The Legal News.

Vol. I. JULY 6, 1878. No. 27.

SHAREHOLDERS AND DIRECTORS.

Amid the embarrassments of financial depression an unusual number of shareholders in joint stock concerns are smarting under the losses which reckless management, inattention, or fraud on the part of directors have inflicted upon them, and various attempts have been made to hold the latter accountable. In the case of *Rhodes* v. *Starnes et al.*, a case which came before the Superior Court at Montreal, Mr. Justice Johnson, on the 28th ult., disposed of one of these actions, and as the points examined by the learned Judge are of much interest at the present time, we give our readers the opportunity of perusing his Honor's remarks *in extenso*.

In connection with this case we may notice one which was recently decided by the Supreme Court of Illinois, *Chetlain* v. *The Republic Life Ins. Co.* The action was by the company to enforce payment of notes given by one Walker, deceased, now represented by the appellant, Chetlain, in payment of twenty per cent. on the shares subscribed by him. The Court stated the principle that the directors of a corporation are the agents or trustees of the stockholders, and the latter are bound by their acts within the scope of their authority; when their acts are outside of, and beyond the scope of their authority, the stockholders are not bound by such acts, and may in a reasonable time proceed in equity to have the act cancelled. In the case under consideration, however, it was held that even if the purchase, by the directors, of an expensive building for the corporation, was *ultra vires*, yet, after a delay of over two years and a half, on the part of appellant's intestate, to take any steps manifesting his disapproval, or to avoid the purchase for that reason, it was too late to insist upon the plea of *ultra vires* as a defence to the action to enforce payment of notes given for subscription to stock. The same was said with reference to an act of the directors specially complained of, viz.: the purchase of the stock of the National Life Co. The fact that the directors had acted beyond their power, or abused it, would not discharge a stockholder or debtor from his obligations to the corporation. The Judge remarked: "The mere mismanagement of the affairs of a corporation has never been held to release stockholders or others from their obligations to the company. When Walker purchased and became the owner of this stock, whether paid for in money, notes or otherwise, he became entitled to all of the privileges and benefits of a stockholder, and liable to all the burthens the relation imposes. Had there been dividends, he would have been entitled to share in them. Had there been losses imposing liabilities on stockholders, he would have been required to respond to them. The stockholders are the owners of the franchise, property and assets of the company, which remain after its debts and liabilities are discharged. For convenience in the transaction of business, and to carry out the purposes of the organization, the charters of such bodies usually authorize the stockholders to choose a certain number from among themselves as directors, who are empowered to transact its business and exercise its franchises. And in doing so, they are agents or trustees for the stockholders, and the latter are bound by their acts, within the scope of their authority. When their acts are outside of and beyond the scope of their authority, the stockholders are not bound by such acts, and may, no doubt, in a reasonable time, proceed in equity to have the act cancelled, and their rights protected from injury and loss, growing out of the unauthorized act."

TESTS OF INSANITY.

In a work recently issued from the press by Prof. Ordronaux, State Commissioner in Lunacy for New York, entitled the "Judicial Aspects of Insanity," the writer criticises the dictum of the N. Y. Court of Appeals, in *Flanagan* v. *The People*, 52 N.Y. 467, that "the test of responsibility is the capacity of the defendant to distinguish between right and wrong at the time of, and with respect to, the act complained of, and that the law does not recognise a form of insanity in which the capacity of distinguishing right from wrong exists without the power of choosing between them. "A hour's conversation with the insane in any asylum," remarks Prof. Or-

dronaux, "will suffice to show that delusions are not omnipresent, and that the knowledge of right and wrong is common in all forms of mental unsoundness outside of idiocy and dementia. All experts in insanity affirm this, and it has also been put upon record in the most emphatic manner. Thus: at the annual meeting of the British Association of Medical Officers of Asylums and Hospitals for the Insane, held in London, July 14, 1864, at which were present fifty-four medical officers, it was unanimously resolved, "That so much of the legal test of an alleged criminal lunatic as renders him a responsible agent, because he knows the difference between right and wrong, is inconsistent with the fact, well known to every member of this meeting, that the power of distinguishing between right and wrong exists very frequently among those who are undoubtedly insane, and is often associated with dangerous and uncontrollable delusions.' "

Pointing out the danger of exclusive reliance upon any particular test, the author cites with approval the following opinion of Dr. Ray: "Jurists who have been so anxious to obtain some definition of insanity which shall furnish a rule for the determination of responsibility, should understand that such a wish is chimerical from the very nature of things. Insanity is a disease, and, as is the case with all other diseases, the fact of its existence is never established by a single diagnostic symptom, but by the whole body of symptoms, no particular one of which is present in every case."

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, June 28, 1878.

JOHNSON, J.

RHODES v. STARNES et al.

Bank—False Representations in Reports—Liability of Directors.

1. Reports made and accounts rendered by Directors in the course of their duty, though made and issued to the shareholders only, as to the state of the affairs of the Company, are considered the representations of the Company, not only to the shareholders, but to the public, if they are published and circulated by the authority of the directors or a general meeting.

2. Directors of a company are personally liable for injury caused by false representations, but the injury must be the immediate, and not the remote consequence of the representation.

