"Wilson's Patent Gas Producers" of the 4 cwt. per hour size, and I think it is according to the evidence that the machines supplied were "Wilson's Patent Gas Producers." The only objection stated to them by the defenders is that they are too small, and do not in fact consume 4 cwt. per hour. I think it was no part of the contract that they should. I think it is not doubtful that the 4 cwt. an hour size was a name given to his articles by the patentee according to tests of his own. It was the description of them according to his view. The defenders expected that they would literally answer that description, and were honestly disappointed to find that they did not. But I think that the pursuer exactly executed the defenders' order. It appears that the patentee had two sizes of these producers, described in the same way as the 4 cwt. per hour and the 8 cwt. per hour sizes respectively, which were sold by persons having his licence. When the defenders' order was given, the pursuer, an engineer having the patentee's licence, obtained from the patentee plans of the 4 cwt. per hour size, which I must assume was a well-known size, the term being used in that way in the defenders' order. These machines have been made and sold in hundreds of the same kind and under the same description for other works. Could the pursuer in the execution of this order have done anything else than obtain plans for that size and erect a perfect machine according to them? And this he did. It is true, according to the testimony of the defenders, that they did not in their hands, though honestly used, consume the amount of fuel by reference to which they are described. That does not lead me to discredit the patentee's testimony that they did by his tests, and according to which he describes them, consume 4 cwt. per hour. Many things might have interfered with their productive capacity in the defenders' hands. I think the pursuer could have done nothing but what he did do, and that having completely executed the defenders' order he is entitled to payment of the price.

I am therefore of opinion that the Sheriff-Substitute's judgment should be recalled, and that we should find that the pursuer completely executed the contract to supply to the defenders "two Wilson's Patent Gas Producers of the 4 cwt. per hour size," and is therefore entitled to payment of the contract price.

Lord Craighill—I am of the same opinion. The contract here was for the erection in the defenders' works of two of "Wilson's Patent Gas Producers" and it is not in dispute that what was furnished by the pursuer to the defenders was "Wilson's Gas Producers." But there was a further condition that these producers should be of the size known as the 4 cwt. per hour size; and the controversy is, Are the articles supplied of this size or not? It appears that the articles are of a kind that have been supplied under that description in large numbers to other works, and according to anything in the evidence those supplied to the defenders were not different from those supplied to others. There is therefore nothing to shew that the pursuer departed from the terms of the contract, but, on the contrary, he took the best means of fulfilling it. But it is found that when tested by the defenders the machines did not in fact consume 4 cwt. of fuel per hour, and the defenders maintain that the contract was that what was furnished to them should not only be of the size known as the 4 cwt. per hour size, but should actually consume that amount of fuel. But I agree with your Lordship that that was no part of the contract, because the thing to be furnished was merely the thing known as "Wilson's Patent Gas Producers" of 4 cwt. per hour size.

I therefore think the Sheriff-Substitute was wrong in his view of the case. He did not consider what the parties meant by the contract, and I agree that his judgment should be recalled and decree given for the pursuer.

Lord Rutherfurd Clark concurred.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"Find that the pursuer, in execution of his contract with the defenders, supplied them with two 'Wilson's Patent Gas Producers' of the 4 cwt. per hour size: Therefore sustain the appeal, recal the judgment of the Sheriff-Substitute appealed against, ordain the defenders to make payment to the pursuer of the sum of £260, with interest thereon," &c.

Counsel for Pursuer (Appellant)—Trayner—Dickson. Agents—J. & J. Ross, W.S.

Counsel for Defenders (Respondents)—J. P. B. Robertson—Lang. Agent—Thomas Carmichael, S.S.C.

Tuesday, January 6.

SECOND DIVISION.

[Lord Adam, Ordinary.

MITCHELL *v.* DUNNETT.

Public Company — Fraud — Process — Title of Shareholder to Sue Action of Damages for Loss by Taking Shares and Debentures of Company, induced by Fraudulent Misrepresentations of Promoter—Relevancy.

