1885
*May 26, 27, 28.
1886
*Mar. 8.

ALEXANDER B. PETRIE (PLAINTIFF).... APPELLANT ;

AND

THE GUELPH LUMBER COMPANY, GEORGE MACLEAN, DONALD GUTHRIE, JOHN HOGG, AND GEORGE DOUGLAS FERGUSON (DEFENDANTS)..... } RESPONDENTS.

JOHN INGLIS AND DANIEL HUNTER, trading under the name, style and firm of INGLIS & HUNTER (PLAINTIFFS)..... } APPELLANTS ;

AND

THE GUELPH LUMBER COMPANY, GEORGE MACLEAN, DONALD GUTHRIE, JOHN HOGG, AND GEORGE DOUGLAS FERGUSON (DEFENDANTS)..... } RESPONDENTS.

ROBERT STEWART (PLAINTIFF) ..... APPELLANT ;

AND

THE GUELPH LUMBER COMPANY, GEORGE MACLEAN, DONALD GUTHRIE, JOHN HOGG, AND GEORGE DOUGLAS FERGUSON (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Corporation—Promoters of—Action against Company and promoters for fraudulent misrepresentation—Action ex delicto for deceit—Fraudulent concealment.

A suit was brought against a joint stock company, and against four of the shareholders who had been the promoters of the company. The bill alleged that the defendants, other than the company, had been carrying on the lumber business as partners and had

* PRESENT—Sir W. J. Ritchie C.J. and Fournier, Henry, Taschereau and Gwynne JJ.

become embarrassed; that they then concocted a scheme of forming a joint stock company; that the sole object of the proposed company was to relieve the members of the firm from personal liability for debts incurred in the said business and induce the public to advance money to carry on the business; that application was made to the Government of Ontario for a charter, and at the same time a prospectus was issued; which was set out in full in the bill; that such prospectus contained the following paragraphs among others, which the plaintiff alleged to be false:

1. The timber limits of the company, inclusive of the recent purchase, consist of 222½ square miles, or 142,400 acres, and are estimated to yield 200 million feet of lumber.
2. The interest of the proprietors of the old company in its assets, estimated at about $140,000 over liabilities, has been transferred to the new company at $105,000, all taken in paid up stock, and the whole of the proceeds of the preferential stock will be dues for the purposes of the new company.
3. Preference stock not to exceed $75,000 will be issued by the company to guarantee 8 per cent. yearly thereon to the year 1880, and over that amount the net profits will be divided amongst all the shareholders *pro rata*.
4. Should the holders of preference stock so desire, the company binds itself to take that stock back during the year 1880 at par, with 8 per cent. per annum, on receiving six months' notice in writing.
5. Even with present low prices the company, owing to their superior facilities, will be able to pay a handsome dividend on the ordinary as well as on the preference stock, and when the lumber market improves, as it must soon do, the profits will be correspondingly increased.

The bill further alleged that the plaintiffs subscribed for stock in the company on the faith of the statements in the prospectus; that the assets of the old company were not transferred to the new in the condition that they were in at the time of issuing the prospectus; that the embarrassed condition of the old company was not made known to the persons taking stock in the new company, nor was the fact of a mortgage on the assets of the old company having been given to the Ontario Bank, after the prospectus was issued but before the stock certificates were granted; that the assets of the old company were not worth $140,000, or any sum, over liabilities, but were worthless; and prayed for a rescission of the contract for taking stock, for re-

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payment of the amount of such stock, and for damages against the directors and promoters for misrepresentation.

There was evidence to show that the promoters had reason to believe the prospects of the new company to be good, and that they had honestly valued their assets.

On the argument three grounds of relief were put forward:

1. Rescission of the contract to subscribe for preference stock.
2. Specific performance of the contract to take back the preference stock during the year 1880 at par.
3. Damages against the directors and promoters for misrepresentation. The company having become insolvent the plaintiffs put their case principally on the third ground.

Held, affirming the judgment of the court below, that the plaintiffs could claim no relief against the company by way of rescission of the contract, because it appeared that they had acted as shareholders and affirmed their contract as owners of shares after becoming aware of the grounds of misrepresentation.

Held, also, as to the action against the defendants other than the company for deceit, that the evidence failed to establish such a case of fraudulent misrepresentation as to entitle plaintiffs to succeed as for deceit.

Held, also, as to the alleged concealment of the mortgage to the Ontario Bank, it having been given after the prospectus was issued it could not have been in the prospectus, and, moreover, that the shareholders were in no way damnified thereby, as the new company would have been equally liable for the debt if the mortgage had not been given; and as to the concealment of the embarrassed condition of the old company, the evidence showed that the old firm did not believe themselves to be insolvent; and in neither case were they liable in an action of this kind.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Chancery Division of the High Court of Justice for Ontario (2) dismissing the plaintiffs' bill.

The facts of the case are sufficiently set out in the judgment in the Chancery Division and in the judgment of Gwynne J. hereinafter given.

Dalton McCarthy Q.C., for the appellants, referred to the following cases and authorities in addition to those relied on in the Chancery Division:—Kerr on Frauds

(1) 11 Ont. App. R. 336. (2) 2 O. R. 218.

(1); *Smith* v. *Chadwick* (2); *Smith* v. *Land and House Property Corporation* (3); *Mackay* v. *Commercial Bank of New Brunswick* (4); *Edgington* v. *Fitzmaurice* (5); *Ex parte Whittaker, in re Shackelton* (6); *Mathias* v. *Yelts* (7).

Christopher Robinson Q.C. and *Walter Cassels* Q.C., for the respondents, referred to *Dickson* v. *Reuter Telegram Co.* (8); *Jennings* v. *Broughton* (9); *Wood* v. *Schultz* (10).

The judgment of the court was delivered by

GWYNNE J.—The learned counsel for the appellant in his argument before us and in the printed argument contained in the appellant's factum, thus summarizes the relief claimed:

The plaintiffs claim:—

1. Rescission of the contract to subscribe for preference stock on the ground of misrepresentation, their being no laches on their part, they having repudiated within one month after they became aware of the fraud.

2. Specific performance of the contract contained in the prospectus should the holders of preference stock so desire, the company binds itself to take that stock back during the year 1880, with eight per cent. per annum on receiving six months notice in writing. The notice was given on the 26th September, 1879.

