farther and with the same object, Mr. Davidson and his co-directors, at the time, including the said Messrs. Pirie, Bannerman, and Garioch, recommended and gave off a quantity of the stock of the company in 1839, amounting to £10,000, reserved under article 1st of the contract, at a premium of £10 or £20 per share."

"*Cond. Art.* 26.—The late Dr. Tulloch, down to the year 1849, relied on the accuracy of the annual reports by Mr. Davidson and his co-directors, and was in total ignorance of the large losses which had been sustained by the bank as aforesaid, as well as of the fact that the capital of the bank had been so completely exhausted. He believed, in consequence of these reports, that large profits had been annually realized. It was only in this belief, and in consequence of the annual reports by Mr. Davidson and his co-directors, and the declaration and payment of dividends, as out of profits, that he became, and for so long a period remained, a shareholder of the bank. He refused to sign the new or prorogated contract of the company, or to continue a partner thereof, after 1848; and on 26th October 1849, he intimated to Mr. Davidson and his co-directors his intention of instituting an action against them for recovery of the loss sustained by him. Such an action was in fact served on 5th March 1851, but proceedings were stayed in consequence of Dr. Tulloch's death, and of other similar actions being then in dependence.

"*Cond. Art.* 27.—It was the duty of Mr. Davidson and his co-directors as directors of the said company, not only generally to make a true and correct representation of the state of the bank's affairs from time to time to the shareholders, but, more particularly, to inform the shareholders, immediately upon its being discovered or known by them, on bringing the affairs of the company to the yearly balance, that one twelfth part of the capital stock of the company had been lost. The shareholders had no means of knowing the amount of losses except from the information afforded to them by the directors; and in terms of article 18th of the contract they were entitled, and had a material interest, to insist that the company should be dissolved when losses to the extent of one twelfth part of the capital had occurred. If Mr. Davidson and his co-directors had done their duty in disclosing the true state of the bank affairs, steps would have been taken for bringing about a dissolution of the concern before further loss was incurred, and for otherwise preventing or alleviating the loss in the course of being sustained; and the late Dr. Tulloch, and the pursuers as his representatives, would have been enabled to recover out of the concern a sum amounting, as at the date hereof, to the sum of £3000 of damages claimed, or to a considerable portion of that sum, which has been lost in consequence of the culpable and fraudulent violation of duty on the part of Mr. Davidson and his co-directors.

"*Cond. Art.* 28.—The late Dr. Tulloch, as already stated, was only induced to purchase his stock in the said bank, and to expend the sum laid out for that purpose, and further, to make payment of the foresaid call, amounting to £250, and to continue a shareholder in the said company, by the false and fraudulent statements and reports aforesaid, issued by Mr. Davidson and his co-directors; and except for these false and fraudulent statements and reports, the money

expended by him, and interest thereon, would have been still in the pocket of the said Dr. Tulloch, or of the pursuers, his representatives.

"*Cond. Art.* 29.—Further, the effect and consequence of the culpable and fraudulent violation of duty on the part of Davidson and his co-directors in misapplying the funds of the bank in the advances before set forth, was to create great and serious loss and damage to the concern, and to Dr. Tulloch as a shareholder thereof, and to reduce and bring down, and in fact almost to annihilate, the value of the stock held by the shareholders, and by Dr. Tulloch amongst others. In consequence of the said culpable and fraudulent conduct, the value to Dr. Tulloch of the stock held by him was reduced and brought down from the sum which he paid for it to nothing at all, or at least not more than 4*s.* 1¼*d.* per share, being, on his hundred shares, little more than £20 in all. The amount of loss and damage in consequence sustained by the said Dr. Tulloch, and by the pursuers, as his representatives, is not less than the sum of £3000 of damages claimed, or is a considerable portion of that sum."

The Court of Session held that the allegations of the pursuers were relevant: that the representatives of the late D. Davidson were liable for the loss incurred by the pursuers, and that the action was competent without joining the other directors as co-defenders.

