HOUSE OF LORDS.

Monday, May 17, 1904.

(Before the Lord Chancellor (Halsbury), Lords Macnaghten, James of Hereford, and Lindley.)

BROOME *v.* SHEPHEARD AND ANOTHER.

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

Company—Joint-Stock Company—Promotion—Prospectus—Omission to Mention Contract—Untrue Statement — Liability of Directors—Directors' Liability Act 1890 (53 *and* 54 *Vict. c.* 64), *sec.* 3.

The prospectus of a company incorporated under the Companies Acts stated that the contracts mentioned in it were the "only" contracts entered into by the company. It omitted to mention a contract which was in fact material but which the directors had been advised and believed to be immaterial. A shareholder who took shares in the company on the faith of the prospectus raised an action of damages against the directors. *Held* that the directors were liable.

The Directors' Liability Act 1890 (53 and 54 Vict. c. 61), sec. 3 (1) enacts—"Where after the passing of this Act a prospectus or notice invites persons to subscribe for shares in debentures or debenture stock of a company, every person who is a director of the company at the time of the issue of the prospectus or notice, and every person who, having authorised such naming of him, is named in the prospectus or notice as a director of the company, or as having agreed to become a director of the company either immediately or after an interval of time, . . . shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture-stock on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith, unless it is proved." . . .

The Companies Act 1897 (30 and 31 Vict. c. 131, sec. 38), which was repealed as from 1st January 1901 by the Companies Act 1900 (63 and 64 Vict. c. 48), sec. 33, provided that every prospectus of a company should specify the dates and the names of the parties to any contract entered into by the company, and that any prospectus which omitted to do so should be deemed fraudulent on the part of the promoters, directors, and officers of the company, knowingly issuing the same as regards any person taking shares in the company on the faith of such prospectus.

The London and Northern Bank, Limited, while in its initiatory stage, proposed to acquire the business and assets of the Leeds Joint-Stock Bank, Limited. To effect this it was necessary to lodge a deposit of £14,250, and the bank, being at that time without funds, arranged with William Bowden, the promoter of the company, for this being done for it. The terms of the arrangement were embodied in a letter dated September 21st 1898 written by the "trustee for the bank" to Craig in the following terms:—"Dear Sir, In consideration of your advancing the sum of £14,250 to enable me to pay the same to the Leeds Joint-Stock Bank, Limited, as a deposit on the purchase of their undertaking and assets, and your taking the risk of forfeiture, I hereby agree to repay the same on directors going to allotment or on the 30th October next, together with £7500 bonus for such loan." An agreement with the Leeds bank was afterwards drawn up and adopted by the directors on behalf of the company, "it being understood that the bank," *i.e.*, the company, "incur no liability under such agreement either to complete the purchase or to find the deposit therein referred to, such deposit having been found by Mr Craig at his own risk."

The subsequent actings of parties so far as concerns this matter are shown by the following resolutions of the directors of the company. A resolution of October 1, 1898, was in these terms—"That the agreement with the Leeds Joint-Stock Bank, Limited, be referred to Messrs Walker & Rowe, the solicitors of the company, to peruse on behalf of the company, and to advise the directors as to its full effect, particularly as to whether it is clear that the bank incur no liability either for completion or on account of the deposit. . . . The subject of the commission-note to Mr Craig was considered, and it was resolved that in consequence of Mr Craig having found the deposit at his own risk the board agrees to repay the same with a bonus of £7500 if the directors go to allotment, and when the purchase is completed." A resolution of 30th October 1898 was in these terms—"That after full discusison and hearing the views of the directors of the Leeds Joint-Stock Bank, Limited, and upon the chairman giving Mr Bowden assurance that his right to receive proper remuneration for commission on introducing the business of the Leeds Joint-Stock Bank, Limited, and raising the necessary deposit, shall be honourably met at a future meeting of the directors of the London and Northern Bank, Limited, it is resolved, with the assent of Mr Craig, that the contract contained in the letter of the 21st September 1898 be cancelled, and that the subject be adjourned to a future meeting of the board."

On October 20th the prospectus of the company was issued. It stated that the "only" contracts entered into by the company were those mentioned in it. It contained no reference to the letter of September 21st or to the resolution or contract of October 10th.

Joseph Broome received a copy of the prospectus, and on the faith of it applied for and had allotted to him 400 ordinary

shares of £10 each, upon which he paid £1000.