JOHNSON, J. This case might have been disposed of before, if the record had been before me; but it was not, and in view of the great amount of supervening business, I thought it best to discharge it, so that the parties might submit it afresh. It has come up again by consent, and I now proceed to give judgment. It has some importance—not only on account of the amount of money lost in this concern, but also perhaps in point of the difficulty to some extent in applying accurately principles of law which unhappily in our day have had to be applied, under an infinite variety of circumstances, to facts more or less like those in the present case. First, I must see precisely what it is that the plaintiff alleges—then what he deduces from what he alleges; then whether these deductions are warranted by the facts as they appear, or even as they are alleged. I wish to avoid verbal reference to the technical language of the declaration; because what I have to say will be long enough without that; and perhaps, more intelligible also; but I will omit nothing that is essential; and where absolute precision is requisite, I will take the words of the declaration, and of the law.

The action is brought to recover from the defendants damages stated at $10,000, being the nominal value of one hundred shares of stock in the Metropolitan Bank, which the plaintiff purchased in July, 1872; and it rests upon alleged false representations, and fraudulent artifices and conduct of the defendants as directors and president and managing directors of that Bank, by which the plaintiff was induced, as he avers, first to purchase the stock in question, and subsequently to retain it until the entire collapse of the bank in the autumn of 1875, at which time the shares became unsaleable, and ultimately proved to be worth not more than forty per cent. of their nominal value. This is a succinct and general way of putting what the plaintiff sets up as the grounds of his case; and as a general proposition, and under certain circumstances, it may be at once admitted that an action against directors might lie for an injury done to an individual by inducing him by false representations to purchase stock. There are numerous and well-known decisions to that effect; though

for the most part they seem to have been founded on false prospectuses, and not on reports to the shareholders—a distinction which has given rise to some discussion; and which I need not further notice at this moment. Then we have our own Banking Act, and our Civil Code establishing a general principle of liability, of which I will not stop now to discuss the limitations, because I gathered from what the defendants' counsel said that he conceded the general principle, or rather *a* general principle, though he by no means conceded any violation of it in the present instance. The first thing therefore will be to see exactly what are the precise misrepresentations and frauds charged. The misrepresentations charged against the defendants are those said to be contained in the annual statement of the 30th of June, 1872, in reliance on which the Plaintiff says he purchased his shares. This statement was submitted to the shareholders at the annual general meeting, on the 2nd of July of the same year. The plaintiff purchased on the 24th of July, at a premium of 5½ per cent., which, he says, the stock would have been well worth, if the statements of the directors had been true. The plaintiff then goes on to specify the precise things that were said in this statement of the directors, and in what respects they were untrue and likely to deceive him. He says, first of all, it asserted that the capital stock paid up was $636,200; and he insists that in this particular it was false, inasmuch as a considerable portion of the capital said to be paid up was only colorably paid up by collusion among the defendants, and not intended to be paid up at all. The report was as follows: "The directors of the Metropolitan Bank submit to the shareholders their first report embodying the balance sheet, and statement of profit and losses, for the year ending 30th June, 1872. The Bank commenced business nominally in July last; but it was only towards the end of August that it was able to do so actively. The various calls have been punctually met, and many shares have been paid in full. The average capital during the year has, notwithstanding, been only $420,000, so that the result will, it is hoped, be satisfactory, and justifies the expectation that with the larger paid up capital of $636,200, still greater profits will be realized. It is not the intention of the directors to make any new calls at present, though the option will be given to the shareholders, as heretofore, to pay up in full. It was deemed expedient a few weeks ago to commence the issue of notes, and the circulation has now reached $79,848. After dividing eight per cent on the paid up capital, the sum of $15,000 has been carried to a rest, leaving a balance at the credit of profit and loss of $4,652,69. The probable further advance in the value of real estate, and the difficulty likely to arise in procuring suitable sites for banking purposes, have induced your directors to purchase the premises now occupied by the Bank at a price upon which an advance can already be got."

The declaration then goes on to say that Mr. Starnes, the President, further stated that the paid-up capital was $636,200, and the average capital from the July previous up to the time of the report was $420,000, and the profits for the year ending June, 1872, were $55,247.39. The next allegation is one that might have had very great importance, if it could be referred to any particular point of time; it is this: "The plaintiff further alleges that notwithstanding the provisions of the act respecting banks and banking, the said directors have collusively and fraudulently loaned to each other for speculative purposes large sums of money belonging to the said Bank upon collusive and fictitious security, and to more than double the amount which, by virtue of the said statute, the said directors could lawfully borrow from the said bank, and a large portion of the indebtedness so incurred is still unpaid by the defendants." I say this allegation would be of importance if it referred to any precise time. If it charged, for instance, that *before* the plaintiff became a stockholder at all, the defendants had unlawfully used vast sums of the funds of the Bank, and that the plaintiff misled by their concealing the fact, had bought, and suffered in consequence, the relation between the concealment of the fact, and the plaintiff's purchase and loss might have directly borne on the question of their responsibility; and more than that, there might have been a direct relation between that fact and the mode of payment of the calls; but if, on the contrary, this allegation is intended to refer to their misapplication of the funds *after* the plaintiff's purchase of shares, not only could there, on that score, have been no concealment of it possible at the time of the purchase; but the differ-