The defenders in their *printed case* appealed on the following grounds:—1. The facts, as averred on record, are insufficient in law to entitle the respondents to judgment under either conclusion of the summons. 2. The action being, with respect to both conclusions, founded on alleged tortious conduct or delict on the part of the late Mr. Davidson, and the remedy sought being damages in satisfaction of the injury thence arising to the late Dr. Tulloch or his representatives as in his right, such action cannot be maintained by or against executors or other personal representatives. 3. The respondents have not relevantly stated that the alleged false reports, said to have been made before 3d October 1834, were made with a fraudulent intent to raise the price of shares, or to deceive Dr. Tulloch, and because the respondents have not relevantly stated any fraud or deceit of Mr. Davidson practised upon Dr. Tulloch, by which he was induced to purchase the shares. 4. The respondents have not stated in what way the alleged false reports on which they say Dr. Tulloch relied in making the purchase came to his knowledge, and have not averred that they came to his knowledge by the only means mentioned in the record which can be held to be the act of Mr. Davidson, viz. their being publicly made known and circulated. 5. The statements of the respondents shew, that, with full means of knowledge, Dr. Tulloch acquiesced in the purchase. 6. The other directors of the bank, who were parties to the acts and proceedings upon which the action is founded, have not been called as defenders. 7. In so far as the claim of the respondents for damages proceeds on the depreciation of the shares through losses sustained by the bank, they have no title to sue or recover; and in so far as the claim is founded on depreciation beyond the amount of these losses, the appellants are not liable. 8. In so far as the claim for damages proceeds on the allegation that Dr. Tulloch was deprived of the means of bringing about a dissolution of the bank, and thereby preventing or alleviating the depreciation of the stock of the company, the claim is founded on an allegation of fact and on conjectures, which are both inconsistent with, and disproved by, the statements of the respondents. 9. The procedure in the Court of Session, subsequent to 22d June 1858, was incompetent and irregular. 10. The diligence and warrant granted to the respondents are improper and unusual in their nature, as well as too extensive, and not necessary for the case which they desire to establish. 11. The issues, as adjusted, are not the proper issues to try the cause, and they do not involve any questions of fact from which any liability against the appellants can be relevantly or legally inferred.—*Irvine* v. *Kirkpatrick*, 7 Bell's Ap. 237; *Burnes* v. *Pennell*, 6 Bell's Ap. 541; *National Exchange Company* v. *Drew*, 2 Macq. Ap. 103, *ante*, p. 482: *Randall* v. *Errington*, 10 Ves. 427; *Syme* v. *Erskine*, 4 Paton's Ap. 516; Williams on Executors, p. 1564; *Wheatley* v. *Lane*, 1 Wms. Saund. 216; Broom's Legal Maxims, p. 811; *Gordon* v. *Douglas*, 3 Paton, 428; *May* v. *Mathews*, 11 S. 305.

The *respondents* supported the judgments of the Court of Session for the following reasons:—1. The Lord Ordinary, and the Court affirming his Lordship's interlocutor, properly found "that the pursuers (respondents) have averred on record matter relevant to entitle them to obtain issues in order to a trial of the cause in their *printed case*." *The Deposit and General Life Assurance Company*, *ex parte Ayre*, 27 L. J. Ch. 579; 25 Beav. 513. 2. Regard being had to the grounds on which the respondents' action is founded, they were entitled to proceed against the appellants as the representatives, of the late Mr. Davidson, without also calling the other directors of the bank, or their representatives, as defenders.—*Ferguson* v. *Kinmoul*, 1 Bell's Ap. 696, *et seq*. 3. The late Dr. Tulloch having sustained loss and damage by and through the fraudulent acts of the late Mr. Davidson, the respondents, as Dr. Tulloch's representatives, were entitled to prosecute and maintain action for reparation of such loss and damage against the appellants as representing the late Mr. Davidson.—*Lawson* v. *The Leith Company*, 13 D. 175; and cases cited above.

The *Attorney General* (Sir R. Bethell), and *Roundell Palmer*, Q.C., for the appellants.—The

interlocutors ought to be reversed for five reasons—1st. Because the statements on record were irrelevant; 2d. Because the respondents were precluded by the lapse of time; 3rd. Because the action was in the nature of a penal action, the right to bring which was extinguished on the death of Mr. Davidson, the alleged wrong-doer, and could not be prosecuted against his representatives; 4th. Because the other directors were not called; and 5th. Because the interlocutors subsequent to the date of the first appeal were not only incompetent and *ultra vires*, but the interlocutor granting a diligence was too sweeping.