3. Damages as against the directors and promoters for misrepresentation, or, as it is called at common law, deceit.

And he adds,

The plaintiffs put their case upon the third or highest ground, and the argument is addressed to that and to that alone for two reasons:—First, that it includes the other two, and, also affords the only substantial redress in the premises, the company being insolvent. Secondly, that if it fails it will suffice to the consideration of the other two, as to the success of which the plaintiffs are in little doubt,

(1) 1 Ed. pp. 32, 36 and 37.
(2) 20 Ch. D. 44.
(3) 28 Ch. D. 15.
(4) L. R. 5 P. C. 394.
(5) 32 W.R. 848; 52 L.T.N.S. 351
(6) 23 W. R. 555; L. R. 10 Ch. App. 446.
(7) 46 L. T. N. S. 502.
(8) 3 C. P. D. 1.
(9) 5 DeG. M. & G. 126.
(10) 6 Can. S. C. R. 592.

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and will thereby afford them the somewhat thankless remedy in the premises of a set-off for costs. It is, therefore, intended to press all three of the above enumerated rights, but it is frankly admitted that this appeal substantially succeeds or fails, except on the question of costs, upon the success or failure to establish the third right.

In view of these admissions the relief sought under the two first of the above heads might have been left out of the statement of claim altogether. That sought under the second head is quite inconsistent with that claimed under the first; for specific performance, or rather the fulfilment of a particular term contained in a contract, cannot be enforced if the contract be rescinded. The plaintiff cannot avoid the contract upon the ground of its having been procured by fraud, and at the same time rest upon it as good and valid, so as to entitle him to have the benefit of the company's contract contained, not in the prospectus which is but an invitation to take stock in the company and is signed by no one, but in the scrip certificate which is under the seal of the company and contains their contract to pay 8 per cent. up to the year 1880, and to take back the stock at par during that year if the holders should so desire, upon receiving six month's notice. As the plaintiff's case is that the company is now insolvent, he does not desire to have a decree against it founded upon this term in the contract; nor could he obtain such a decree without abandoning his claim for rescission of the contract, as to which, however, it is sufficient to say that the plaintiff, having been a party to the report made in August, 1879, containing the information upon which the charges contained in his statement of claim are based, and having subsequently acted as a shareholder in virtue of the stock which he says he was induced to subscribe for by the fraud and false representations of the defendants other than the company, and having voted at an election of directors with full

knowledge of the several matters now relied upon as the acts of fraud and false representation, he cannot now claim to be relieved of his stock, even if such relief would be of any benefit to him. His sole remedy, therefore, if any he has under the circumstances appearing in evidence, consists in an action in form *ex delicto* against the defendants other than the company as for deceit, and upon the result of that action alone he must stand or fall, and in consideration of that claim we cannot lose sight of the fact that at the election of directors of the company, held after the report made in August, 1879, by the committee, of which the plaintiff (Petrie) was himself a member, as also was Inglis, he voted for all of the defendants except MacLean, while Inglis voted for all including MacLean, as directors of the company for the ensuing year. At the trial the plaintiff's case was rested chiefly upon his own evidence of statements which he alleged to have been made to him by MacLean alone, who brought the prospectus to him and asked him to take stock, but this case cannot be rested as against the other defendants upon any false and fraudulent representation, if any, made by MacLean to the plaintiff on that occasion, for three reasons—

1st. Because in an action of this kind, where the liability arises from wrongful acts of the defendants, although each is liable for all the consequences attending wrongful acts of which they are guilty, yet, the others of them cannot be made responsible for the consequences of a wrongful act of one of them to which the others are not parties. The case against each is distinct, depending upon the evidence against each (1). MacLean, as a provisional director of the incorporated company, and as one of the partners of the old firm, may have had the authority of the other defendants to take the prospectus around and upon the strength of its

(1) *Atty. General* v. *Wilson* 1 Cr. & Ph. 28.

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statements to canvas for subscriptions of stock, but he was not the agent of the other defendants to make, and had no authority from them to make, any representations outside of the prospectus by which, if false and fraudulent, they could be made responsible for such false and fraudulent representations; if any were made by MacLean, he alone is responsible;

2nd. As against MacLean himself, this evidence of the plaintiff cannot be relied upon as sufficient, because the evidence in respect of the matters complained of by the plaintiff is not only not corroborated by any other evidence, but is in most material particulars contradicted, not only by MacLean, but also by one Edgar, who was present, and who further gives a narrative of the circumstances under which Petrie signed the agreement to become a subscriber for stock at the foot of the prospectus in the books of the company, wholly different from that given by Petrie; and in an action of deceit it would be very unsafe to proceed upon the evidence of a plaintiff alone not only uncorroborated, but so contradicted by other evidence (1);

And 3rd. Because the only case made by the plaintiff's statement of claim is one of false and fraudulent misrepresentations contained in the prospectus itself. Whether there be in the prospectus itself such false and fraudulent misrepresentations as entitle the plaintiff to recover in this action *ex delicto* is then the sole question in the case. The preliminary facts may be stated to be, that these defendants, being engaged together as partners in the business of manufacturers of lumber, had acquired certain timber limits and rights to cut timber upon private property, and, in the year 1875, had erected, at considerable expense, a first class saw mill upon their property at Parry Sound, the machinery for which was furnished and put up in the

(1) *Lovesy* v. *Smith* 15 Ch. D. 664.

mill by Inglis & Hunter, the plaintiffs in the second of the above actions; and in the year 1876, they had constructed docks at their mill for the convenient shipping of the lumber cut at the mill. In the spring of 1877, having a considerable stock of lumber on hand, and the lumber trade being then in a very depressed condition, and in consequence thereof the value of timber limits being very much reduced, MacLean, who was the manager of the partnership business in charge of the mill and of the sale of its produce, strongly urged upon his co-partners the great benefit it would be to the business if they should take advantage of the low price of limits and acquire some which were in the market, and could be purchased at a low and very advantageous rate. This he persuaded them would be so much to the advantage of their business, that they came to the conclusion, as they had already invested largely in the business, to form a joint stock company of limited liability in order to raise the sum of $75,000 additional capital, which was thought necessary in order to acquire additional limits and to carry on the business on a large scale, so as to secure the benefit of an improved condition in the lumber trade which was looked forward to as likely, shortly, or at no distant day, to take place. Accordingly, upon the information furnished by their manager, in whose judgment they apper to have had implicit confidence, they made an estimate of their liabilities and of their assets, for the purpose of arriving at the amount at which their assets in excess of their liabilities might be estimated, with a view to their taking stock in the joint stock company to that amount, to be deferred to the $75,000.00 proposed to be raised as preference stock, and as a result of this estimate of their liabilities and assets they concluded to take steps for the formation of a joint stock company upon the basis of their taking

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stock to the amount of $105,000.00, as the estimated value of their interest in the partnership assets and to invite subscriptions for preference stock upon this basis. Accordingly, upon the 28th May, 1877, they entered into an agreement made and executed by all the partners in the firm consisting of the above defendants and one Symon, since deceased, whereby after reciting that the partnership firm, known as the Guelph Lumber Company, were possessed of a mill property, timber limits, timber and other property, and that for the purpose of purchasing additional limits and otherwise extending their business it was desirable to procure additional capital and to form a joint stock company to be incorporated under the name of The Guelph Lumber Company (limited), and that the members of the old company proposed to take paid up stock in the new company for their interest in the assets of the old, the same being estimated for the purpose at $105,000 00, and that the capital stock of the new company should be $300,000.00 divided into 300 shares of $1,000 each. It was mutually agreed as follows:—

1. That a new company be incorporated under the Joint Stock Companies Act for the purpose of taking over the business and assets of the old partnership firm known as The Guelph Lumber Company, such new company, when incorporated, to take the place of the old in respect of such business.

