LORD LOW—I am of same opinion. I do not think the meaning of the bye-law is at all doubtful, but it can be contravened in a variety of ways, and it is the right of the accused to know the kind of case to be made against him.

The Court suspended the conviction.

Counsel for the Complainer—Guy. Agent—A. C. D. Vert, S.S.C.

Counsel for the Respondent — Clyde. Agents—J. B. Douglas & Mitchell, W.S.

COURT OF SESSION.

Thursday, October 29.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

M'MORLAND'S TRUSTEES *v.* FRASER AND OTHERS.

Company — Prospectus — Failure to Disclose Contract — Companies Act 1867 (30 *and* 31 *Vict. c.* 131), *sec.* 38

In order to recover damages under the Companies Act 1867, sec. 38, from the persons issuing the prospectus of a company, for failure to disclose a contract, it must be proved affirmatively that the person taking shares has done so in consequence of having relied on the statements in the prospectus.

Circumstances in which *held*, in accordance with the above rule, that this had not been proved.

Opinions reserved (1) whether a contract for the sale of collieries at a price of £30,000, to persons who on the same day re-sold the collieries to the company for £60,000, and subsequently issued a prospectus as promoters, required to be disclosed under the section in question; and (2) as to the validity of a clause in a letter of application waiving compliance with the section.

Question whether the fact that the vendors and promoters were the sole directors affected their liability under the statute.

Company—Director—Misrepresentation by Director.

A director of a colliery company, who was also a vendor to and a promoter of the company, being asked his opinion about it as an investment by an old friend and business partner, stated that considering the usual mining risks, the best answer he could give was that he was himself a shareholder, and also stated, as was the fact, that the coalfield was very extensive and conveniently situated, but did not state, as was the fact, that he with others had bought the collieries for half the sum at which on the same day they had sold them to the company, and that the company was then in such a position financially that unless more capital could be obtained the coal mines could not be worked at a profit. The company ultimately went into liquidation owing to want of capital, through the shares not being sufficiently taken up by the public. *Held* that the director had not been guilty of fraudulent misrepresentation and concealment.

This was an action at the instance of the testamentary trustees of the late Patrick M'Morland, coalmaster in Glasgow, against William Fraser, managing director, Pumpherston Oil Company, Limited, Glasgow, James M'Killop, coalmaster, Slamannan, and Robert Alexander Murray, chartered accountant, Glasgow, trustees on the sequestrated estates of James and William Wood, coalmasters, Glasgow, and of James Wood and William Wood, the individual partners thereof. The defenders were directors and promoters of and vendors to the Bryndu Coal and Coke Company, Limited, incorporated 18th August 1892 under the Companies Acts 1862 to 1890.

The summons concluded (1) for declarator that the prospectus "of the Bryndu Coal and Coke Company, Limited, dated 22nd August 1892, was fraudulent on the part of the defenders, the said William Fraser and James M'Killop, and the said James Wood and William Wood, within the meaning of section 38 of the Companies Act 1867, and was issued, *inter alios*, by them or on their behalf, and that the defenders the said William Fraser and James M'Killop, and the said James Wood and William Wood, were bound, jointly and severally, to make reparation to the pursuers for the damage sustained by the truster, the said Patrick M'Morland, by taking shares in said company on the faith of said prospectus," (2) for payment of £5000, and (3) for declarator that that sum was a just and lawful debt of James Wood and William Wood.

On 30th June 1892 a minute of agreement was entered into between James and William Wood, and James Wood and William Wood as individuals, of the first part, and George Anderson, coalmaster, Glasgow, and the defender William Fraser, of the second part, whereby the first parties agreed to sell, and the second party to purchase, the Bryndu, Cefu, and Glyn Collieries in South Wales, at the price of £30,000, with entry at 1st July 1892.

On 18th August 1892 a second minute of agreement was executed, which was practically identical with the agreement of 30th June, except that the name of the defender M'Killop was introduced as one of the parties of the second part, the date of entry being "as on 1st July 1892."