Subsequent to the issue of the prospectus Bowden, through Craig, sued for his commission or bonus, and by settlement received £1500.

The company went into voluntary liquidation on 29th December 1899, and on 17th January 1900 the liquidation was placed under the supervision of the Court.

Broome raised an action of damages against Shepheard and others, directors of the Company, based upon the companies Act 1867, sec. 38, and the Directors' Liability Act 1890, sec. 3, and the Judge (BUCKLEY) found for the plaintiff, and ordered an inquiry as to the damages sustained. On appeal this judgment was affirmed by the Court of Appeal (COLLINS, M.R., ROMER and COZENS-HARDY, L.J.J.)

The defendants appealed.

At delivering judgment—

LORD CHANCELLOR (HALSBURY)—In this case I take the same view as that which both Buckley, J., and the Court of Appeal have taken as to what the evidence proves, and to my mind it is quite immaterial to go through the whole narrative of events, which have been carefully analysed by Buckley, J. It comes practically to this, that the defendants issued a prospectus with the knowledge in their minds that certain contracts had been entered into which were not referred to or stated in the prospectus. That the contract in question was not material I should have thought was hardly arguable, and indeed, when once the facts are understood it is very difficult to argue that "he (in the language of Romer, L.J.) did not appreciate the legal effect of the circumstances which he knew, or did not understand that those circumstances caused such a liability to be cast upon the company as had to be set forth in the prospectus under section 38." It is hardly necessary to add that if that is the true result of the evidence, no advice given to him by anyone can relieve him from the consequences of being a party to that prospectus. I feel, with Cozens-Hardy, L.J., that it is a painful duty to be obliged to treat that as fraudulent which in truth was not fraudulent. But section 38 of the Act of 1867 compels us to say that it shall be deemed to be fraudulent. The statute, rightly or wrongly, contemplated the possibility of there being no actual fraud, and intentionally enacted that, even if there were no fraud in the ordinary sense, yet if the facts established the issue of a prospectus which did not mention a contract under the circumstances contemplated by that section, which exist in this case, such prospectus should be deemed fraudulent. While therefore I quite agree with every judge who has dealt with this case that it would be wrong to attribute fraud to Mr Shepheard, yet I cannot doubt that his act has brought him within the section of the Act of Parliament, and accordingly, therefore, that this appeal must be dismissed with costs.

LORD MACNAGHTEN—I am of the same opinion. I should have been very glad if it had been possible to relieve the appellant from the consequences of what has occurred, but I see no reason to differ from the conclusion of the courts below. I must say that I am very sorry for him.

LORD JAMES OF HEREFORD—It is with great regret that I also have come to the conclusion that this appeal must be dismissed. There certainly seem to be two documents, a letter of the 21st September 1898 and a resolution of the 10th October 1898, which were material and important in the interests of the company and its shareholders. That the appellant knew of them is admitted, and that being so, the Directors' Liability Act 1890 renders a director issuing a prospectus which omits reference to such contracts liable in damages. That the appellant took the best advice that he could obtain upon the disclosure that should be made in the prospectus, and has acted in perfect good faith, with the fullest intention and desire to omit nothing that he ought to have disclosed, does not afford any defence against an action founded on this statute. I think also that, a *prima facie* cause of action being established, the plaintiff must be afforded an opportunity by an inquiry of showing whether he has sustained any damage. I express no opinion as to whether the facts established at the hearing do or do not sustain a claim for damages.

LORD LINDLEY—It is impossible not to sympathise with the appellant in this case, but I cannot say that the decision from which he has appealed is wrong in point of law. The Acts of Parliament which he has been held to have infringed are very stringent and are not very happily expressed. To be compelled by Act of Parliament to treat an honest man as if he were fraudulent is at all times painful; but the repugnance which is naturally felt against being compelled to do so will not justify your Lordships in refusing to hold the appellant responsible for acts for which an Act of Parliament clearly declares that he is to be held liable. He is said to have infringed two statutory enactments—viz., section 38 of the Companies Act 1867 (30 and 31 Vict. cap. 131), and section 3 of the Directors' Liability Act 1890 (53 and 54 Vict. cap. 64). The first of these has happily been repealed, but its repeal was too late to render the Act inapplicable to this case. The appellant is alleged to have infringed these enactments by not noticing in a prospectus certain letters and resolutions of the board which ought to have been referred to in it, and especially a letter of the 21st September 1898, and a resolution of the 10th October of the same year. There can, in my opinion, be no doubt that these letters and resolutions were extremely material and ought not to have been suppressed. The appellant knew of their existence but he honestly believed that it was unnecessary to refer to them. He took legal advice on the subject but whether he was wrongly advised or whether he mis-