2. That MacLean, Guthrie, Hogg, Ferguson and Symon, being the only persons interested in the old partnership agree to accept paid up stock in the aggregate for $105,000.00 in the new company, in the proportions set opposite to their respective signatures in full satisfaction of their interest in the business and assets of the old company when incorporated, and the said new company shall thereupon succeed to and assume all the business and assets of the old company.

3. That the capital stock of the new company should be $300,000, divided as aforesaid, and the parties thereto agreed to take and subscribe for the number of shares thereof set opposite to their respective signatures.

4. That the first directors of the new company should be John

Hogg, George MacLean and Donald Guthrie, and that the said directors should take steps to procure the incorporation of the new company.

5. That the said directors are authorized to purchase in trust for the new company any timber and timber limits offered for sale prior to the procuring of a charter.

6. That the business of the old company should belong to the new company at the time of incorporation on the terms therein specified, notwithstanding any increase or change in the assets thereof, it being understood that the members of the old company should not, in the meantime, receive any dividend or profit therefrom. The instrument was then subscribed

By the defendant Ferguson	for 28	shares.....	$ 28,000 00
By the defendant Hogg	for 28	do	28,000 00
By defendant MacLean	for 24	do	24,000 00
By defendant Guthrie	for 23	do	23,000 00
And by Charles Symon	for 2	do	2,000 00
			$105,000 00

In pursuance of this agreement the steps necessary to procure letters patent of incorporation to be issued incorporating the new company under the provisions of the Joint Stock Companies' Act were taken, which letters patent issued as stated in the plaintiff's statement of claim, namely, upon the 20th of August, 1877.

In the meantime a contract having been entered into by Mr. Guthrie on behalf of the old firm with one Dodge for the purchase of certain limits, to be held in trust for the new company in the event of its being incorporated, and the sum of $5,000 having to be paid as a cash instalment of purchase money upon such purchase, the defendant Guthrie himself advanced $3,000, part thereof, and procured Inglis and Hunter to advance the residue, namely, $2,000, and thereupon an agreement was entered into between the old partnership firm, known as the Guelph Lumber Company, and the defendant Guthrie and Messrs. Inglis and Hunter, and signed by them respectively in the terms following :

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The Guelph Lumber Company having requested Messrs. Inglis and Hunter to make an advance of two thousand dollars and D. Guthrie of three thousand dollars to pay the cash payment required to be paid to secure purchase of 6th June, 1877, from W. E. Dodge of the following timber berths, namely, the Township of Spence, Berth number one, Township of Ferguson, Berth number one, Township of Hagerman, and Berth number three Township of McKillop, it is agreed as follows:—The agreement or agreements for said purchase and said timber berths or the interest of MacLean, Ferguson, Hogg, and Guthrie therein (representing The Guelph Lumber Company) shall be assigned to Inglis and Hunter, in trust to secure them in the first place and said Guthrie in the next place, the repayment of the said respective advances and interest thereon at the rate of 9 per cent. per annum to be repaid in one year after the date, with power of sale of the said timber berths and interest therein in default of payment, interest to be paid yearly.

It is further agreed that a formal assignment of said agreement or agreements and said interest in said timber berths shall be made to said Inglis and Hunter, said Inglis and Hunter to hold Guthrie's interest therein, in trust for such person or corporation as may advance him the money, if any to pay such advance or any part thereof. It is further agreed that the said Inglis and Hunter shall have the option of acquiring an interest in the said company equal to two shares of one thousand dollars each therein, and also that said Guthrie shall have a similar option to acquire an additional interest equal to three shares of $1,000.00 each in said company, such shares to be in an incorporated company with limited liability, and to be preferred shares to those held at present by the old members, and such option to be exercised at any time within one year from the date hereof. It is further agreed that the arrangement witnessed hereby shall apply to the notes this day given to the manager of the said company to secure such advances, such notes, namely, one of two thousand dollars by Inglis and Hunter and one by Guthrie for three thousand dollars to be taken as cash, and before such notes mature the company shall execute the said formal assignment. The company agree that if Inglis and Hunter and Guthrie, or either of them, shall not take stock as aforesaid to repay to them respectively the amount of such advances and interest thereon half yearly from this date at the rate aforesaid.

The stock subsequently accepted and taken by Inglis and Hunter was taken by them in lieu of the $2,000 by them advanced to purchase limits, and secured by the above agreement.

Subsequently to the issue of the latters patent of incorporation of the defendants, and others who should become subscribers for stock as a company with limited liability, the provisional directors of the company, namely, Hogg, MacLean and Guthrie, issued the prospectus which contains the statements which are charged to be false and fraudulent, and in the preparation and issuing of that prospectus, the defendant Ferguson also took part, and it was in the month of September, 1877, that Petrie and the other plaintiffs agreed to become subscribers for the shares, which were subsequently, as is admitted, allotted to and accepted by them respectively. Petrie in his evidence seemed to convey that it was before the issue of the letters patent of incorporation, but I take the statement in his statement of claim upon this point, which alleges it to have been after the date of the letters patent, to be more correct, because it was not until the latter end of August or beginning of September, 1877, that Edgar says he went up to inspect the mill premises and its capacity, and it was after he came down that the subscriptions to the prospectus in a book opened by the company were obtained, and Inglis, whose name is on the list before that of Petrie, says that he subscribed his name there in the latter end of September or beginning of October.

As to the evidence necessary to support an action of this kind, in its nature *ex delicto*, there does not appear now to exist any conflict of judicial opinion.

In *Taylor* v. *Ashton* (1) the plaintiff brought an action *ex delicto*, against the directors of a bank for statements made by them in certain of their reports, upon the faith of which the plaintiff had purchased shares, and which he alleged to be false and fraudulent. The jury found a verdict for the defendants upon the ground that although the statements complained of

(1) 11 M. & W. 400,

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were in fact untrue, the defendants had no knowledge of their being so; but they accompanied their verdict with the expression of opinion that the defendants had been guilty of gross and unpardonable negligence in publishing the report. A motion was made for a new trial upon the contention that the gross negligence so found accompanied with damage to the plaintiff, was sufficient to sustain the plaintiffs action, but Parke B., delivering the judgment of the court, says:—

> From this proposition we wholly dissent, because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind unless it be fraudulently made.