A shareholder in a limited joint-stock company registered under the Companies Acts raised an action of damages against the promoter of the company, alleging that he had been induced to take shares and pay calls on them, and to take debentures of the company, to his loss and damage, on the faith of certain false and fraudulent statements made by the defender, which had led to the formation of the company and to his becoming a member of it. In that action he obtained decree in absence in his favour. In a suspension of the decree in absence by the defender, the Lord Ordinary granted suspension, on the ground that the pursuer as an individual member of the company had no title to sue. *Held* that as regarded the alleged loss from having taken debentures of the company, the pursuer had a title to sue in his own person, and that as he had made averments relevant to infer falsehood and fraud on the part of the defender, the Lord Ordinary's interlocutor should be recalled and the action remitted back to him for probation.

Opinions reserved as to the pursuer's title to sue in respect of loss and damage arising from having taken shares and paid calls.

In November 1883 Alexander Mitchell, timber merchant, Glasgow, in his own right and as assignee of certain other parties after mentioned, raised against Matthew Dunnett, residing in Molde, Norway, against whom he had used arrestments *jurisdictionis fundandæ causa*, an action for £3000 as damages.

He averred—Cond. 1. In August 1877 Dunnett, who was a Scotsman resident in Norway, professed to the pursuer Mitchell and his cedents, Robert Robinson, timber merchant, Partick, John Donald, iron merchant, Glasgow, and James Lockhart Mitchell, timber merchant, Glasgow, to have discovered a very rich and extensive bed of iron ore on an estate in Norway, on which there also grew a forest of valuable timber. The estate referred to was the Vaagsoeter estate, situate in Romsdal County, twelves miles north of Molde, on the west coast of Norway. None of these parties had any knowledge of the property except what was conveyed to them by Dunnett, who explained that he wished to form a limited company in this country to purchase the estate and work the timber and minerals on it. He drew up a prospectus and prepared reports, describing the minerals and forests thereon.

Cond. 2. "According to the statements made by the defender to the said parties, and also made by him in said prospectus, the estate was represented as within his personal knowledge to contain 1000 imperial English acres, and the following statements were also made by the defender in the prospectus in regard to the timber on the said estate, the defender being the vendor mentioned, viz., 'The forests, nearly 4 miles in length, have been surveyed by Messrs O. Holm and M. Y. Aarsett (leading forest owners of the district), and the vendor guarantees the accuracy of their inventory and dimensions as follows:—4000 trees of 12½ to 15¾ inch diameter at 24 feet from ground, and estimated 50 to 60 feet high. 10,000 trees of 7½ to 11½ inch diameter at 24 feet from ground, and estimated 40 to 50 feet high. 20,000 of 5½ to 7½ inch diameter at 20 feet from ground, and estimated 30 to 35 feet high. The trees under the last diameter were too numerous to be counted, but of sizes to yield each tree 20 feet length, for pit prop wood, are estimated at 80,000. . . . . The vendor has extended the foregoing inventory, and values the timber at market prices in British ports at £25,303."

Cond. 3. "The minerals in the lands were also described by the defender to the pursuer and others, and in the prospectus, as being valuable, and consisting of iron ore of excellent quality. In a separate special report entitled 'Report on a new Iron Ore Field in Norway' (meaning Vaagsoeter), the defender, *inter alia*, stated that he had proved the great bed of iron ore for about ¾ of an English mile, and that the supply of ore was practically inexhaustible, and concluded—'the average metallic yield of all the veins of this great iron seam is above the yield of the ores used either in Staffordshire or Yorkshire furnaces, and the richest veins of the seam could be put out separately, being admirably suited for making Bessemer steel. The defender also represented in the said report that samples of the ore shewed on analysis from 36·72 to 61·49 per cent. of metallic iron.'"

In Cond. 4 it was set forth that Dunnett offered to sell the estate (which he represented he had acquired from the Church Commissioners of the State of Norway) to the proposed company for £3800, payable £2850 in cash and £950 in paid-up shares of the company; that he expressly guaranteed repayment of this sum of £2850 within four years from the company's entering into possession, and further agreed to become the company's resident manager at an annual salary of £250, and undertook to erect certain buildings and machinery at a cost of £800, and to advance cash to put f. o. b. the first two cargoes of timber.