ence would also be very important in another respect, for the relation of the directors to the plaintiff would then have been a very different relation; from being a stranger and an outsider, he would have become a shareholder and member of the corporation, and their responsibility to him *qua* shareholder might essentially differ from their responsibility to an individual not a member of the corporation. Therefore I say, the absence of all particularity as to the time of the alleged delinquency on their part must prevent its having any effect whatever as a concealment of facts in the report which, if known to the plaintiff, would have prevented him from buying his stock. The rest of this declaration refers only to what occurred after July, 1872—the buying of the stock, the price paid for it, and the subsequent annual meetings up to 1874 inclusive, what was done at those meetings, and the untruth of the statements and representations they contained. The plaintiff's case, then, as he puts it, is made to rest on the fraud and misrepresentation of the defendants as affecting every part of it; and he brings it under two separate heads: 1st, he says: your misrepresentation of certain facts induced me to buy, and what you represented being false, you are responsible to me for the loss I have suffered through it; and 2nd, he says: after I bought, you continued your frauds and concealment and false reports, and therefore you are further answerable to me personally for the loss I sustained from what you did after I was a shareholder in the bank. The defendants, Starnes, O'Brien and Cuvillier, have pleaded a general denial. The two other defendants, Judah and Hogan, specially deny any fraud or misrepresentation, and any acquiescence in fraud or misrepresentation by them; alleging, on the contrary, that they acted in good faith, and to the best of their judgment; but admitting that they were elected directors, and that the reports were made in the terms alleged. Subsequently, owing to an amendment in the declaration, the two last named defendants pleaded further that the plaintiff had no right of action for what occurred after he became a shareholder. The reports are produced and proved. It further appears by the evidence that during the year 1871 fifty per cent. of the capital was called up by five calls of ten per cent. each, all of which had become due in February, 1872. In April of that year the defendant Cuvillier owed $28,565, for calls and interest. For this sum he gave his own promissory note, payable on demand. The amount of this note was placed to his credit in the bank's books, and he then gave a check for it, in payment of the calls. On the defendant Hogan's shares, he only paid two calls in cash not got from the bank; the remaining three calls he arranged for by money advanced to him by the bank on his letter or undertaking, and the amount being placed to his credit, he drew a cheque for what was in arrear, viz.: $17,700. Starnes did the same thing as Hogan, the amount in his case being $14,320. These sums amount to $60,584. The plaintiff deduces from these facts, that this report was absolutely false in several particulars: First, he says that the capital was not paid up, because these payments were merely colourable and collusive, and in reality there was no intention that they ever should be paid at all; and the capital must therefore *pro tanto* be held to have been reduced; 2nd, he contends that these payments—whatever they may have been, whether colourable or not, were overdue before they were made; 3rd, the plaintiff deduces from this state of facts that Starnes' statement that there were no bad or doubtful debts was untrue; and fourthly, he deduces that the $55,000 odd of profits was also a delusion, because in the calculations showing that amount of profit, these demand notes and letters were included as assets. I am bound to say that from the evidence of record I have no doubt whatever of the mere facts themselves from which these conclusions are deduced by the plaintiff; I have no doubt that the calls were paid by the proceeds of loans or discounts; but as to all the inferences of fraud or collusion and intent never to pay them at all, I think they must be considered with reference to all the evidence in the case, to see if they are just. I am now on the first branch of the case, *i. e.* the plaintiff's complaint that these were false representations by which he was induced to buy, and by which he has suffered loss. The first thing to look at will be: what is a false representation? how made and to whom? and a second point, one would think, would be: if false statements are made by directors of banks, and adopted by the latter, on whom is the responsibility to fall? on the directors personally, who are agents of the

Bank? or on their principals, the Bank itself that adopted and profited by these reports? or, is it to fall on both? Yet none of these points have been noticed at all; though they certainly up to a very recent date, were most seriously discussed in England. A collection of case-law on this and cognate subjects is to be found in Shelford's law of joint-stock companies, and other books referring to the highest sources of authority in cases of this description in England, both on the question of a report of directors being in any sense a representation to an outsider who buys on the faith of it, and also on the point whether it is to be considered a report of directors, or, (after its adoption by the Bank), a report by the latter, as having approved of it and profited by it. I will read now from Mr. Shelford's work, cap iii., par. 15, p. 56: "Reports made and accounts rendered by directors in the course of their duty, though made and issued to the shareholders only, as to the state and affairs of the company, are considered the representations *of the company*, not only to the shareholders, but to the public, if they are published and circulated by the authority of the directors, or a general meeting. But such reports and accounts made and issued to the shareholders are not the representations of the company to a person who obtains knowledge of their contents only from private sources. The various judgments with respect to this part of the law, are very conflicting, both on account of the view formerly taken by the courts as to the difference between companies and other persons as to their liability for the frauds of their agents, and from its having been considered that reports made to shareholders could not be considered reports made by them. The real question, however, seems to be, whether the person deceived has obtained knowledge through persons he has a right to consider authorized by the company to afford such information. * * * * * *

"Moreover, it is conceived that many of such matters, such as reports made to the general meetings of railway companies, are of so public a nature that they must be considered as issued to the world at large."