1st. Relevancy could not be sustained—*First*, because there was no allegation of any false affirmation being made by Mr. Davidson to the respondent's predecessor. This, in the general case, is clearly necessary; and although a qualification has been introduced, where the thing sold consists of stock saleable in the market, yet in regard to such article there must be an averment of a false affirmation meant to affect the market price of the stock, and induce the public to act upon it. *Second*, because there was no intent alleged to induce the contract of purchase being entered into. *Third*, because there is no allegation that the representation was made *animo lucrandi*, and any loose statements that may have that tendency have reference to other persons than Mr. Davidson. *Fourth*, because with regard to the second claim of the pursuer, namely, the alleged loss and injury he sustained after he became a partner, the same objections to the relevancy hold. But further, even if they were sufficient, the pursuer, an individual partner, has no title to sue. If loss was sustained in consequence of the improper or fraudulent conduct of Mr. Davidson, as a director, it was a loss sustained by the company as a body, and the company had the proper and only *locus standi* to maintain the action. The damages recovered would be divisible among the different partners, including the pursuer—*North of Scotland Banking Co.* v. *Thomson*, 16 D. 1011; *West of Scotland Malleable Iron Co.* v. *Buchanan*, 17 D. 461; *Barclay* v. *Lawrie*, 19 D. 488. The pursuer's remedy would be put in motion by the company. Such a suit as the present cannot be maintained at the instance of an individual shareholder—*Foss* v. *Harbottle*, 2 Hare, 461; *Mozley* v. *Alston*, 1 Phil. 790; *Lord* v. *Copper Miners' Co.* 2 Phil. 740.

2d. Although no prescription may have run, the ingredient of time is material in considering the relevancy of such an action; and here it is fatal. The contract for the purchase could only be avoided when *restitutio in integrum* could be given. Here that is impossible—*Campbell* v. *Fleming*, 1 A. & E. 40.

3d. The rule of the law of England, that *personalis actio moritur cum personâ* is founded upon sound principle, and there is no reason or authority for holding that the law of Scotland is in any respect different. How far would the respondents carry the doctrine? To actions for assault or libel?

4th. The action was defective in not bringing before the Court all the directors, and with regard to the claim by the pursuer, as a shareholder, in not having before the Court all the other shareholders.

5th. The original appeal having been offered for presentation, and a certificate to that effect issued, stayed procedure, and the Court had no power or authority to make any further order in the cause—*Lindsay* v. *Lindsay*, 11th July 1811, F. C. Moreover the diligence against havers was irrelevant and incompetent.

Rolt Q.C., and *Anderson* Q.C., for the respondents contended—1st. That the action was well constituted in respect of parties, whether as regarded the persons called as defenders or the instance of the pursuers. As the ground of action was fraud, it was not necessary to join as co-defendants the directors, other than the defenders as representing Davidson. In all questions of delict, or *quasi* delict, each co-delinquent is liable *in solidum*, and may be sued separately—Stair, 1, 9, 5; Ersk. 3, 1, 15; *Hay* v. *Elphinston*, M. 14,658; *Leslie's Representatives* v. *Lumsden*, 14 D. 214; *Attorney General* v. *Wilson*, Cr. & Ph. 1.

2d. The claim did not perish by the death of Mr. Davidson. The law of Scotland has not adopted the maxim *actio personalis moritur cum personâ* so extensively as the law of England has. The Scotch law, in this respect, is founded on the maxim of the canon law rather than of the civil, and regarding, as it does, the heir as *eadem persona cum defuncto*, it has rendered personal, or even penal actions, where the claim is made for civil reparation and damages, transmissible to representatives—Ersk. 3, 1, 15, and 4, 1, 14; Bell's Prin. § 546; Bell's Dict. *voce* Penal Action; *Macnaghton* v. *Robertson*, 17th February 1809, F. C.; *Morison* v. *Cameron*, 25th May 1809, F. C.; and *M'Kenzie* v. *M'Kenzie*, F. C. in a note to the last case.