Cond. 5 stated that after some time Mitchell and some others agreed to form a company on the lines of Dunnett's prospectus. The formation of the company was however delayed till a deputation of two of those induced by Dunnett's representations to take an interest in it had gone to Norway to inspect the property along with Dunnett. From the statements of Dunnett and the lines on which they were led to believe by him and a native guide named Knud, provided by him, that the boundaries of the estate ran, they formed the impression that the area of the estate was what Dunnett had represented it to be, namely, 1000 imperial acres, and they reported accordingly to the promoters on their return to Glasgow. "While the report of the deputation was under consideration, a letter dated 18th October 1877 was received from the defender by the law-agents of the promoters, informing them for the first time that unless the company was formed and the price paid to the original vendors in Norway on or before 31st December following (1877), the offer which the defender held from the latter would expire. It was also represented in said letter that the company would thereby lose the opportunity of purchasing the estate, as there were other parties in Norway ready to take it up."

In Cond. 6 it was stated that in consequence of the receipt of this and other urgent letters from Dunnett a company was formed and registered in November 1877, under the name of the "Vaagsoeter Estate Company (Limited)," with a capital of £5000, divided into 500 shares of £10 each; that relying on the truth of the statements and representations of Dunnett, Mitchell and his cedents took altogether 180 shares, and paid in calls on them the full price of £1800.

Cond. 8 and 9 stated that the company afterwards paid to Dunnett the price of £2850, he making a profit on the transaction of £1080, over and above his 95 fully paid-up shares, which fell to be retained by the company until his guarantee as to the repayment of the £2850 was fulfilled; that he was appointed resident manager of the company in Norway at a salary of £250 a-year, and acted as manager till October 1878, when he was dismissed for gross mismanagement and repudiation of his obligations to the company; that his claims against the company for salary and advances were satisfied in December 1879 by a payment of £300 in cash, a mortgage over the estate for another £300, and his 95 shares, it being made a condition-precedent of the mortgage that it should not be called up for five years, but Dunnett violated that condition by calling up the mortgage in December 1880, compelling the

directors, in order to prevent a sale, to have it taken over by some one in this country; that the business at Vaagsoeter was thereafter carried on on behalf of the company by John Olsen, who had previously been Dunnett's foreman; that up to the time when the arrangements for settlement with Dunnett above mentioned were completed neither Mitchell nor any of the other shareholders in this country had any reason to doubt the truth of Dunnett's statements and representations which led to the formation of the company, but on the contrary, he, after assuming the management of the company, reported that from a further inspection of the property he believed it to be of at least 1500 acres in extent, and that the company would receive handsome dividends from the timber for ten years, but it was only in June 1882 that the directors and Mitchell and his cedents learned from Olsen that the forest was nearly exhausted, and would only yield one more year's supply of timber.

Cond. 10. "It has now been ascertained, as the result of a careful scientific survey by Mr Olsen (who has the requisite skilled knowledge), and the pursuer believes and avers, that in place of Vaagsoeter containing 1000 imperial English acres, as represented and guaranteed by the complainer, it contains not more than 530 acres. The property is in shape an oblong, and extends inland in an easterly direction a distance of about $3\frac{1}{4}$ miles, while its greatest breadth from north to south is not more than 700 yards, narrowing down to about 279 yards. When it was inspected by the deputation sent out by the promoters in September 1877, they arrived at the foresaid approximate estimate of its size, and were misled in making the favourable report to the shareholders which they subsequently did in the following manner. Accompanied by the complainer and his guide Knud, they perambulated the greater part of the boundaries. At certain points, however, they were taken into the adjoining properties and shown by the complainer and Knud, at a distance, the lines in which the boundaries of Vaagsoeter were said to run. To ascertain the average breadth of the estate, Messrs Robinson and Broom (who formed the deputation), along with the complainer, stepped the ground across at two points to which they were taken by the complainer. It was between these points that the boundaries were indicated to Messrs Robinson and Broom from a distance, as already mentioned, and it has now been ascertained that" in place of these two points giving the average breadth, as they were led to believe by the defender, the estate, in point of fact, between those two points makes a large sweep inwards. "This change in the lines of the boundaries could not have been ascertained from the point where these were indicated to Messrs Robinson and Broom as aforesaid, nor without their attention being specially directed thereto. Dunnett had known the property for at least two years previously, and was fully acquainted with the true boundaries. Although known both to the complainer and the guide Knud, they fraudulently concealed from and failed, as they were bound to do, to point out to Messrs Robertson and Broom the true state of the boundaries, and, in particular, the fact that they receded to so great an extent between the two points referred to as to diminish the size of the estate to about one-half what it would have been had the mean of the breadth at the said points really indicated the average breadth of the property. This concealment on the part of the complainer of the true state of the boundaries of Vaagsoeter, and the consequent effect on its size, only came to the knowledge of the respondent and his cedents for the first time in the month of October 1883.