Vice-Chancellor Kindersley said he had decided *Brockwell's* case on the principle that the report of a joint stock company was in effect a public document. Brockwell's case had been overruled by *Mixer's* case; but the reasons of Vice-Chancellor Kindersley were not questioned, and have since been expressly approved in the House of Lords in the case of the *Western Bank of Scotland* v. *Addie*. This proposition is that which the courts of equity now adopt. In the case of the *National Exchange Bank of Glasgow* v. *Drew*, 2 Macq. 103, Lord Cranworth said: "What is the consequence of the Company receiving a report and publishing it to the world? I confess that, in my opinion, from the nature of things, and from the exigencies of society, that must be taken, as between the company and third persons, to be a representation by the company. The company, as an abstract thing, can represent or do nothing: it can only act by its managers; when therefore the directors, in the discharge of their duty, fraudulently, for the purpose of misleading others, as to the state of the concerns of the company, represent the company to be in a different state from that in which they know it to be, and the persons to whom the representation is addressed act upon it, in the belief that it is true, I cannot think that society can go on without treating that as a misrepresentation by the company; otherwise companies of this sort would be in this extraordinary predicament, that they may employ, nay must employ, agents to carry on their concerns, and that those agents might make representations, be they ever so false, and ever so fraudulent, and yet that the company might benefit by those representations."

And again in the same case, Lord St. Leonards said: "I have certainly come to this conclusion, that if representations are made by a company fraudulently for the purpose of enhancing the value of their stock, and they induce a third person to purchase stock, these representations so made to them for that purpose do bind the company. I consider representations by the directors of a company as representations by the company; although it may be a representation to the company, it is their own representation." These remarks are sanctioned by Lord Chelmsford in a more recent case, that of *The Western Bank of Scotland* v. *Addie*, L. R. 1. Sc. Ap. 156. Again, Lord Westbury said: "If reports were made to the shareholders of a company by their directors, and adopted by the shareholders at a regular meeting, and those

reports were afterwards industriously circulated, undoubtedly representations contained in those reports must be taken, after their adoption, to be representations and statements made with the authority of the company, and, therefore, binding the company; and if those reports, having been industriously circulated, should be clearly shown to be the proximate and immediate cause of shares having been bought from the company by any individuals, undoubtedly it would be impossible consistently with the principles of equity to permit the company to retain the benefit of that contract, and to keep the purchase money." *New Brunswick R. & Land Co.* v. *Conybear*, 31 L. J. 302.

A great number of cases more or less distinguishable from each other, and from this one, in some of their details, are collected in this volume, and in a much later work by Mr. Buckley—the second edition of which was published in 1875—and without now going into them, I will only say, that whether the corporation itself be liable for representations made in this report; or whether the directors alone—or whether both alike are liable—if they should turn out to be false and to have caused injury, there is abundant authority and reason for holding that such a representation by whomsoever made, and on whomsoever binding, is a representation made to the outside public, and which the plaintiff might properly treat as a representation made to him. I will only add on this point the words of V. C. Kindersley in the *National Patent Steam Fuel Co.* v. *Worth*, , 4 Drew, 529, "It has been the opinion of the most eminent judges of the present day that if in a body like this, consisting of a great number of shareholders, the directors whose duty it is to present a balance sheet or report to the body at large containing a representation of the state of the affairs of the company, if that body exercising that duty or that function, make a report that is entirely false, and if that is made to a public and general meeting, although there be no order to publish it either by the directors or the body at large, from the very nature of the case, it must be made public."

Whether the corporation itself, having adopted the acts of their directors, and profited by them—having gone on, as the record shows, for some three years after this report of 1872, could itself be made liable for the consequences of it to the plaintiff, is a point not raised at all in the case; and indeed, if it were, it would be quite immaterial if the law also made the directors personally liable. Now, upon the point of personal liability on the part of the directors in certain cases, there can be no manner of doubt whatever. Whether this is one of those cases is another question; but the law of Lower Canada on the subject is, I think, quite clear. The 62nd section of our Banking Act of 1871 says, that "the making of any wilfully false or deceptive statement in any account, statement, return, report, or other document, respecting the affairs of the Bank, shall, unless it amounts to a higher offence, be a misdemeanor; and any and every president, vice-president, director, principal partner *en commandite*, auditor, manager, cashier, or other officer of the Bank, preparing, signing, approving or concurring in such statement, return, report or document, or using the same with intent to deceive or mislead any party, shall be held to have wilfully made such false statement, and shall further be responsible for all damages sustained by such party in consequence thereof." Here we have both criminal and civil responsibility—the latter expressly extended to bank directors, in terms perhaps different from those of the common law, that finds expression in art. 1053 of the Civil Code: "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill." Therefore I think we must see whether this was a false representation within the meaning of the law, and which was the immediate or proximate cause of damage to the plaintiff. I have stated already what is the proof as to the mode of payment of the calls, and also how the plaintiff arrives at the conclusion that there was a diminution of the capital because the payments were collusive and colorable only—that is to say sham or simulated, and indeed expressly charged in the words of the Declaration, to have been made in that manner because of the intent that they should never be paid at all. I must say at once that in my opinion the plaintiff has entirely failed in proving anything of that kind. To avoid the risk of any inaccuracy on this point, and to see exactly what it is that the plaintiff does assert, in contradistinction to what he does not