3d. The pursuers have a good title to sue. This is clear as to the first ground of action, which has reference to the fraud by which Dr. Tulloch was induced to become a shareholder. The company as a body, and the other shareholders, had nothing to do with that claim. But further, the title is also good as to the loss sustained by the fraud of Davidson, after Dr. Tulloch became a shareholder, because, although the company might have sued for the general behoof, yet Dr. Tulloch or the pursuers could not put them in motion; and further, the company could not, by any act of theirs, sanction or confirm the fraudulent acts complained of, so as to preclude any one shareholder from his remedy. *Foss* v. *Harbottle*, and that class of cases, proceeded upon

this text; and it was assumed on all hands that the Court would interfere if the act of the directors complained of was such as the company could not confirm.

4th. The pursuers' averments are relevant. 1st. The affirmations are alleged to be false; 2d. That Davidson knew they were so; and 3d. That he made them for an improper purpose; that it was not necessary that it should be alleged his motive was to induce the public to buy shares; it was enough that any one member of the public was so induced, and that is averred on the record—*Pontifex* v. *Bignold*, 3 Man. & Gr. 63; *Gerhard* v. *Bates*, 2 El. & Bl. 476; *Bedford* v. *Bagshaw*, 4 H. & N. 538; *Clark* v. *Dixon*, 5 Jur. N. S. 1029.

5th. The interlocutors, subsequent to the date of the first petition of appeal, were regular and competent. An appeal only stays procedure from the date of the service of the order for answer, and notice of an intention to appeal is immaterial; and here there was no effectual appeal until the petition was received by the House and the order of service thereupon issued.

Cur. ad. vult.

LORD CHANCELLOR CAMPBELL.—My Lords, I see very great difficulties which must be encountered in the trial of this case, and I rejoice that I shall not be the Judge to preside at the trial; but what we are to see is, whether, on the pleadings, there is a sufficient cause of action alleged; and then, whether there is any answer to that cause of action.

Two causes of action are alleged,—first, with respect to the original purchase of the shares in the company; and secondly, with respect to the misconduct of Davidson, one of the directors, after these shares had been purchased, and while Dr. Tulloch was a shareholder.

With regard to the first, if the pursuers had sought to disaffirm the contract, and to recover back the purchase money, I should have clearly held, that the action was not maintainable, because a contract tainted by fraud is not necessarily void. It is voidable, and it may be rendered void, but that must be as soon as the party defrauded knows of the fraud, and while things can be restored to the situation they were in before the fraud was perpetrated. Here Dr. Tulloch continued for years as a shareholder, receiving dividends and acting as a shareholder.

When we come, however, to see the exact manner in which the case is alleged, I am of opinion, that it is set forth in such a manner that the action is maintainable, because the gist of it is this, that Davidson, now deceased, by false and fraudulent misrepresentations, induced Dr. Tulloch to buy his shares, whereby he was injured. He bought shares not of the company, but of a third person, and there was a binding contract between them, and that contract stands. That is sufficiently alleged. But then comes the manner in which the damages are calculated. That cannot be supported, because the damages are calculated, as if the defendants were to be obliged to take the shares off the hands of the pursuer, and to place the pursuer 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 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 clearly would be to ascertain the difference between the purchase money and what would have been a fair price for these 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 should take place.

With regard, then, to the relevancy of this part of the case, there seems to me to be no doubt whatever, and it is unnecessary to make a single observation upon it. We come, then, at once to consider whether—Dr. Tulloch having died, and this being an action against executors—it can be maintained, for that seems to be the only bar to the action that we can now take notice of. The delay that has arisen was very properly held to be no bar to the action. It is merely a reason for looking more critically at the allegations. Now the law on this subject, by which we must be governed, is the law of Scotland; and I must say, that it has been proved to demonstration, that it is the law of Scotland, that if by a delict there is a pecuniary loss occasioned, and the party dies who was guilty of that fraudulent misrepresentation, an action lies against his executor, if the executor is *lucratus*. There was some uncertainty at first introduced into the argument by that word *lucratus*. It was supposed, that that might mean, that merely the party who was guilty of the fraud was *lucratus;* but that was explained satisfactorily, and was shewn to mean an executor *lucratus*, as by taking up the succession of a person liable for a wrongful interference with the property of the person complaining. That being so, the action lies against executors just as much as if it had been brought against Mr. Davidson himself. So much for the first objection as to the relevancy.