Cond. 11 and 12 stated that it had been afterwards ascertained that the quantity of timber on the estate had been fraudulently stated by Dunnett in his prospectus, and in the other reports and statements submitted by him. In particular, of the largest-sized trees, stated by him at 4000, not more than 200 had been found on it, and of the other classes not more than one-half of those stated in the prospectus. Dunnett was aware when he made his representations that no proper survey or counting had been made by Messrs Holm and Aarsett. It was then stated that the ore on the estate had been recently tested and analysed by Dr Wallace, analytical chemist in Glasgow, and found to yield 30·24 per cent. of metallic or pure iron, and had been pronounced by him to be of no value; that the statements by Dunnett in the prospectus and report referred to, and quoted in stat. 3 above, were false, and were made by him for the purpose of deceiving and imposing upon the pursuer Mitchell and his cedents in a matter of essential importance in judging of the estate; that in consequence of the exhaustion of the forest, and the worthless quality of the iron ore on the estate, the business would fall to be shortly wound up; that there had been expended in the purchase and in the erection of buildings, &c., about £4500; that the estate had now been valued by experienced valuators at £66, 12s., and the buildings and machinery at £188, 14s.—£255, 6s. in all—and the company had abandoned the property to the mortgagees; that the company was, besides, indebted on debenture account to the extent of £600, on which there were, on 31st December 1882, arrears of interest to the extent of £144; but there was not the sightest prospect of any assets to meet the debenture debt, much less to yield a dividend to the shareholders; that of the debenture debt the pursuer Mitchell and his cedents then held £426, including interest to 31st December.

Cond. 14. "The statements and representations of the defender condescended on in statements 2, 3, 5, and 10 were false and untrue, and were made by the defender in the knowledge of their falsehood, and fraudulently, for the purpose of inducing the respondent and his cedents to subscribe for shares in the said company. And the pursuer and his cedents were induced by the said false and fraudulent misrepresentations and the foresaid fraudulent concealment on the part of the defender to subscribe for shares, and pay calls thereon as aforesaid, and to make the said debenture advances. By the said false and fraudulent misrepresentations and concealment the complainer has been *lucratus* to the extent of not less than £1300."

The pleas-in-law were as follows — "(1) The pursuer is entitled to damages as concluded for, in respect that he and his cedents were induced to take and pay for shares in it, and take up debenture bonds of said company by the false and fraudulent representations and concealment of the

defender. (2) The defender having knowingly made the foresaid false and fraudulent representations, and having wrongfully and fraudulently concealed essential facts within his knowledge, and having thereby induced the pursuer and his cedents to become shareholders and debenture-holders of said company, is liable in damages and expenses as concluded for."

The summons was served edictally. No defences were lodged, and decree in absence was on 8th December 1884 in consequence pronounced against the defender.

On 11th February 1844 Dunnett brought a suspension of this decree in absence.

He averred—(After narrating the action)"During the whole of the foregoing proceedings the complainer was resident in Norway, where he has lived since April 1880, and he still resides there. No copy of the said summons was served on him personally, or sent to him, although his address was known to the respondent and his law-agents, and he did not hear of the said proceedings till after the said decree had been pronounced, and in consequence of the irregularity of the posts in Norway, and in the time occupied in communications between the complainer and the agents whom he instructed in this country, the information necessary to enable his said agents to take proceedings for having the said decree suspended was only received by them at or about the date of the presentation of the note." He further averred that the decree was ill-founded on the merits. He denied the averments of false and fraudulent representation and concealment made against him in the summons, and maintained that the statements therein were unfounded in fact. His own account of the facts leading to the formation of the company and the purchase of the estate were substantially to the following effect—Previous to bringing the estate under the notice of the promoters of the company he had visited it only once, in 1874, when he examined indications of minerals, and took specimens for analysis, which afterwards proved satisfactory. He did not examine the trees on the property, nor inquire into its extent or its boundaries. He did not revisit the estate again until he accompanied the promoters' deputation above mentioned. The report by Holm and Aarsett, who were entire strangers to him, was got by him from John Olsen, who did not act as his agent in procuring it. In the belief that the information there given was correct he brought it under the notice of the respondent and his cedents. The information contained in the memorandum prepared and laid by him before the respondent and his cedents was obtained from Olsen, and through him from others, whom the respondent believed to be trustworthy and properly skilled. When Robinson and Broom made their report after visiting the estate they had all the information, and the same means of information, about the property which the complainer had himself, and were as well able to judge of it as he was. The company was formed and the estate purchased, not on the faith of any statements of his, but on that of the report of the deputation. The conveyance of the estate to the company was not granted by him, but by the owners and Olsen. The company employed their own lawyer in Norway to carry out the purchase. He did not admit the statements as to the extent of the property and those regarding the trees and the minerals set forth in the summons. In 1878 he and Olsen again inspected the whole boundaries of the estate, and reported the result, which was corroborative of the previous inspection and the prospectus. He also stated that since the summons had been served a resolution had been passed to wind up the company voluntarily, and the estate had been sold to John Olsen.