It was held, however, that in order to constitute actionable fraud, it was not necessary to show that the defendants knew a fact stated as being true to be untrue, if it was stated for a fraudulent purpose, they, at the same time, not believing it to be true.

Ormrod v. *Huth* (1) was an action of deceit brought to recover damages alleged to have been sustained by the plaintiff, by reason of his having purchased cotton from the defendant upon the faith of a representation made by him that the bulk corresponded with the sample, which in truth it did not, but was very inferior.

Upon the trial the learned judge directed the jury that, unless they could infer that the defendants or their brokers were acquainted with the fraud that had been practised in the packing, or had acted in the transaction against good faith or with some fraudulent purpose, the defendants were entitled to the verdict, and this was held by the Court of Exchequer and the Exchequer Chamber to be the proper direction; and the latter court held the rule upon the sale of goods to be that, in the absence of a warranty a purchaser cannot recover

(1) 14 M. & W. 651.

on a representation as to quality, unless he can show it to have been fraudulent; that if the representation was honestly made and believed at the time to be true by the party making it, though not true in point of fact, the representation does not furnish a ground of action. This case establishes the principle that in the case of a contract inter parties induced by the representation of one of them, unless the representation be embodied in the contract, it affords no ground of an action, if it be not false to the knowledge of the one making it.

In *Childers* v. *Wooler* (1) it is laid down as established by *Collins* v. *Evans* (2) in Error, and numerous other authorities, that to support an action for false representation, the representation must not only have been false in fact, but must also have been made fraudulently.

The case of the *Western Bank of Scotland* v. *Addie* (3) establishes that representations made by directors of a company relative to the affairs of the company, which they do not believe to be true, or have no reasonable grounds to believe to be true, will, if untrue, give a good cause of action in deceit to a person suffering damage from such representation. If the directors *bonâ fide* believe the representation to be true, the action will not lie, but then the *bonâ fides* of the belief is a fact which is to be tested and determined upon a consideration of the grounds of belief; but before we can arrive at the conclusion that the representations were made fraudulently and not under the influence of a *bonâ fide* belief in their truth, the insufficiency of the grounds to warrant such belief should be apparent beyond all controversy, for some persons may entertain a *bonâ fide* belief in the existence of a fact upon grounds which, in other minds, might not give birth to the same belief,

(1) 2 El. & El. 307. (2) 5 Q. B. 820.
(3) L.H. 1 Sc. App. 162.

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and the question is not whether, in the opinion of the persons testing the *bona fides* of the belief of another in the existence of the fact, there were sufficient grounds to warrant the belief, but whether in point of fact the belief was *bonâ fide* entertained by the persons who assert that they entertained it. As said by Lord Cramworth in that case, persons who make statements which they *bonâ fide* believe to be true, cannot be said to be guilty of fraud because other persons think, or the court thinks, there was not sufficient grounds to warrant the opinion they had formed. In *Venezuela Railway Company* v. *Kisch* (1), which was a case in which a shareholder in a company sought relief from his contract as a shareholder upon the allegation that he was induced to subscribe for shares by false representations contained in a prospectus issued by the company, Lord Chancellor Chelmsford, adopting the decision of V. C. Kindersley in *New Brunswick and Canada Ry. Co.* v. *Muggeridge* (2), as enunciating the rule applicable in such cases, says:

> Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.

In *Reese River Silver Mining Co.* v. *Smith* (3), which was also the case for relief by a shareholder from his contract for subscription of shares induced by like false and fraudulent statements, etc., in a prospectus, Lord Cairns says:

> I hardly think it was gravely argued at the bar that in this case a fraud had been committed against the respondent—when I say a

(1) L. R. 2 H. L. 99. (2) 1 Dr. & Sm. 363.
(3) L. R. 4 H. L. 79.

"fraud" I do not enter into any question with regard to the imputation of what may be called fraud in the more invidious sense against the directors. I think it may be quite possible, as has been alleged, that they were ignorant of the untruth of the statements made in their prospectus; but I apprehend it to be the rule of law that if persons take upon themselves to make assertions as to which they are ignorant, whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue.

Peck v. *Gurney* (1) was, on the contrary, a bill against directors in form *ex delicto* to recover damages from them for the wilful suppression and concealment from their prospectus, for the formation of a company in which the plaintiff had become a shareholder upon the faith of the truth of the statements made in it, of a deed which, if mentioned in the prospectus, would have shown the statements which were made in it to be positively untrue. Lord Chelmsford there says:

This is a suit instituted to recover damages from the respondents for the injury the appellant has sustained, by having been deceived and misled by their misrepresentations and suppression of facts to become a shareholder in the proposed company of which they were promoters. It is precisely analogous to the common law action for deceit. There can be no doubt that equity exercises a concurrent jurisdiction in cases of this description, and the same principles applicable to them must prevail both at law and in equity. I am not aware (he adds) of any case in which an action at law has been maintained against a person for an alleged deceit, charging merely his concealment of a material fact which he was morally, but not legally, bound to disclose.

And after quoting cases in support of this view he adds:

Assuming that mere concealment will not be sufficient to give a right of action to a person who, if the real facts had been known to him, would never have entered into a contract, but that there must be something actively done to deceive him, and to draw him to deal with the person withholding the truth from him, it appears to me that this additional element appears in the present case. He then proceeds to show how the matter, which was designedly suppressed so

(1) L. R. 6 H. L. 378.

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falsified what was stated as to constitute a positive and active misrepresentation of the truth.

And Lord Cairns in that case shows that he also recognizes the distinction between the rule applicable in a case simply for rescission of a contract, and that applicable in an action for deceit.

> This suit (he says) is in the nature of an action for damages for misrepresentation, it is in the nature of an action or proceeding *ex delicto*.

And again:

> I entirely agree with what has been stated by my noble and learned friends before me, that mere silence could not, in my opinion, be a sufficient foundation for this proceeding. Their non-disclosure of material facts however, morally censurable, however the non-disclosure might be a ground in a proper proceeding, at a proper time for setting aside an allotment or a purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some action, misstatement of fact, or at all events, such a partial and fragmentary statement of fact as, that the withholding of that which is not stated, makes that which is stated, absolutely false.

And he proceeds to show how the deed, the existence of which was designedly withheld, showed the statements which were made in the prospectus to be absolutely false.