Then the second objection is, (and I think it is confined to this objection now,) that there is no sufficient allegation that this false statement was made so as reasonably to be supposed to induce Dr. Tulloch to buy the shares. I think we need look no further than the 19th article of the condescendence, in which it is alleged that, "relying on the truth of the foresaid reports, which were publicly made known and circulated by Mr. Davidson and his co-directors, the late Dr. Tulloch was induced to purchase shares in the bank." What is the natural meaning to be ascribed to these words? Clearly that these were false reports of the circumstances of the

company, and that those reports were printed, and that they were circulated in Aberdeen, and so were made public by the defender and those who were acting in concert with him ; and that Dr. Tulloch, reading those reports, thought this was a very flourishing concern, that it would be a good investment for him, and that he went and bought the shares, and so became and since continued a member of the company.

Then the allegation being sufficient as to the relevancy, the question arises as to whether the action can be maintained by an individual shareholder, and ought not to be brought by the company. On looking at the allegations, they shew a concurrence of *damnum cum injuriâ*. *Primâ facie*, therefore, an action lies. It would be incumbent on the other side to shew, that an action cannot be maintained by the party who is injured. Now, no authority has been brought forward on that subject. On the contrary, we have the authority of the Court of Session in *Leslie* v. *Lumsden*, which is precisely the same case as the present. It is not binding on us, but it is a decision of the Court of Session pronounced a number of years ago, which was not appealed against, but which has been acquiesced in and treated as law from that time to this. If nothing were alleged here as done by Davidson and his co-directors but what the general meeting of the shareholders might have ratified, there might have been strong reason to suppose, that, according to the English authorities, and what is understood to be the practice in this part of the kingdom, an action might be brought by the company, but could not be brought by an individual shareholder. But there are frauds here alleged not merely by lending money to insolvent persons, but by systematically making false reports and declaring false dividends which were not justified by the real state of the company. There are allegations of fraud here, and facts stated, which could not be ratified by the company ; and which, therefore, render the cases which are relied upon on the part of the appellant not at all applicable.

That being so, it seems to me, that, with reference to the second ground upon which an objection is raised, the action is maintainable ; because this form of action applies equally to a representative as to the person himself ; and that being so, it seems to me, that this interlocutor must be affirmed.

With respect to drawing up the issues, it seems to me, that the Court proceeded with perfect regularity. There having been no due notice of the appeal to this House, there was no stay of proceedings ; and the Court had a right, under those circumstances, to act as if no appeal had been lodged.

With regard to the form of the issues, I think it is said now, on the part of the appellants, that they are indifferent respecting the form of them. The first and second issues seem to me to be perfectly unexceptionable. As to the third, both sides seem to be agreed as to the form of the issue ; and I do not think, that it is our duty at all to interfere, although that third issue certainly is an issue, as to which I do not at present see how it can ever be practically brought to a satisfactory determination ; but, at the same time, I do not see that it is at all incumbent upon us to make any alteration in it.

Upon the whole, therefore, I should advise your Lordships, that the appeal should be dismissed with costs.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend ; and among the other remarks which he has made, I particularly agree in one in expressing my great satisfaction that I have not to try these issues, whether reformed or not, for I think whoever has to try this question, as far as regards the mode and the manner and measure of the compensation in damages, will have a very difficult task to perform. But for us the only question is, Does the action lie? I consider it to be quite clear, that the 19th article of the condescendence (other articles also may be taken into account) does set out a distinct and valid ground of action. It alleges frauds committed during a series of years, a constant paying of profits out of capital, pretending that they were paid out of profits, where the parties making those payments had entire knowledge of the state of the concern, and kept that knowledge to themselves, and gave a false representation of the state of the concern to the public. And it is also distinctly alleged, that the party, who is said to be damnified by their conduct, was wholly ignorant of these matters ; and that, relying on that state of the concern, relying on the value attached to these shares by these fraudulent representations, and this fraudulent conduct on the part of Davidson and the other directors, he was induced to purchase shares, and was damnified by that purchase.