It was admitted that a resolution to wind up had been passed by the company.

The complainer pleaded—"(1) The decree complained of having been pronounced in absence of the complainer, and without notice to him, and during his residence furth of Scotland, he is entitled to suspension thereof as craved. (2) The said decree being ill-founded upon the merits, the complainer is entitled to suspension as craved. (3) The averments of the respondent, in the action in which said decree was pronounced, and in the present suspension, being irrelevant, the complainer is entitled to suspension as craved. (4) The respondent had no title to sue the said action. (5) The shareholders and creditors of the company were not entitled to make any claim arising out of the transactions referred to on record as individuals and apart from the company, not having alleged or sustained any loss apart or distinct from the company. (6) The respondent's claim in the said action was bad, in respect that the alleged damage was not the natural, necessary, or actual consequence of the respondent and his cedents having become shareholders or creditors of the company, but arose out of the purchase, by the said company, as its *proxima causa*, and the right to claim damage in respect of said purchase belongs to the company alone. (10) The purchase of the said estate having been made, and the respondent and his cedents having taken shares in the said company, and lent the company on debenture, not on the faith of any representations by the complainer, but of the report of the said deputation, the respondent has no claim against the complainer. (11) The said company having, before the purchase of the said estate, and at least before payment of the price and conveyance of the subjects, had equally good opportunities with the complainer of investigating the extent and value of the said estate, the respondent's claims cannot be maintained."

The respondent's statements of facts were, with some slight amplification and specification in detail, substantially the same as those made by him in the summons in the action of damages above recited, and need not therefore be again detailed. In particular, it was stated (Stat. 13) that the estate had been then recently sold for £328, "a sum barely sufficient to meet the principal and interest on the existing mortgage on the property."

He pleaded—"(1) The respondent being entitled to damages as concluded for in said action against the complainer, in respect that he and his cedents were induced to take and pay for shares in, and take up debentures of said company, by the false and fraudulent representations and concealment of the complainer, the suspension should be refused. (2) The complainer having knowingly made the foresaid false and fraudulent representations, and having wrongfully and fraudulently concealed essential facts within his

knowledge, and having thereby induced the respondent and his cedents to become shareholders and debenture-holders of said company, the decree under suspension was well-founded, and the suspension should be refused."

The Lord Ordinary (ADAM) suspended the decree in absence, threatened charge, and whole grounds and warrants thereof.

"*Note.*—It is alleged that respondent and certain cedents were induced, by the representations of the complainer, to found along with certain other persons a company, which was registered on the 26th November 1877 under the name of The Vaagsoeter Estate Company, Limited, with a capital of £5000, divided into 500 shares of £10 each. The respondent and his cedents took 180 of these shares, on which they paid calls to the company to the amount of £1800.

"The object for which the company was formed was the purchase from the complainer of the Vaagsoeter estate in Norway. It is said that the complainer represented to the respondent and his cedents that the estate had a large quantity of valuable timber upon it, and was rich in iron ore and minerals. The estate did not belong to the complainer, but he had an offer of it from the proprietors, which was to continue binding until the end of the year 1877.