In *Eaglesfield* v. *Marquis of Londonderry* (1) Lord Justice James says:

> That in order to maintain a case of misrepresentation in an action of deceit the representation must be wilful and fraudulent.
>
> Whether the fraud, (he says) is supposed to be a fraud in this court as distinguished from moral fraud or not, there must be a wilful and fraudulent statement of that which is false to maintain an action of deceit.

In *Arkwright* v. *Newbold* (2), which was an action in form *ex delicto* to recover damages from the defendants for injury sustained, as was alleged by the plaintiff, by reason of his having been induced to subscribe for

(1) 4 Ch. D. 711.

(2) 17 Ch. D. 301.

shares in a company of which the defendants were promoters and directors and secretary, upon the faith of statements contained in a prospectus issued by the defendants, Lords Justices James and Cotton recognize in the clearest language the difference existing between the nature of the misrepresentation requisite to sustain an action for deceit and that which is sufficient for the rescission of a contract. Reversing the judgment of Fry J., (1) Lord Justice James says:

It appears to me, with all deference to him, that there has been on his part a confusion, if I may use the expression, between two different wrongs and two different remedies—between the question what *mala praxis* on the part of vendors and persons standing in a fiduciary position to a purchaser is sufficient to entitle the purchaser to rescind the contract, and the question what *mala praxis* is sufficient to enable him to maintain an action of deceit. There are a number of purely equitable considerations which arise when the courts are dealing with actions to set aside contracts or conveyances which have been obtained by means of misrepresentation of a fact, or by means of concealment or suppression of a fact which, in the opinion of the court, ought to have been stated. Those cases stand by themselves, and are entirely distinct from such a case as we have before us.

And again:

It has been conceded throughout that there has been misconduct, that is to say, improper dealing between the vendors and the persons whom they procured to become directors—a kind of transaction against which the courts always have, and I hope always will, very strongly set their faces. But we have to see whether there was, to use the language of Lord Cairns in *Peek* v. *Gurney*, (2) that which must be proved—some active misstatement of fact, or at all events such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false. The statement made must be either in terms, or by such an omission as I have stated, an untrue statement, and no mere silence will ground the action of deceit.

And Lord Justice Cotton (3) says:

I think it is in this case essential to consider what the action is, and I say so because a great deal of the argument and a considerable

(1) P. 316.
(2) L. R. 6 H. L. 377.
(3) P. 320.

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portion of the learned judge's judgment does not, in my opinion, draw a sufficient distinction between an action of deceit and an action or proceeding to set aside a purchase, or to make the directors of a company answerable for money which they received by reason of their being in a fiduciary position. An action of deceit is a common law action, and must be decided on the same principles, whether it be brought in the Chancery Division or in any of the common law divisions; there being, in my opinion, no such thing as an equitable action for deceit. It is a common law action in which it is necessary to prove that a statement has been made, which, to the knowledge of the person making it, was false, or which was made by him with such recklessness as to make him liable, just as if he knew it to be false, and that the plaintiff acted on that statement to his prejudice or damage. Much has been said about omission—of course I adopt what was said by Lord Cairns—that the omission of something in a prospectus or any other document may make the statement contained in it false, as, for instance, if it contained the statement of a covenant and omitted to state the fact that the covenant had been released; but mere omission, even though such as would give reason for setting aside a contract, is not, in my opinion, if it does not make the substantive statements false, a sufficient ground for maintaining an action of deceit. It also must be borne in mind, that in an action for setting aside a contract which has been obtained by misrepresentation, the plaintiff may succeed although the misrepresentation was innocent; but in an action of deceit the representation to found the action must not be innocent, that is to say, it must be made either with knowledge of its being false, or with a reckless disregard as to whether it is or is not true. That difference is material in regard to the question whether or not the plaintiff in this action is entitled to succeed.

Redgrave v. *Hurd* (1) was a case in which the plaintiff sought specific performance of a contract entered into by him with the defendant, who resisted the performance and claimed a return of his deposit of £100, upon the ground of misrepresentations made to him by the plaintiff in relation to the subject of the contract, and he, also, in his counter claim, claimed £300 for other damages sustained by him *ultra* the £100 recoverable upon the rescission of the contract, as having been incurred by the deceit of the plaintiff. The case of the

(1) 20 Ch. D. 1.

respondent was two-fold—first, for rescission of the contract, and as incident thereto, the return of his deposit, and second, for recovery of damages, by way of counter claim, in an action of deceit. Now, this case, although much pressed upon us by the learned counsel for the appellants in support of their right to recover in this action, in consequence of certain observations of Sir George Jessel M. R., set out below and upon which the learned counsel relied, seems to me to point out very clearly the distinction between an action of deceit and one for rescission of a contract, to which latter species of action the observations of the master of the rolls related.

As regards the defendant's counter claim (the learned master of the rolls says (2), we consider that it fails so far as damages are concerned, (that is to say, so far as it is in form *ex delecto* for deceit), because he has not pleaded knowledge on the part of the plaintiff that the allegations made by the plaintiff were untrue, nor has he pleaded the allegations themselves in sufficient detail to found an action for deceit.

But as to the plaintiff's claim for specific performance, and so much of the defendant's counter claim as asks for the rescission of the contract and, as involved therein, the return of his deposit, the learned master of the rolls said :

Before going into the details of the case I wish to say something about my views of the law applicable to it, because in the text books, and even in some observations of noble lords in the House of Lords, there are remarks which, I think, according to the course of modern decisions, are not well founded and do not accurately state the law. As regards the rescission of a contract there was no doubt a difference between the rules of the Courts of Equity and the rules of courts of common law—a difference which, of course, has now disappeared by the operation of the Judicature Act, which makes the rule of equity prevail. According to the decision of courts of equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made

(2) P. 12.

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that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was: A man was not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say for the purpose of civil jurisdiction that when he made it he did not know it to be false—he ought to have found that out before he made it. The other way of putting it was this: Even assuming that moral fraud must be shown in order to set aside a contract, you have it, where a man having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping the contract. To do so is a moral delinquency, no man ought to seek to take advantage of his own false statements. The rule in equity was settled, and it does not matter on which of the two grounds it was rested. As regards the rule of common law, there is no doubt it was not quite so wide. There were indeed cases in which, even at common law, a contract could be rescinded for misrepresentation, although it could not be shown that the person making it knew the representation to be false. They are variously stated, but I think according to the later decisions the statements must have been made recklessly, and without care whether it was true or false, and not with the belief that it was true. But, as I have said, the doctrine in equity was settled beyond controversy, and it is enough to refer to the doctrine of Lord Cairns in the *Reese River Silver Mining Company* v. *Smith* (1), in which he lays it down in the way which I have stated.