Of the same date a minute of agreement was entered into between James Wood, William Wood, the defender Fraser, George Anderson, and the defender James M'Killop, as vendors, of the first part, and Robert King, coalmaster, Glasgow, on behalf of a company intended to be formed with limited liability under

the Companies Acts 1862 to 1890, with the name of the Bryndu Coal and Coke Company, Limited, of the second part, whereby the first parties agreed to sell, and the second parties to buy, the lease of the Bryndu and Cefu Collieries and the lease of the Glyn Colliery, with goodwill, &c., at the price of £60,000 payable £30,000 in fully paid-up £10 shares to be allotted to the vendors, 700 to each of the vendors other than the defender M'Killop, and 200 to him, and £30,000 in cash. It was provided that the vendors should be deemed to be carrying on the business as from 1st July 1892, and that if the agreement were not adopted by the company within three months it might be rescinded by either party.

The company was incorporated on 18th August 1892, and the agreement last mentioned was adopted by the company on 5th September 1892.

On 22nd August 1892 a prospectus was issued inviting the public to subscribe for shares. At that date the sole directors of the company were the vendors above named. The capital of the company was fixed at £180,000, in 18,000 shares of £10 each, of which 9000 were 6 per cent. cumulative preference shares, and 9000 were ordinary shares.

The prospectus, *inter alia*, stated—"The vendors, who are the promoters of the company, have fixed the price to be paid by the company for the collieries, including leases, pits, machinery, goodwill, and all the plant belonging to them on the leaseholds, at £60,000, payable as to £30,000 in 3000 ordinary shares fully paid-up, and the balance of £30,000 in cash. . . . The following contract has been entered into, viz.:—An agreement dated the 18th August 1892 between James Wood, William Wood, William Fraser, George Anderson, and James M'Killop, on the one part, and Robert King, coalmaster, Glasgow, as trustee on behalf of the company, on the other part. The vendors will provide all preliminary expenses incidental to the purchase of the company up to and including registration. There are also various contracts connected with the properties as a going concern, which it would be inexpedient to publish, and all applicants for shares must be deemed to waive the insertions of dates and names of the parties to any such contracts as may be required under sub-sec. 38 of the Joint-Stock Companies Act, and to accept the above statements as a sufficient compliance with the Act."

The prospectus also set forth that the object of the company was to take over and acquire "the business now carried on by James Wood, William Wood, William Fraser, George Anderson, and James M'Killop at the collieries known as the Bryndu and Cefu."

Neither the agreement of 30th June 1892 nor the agreement of 18th August 1892, between the Woods and Anderson, Fraser and M'Killop, was disclosed in the prospectus.

On 5th September 1892, 4012 preference shares and 1392 ordinary shares had been applied for. At a meeting held on that date it was arranged that notwithstanding the terms of the preliminary and confirmatory agreements, the 3000 vendors' shares should be allotted to the five vendors equally. It was also agreed that the vendors would waive their right to a dividend on these shares for a period of five years, unless a dividend at the rate of 7½ per cent. per annum should be paid on the ordinary shares. At that meeting it was also determined to proceed to allotment, and 4012 preference and 1392 ordinary shares were allotted accordingly.

On 20th October a meeting of the directors was held, when they considered the financial position of the company, and were of opinion that £30,000 additional capital was required to carry out the undertaking, and the directors agreed to take or get their friends to take ordinary shares to the extent of £30,000. At this time the total number of shares taken up, including the £30,000 just mentioned, was 11,400, making £114,000. Of this sum £60,000 fell to be deducted as purchase money, leaving £54,000 for working capital, development of the colliery, and other expenses. In the report of the engineer, founded on in the prospectus, it was stated that £58,000 would be required to develope the mines so as to increase the output sufficiently to make them worth £60,000 as a going concern.

Mr M'Morland, the pursuers' author, was a partner and intimate friend of the defender M'Killop. For some years previous to 1892 Mr M'Morland had been in delicate health, and had latterly taken nothing to do personally with the management of the business in which he was a partner. For the sake of his health he spent the winter abroad. Up to 1890 he had a house in Glasgow, but in that year he sold it, and thereafter when in Glasgow he stayed at the Central Hotel.