"The company being thus formed, purchased from the complainer the estate. The settlement of the price took place in Norway on 6th December 1877, when the company paid the sum of £2850 in cash. Of this sum it is alleged that, after settling with the original vendors, the complainer received as profit on the transaction £1080 over and above 95 fully paid-up shares. These shares, however, were to be retained by the company until a certain guarantee undertaken by the complainer as to repayment of the £2850 had been fulfilled. It had also been arranged that the complainer should act as resident manager of the company in Norway at a salary of £250 per annum; and he was so appointed accordingly. It is alleged that the complainer continued to act as manager until 14th October 1878, when, owing to the difficulties occasioned by his gross mismanagement and his repudiation of his obligations to the company and other unsatisfactory conduct, the directors were compelled to dismiss him; and his claims against the company and their counter claims against him seem to have been settled by an agreement of date 30th December 1879, which, however, is said not to embrace the questions at issue in this case.

"The company thereafter appointed another manager. It is said that the business of the company has come to an end, and that it is in course of being wound up, with the result that there has been expended in the purchase of the estate and the erection of buildings, etc., thereon about £4500—that the estate with the buildings thereon has been recently sold for the sum of £328, a sum barely sufficient to meet the principal and interest on the existing mortgage on the property—that the company is, besides, indebted on debenture account to the extent of £600, on which there were, at 31st December last, arrears of interest to the extent of £144, and that there is not the slightest prospect of any assets to meet the debenture debt, much less to yield any return of capital to the shareholders.

"It is alleged that this result has been produced by the exhaustion of the forest and the worthless quality of the ore on Vaagsoeter. It is further alleged that the complainer grossly misrepresented the size of the estate; that he represented the quantity of timber thereon as being grossly in excess of what he knew to be the actual quantity; and that the iron-ore, which was represented by him to be of excellent quality, is in point of fact of no value. It is further said that the statements and representations so made by the complainer were false and untrue, and were made by the complainer in the knowledge of the falsehood, and fraudulently for the purpose of inducing the respondent and his cedents, as in point of fact they were thereby induced, to form along with others the said company for the purpose of purchasing the said estate from him, and that the respondent and his cedents were also induced by the false and fraudulent misrepresentations to subscribe for shares in the said company and pay the calls thereon.

"Assuming these averments to be true, it appears to the Lord Ordinary that the loss which the respondent says he has suffered has been occasioned by the purchase by the company of which he was a shareholder of the Vaagsoeter estate. The company might have been formed, but no loss would have resulted unless the company had proceeded to purchase the estate.

"It is clear, therefore, that the loss which the respondent alleges he has suffered has resulted from the actings of the company after he became a member of it. The company may have been defrauded, and it may be that the company will take proceedings against the complainer and obtain full redress, in which case the respondent will suffer no loss; or it may be that the company is satisfied that it has not been defrauded, and will take no proceedings. In either case, it appears to the Lord Ordinary that an individual member of a company has no title to sue in respect of a wrong alleged to be done to the company. It appears, therefore, to the Lord Ordinary that no relevant case has been stated against the complainer."

The respondent reclaimed, and argued—If the Lord Ordinary's view was right, that he was to have no remedy unless the action was raised by the company, there would ensue the inequitable result that he being a sufferer by the fraud of the complainer might have no remedy at all, for he could not compel the company to sue—*Smith* v. *Chadwick*, L. R. 20, Chan. Div. 27; 9 H. of L. 187. At all events the title to sue was clear as to the debentures, for they were the debt of an individual, and as to them the company, not being the persons damnified, had no title to sue. The title must therefore be in the respondent.

The complainer replied—The Lord Ordinary was right. The company as the person injured by the misrepresentations, assuming that he (complainer) had made them, was the only person entitled to sue an action of reparation in respect of them. There was no distinction between the debenture debt and the shares. Both were the loss of the individual shareholder or debenture-holder, but both were equally caused by the failure of the company, the formation of which was caused, it was alleged, by the complainer's alleged misrepresentations.