Then in *Smith* v. *Chadwick*, in the same vol. (2), which was an action for deceit in form *ex delicto*, the same learned judge says (3):

This is an action, which used to be called an action of deceit, brought by a gentleman against a firm of financial agents for inducing him to take shares in an iron company by means of false and fraudulent representations—that is, by means of representations which were material to induce him to take the shares, which were false in fact, false to the knowledge of the defendants, or as to which, at all events, they made statements, although they knew nothing about the facts—that is, statements made so recklessly, that in a court of law they would be in the same position as if the statements were false to their knowledge. That is the case which the plaintiff has to make out, the real questions we have to try are, whether there were representations false in fact—whether if any of these

(1) L. R. 4 H. L. 64. (2) 20 Ch. D. 27.
(3) P. 43.

representations were false in fact they were false to the knowledge of the defendants, or recklessly made by them?

And again he says:

Again, in an action of deceit, even though the statement may be untrue, yet if it was made in good faith, and the defendant had reasonable ground to believe it to be true, the defendant will succeed.

In this case in the House of Lords to which it was carried (1), Lord Blackburn expresses his entire concurrence with what was said by Cotton L.J., in *Arkwright* v. *Newbold*, that an action of deceit is a common law action, and must be decided upon the same principles, whether it be brought in the Chancery Division, or any of the common law divisions, there being no such thing as an equitable action for deceit, and Lord Bramwell (2) says:

I am not satisfied that these men did not believe the statement to be true; under these circumstances I am not dissatisfied that your lordship's should affirm the judgment that has been given in their favor. The question is not whether they should be in any way punished for most improvident and rash statements (more than one) in the prospectus, but whether we are satisfied that this particular statement was fraudulent as well as, what it was to my mind, an untrue statement. I am not satisfied of that—let me not be misunderstood: an untrue statement, as to the truth or falsity of which the man who makes it has no belief, is fraudulent, for in making it he affirms that he believes it, which is false.

The learned Law Lord's judgment was in favor of the defendants, because, although he believed the statement in question to have been untrue, in fact, still he was not satisfied that the defendants did not believe it to be true; and upon the question of *bona fides* of the defendants' belief, he rested upon their own evidence on the cause and the fact that one of them gave convincing proof of his sincerity by taking £500 of stock in the company. The learned counsel for the appellant also strongly contended that the language of Lord Justice

(1) 9 App. Cas. 197. (2) P. 203.

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Knight Bruce in *Rawlins* v. *Wickham* (1) was in support of the maintenance of the present action, but that was not an action in its nature *ex delicto* for deceit, but in its nature *ex contractu* to set aside a contract of partnership into which the plaintiff had been induced to enter with Bailey, one of the defendants, and Mr. Wickham, since deceased (whose executors were the other defendants) by a positively false statement as to the liabilities of a banking firm, of which Bailey and Wickham were the sole members, furnished to the plaintiff to induce him to enter the partership firm, he having required to be furnished with a statement of such liabilities before he would consent to becoming a partner; and the plaintiff, by his bill, sought for reimbursement of the money paid by him on entering the firm, with interest to be made to him out of the estate of Wickham; Bailey, against whom he had recovered in an action at law, having become insolvent. If this action had been one in its nature *ex delecto* for deceit, the plaintiff must have failed, for, as said by Lord Chelmsford in *Peck* v. *Gurney*—

> No case can be found in which upon a claim against a testator *ex delicto* executors have been held liable in equity to answer in damages.

It is to the nature of the action as one to set aside a contract, and to obtain indemnity out of the estate of the testator who benefited by the false statement to which he was a party, that the observations of the lord justice relate. The false representation vitiated the contract of partnership, and therefore the plaintiff was entitled to obtain and obtained redress by a decree that it should be set aside, and that the plaintiff should be reimbursed out of the estate of Wickham for the money paid by him on his joining the firm. The contention

(1) 3 D. & J. 348, also reported in 5 Jur. N. L. 280.

(2) L. R. 6 H. L. 375.

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of the learned counsel was that since the Judicature Act the same rule as governed courts of equity in cases like the above, for setting aside contracts and reimbursing to the plaintiff the amount paid by him on the contract being entered into, applies now to a claim in its nature *ex delicto* for deceit, but that is not so; if it were, then all the judgments in the cases above cited, laying down what is necessary to be established in a claim for damages for deceit, would be erroneous. With respect to such a claim the Judicature Act makes no difference whatever. The clause relied upon is that which makes provision that in all matters in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail. This rule applies, doubtless, to the cases of actions brought upon a contract, the defence to which is that it was obtained by fraud, of which nature were *Corafoot* v. *Fouke* (1) and *Evans* v. *Edwards* (2), or to an action for money had and received to recover back money paid upon a contract procured to be entered into by defendant by the fraud of the plaintiff, of which nature was *Clarke* v. *Gibbs* (3). In such cases the rule of equity, as stated by Sir George Jessel in *Redgrave* v. *Hurd*, governs under the above provision in the Judicature Act; for in those matters, that is those relating to the rescission of contracts, there was a conflict between the rule of equity and the rule of common law with reference to the same matter. But an action to enforce a contract, the defence to which is that it was obtained by fraud, or an action for specific performance of a contract which is resisted on the ground of fraud, or an action for rescission of a contract, which are all in their nature *ex contractu*, are matters wholly different from

(1) 6 M. & W. 359.
(2) 13 C. B. 777.
(3) El. Bl. & El. 148

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an action to recover damages for deceit, which is in its nature *ex delicto*, as to which matter there never was any of rule of equity other than the rule of common law, consequently in such a matter there can be no conflict between a rule of equity and a rule of common law, and the provision of the Judicature Act is not that a rule of law, which is applicable to one particular matter and to an action of one nature, shall give place to a rule of equity, which is applicable to a wholly different matter and to an action of a different nature. As to the paragraph in the statement of claim, alleging that the defendants other than the company by the prospectus promised to whomsoever should become an applicant for a share or shares, in the proposed preference stock, that they would fulfil the undertaking and make good the representations in the prospectus contained, &c., &c., &c., &c., there is no foundation for this contention. The prospectus is signed by no one, and does not in fact contain any such promise or warranty. For the representations made in it, if false and fraudulent, the defendants are responsible in an action *ex delicto* like the present, but not at all *ex contractu*, for there is no contract contained in it, it is merely an invitation to the parties to whom it is presented and to the public to take shares, but it contains no contract upon the part of the defendants issuing it. The signature of the plaintiff to the undertaking at the foot of the prospectus in the books of the company to take shares to the amount set opposite to his name, if allotted to him by the company, is an offer made to the company which, when the allotment takes place, matures into a contract with the company. In this case the plaintiff's contract became complete when he accepted the shares, which could not have been until some time in or after the month of March, 1878, inasmuch, as although the company was incorporated on the 20th August, 1877, they