assert, perhaps I had better refer verbatim to this part of the declaration: "And the plaintiff saith that the said reports, both written and verbal, so made as aforesaid by the said defendant, the said Honorable Henry Starnes, as the mouth-piece and organ of the directors of the said bank, were, and each of them was false and fraudulent, and more especially false in this respect: that it was asserted by the said reports and by the said president, that there was an amount equal to $636,200 of the capital stock paid up, whereas in truth and in fact a large portion of the capital which was pretended by him and by the said directors had been subscribed in the said bank, was so subscribed merely colorably, without any *bona fide* intention on the part of the defendants of paying for the same. * * * That the said directors knew when they made the said report, that the said sum of $636,200 was not in fact paid up on account of the Bank; but on the contrary was represented on the books of the Bank by promissory notes of the said directors *colourably, collusively* and *fraudulently introduced into the books, and pretended to be discounted therein, which were never intended to be paid.*" This is what he says, and what, therefore, he must be held to mean; he does not say, and cannot mean, that if this arrangement had been made in good faith, with the intention and the ability at the time to carry it out, the calls would not in effect have been paid, or the capital have been diminished. He probably could not have said with any show of reason that the capital was not paid in the way that the Bank consented to take payment; and there is no allegation whatever that the directors, as agents of the Bank, went *ultra vires* in taking payment in that way, if they acted in good faith. He could only mean that there was in fact no such consent given, because the whole thing was a fraud and a pretence to avoid payment; and this is, I take it, precisely what he does say. It is certain, therefore, as far as language can make it certain, that the plaintiff rests this part of his case on the arrangement for the payment of calls having been a simulated one; and not on their having been valid arrangements between the parties to them which if faithfully contracted and carried out would have diminished the capital. I say that in my judgment he has proved nothing of the kind. He has proved something of a very different kind. He has proved that at the time of the report, these calls were paid in a manner that I do not say is a right manner of paying calls; (for if I did I should be saying that the capital of the Bank might consist entirely of the credit of its shareholders) but that is not at all the case of the plaintiff, as he puts it himself. He does not say that this Bank could not in good faith debit a shareholder with a loan, and credit him with a payment; he says they did not do that, but only pretended to do it; that the thing was a sham, and there was never any intention of paying at all. That position is not supported by the evidence, which shows not only that some of these loans have been since paid and discharged; but that the credit of Cuvillier, the principal borrower, was at that time very high. Can I say then, without a particle of proof as to any motive such as might have been furnished by evidence of the abuse of the funds at that time, that there is proof that this arrangement was a sham; and that the directors made a wilfully false report with intent to mislead? If I could say that, I should then have to be satisfied that such false statement on their part was the cause of the damage complained of; but I cannot see that; and therefore in making that report, the directors, though they may have fallen short of their duty to the Corporation in trusting anybody for stock—a question between them and the Bank whose agents they were, they may have done so without being in fairness chargeable with a mis-statement to others with intent to deceive. They may have erred in judgment also perhaps; but if they in good faith took that mode of payment as satisfactory in their judgment at that time, they would not have told the truth if they had said that the calls had not been paid. It is certainly true that they did not say in their report in what way the calls had been paid; possibly, if they had been asked, the truth would have come out, but who is to blame for that? There is a case of recent date—the case of *Peek* v. *Gurney* to which I called counsel's attention. It is a leading case (vol. 6 English and Irish Appeals), and it turned principally upon whether a misrepresentation in a prospectus could be a misrepresentation to a purchaser in open market after all the shares had been allotted, and the office of the prospec-

tus ended. But a variety of other points arose in that case—among them one very like this; and Lord Cairns said: "Mere non disclosures of material facts, however morally censurable, however they 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."

Referring further on to what was insisted on in that case as a misrepresentation, Lord Cairns observed: "Strange as it may appear to us now, when looked at by the light of subsequent events, I am not satisfied that this statement was not perfectly consistent with the opinion the directors really had." In the present case I cannot doubt that the directors considered it was a good payment, and, therefore, in the absence of evidence of motive, ought to be absolved not only from intent to mislead, but from the charge as it is brought of having misrepresented a fact. Of course I am aware of the distinction between criminal and civil responsibility. I am not prepared, however, to say that that distinction does not in reality disappear under our Statute of 1871, passed after the Code, and defining perhaps the liabilities of directors differently from those of other persons as settled by the article of the Code. That point, however, is not raised, and I shall only observe that in my opinion it is immaterial whether in the present case, such a distinction is made or not, for I am quite certain in my own mind, after a pretty carefully cultivated acquaintance with this record, that the plaintiff has suffered no injury or loss from the representation thus made. The rule to be acted on was laid down by Lord Hatherly when he was Vice Chancellor, in *Barry* v. *Croskey*. That case was referred to by Lord Cairns in giving judgment in *Peek* v. *Gurney*, and the principles reduced to three: "First, that every man must be held responsible for the consequences of a false representation made by him to another upon which that other acts, and so acting is injured or damnified; Secondly, every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or damnified, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the loss or injury;" "and thirdly," he continues: "but to bring it within the principle, the injury must be *the immediate, and not the remote consequence of the representation made*." Now what do we find to be the case here? The plaintiff buys stock in July, 1872. He remains a shareholder from that time up to June 1876, when he brought his action, and for aught I know is so still. During all that time that he held his stock with the presumable knowledge, or what is the same thing, the means of knowledge of what the directors were about; with the same means at his disposal at all events, as all the other stockholders, and the power of questioning them at every meeting, and either getting all the information he desired, or beng refused it, and acting accordingly; he continues during all that time to hold the power which he can exercise whenever he finds it profitable, of selling the stock in question, but decides not to do so; and after three years, when the crash has come, he turns round and says to these directors: you told me in your report in 1872 that the capital stock was so much—which was false, because the payments of the calls were made with the proceeds of a sham loan which was never intended to be paid; and by that statement you have caused me $10,000 damages. This is his first complaint. Then, he goes on and shows, as I think, conclusively, that he cannot be right in saying that his loss can be attributable to the stock not having been paid; for he says, further, you have squandered all the capital. It is true, he gives no time as to this squandering of capital, and, therefore, it cannot serve as a motive for concealment in the report; but we must take it as true as against him, for he says it himself. Now, it must have been either before or after the report, and in either case, according to the plaintiff, the statement in the report would have been immaterial; since, if the capital had all been paid in gold, it was equally squandered. Of course, if it was a misrepresentation, the the additional wrong of squandering the Bank's funds could not excuse it; but it remains true, also, that the false statement was not the cause of the injury; for, to use Lord Cairns' words, "the injury must be the immediate, and not the remote consequence of the representation." I need not dwell upon the other conclusions deduced by the plaintiff, from the fact or assump-