At advising—

Lord Young—The respondents here are shareholders of a company called The Vaagsoeter Estate Company, Limited, which was formed and registered in November 1877. One of the purposes of the company, and apparently the leading one, is thus stated—"The purchasing of the Vaagsoeter Estate, in the Circuit of Veo, Romsdal County, Norway, with the lands, houses, forests, minerals, water rights, and other rights and privileges comprehended therein, upon such terms and subject to such reservations and conditions as the company may agree upon with the vendors." The complainer, a Scotsman residing in Norway, brought the advantages, as he represented them, of this estate under the notice of certain persons in this country, including the respondents, and on his representations, and according to the statements of the respondents, and according to the documents before us—documents, the import of which is not in controversy—the company was formed and registered for the purpose of purchasing this estate and carrying on a certain business by means of it. The company came to grief, the value of the estate having turned out *nil* or nearly so. The respondents in the present supension brought some time ago an action of damages against the complainer, on the ground that, on statements made by him, which were false, and which were known by him to be so, and which were made by him for the purpose of deceiving them and others with a view to his own advantage, the company has been formed, and they have taken shares in it, and afterwards certain debenture-bonds as well. Because of these losses they sought reparation in the shape of damages from him who for his own advantage had misled them by these false statements, and in that action they obtained a decree in absence. Of that decree the complainer brings this suspension, stating that when the action was raised he was in Norway, that it was not served on him personally, though his address was known, but only edictally, and that he did not hear of the proceedings until the decree had been pronounced, and so he asks that the decree in absence shall be suspended. A record has been made up in the suspension, and the Lord Ordinary has passed the note and set aside the decree in absence on the ground that the respondents—who in the action of damages were pursuers—had set forth no relevant ground of action. In doing so the Lord Ordinary has proceeded on the view that the controversy between the parties was well raised by the record in the suspension, the issue being whether the decree could be set aside or upheld on its own merits, and that apparently is according to the view which was sanctioned in the case of *The Edinburgh, Perth, and Dundee Railway Company* in 1852 (14 D. 1001), namely, that when a suspension is brought of a decree in absence the real merits of the dispute should be set forth in a record in the suspension—I mean the respective averments of the parties and their pleas-in-law—and that the decree in absence cannot be set aside till the merits of the case are determined on a record in the suspension so made up, and I see Lord Ivory, who delivered the opinion of the Court in that case, thought the best course was to conjoin the processes and dispose of both on the merits together.

Looking at the summons on which the decree in absence was pronounced, I see that the grounds of action there stated are substantially the same as the statement of facts for the respondents in this suspension. I mean, to be more explicit, that the condescendence in the action of damages is substantially the same (as we should expect it to be) as the respondents' statement of facts in the suspension. But I notice that the pleas-in-law are to the effect that the pursuer having been induced to take shares in the company and to pay the calls and to take debentures on the statements of the defender, is entitled to damages. Now it was pointed out at an early stage of the discussion that there may be no relevant statement of facts to support that ground of action. But if there is a relevant ground of action it is clear that it can only be at the instance of the party so induced to take shares, and pay up calls and take debentures. But the Lord Ordinary has set aside the decree in absence on the ground that the only damage condescended on in the summons is damage arising from the purchase of the estate in Norway induced by the representations of the complainer, and that if there is any remedy against him for having so induced the company to make a bad purchase it is with the company (which, if successful, will obtain the means of indemnifying all the shareholders), and that there is no room for an action at the instance of an individual shareholder. I do not say that there may not be a great deal to say in support of that view, but that view is not applicable to the debenture debt, for as regards that the company could have no remedy against the complainer on the ground that certain individuals had been induced to take debenture bonds and to lose their money by his false and fraudulent representations. To that extent — whatever else may be advanced in support of it—the Lord Ordinary's view is inapplicable. If relevantly stated otherwise, the action for having been fraudulently misled to their loss into lending their money on the debenture bonds of the company must be with the parties who lent it—that is to say, those upon whom the deceit was practised with the effect of inducing them to part with their money on a bad security. They are the only parties at whose instance it can proceed. I say "they," because the pursuer, although alone, is suing as assignee of other parties in a similar position. So far, therefore, still dealing with the debenture debts by way of illustration merely, I think it is clear that we must consider whether there is a relevant ground of action stated here. Now, I think that what is said in statement 14 as to the statements and representations of the complainer condescended on in statements 2, 3, 5, and 10, being false and untrue, and being made in the knowledge of their falsehood, and for the fraudulent purpose alleged, does afford a relevant ground of action, and if the pursuer should prove that these statements were made, and that they were false, to the knowledge of the complainer, and made for a fraudulent purpose, and with the effect alleged, he would be entitled to compensation in name of damages for loss sustained in consequence.