did not obtain power to issue the preference shares until an Act was passed by the Legislature of Ontario on the 7th March, 1878, 41 Vic., ch. 8, sec. 16 of which gave them the power, and the certificate of allotment subsequently issued to the plaintiff contains the terms of his contract, which is with the company and not with the defendants other than the company. Between these latter defendants and the plaintiff there is no contract. The learned judge before whom the case was tried was of opinion that the evidence wholly failed to establish the case made by the plaintiff's statement of claim, and he dismissed the claim; the learned counsel for the appellant, while admitting that the evidence failed to establish the wilful and deliberate conspiracy to defraud charged in the statement, still insisted that it displayed a reckless disregard, whether the statements contained in the prospectus were true or false, and a fraudulent concealment of material facts, if such facts were necessary to be established to entitle the plaintiff to recover; but all that was necessary to be established, as he contended, was such misrepresentation as upon the authority of *Redgrave* v. *Hurd* and *Rawlins* v. *Wickham*, and cases of that class, was sufficient to call for a rescission of his contract for shares, in a court of equity. I have already shown that such evidence, as is sufficient in cases for rescission of a contract, is not sufficient to support an action of the nature of the present which is for deceit, and arises *ex delicto* and not *ex contractu*. Now, having read with the greatest care every particle of the evidence, and having given the best consideration I could to the argument of the learned counsel for the appellant, as delivered orally before us, and as expanded at large in his printed factum, I feel compelled to say, that in my opinion, the defendants are not only free from any just imputation of the gross fraud with which they are charged in the

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statement of claim, but that they are equally free from any reckless disregard of the truth or falsity of the statements made in the prospectus, and that they prepared that document with an honest intention of fairly representing, according to their knowledge, the condition of the business for the taking up which the company was proposed to be incorporated, and that they *bonâ fide* believed to be true every statement made in the prospectus, both as to the condition of the business in which they were engaged and as to the prospects of the proposed company, of which I think they have given, in addition to their evidence upon oath in the cause, the strongest possible proof by having taken among themselves $40,000, or more than 50 per cent. of the preference stock issued by the company; and I cannot but add, that the fact that the plaintiffs in these three suits voted for the defendants as directors of the company after they had made the investigation, in which they acquired all the information upon which they based these actions and caused them to be brought, seems to my mind to show that the plaintiffs themselves did not believe the defendants to be guilty of the frauds now imputed to them, the charges as to many of which as appears by the examination of the plaintiff, seem to owe their origin to the zeal of the pleader who prepared the statement of claim rather than to the plaintiff or any information derived from him. The defendants interrogated the plaintiff very precisely, requiring him, as to each of the allegations of misrepresentation contained in his statement of claim, and as to each paragraph of the prospectus, to state in what he considered the falsity charged to consist, and be resolved all into an objection as to the value of the mill and timber limits, and as to the amount of the assets.

In the following paragraphs of the prospectus are involved all the grounds of the plaintiff's complaint :

1. The timber limits of the company inclusive of the recent purchase consist of 222½ square miles, or 142,400 acres and are estimated to yield 200 million feet of lumber.

2. The interest of the proprietors of the old company in its assets, estimated at about $140,000 over liabilities has been transferred to the old company at $105,000 all taken in paid up stock, and the whole of the proceeds of the preferential stock will be used for the purposes of the new company.

3. Preference stock not to exceed $75,000.00, will be issued by the company to guarantee 8 per cent. yearly thereon to the year 1880, and over that the net profits will be divided among all the shareholders *pro ratâ*.

4. Should the holders of preference stock so desire, the company binds itself to take that stock back during the year 1880 at par with 8 per cent. per annum on receiving six months' notice in writing.

5. Even with present low prices the company, owing to their superior facilities, will be able to pay a handsome dividend on the ordinary as well as on the preference stock, and when the lumber market improves, as it must soon do, the profits will be correspondingly increased.

Now, the sole objection to the first of the above paragraphs consists in the estimate of the yield of lumber from the limits which, as was contended, was grossly excessive. In the opinion of one witness called by the defendants, an experienced government wood ranger, an expert in such matters, the estimate of the defendants is under the mark. In the opinion of another, himself an owner of limits and a manufacturer of lumber, it was much below the mark; of two witnesses called by the plaintiff, who were also lumberers, one said that from the results of a careful investigation, taking the whole area of water, rock and timber in the region in which defendants limits are, he estimated one million feet per square mile, the fair average production, leaving one-third of that still remaining to be cut at a future period, but that in a well timbered limit it will often yield two or three million to the mile, and the

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other said, that one million feet per square mile is the fair average estimate in the original state, but he, with a view to making an offer for the defendants company's limits since the disaster which has befallen the company, deducted from the total product calculated upon that average, 30 million feet for losses by fire and taken away by settlers, which estimate of loss did not appear to be founded on any actual data, but was to all appearance quite conjectural. As to the evidence of the two other witnesses called by the plaintiff upon this point, it is only necessary to say that it was utterly unreliable in consequence of the partial inspection, which, by their own showing they made of the limits; their object apparently being, in the interest of their employers, who also contemplated purchasing since the failure of the defendant company, to depreciate the limits rather than to estimate them at their fair value. Upon this evidence the plaintiff has, in my opinion, wholly failed to establish that the estimate of the quantity of lumber on the limits stated in the prospectus was inaccurate, much less fraudulently so. As to the second of the above paragraphs, it has been treated in argument by the learned counsel for the appellant as if the defendants had in this paragraph made a positive assertion as matter of fact that the value of their assets exceeded their liabilities by $140,000, and that such statement was untrue in fact, as was the statement of liabilities made by Bailey and Wickham in *Rawlins* v. *Wickham*; but no such positive assertion is made in the paragraph. The defendant Guthrie explained that their object was, as I think the paragraph itself seems clearly enough to show, to ascertain at what rate in paid up stock of the incorporated company the interest of the partners in their assets might be fairly estimated, and that having, upon as careful a calculation as they could make

of the value of property of the nature of that under consideration, came to the conclusion that the value of their assets in excess of their liabilities was about, or in the neighborhood of, $140,000. They, in order to make sure of arriving at a fair estimate, deducted 25 per cent. from that amount, and so arrived at the $105,000. Now, upon the recent investigation which has taken place in this suit, it appears that some liabilities escaped observation; I say "escaped observation" because the evidence fails, I think, wholly to establish any intentional suppression of them; it is also sworn that some of the assets were under estimated in the calculation by which the sum of $105,000 was arrived at, and that the liabilities which escaped observation fell short of the 25 per cent. which was deducted from the $140,000. The evidence, therefore, in my opinion, fails to establish that the estimate of $105,000, as the amount for which the defendants should have paid up stock in the incorporated company, was arrived at by any reckless disregard of the truth or falsity, or of the accuracy or inaccuracy of such estimate. All that the plaintiff said when asked to explain his objection to this paragraph, and what he understood by it, and wherein its falsity consisted, was that he understood that the defendants, the old firm, would receive stock to this amount of $105,000 for the estimated $140,000, and that when the new company should be formed they would assume the business, and that there was a binding contract to that effect which would be carried into effect upon the company becoming incorporated. Well, that expectation does not seem to have been disappointed to the plaintiff's prejudice or at all. It was contended also that the proceeds of the preference stock was not applied to the uses of the new company, as the paragraph had said that they should be. If not so applied that was a matter occurring after the prospectus had been