understood the advice given is not clear. If the case had turned only on section 38 of the Act of 1867 it would have become necessary to consider the effect of the waiver clause inserted not only in the prospectus but also in the applications for shares. But it is not necessary to decide this question, for the waiver clause has no application to the appellant's liability under the Directors' Liability Act of 1890. The prospectus unfortunately stated a fact which was not true—viz., that the only contracts to which the bank was a party were the two which were mentioned in it. This untrue statement brings the case clearly and unmistakably within section 3, clause 1, of the Directors' Liability Act 1890. It is contended for the appellant that he is not liable under this Act because he had reasonable ground to believe, and did believe, that the statement in the prospectus was true. But he knew of the documents, and he knew that they were not disclosed; he thought that they were not such as required disclosure. This is a question of law, and I agree with Buckley, J., and the Court of Appeal, that a mistake of this kind does not furnish a defence to an action founded on the statute in question. *Twycross* v. *Grant* (1877, 2 C. P. Div. 469) is an authority in favour of this view, although it turned on the Act of 1867. It was there contended that there was no evidence that the plaintiff who took shares on the faith of the prospectus had sustained any damage by reason of the untrue statement contained in it. The company failed about a year after it was formed, and the plaintiff has lost the money which he paid for his shares. This appears to me to be sufficient *prima facie* evidence of some damage sustained by the plaintiff by reason of the untrue statements in question. All that has been done by the Court as yet has been to decide that the plaintiff has proved enough to entitle him to an inquiry as to the amount of damages which he has sustained by reason of such statements. This is quite in accordance with the usual practice in actions of this kind when brought in the Chancery Division, and it is extremely convenient. It saves the trouble and expense of going into evidence which will be useless if the plaintiff fails to establish any liability of the defendant to him. The appeal ought to be dismissed with costs.

Appeal dismissed and judgment appealed from affirmed.

Counsel for the Plaintiff and Respondent —Astbury, K.C.—Roskill, K.C. Agents—Rowcliffes, Rawle, & Company.

Counsel for the Defendants and Appellants—Haldane, K.C.—F. Cassel. Agents —Waterhouse & Company.

HOUSE OF LORDS.

Tuesday, May 17, 1904.

(Before Lords Davey, James of Hereford, and Robertson.)

MIDLAND RAILWAY COMPANY *v.* SHARPE.

(On Appeal from the Court of Appeal in England.)

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *First Schedule, sec.* 1 (*a*)—*Earnings—Lodging Allowance.*

The word "earnings" in the Workmen's Compensation Act 1897 means the full amount which a workman receives on account of and in return for his services, and includes remuneration which, without accounting for the use of it to his employers, he receives in consideration of peculiar conditions affecting his employment.

In terms of the rules of a railway company the guards in their employment received fixed lodging allowances for each night which they were compelled in the course of their employment to spend away from home. They were not bound to account to the railway company for these allowances.

Held that in estimating the compensation due to a railway guard under the Workmen's Compensation Act 1897 the lodging allowance formed part of his earnings.

In an arbitration under the Workmen's Compensation Act 1897, brought before the County Court Judge of Derbyshire, the widow of George Charles Sharpe claimed compensation from the Midland Railway Company for the death of her husband, a goods guard in the employment of the Railway Company, as the result of an accident in the course of his employment on the 9th September 1902.

The question at issue between the parties was whether there was to be included in the "earnings"—on which the compensation due under the Act was based—a sum of £23, 2s., consisting of various amounts which Sharpe had received as "lodging allowance" during the three years preceding his death.

The following facts were proved or admitted:—Railway guards having in the course of their employment sometimes to spend the night away from home, a lodging allowance was granted to such by the Railway Company in terms of the following provisions in the company's rules:—"When men are required to lodge away from home they are allowed one shilling a night in the provinces and one shilling and sixpence in London if the company's lodging-house is used; three shillings in London and two shillings elsewhere for private lodgings. In exceptionally long periods of rest for the company's convenience where men have to lodge for over fifteen hours an extra