On 26th October 1892 Mr M'Morland sent for Mr M'Killop to come and see him, and they had a conversation upon various business matters. In the course of the conversation Mr M'Morland stated that he had some money to invest, and the result of what Mr M'Killop said to him on that occasion was that Mr M'Morland went with Mr M'Killop to the office of the Bryndu Coal and Coke Company, where he filled up a form of application for 400 ordinary shares. The letter of application was in the following terms:—"To the Directors of The Bryndu Coal and Coke Co., Ltd. GENTLEMEN,—Having paid to your bankers, the Commercial Bank of Scotland, Limited, or the National Provincial Bank of England, Limited, the sum of £1000, being a deposit on 400 ordinary shares of £10 each of the above company, I request you to allot the same to me upon the terms of the prospectus dated the 22nd August 1892 and the memorandum and articles of association of the company; and I agree to accept the same or any smaller number that may be allotted to me; and I request you to place my name on the register of members for the shares so allotted; and I agree to pay the

further instalments thereon in accordance with the terms of the said prospectus; and I declare that I waive any fuller compliance with section 38 of the Companies Act 1867, than that contained therein, and all my rights and remedies (if any) in connection therewith, whether under the said section or otherwise." Four hundred shares were allotted to Mr M'Morland accordingly. On 17th November Mr M'Morland wrote to his law-agents:—"I have yours of the 11th. I told Mr M'Killop to call on you to explain matters about the Bryndu Colliery, which I thought he would have done, otherwise I would have written you about it. I only fixed the 400 shares on the eve of starting for London. You might drop him a note the first time he is in town to call on you, when he will give you full particulars. From what he says, and assures me of his personal knowledge, with regard to everything connected with the colliery seems very good. Of course a good deal depends upon the management, but from what I hear, both from himself and others, I have reason to believe it will be a good venture. Mr M'Killop is a director, and has personally examined the mines, and finds them in every respect satisfactory. The quality and thickness of seams good, and within easy access of Cardiff for shipment, being only eight miles, which is a great advantage. Therefore, if well managed, I don't see why it should not pay well. However, that is to be seen in the future. I wired you to pay the first call on allotment, which I presume you have done." On 23rd November he again wrote to his law-agent:—"Regarding the Bryndu Colliery I have written M'Killop to call on you and explain matters, which I have no doubt he will do when in town. I have reason to believe from all accounts it is a good genuine venture. Had Mr Mac. not been interested and surveyed the mine for himself, I would not have put a penny into it, as I don't believe much in mining unless the subjects are good, from good authority, and also the management. He will give you a prospectus, and give you all particulars."

In July 1893 the Messrs Wood got into such serious financial difficulties that they intimated their inability to pay any more calls on the shares taken by them over and above their vendors' shares. Their shares were taken over by Messrs Fraser and M'Killop, as were also those of Mr Anderson, and Mr Anderson and the Woods ceased to be directors or shareholders in the company. Ultimately, as Messrs Fraser and M'Killop were unwilling to risk any more money, and it was found impossible to obtain sufficient capital for the proper working of the company, it was put into liquidation in 1894, and it was matter of admission that it was unlikely to yield any return to the shareholders.

Apart from their vendors' shares, which were allotted to them fully paid up, Messrs Fraser and M'Killop paid in cash to the company for shares allotted to, or acquired by, them in all £9491 and £6151 respectively. Of these sums £3500 was paid by each of them prior to 20th October 1892, and the remainder after that date. Mr M'Killop also became cautioner to the bank for the sum of £1000, and ultimately paid that sum for the company.

Mr M'Morland died on 11th April 1893, and his trustees were registered as owners of the shares in the company on 19th March 1894.

The Companies Act 1867 (30 and 31 Vict. cap. 131), sec. 38, enacts as follows:—"Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall 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, unless he shall have had notice of such contract."

The Directors Liability Act 1890 (53 and 54 Vict. cap. 64), section 3 (1), enacts as follows:—"Where after the passing of this Act a prospectus or notice invites persons to subscribe for shares in, or debentures or debenture stock of, a company, any 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, and every promoter of the company, and every person who has authorised the issue of the prospectus or notice, 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 (*a*) with respect to every such untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares, debentures, or debenture stock, as the case may be, believe that the statement was true."

In these circumstances the pursuers brought the present action, the summons being signeted on 19th November 1895.