tion that there was misrepresentation as to the the payment of the calls. They all depend upon whether that was a statement that was wilfully and absolutely false, or whether it was a statement that was true in the sense that these payments were *bona fide* considered by the directors as available assets of the bank. I have already given my judgment upon that point, and it therefore appears to me that the first part of the plaintiff's case must fail. Confining myself to the first part of this case, and to that alone, I find that all authority is against subjecting directors to personal responsibility, however imprudent their conduct may seem, unless it is shown that it has been prompted by fraudulent and improper motives. There is nothing of this kind brought to bear upon the time of the first report; and, therefore, if the grossest misconduct were proved afterwards, should have no concern with it in the present case.

I decide the case upon the grounds that I see no wilful misstatement leading immediately or proximately to the injury complained of; and because it appears to me, upon the whole, that the plaintiff who here asks damages for having been induced to purchase his shares by misrepresentation, cannot complain, if he has continued to hold them without objection after knowledge, or with the full means of knowledge, of the truth or untruth of the representations on which he bought them. The case seems to me analogous in principle to that of *Peek* v. *Gurney*—in one part of that case, where Lord Chelmsford said: "The Master of the Rolls proceeded upon the principle established by many decided cases, that an allottee *or purchaser* of shares in a company seeking to divest himself of them upon the ground of having been induced to purchase by misrepresentation, cannot be relieved, if he has continued to hold them without objection after knowledge of the falsehood by which he has been drawn in to acquire them. These cases proceeded upon the ground of acquiescence, and on the application of a more general principle that an agreement produced by fraud is not absolutely void; but that it is entirely in the option of the person defrauded whether he will be bound by it or not. The suit in the present case is not for the rescision of the contract; but is founded on the loss the appellant has sustained, and is similar to an action for deceit."

Upon the second part of the case, the responsibility of the defendants to the plaintiff for what occurred after he became a shareholder, it is not expected probably that I shall say much. I am quite satisfied upon principle and upon express authority cited that all that is alleged to have taken place after the meeting of July, 1872, constitutes an injury to the corporation to whom alone an action would on that account belong; and I have no doubt that portion of the Declaration might have been demurred to. As I am not able to give judgment against any of the defendants, I am not called upon to discriminate between them. After all that has been said, however, as to malfeasance, it is only proper to observe that as regards the defendant O'Brien, he was not a director at all until some time after the report of 1872; and as respects Mr. Judah, the plaintiff's counsel admits that his name was used without authority by Mr. Starnes in a loan account opened by the latter; and indeed it appears from his own testimony that he sold his stock in March, 1872, and only attended to watch the interests of the City and District Savings Bank, of which he was president. That there were speculations in stocks with the funds of this Bank is not only true, but was assigned by Mr. Judah as the reason for selling his stock. On a thing of that sort probably all sober people have the same opinion and I need not give mine now, but it was a matter between the shareholders as a body—that is, the corporation and those persons who so used the funds, and has nothingwhatever to do with the representation made in the report upon which the plaintiff expressly puts his case, and which, he says, had it been a true report, would have made his stock worth all that he paid for it; and I gathered from what was said at the hearing, that the corporation had practically renounced its claim against them. Before concluding I will mention one other consideration which appears to me to have weight in this case. The case of *Peek* v. *Gurney* has been referred to already; but there is one part of Lord Cairns' admirable judgment in that case that seems to bear directly on the position of the parties here. That was a case of misrepresentation also—the only difference being that there it was in a prospectus, and here in a directors' report. The