In respect to the other loss alleged, namely, paying calls, the question may be different, and there is room for the Lord Ordinary's view. There are two sides to this question, and I do not desire

to state any opinion now which might prevent me hereafter having a different view. On the one hand, it may be said that the calls are part of the purchase for which they are responsible, and the responsibility must be made good at the instance of the company; while, on the other hand, it may be said that any shareholder who is in a position to aver, as the pursuer does, and is in a position to prove, as he says he is, that he was induced to become a member of the company at all, is entitled, irrespective of the company, to reparation in damages for the loss so sustained. I think a great deal can be said in support of the latter view. Even if a going company had raised such an action and failed, that would not hinder any individual shareholder from averring and proving, if he could, that but for the falsehood and fraud which he undertakes to prove he would never have been connected with the company. But the question of loss by the pursuer is only a question of greater or less loss upon the calls which were paid when he joined the company, and as the case is clear upon the question of the debenture debts, I would suggest, without indicating a conclusive opinion on the other matters, that we should recal the Lord Ordinary's interlocutor and remit the case back to him for probation. Then everything will be open. The respondents may not succeed in proving his averments of falsehood and fraud. If he does, the question will then be, whether the loss was attributable to the fraud practised on him and the others whom as assignee he represents?

Lord Craighill—I am entirely of the same opinion, and would add only this, that the present case is one in which the company is now, and has long been, in course of liquidation. Further, there is no controversy as to Mitchell having been induced to become a shareholder through the complainer's representations, or any other individual member of the company. In many cases it is conceivable that in such circumstances an individual member might desire to separate himself from the company and take an independent position, and say, that "Whatever may be thought, still there has been fraud exercised by which I have suffered, and I am entitled to damages." But I do not go into that. I entirely agree with the views your Lordship has expressed, and in the interlocutor which your Lordship proposes.

Lord Rutherfurd Clark—I also concur in the course which your Lordship proposes, and I agree that we should reserve our opinion entirely on the qnestion whether the pursuer can recover damages which may possibly be recovered by the company. There is no question with respect to the debenture debts, because the damage the party suffered by these is his damage and not the company's. With respect to the other damage, I confess I have very considerable doubt whether there is a case against the defender at all. On that, however, I do not want to say anything more than to reserve my opinion, because it is quite plain that on one part of the case there must be a proof, and that on the other proof also may be required.

The Lord Justice-Clerk was absent.

The Court recalled the Lord Ordinary's interlocutor, and remitted the case to him with instructions to allow the parties a proof of their respective averments, reserving all questions of expenses.

Counsel for Complainer — Mackintosh — Jameson. Agents—J. & J. Ross, W.S.

Counsel for Respondents—J. A. Reid. Agents —Boyd, Jameson, & Kelly, W.S.

Wednesday, January 7.

SECOND DIVISION.

[Lord Lee, Ordinary.

HEIMAN *v.* HARDIE & COMPANY.

Sale—Agreements and Contracts—Gaming Transaction—Wagering on Rise and Fall of Market.

A in Berlin and B in Leith had a series of transactions in the form of contracts of purchase and sale of wheat, in which each occupied the position sometimes of buyer and sometimes of seller. Each transaction was constituted by letter from the party in the position of buyer to the party in the position of seller, intimating that the former had bought from the latter so much wheat, to be delivered on every occasion in Berlin within a specified period. No delivery was ever made, and the practice of both parties throughout was to balance accounts by compensating orders. After a continuance of transactions on this footing for some months, B repudiated two transactions in which A had intimated purchase from him, and refused to give a compensating order or to make delivery. With the exception of these two transactions the quantity of wheat sold and bought by each party was exactly the same. A sued B for the amount of loss caused him by A's repudiation of these alleged sales, debiting him with the difference between the contract price in the two sales and the average price obtained for wheat on the last day for delivery. *Held* that it was to be inferred from the whole dealings of the parties with each other that these transactions were, in the intention of the parties, not in reality contracts of purchase and sale, but were merely colourable contracts of the nature of gaming transactions or wagers on the market price of wheat, and therefore could not be enforced.

During the year 1882 Julius Heiman, merchant in Berlin, carrying on business under the style or firm of A. Heiman, and Robert Hardie & Company, merchants, Leith, had a course of transactions with each other under the form of contracts for the purchase and sale of wheat. In these transactions sometimes one of the parties and sometimes the other occupied the position respectively of buyer and seller. In the first of these transactions, made on 28th February of that year, Heiman took the place of seller, and Hardie & Company of buyers. It was constituted by the following writing:—"Dear Sir,—We beg to confirm herewith that we have bought from you to-day through Mr V. Böttcher, according to all