My noble and learned friend has stated, what is undoubtedly correct, that the mode which is adopted here of setting forth or estimating the damage is not the correct one, and he has stated what the correct one is, namely, to claim the difference between what Dr. Tulloch paid for the shares and the real value at the time of purchase. The difference between what he paid, and what, in the circumstances of the case, the real value of the shares was, is the amount of damage which he sustained, and no greater amount can be recovered. I do not go into the other allegation of his being induced by the false and fraudulent representations to pay a call which came afterwards. It is unnecessary to go into that ; but that this amounts to a valid allegation of conduct on the part of the defenders, whereby the pursuer was damnified, I have no manner of doubt any more than my noble and learned friend.

As to the issues, I think to the first two there can be no kind of objection. As to the third, I take it for granted, that the respondents, who desire to have the matter tried, can have no objection that it should be so far reformed as to meet the objection which has been made to it. I therefore agree with my noble and learned friend in recommending your Lordships to dismiss the appeal.

Before I conclude, however, there is one thing I beg leave to say. I entirely agree with my noble and learned friend, that it has been clearly and distinctly made out by the authorities cited, and it is fit that it should be mentioned, in order that it may be seen that there is no difference among us on that point, that, in the circumstances of this case, the action transmits against the executors or personal representatives, they being liable to make good the damage sustained by the misconduct of those of the parties whom they represent. It is quite clear, that the law of Scotland makes this undoubted provision for the remedy of parties who have been injured by the tortious proceedings of a deceased party, if that proceeding pecuniarily damnifies—as they call it, patrimonially damnifies—the party who sues; the action transmits against the wrong doer's representatives.

LORD CRANWORTH.—My Lords, with respect to the last point to which my noble and learned friend has just adverted, I must say, that I think the decision, at which your Lordships are arriving, is not only in conformity with the law of Scotland, but is in conformity with what good sense and justice require. I entirely concur with the argument of Mr. Rolt on that head, that if, according to our system of law, or any system of law, that is not the law, it is much to be regretted that it is not so; but I am glad to find, as we do in the authorities to which we have been referred in this case, which are not numerous, that we are warranted in saying, that unquestionably it is the law of Scotland, that if a wrongful act is fraudulently perpetrated by any man by which I am injured in my property, if the person having perpetrated that wrongful act dies, I have a right to go against his representatives for redress.

The first point on which the appellants complain at your Lordships' bar is with regard to so much of the summons of Dr. Tulloch as complains that he was led, in 1834, to purchase these shares by false representations. I think that has been completely cleared up and explained. It was not, as I was led to suppose in the opening, that there was an attempt to upset that purchase—that would have been impossible, because the sellers were not before your Lordships; but, on looking at the course of proceedings, and at the issues as finally directed, I observe that there is no issue directed to any such result. The only question is, whether Dr. Tulloch or his representatives are not entitled to recover damages by reason of his having been wrongfully induced to give for these shares what he would not have given had the truth been disclosed to him, or rather, had not falsehoods been pressed upon him. That is not a part of the case upon which I have ever had any doubt.

The doubt I have had has been upon the point, whether Dr. Tulloch, as an individual shareholder, was entitled to maintain this action, with respect to frauds that were perpetrated during the time he was a shareholder. On that subject I do not believe there can be any difference in principle between the law of Scotland and the law of England; and I take that principle to be extremely clearly and well enunciated by stating, that, in respect to any transaction which the body of shareholders could not sanction, there might be a right of action; but in respect to any transaction which they could sanction, although the directors might not have been justified in what they were doing, there could be no right of action—the remedy must be of a different nature. The question, therefore, really is this, whether the acts alleged to have been perpetrated by Davidson and the other directors come within the one class or the other. If there had been nothing alleged against the directors, but that they had advanced money (even putting in the word fraudulently) for the benefit of persons with whom they or some of them were associated, and whom they wished to assist, I should have been very reluctant indeed, to hold, that that was not an act which the body at large might not have sanctioned; for, in truth, it amounts to no more than this, an improvident and improper advance of funds. But there are allegations, on the face of the condescendence, of acts done by the directors, which no body of shareholders could have sanctioned against a single dissentient; no body of shareholders could authorize these directors to put forward and to represent to the shareholders, who were not parties to the arrangement, false accounts of the different transactions in which they were engaged, and to pretend that dividends were payable, year after year, out of profits, when, in truth, they were paid only by sinking the capital. That is a course of transactions which no body of shareholders could sanction even against a single shareholder, who might have been absent when such an attempt was made. It is quite clear to my mind that this was an injury to each individual shareholder, who was, or might have been, deceived by the false representations so put forward. I therefore think, on both grounds, the action is maintainable.