office of the prospectus was over—all the shares having been allotted;—in other respects the principle of liability and the duration of it were the same as in the present case. Lord Cairns' language was this: "Now, my lords, I ask the question, how can the directors of a company be liable after the full original allotment of shares for all the subsequent dealings that may take place with regard to those shares upon the *Stock Exchange*? If the argument of the appellant is right, they must be liable *ad infinitum*, for I know no means of pointing out any time at which the liability would, in point of fact, cease. Not only so, but if the argument be right, they must be liable, no matter what the premium may be at which the shares may be sold. That premium may rise from time to time from circumstances altogether unconnected with the prospectus"—and so I would observe it might rise or fall here from circumstances altogether unconnected with the report—"and yet, the appellant would be entitled to call upon the directors to indemnify him up to the highest point at which the shares may be sold for all that may be expended in buying the shares. My lords, I ask, is there any authority for this? I am aware of none." It must be allowed, of course, that Lord Cairns asked and answered this question in a case where liability had ceased, because the office of the prospectus in which the statement had been made was over, and the plaintiff had bought afterwards in open market. As far as responsibility for misrepresentation is concerned, there was that difference between that case and this one, and there was no other difference: it was a difference as to the existence of responsibility; not as to the duration of responsibility, if it existed. Therefore as to the duration of existing responsibility, that case and this one are on the same footing; and it was as to the injustice of the duration of this responsibility, if it existed at all, that Lord Cairns was speaking.

The plaintiff's action must be dismissed; but as to costs, it is entirely owing to the fault of the defendants that the plaintiff has taken these steps; and though they made no intentional misstatement; and therefore no action can be maintained against them for it, they will get no costs from the plaintiff; and the action is under the circumstances dismissed without costs.

Abbott & Co. for plaintiff.

Judah, Wurtele & Branchaud, for defendants.

CIRCUIT COURT.

Montreal, May 22, 1878.

DORION, J.

LEPAGE v. WATZO, and WATZO, Opposant.

Property of Indians—39 Vict. (Canada) C. 18.

Held, that under the Indian Act of 1876 (39 Vict. c. 18), the moveable effects of Indians are exempt from seizure, and the fact that an Indian is a trader and trades with whites does not render his effects liable to seizure.

2. That the word "property," used alone in a statute, includes both moveables and immoveables.

Opposition maintained.

J. G. D'Amour for opposant.

Duhamel & Co. for plaintiff contesting.

DISPUTED QUESTIONS OF CRIMINAL LAW.

(*Continued from page* 307.)

III. Uncommunicated Threats.—Two new cases are reported on the question of the admissibility, on trials for homicide, of evidence of utterances by the deceased, threatening the life of the defendant, such utterances not having been reported to the deceased. One of these cases, decided in 1877 (The State v. Taylor, 63 Mo. 358), has a head-note which states explicitly that uncommunicated threats by the deceased are inadmissible when offered by the defendant. When we examine the opinion of the court however, we find that the ruling is limited to cases where the defendant makes no claim to have been acting in self-defence. "The court," says Henry, J., "properly refused to admit evidence of threats by Ghenn against defendant. *It is not pretended that defendant, when he killed Ghenn, was acting in self-defence.* Defendant was aggressor in the difficulty in the forenoon, and when shot by defendant, Ghenn was not only making no attempt to injnre defendant, but was unarmed and endeavoring to escape from him."

The other case is The State v. Turpin, 77 N. C. 473, also decided in 1877. In this case a "*per curiam*" opinion was given by Bynum, J., who says:

"1. The uncommunicated threats were admissible for the purpose of corroborating

the evidence of the threats which had been already given.

"2. They were admissible to show the state of feeling of the deceased towards the prisoner and the *quo animo* with which he had pursued his enemy to the house.

"3. In ascertaining whether the prisoner had acted in self-defence, a most material question was, Who introduced the rock into the conflict, and for what purpose? * * * To corroborate this view, and fix the ownership of the rock, the prisoner offered evidence both of the violent character and deadly threats of the deceased. In this aspect of the case *the threats were equally admissible, whether communicated or uncommunicated*, and, in connection with the other facts indicating a felonious assault upon the prisoner, would constitute a case of murder, manslaughter, or justifiable homicide, as the jury, under proper instructions, might determine upon all the facts."

Prior to these cases, but not cited in either of them, we have Wiggins *v.* The People, 3 Otto, 465. In this case we have the following from Judge Miller:

"Although there is some conflict of authority as to the admission of threats of the deceased against the prisoner in a case of homicide, where the threats had not been communicated to him, there is a modification of the doctrine in more recent times, established by decisions of courts of high authority, which is very well stated by Wharton, in his work on Criminal Law, section 1027. 'Where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to the defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that at the time of the meeting the deceased was seeking defendant's life.' Stokes *v.* The People of New York, 53 N. Y. 174; Keener *v.* The State, 18 Ga. 194; Campbell *v.* The People, 16 Ill. 18; Holler *v.* The State, 37 Ind. 57; The People *v.* Arnold, 15 Cal. 476; The People *v.* Scroggins, 37 Cal. 676."

"Certainly," as I argued in discussing more fully this question in my work on Homicide, "if such evidence is offered to prove that the defendant had a right to kill deceased, then it is irrelevant." But "it is difficult to understand the reason why an acquaintance by the defendant with the deceased's threats should strengthen the admissibility of such threats. If the defendant knew beforehand that his life was threatened, he should have applied to the law for redress; if he did not know, and was attacked without warning by the deceased, then proof of the deceased's hostile temper, whether such proof consist of preparations or declarations, is pertinent to show that the attack was made by the deceased. * * * For the purpose, therefore, in cases of doubt of showing that the deceased made the attack, and, if so, with what motive, his prior declarations uncommunicated to the defendant are clearly evidence."