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issued, and could not make false any statement contained therein or make the defendants liable as for deceit for issuing it, whatever claim the company might have against its directors for misappropriation of the funds of the company. But the plaintiff in his examination admitted that he knew there were liabilities of the old firm, as to the amount of which he made no enquiries, but he knew that part of the proceeds of the new stock was to be applied towards the payment of these liabilities. He also knew that the business was to be transferred from the old firm to the new company as a going concern, and that it was to be continued right along until it should be transferred to the new company, and such was the nature of the business that to carry it on, new liabilities would naturally have to be incurred in carrying it on in 1877 and 1878; and there is no pretence that the proceeds of the preference stock were applied to any other purpose than towards payment of instalments upon the recent purchases of new limits, and of the liabilities of the old firm assumed by the company, and of the expenses incurred in carrying on the business for the benefit of the incorporated company under the terms of the agreement of the 28th May, 1877. The persons who received the proceeds of the preference stock were the directors of the incorporated company, and if they have misappropriated any of the funds of the company they may be made answerable for such breach of trust in an appropriate proceeding, but not in an action of the nature of the present.

The plaintiff's claim, in respect of the 3rd and 4th of the above paragraphs, is in its nature *ex contractu* and against the company, founded upon the contract as evidenced by his scrip certificate of stock held by him, and not one *ex delicto* against the defendants for deceit. However, in the 5th paragraph, the plaintiff contends

that the defendants, in reckless disregard of the truth or falsity of the matter therein, stated fraudulently and represented the prospects of the company to be better than they could have believed them to be. As to this charge I have already said that I have come to the conclusion that the defendants *bonâ fide* entertained the expectations set forth in this paragraph. The question is not whether, in the opinion of the witnesses called in this cause or of the court, these expectations were well founded, but whether in point of fact the defendants *bonâ fide* entertained them, and that they did so entertain them they have, in my opinion, given the best possible proof by taking among themselves $40,000 of the stock which they invited others to take.

Some of the evidence, given on the plaintiff's behalf, is sufficient to establish that the great disaster which has befallen the company within the short period of $2\frac{1}{2}$ years after its incorporation, may fairly be attributed to bad management, coupled with a continued depression in the timber trade, which, instead of improving as was expected in 1877, became worse and continued so until 1880 or 1881. In the timber business success is said to depend wholly on the management, which, according as it is good or bad, may readily make a difference of $2.00 on every 1,000 feet of lumber cut. Now MacLean's management has been condemned by the witness, who thus speaks of good management as the essential element of success in the lumber business, and it may well be that the disaster which has befallen the shareholders in this company, and from which the defendants themselves are the chief sufferers, is attributable to MacLean's bad management, but bad management and fraud are matters very different in their nature; moreover the evidence shows that there are

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those who entertain the belief that if the creditors of the company could have waited for another year when prosperity returned to the lumber trade, the expectations of the promoters would have at length been realized.

The only remaining point is that of the alleged fraudulent concealment.

The only matters relied upon as having been concealed are the execution of the mortgage to the Ontario Bank in January, 1878, and the fact that at the time the prospectus was issued, the old partnership firm were, as the plaintiff alleges the fact to be, in a state of hopeless insolvency. As to the former, as it was a matter which occurred long after the issuing of the prospectus, it could not be stated in the prospectus; but, in truth, the giving of this mortgage did not place the plaintiff in any different position from that in which he would have been if the mortgage had not been given. The plaintiff knew that the business was to be carried on as before until the incorporated company should be completely organized, but for and in the interest of the proposed company, and for this purpose, in order to carry on the business in the winter of 1877-78, it was necessary to get an advance from the Bank of Ontario, which they gave to the directors of the company which was incorporated by letters patent in the month of August, 1877, on the condition that security should be given to the bank by mortgage for the sum so advanced and the debt of the old partnership firm; and as the title to the property mortgaged still remained in the members of the old firm, they executed the mortgage; but the incorporated company would have been equally liable for the whole amount secured by this mortgage, if the mortgage never had been executed; so that, in point of fact, the mortgage made no difference whatever in the position in which the plaintiff,

as a shareholder, would have been, if the mortgage had not been given.

As to the allegation that the prospectus was issued by the defendants when they knew that they were in a state of absolute insolvency, it is only necessary, in my opinion, to say that the defendants did not know or believe themselves to be, if they were in fact, in any such state. The term insolvency, as here applied, cannot be used in the strict sense in which that term was used in the Insolvent Act, when it was in force, namely, an inability to pay all their debts as they fell due. In the conduct of the lumber business a very large outlay is necessary before there is any return, and when the business is carried on, as it generally is by accommodation at a bank, a long and generous credit must be extended by the bank, and constant renewals granted, to ensure success to those engaged in the business. Now the defendants had, as they believed, completed the improvements at their mill necessary to enable them to carry on a large business. They had assets which, to a very considerable amount, constituted fixed capital in the business, that is, the property necessary to be retained for carrying on the business, and which, therefore, were not available for sale so long as the business should be carried on; they had, also, other assets to a considerable amount, which were the product of the business, and which were available for sale, but the market for which was in a very depressed condition, which depression however was expected to pass away shortly. Now, it is not pretended that the property with all its recent improvements, was not in a good position to carry on business upon a large scale, although if the creditors of the owners of this property attempted to enforce immediate payment of their claims they might not have been able to continue the business.

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For the above reasons I am of opinion that the appeals in all three cases must be dismissed with costs.

Appeals dismissed with costs.

Solicitors for appellants: *McCarthy, Osler, Hoskin & Creelman.*

Solicitors for respondents other than George MacLean: *Blake, Kerr, Lash & Cassels.*

Solicitors for respondent George MacLean: *Moss, Falconbridge & Barwick.*