The pursuers averred, *inter alia*—"(Cond. 11) The said prospectus was fraudulent within the meaning of section 38 of the Companies Act 1867, in respect of the failure to disclose the said first agreement of 18th August 1892. It was knowingly issued by the Messrs Wood, and the defenders Fraser and M'Killop and Anderson; and the said deceased Patrick M'Morland

took shares on the faith of the prospectus. The said first agreement was a material one to be considered by any person taking shares in the company, and the vendors were bound to set the same forth in the prospectus under and in terms of said Act." They also averred (Cond. 6) that in October 1892 the company was suffering from having started with insufficient capital, and that the defender M'Killop, in pursuance of a resolution of the directors to get persons whom they knew to join the company, and acting for himself and the other defenders, "represented to Mr M'Morland, contrary to the facts as then known to the defenders, that the undertaking and arrangements of the company were good, genuine, and satisfactory for an investing shareholder," and gave him further particulars, the same in substance as those contained in the prospectus, and that Mr M'Morland acted upon these statements, conveyed and confirmed to him by the defender, acting for himself and the other defenders. They further averred (Cond. 12) that the prospectus was false and fraudulent in respect (1) that it set forth falsely that the business was then being carried on by the whole of the vendors, whereas it had been carried on by the Woods alone and never by the other promoters, and (2) that it set forth that the vendors had fixed the price at £60,000, whereas the price to be paid to the proprietors was £30,000, and the balance was to be paid to Fraser, Anderson, and M'Killop as a consideration for their appearing and giving their names as vendors and promoters, and that if the truth had been known the company could not have been floated and M'Morland would not have taken shares.

The defenders denied these averments, and averred in answer that M'Morland did not see a prospectus of the company, and had no knowledge of the statements contained therein, and that he relied solely on the information obtained verbally from Mr M'Killop at the interview on 26th October 1892.

A proof was allowed, which was taken on 27th and 28th May 1896. Mr M'Killop deponed, with reference to the conversation on 26th October 1892, which resulted in Mr M'Morland taking shares in the company—"Mr M'Morland then said that he understood I was associated with some Welsh mining concern, and he wanted to know about it; and he asked my opinion about it as an investment, considering the usual mining risks. Of course mining risks are speculative, and I said to Mr M'Morland that the best answer I could give to his question was the fact that I was putting a considerable stake in it myself. I told him that I had looked over the plans, and that I had never in my experience contemplated such an area of working coal. I explained that there was an illimitable supply of coal, that it was in thick sections of first-class quality, and very near the shipping ports. Mr M'Morland followed up my statement by saying that he had a disposition to take a share in the concern seeing that I was associated with it in the way that he understood. He asked me if there were any shares to dispose of, and I said yes, that they had not all been taken up by the public, and he volunteered to go to the Bryndu office with me in order to take out an allotment at once. So far as I saw, Mr M'Morland had no prospectus of the company. I had no prospectus, and there was no allusion made at that conversation at all to the prospectus of the company. Mr M'Morland's willingness to associate himself with the concern was entirely in confidence of my individuality, seeing that I was associated with the mines. (Q) He had confidence in you—(A) Well, he had great reason to have confidence in me from past experience. Nothing passed at that meeting at all to indicate that he had ever seen the prospectus, or that he was proceeding to any extent on the facts stated in the prospectus. As far as I could judge, in taking the shares he was proceeding entirely upon the fact of my being associated with the mines. After our conversation Mr M'Morland and I went to the office of the company; he volunteered to go as he intended to leave Glasgow within a few days. When we got to the office of the company Mr M'Morland asked for a form to fill up. He sat down to write out the form, and when I asked how many shares he purposed to take out he said 500 shares. I then told him I thought that he should not take out such a number, and that he should restrict himself to not more than 400 shares. He then wrote out an application for 400 shares and handed it to the secretary. There was no prospectus shown to him at that meeting, and he did not ask for any. In the office he made no inquiries at all as to the details of the business; I had described the general details, which seemed to satisfy him with the property as an investment for his money. With regard to the other concerns in which Mr M'Morland and I were associated together, he was in the habit of going into these very much because I was associated with them. I also joined certain things that he was associated with because he was associated with them, and some of which have turned out extremely unprofitably. We were associated with each other in several enterprises which were more or less of a speculative character, and some turned out good and some the reverse." . . . There was no other evidence as to what took place at this interview. It was not disputed that Mr M'Killop's statements as to the quantity and quality of the coal and the convenient situation of the collieries were true.