With respect to the form of the issues, I regret that they are framed in so loose a manner, but I think it would not be a proper course for this House to take, to correct merely verbal defects in issues, if they substantially raise the question, which it is necessary should be raised for the justice of the case. That is not the proper function of this House; and I think, looking

at the issues, although they are not drawn up in the mode in which, if I had been framing them, I should have drawn them up, or in the mode in which, if more experienced pleaders than myself had drawn them, they would have framed them, I think they all do raise the substantial point in question; and I must observe, whatever difficulties there will be in the trial of the third issue, if the parties are not wise enough to abandon it, which, I think, they had much better do, the difficulties are difficulties not arising from the form of the issue, but from the substance of it. There will be exactly the same difficulties in whatsoever way you frame it, because the question is, whether, from the course of dealing throughout the whole of the partnership, Dr. Tulloch was not lulled to sleep and led not to take steps for bettering his condition, which, if the real state of things had been disclosed to him, he would probably have taken; the difficulty is one arising not on the form of the issue, but on the substance of it. But to the substance of the issue I think the respondents were entitled; and, consequently, the interlocutors affirming the issues ought not to be interfered with.

Interlocutors affirmed, with costs.

For Appellants, H. Harris, Solicitor, London.—*For Respondents*, Robertson and Simson, Solicitors, London.

MARCH 7, 1860.

Poor Mrs. JANE DONALDSON or MAXWELL, *Appellant*, *v.* SAMUEL M'CLURE, *Respondent.*

Domicile—Succession—Dead's Part—Wife's Next of Kin—Husband and Wife—*A Scotchman by birth went to and resided in England, where he carried on business and married; and after the lapse of nearly* 30 *years he returned to Scotland, where he purchased a residence, at which his wife died in the third year without leaving issue. They had kept on their English residence also. On the ground that the domicile of the married pair was in Scotland at the dissolution of the marriage, a claim was made by a party as next of kin of the wife, and, as such, entitled to a half of the goods in communion.*

HELD (affirming judgment), *That the domicile was in England at the dissolution of the marriage, there being no evidence to rebut the presumption of an English domicile arising from the retaining of the English residence; it being clear, that he had an English domicile before returning to Scotland.*[1]

The pursuer, who claimed to represent the deceased Mrs. Ann Donaldson or M'Clure, the wife of the defender, as her next of kin and executrix dative, brought the present action in the Sheriff Court of Dumfriesshire for the purpose of being found entitled to the dead's part, or one half of the goods held in communion during the subsistence of the marriage between the defender and his wife, who died, without leaving issue, on 8th April 1851.[2] The action, which proceeded on the medium, that the defender and his wife were domiciled in Scotland at the dissolution of the marriage, called on the defender to account for the means and estate forming the goods in communion, and to pay to the pursuer £20,000, or such sum as should appear to be the just half thereof, with interest from and after the death of his wife.

The defence was, that the rights of parties ought to be regulated by the law of England, as the defender and his wife were domiciled there up to the date of the dissolution of the marriage, and that, according to English law, the pursuer was not entitled to insist in such a claim.

The Sheriff having decerned in favour of the pursuer, the case came into the Court of Session by advocation.

The leading facts as to domicile, as arising from the statements and admissions of parties, and the proof, appear to be as follow:—The defender was born in 1793, in the parish of Buittle, and stewartry of Kirkcudbright, his father having been a farm servant or labourer in that parish during the greater part of his life. The defender was at first employed as a farm servant in his native parish; but about 1813 he left Scotland, and went to Wigan in England, where he served an apprenticeship to a draper, and where he afterwards commenced business on his own account.

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[1] See previous reports 20 D. 307: 30 Sc. Jur. 165. S. C. 3 Macq. Ap. 852: 32 Sc. Jur. 408.

[2] This right of the wife's next of kin to demand upon her death a division of the goods in communion, and to recover her share, was abolished in 1854 by the Statute 18 Vict. c. 23, § 6.