It may be objected that such evidence is hearsay. To this it may be answered:

1. It is primary; and hearsay, when primary, is admissible when relevant. The question at issue is, Did the deceased attack the defendant? self-defence being set up by the defendant in confession and avoidance. To prove an attack by the deceased—to show, in other words, that his object in meeting the defendant was to attack him — the deceased's intention is material. How is this intention to be discovered? If the deceased were alive, we would call him and ask him as to the facts. He is not alive, and the best evidence we can have of an intended attack on his part is his own expressions, whether in word or in deed. If we reject these expressions, then we have no other way of proving a material fact.

2. Whenever the condition of a party's mind is at issue, then expressions of the party are admissible, when tending to throw light upon such condition. See Hadley *v.* Carter, 8 N. H. 40; The Commonwealth *v.* O'Connor, 11 Gray, 94; Howe *v.* Howe, 99 Mass. 88. This is eminently the case when the party whose declarations are to be proved is dead, and when his state of mind, when material, can be proved in no other way than by his declarations. In R. *v.* Johnson, 2 Car. & Kir. 354, where the prisoner was charged with murdering her husband, and when the deceased's state of health prior to the day of his death became material, a witness was called to prove declarations on this topic by the deceased a day or two

before the death. This was objected to by the prisoner, but was admitted by Alderson, B., who said that he thought that what the deceased said to the witness was reasonable evidence of the deceased's state of health at the time. And, in a suit on a policy of life insurance, it was held admissible to show that the deceased had made declarations at various times as to his health at variance with those which he had given to the defendants. His good faith at the time was at issue, and his declarations were held admissible to negative such good faith. Aveson *v.* Kinnaird, 6 East, 188; Witt *v.* Klindworth, 3 I. & T. 143.

CURRENT EVENTS.

ENGLAND.

CONTRACT—OFFER AND ACCEPTANCE.—In *Lewis* v. *Brass*, (London L.T., Feb. 9, 1878, p. 738), defendant sent in a tender to do certain work for plaintiff. Plaintiff's agent replies, accepting the tender, and adding: "The contract will be prepared by," etc. *Held*, That the tender and acceptance formed a complete contract.

LEASE—OPTION TO PURCHASE.—In the case of *Edwards* v. *West*, (London L. T., p. 481, June 1, 1878), under the terms of a lease, the lessees had an option to purchase the fee simple of the property for a fixed sum, on giving notice before a fixed date. It was also agreed that if the premises were injured by fire to a certain extent, the time should absolutely determine. This event happened before the exercise of the option to purchase. *Held*, that the option to purchase continued, notwithstanding the term had been put an end to.

UNITED STATES.

SALE OF COLLATERAL SECURITIES.—The Supreme Court of the United States has unanimously affirmed the right of banks to sell collaterals deposited as security for a loan, when the loan is not paid, and to apply the proceeds in payment of the indebtedness. The case was that of *Hayward*, appellant, and *The Eliot National Bank*, respondent, an appeal from the Circuit Court of the United States for the District of Massachusetts. The Court applied the rule with the less hesitation owing to the fact that the person depositing such securities had notice of the contemplated sale, and knowledge that the sale had been made, and yet made no objection thereto, nor attempt to redeem for a long time.

DOMICILE.—In *Hardman's Appeal*, 5 W. N. Cas. 347, the Supreme Court of Pennsylvania passes upon the question of domicile. The definition of Vattal that a domicile is a fixed place of residence with an intention of always remaining there is said to be too limited to apply to the migratory habits of the people of this country. So narrow a construction would deprive a large proportion of our people of a domicile. The definition best adapted to our habits is that it is that place in which a person has fixed his habitation without any present intention of removing therefrom. In this case a decedent, a bachelor who was born in another State and lived there until 1871, sold all his land there, and taking his moveable property with him, went to live with his brother-in-law in Pennsylvania, where he remained until the time of his death in June, 1872. When he went to Pennsylvania he told his brother-in-law that he intended to buy another farm in the State he came from, and that he wished to remain with his brother-in-law until he could suit himself. He refused to be assessed for taxation in Pennsylvania, saying that he did not wish to become a citizen of that State. He, however, made no purchase of land in the other State. The court held, however, that the decedent had a domicile in Pennsylvania, and that his property must be distributed according to the law of that State. The court says that a mere intention to remove permanently without an actual removal, works no change of domicile nor does a mere removal from the State, without an intention to reside elsewhere. But when a person sells all his land, gives up all his business in the State in which he has lived, takes his movable property with him, and establishes his home in another State, such acts *prima facia* prove a change of domicile. Vague and uncertain evidence cannot remove the legal presumption thus created. The case follows *Abington* v. *North Bridgewater*, 23 Pick. 170, where it is said, that "it depends not upon proving particular facts, but whether all the acts and circumstances taken together, tending to show that a man has his home or domicile in one place, overbalance all the like proofs tending to establish it in another." See, also *Wilbraham* v. *Ludlow*, 99 Mass. 587; *Harris* v. *Firth*, 4 Cranch, 710; *North Yarmouth* v. *West Gardiner*, 58 Me. 207 4 Am. Rep. 279.—*Albany Law Journal.*