The only evidence led by the pursuers to show that Mr M'Morland had read the prospectus and relied upon the statements contained therein was as follows:—The hall-porter of the Central Hotel, Glasgow, deponed that Mr M'Morland stayed in that hotel from 8th August to 27th August, from 29th August to 1st September, and from 11th October to 29th October in the year 1892; that the *Glasgow Herald, Evening Citizen, Times, and News*, and the *Scotsman* and other Edinburgh newspapers were provided for the use of visitors; and

that Mr M'Morland had no private sitting-room, but usually sat in the smoking-room or reading-room. An advertising contractor deponed that for a company of the kind the prospectus was largely advertised, £848, 3s. 4d. being paid for circulating it, and for advertising in the newspapers, that the prospectus appeared in full or abridged in all the Glasgow and Edinburgh newspapers published between 22nd and 30th August 1892 with the exception of the Edinburgh evening newspapers of 30th August, and that between 50,000 and 55,000 copies of the prospectus were sent to investors, particularly to those in the coal trade. One of the pursuers also deponed that he had noticed the prospectus of the company in the Glasgow newspapers at the time.

With regard to the company, Mr Fraser deponed that its failure was due to the financial collapse of the Woods, and Mr M'Killop attributed it to that cause, and also to a strike which took place among the haulliers in South Wales not long before the liquidation. He also deponed—"But for the untoward circumstances which I have mentioned which led to the liquidation, I am still of opinion that the colliery had the elements of great value in it. I have seen nothing about the colliery which has materially changed the opinion I originally formed about it, and I consider that it is a fair form of investment for capital taking into account the usual mining risks."

Thereafter the Lord Ordinary (KYLLACHY), by interlocutor dated 6th June, assoilzied the defenders.

Opinion.—"The pursuers here sue for damages in respect that their author, the late Mr M'Morland, was induced to take shares in a certain mining company by the fraud of the defenders, who were the promoters and vendors, and also the whole directors of the company. The leading ground of action is that the defenders failed to disclose in the prospectus a certain contract—or rather two contracts—which, according to the pursuers, ought to have been disclosed in terms of section 38 of the Companies Act of 1867. The pursuers also allege a case of misrepresentation or concealment at common law. Now, I have not found it necessary to decide the somewhat difficult questions upon the construction of the 38th section of the Act of 1867, which were raised and argued at the debate. The contract of 18th August 1892 (following on the previous contract of 30th June 1892) is one as to the duty to disclose which I should have had little doubt but for one circumstance, and that is, I think, the somewhat unusual circumstance that in this case the promoters and directors are themselves disclosed as the vendors of the company. The defenders are the sole vendors and the sole directors, and it was therefore plain to any person reading the prospectus that the directors of the company and every one of them had an interest adverse to the company. How any intending investor should have invested in a company where that was the state of affairs, I do not myself understand. But that is undoubtedly a peculiarity in this case,—a peculiarity which appears to me to raise a perhaps difficult question as to whether or not the prospectus was fraudulent in respect of the non-disclosure of the contract or contracts in question. I have not found it necessary, as I have said, to determine that difficult question, and I am glad that that is so, because it may come up in some other case. What appears to me to be enough for the decision of this case is that I have come to the conclusion upon the evidence that the pursuers have failed to show that their author took shares in this company on the faith of the prospectus. That is a question of fact; and having given full attention to the evidence and to the excellent argument which I had upon its import from the pursuers' counsel, I am unable to hold that there is sufficient evidence that Mr M'Morland took shares on the faith of the prospectus. That being so, it is admitted the 38th section of the Companies Act does not apply.

"Then as to alleged misrepresentation at common law, I confess I do not think that was made out. I do not think there is evidence that Mr M'Killop or any of the defenders made misrepresentations to the pursuers' author upon material matters of fact. And that being so, I think the result is that the defenders are entitled to absolvitor, and, of course, with expenses."

The pursuers reclaimed, and argued—M'Morland bought on the faith of the prospectus. It was largely advertised and circulated in Glasgow, where he was living at the time, and especially among persons interested in the coal trade, as he was. He applied on the form which accompanied the prospectus. His conversation with M'Killop indicated that he had already seen the prospectus. The letters also contained indications to the same effect. In any view, it was not proved that he had not read the prospectus, and if there were no evidence either way, it must be presumed that he had read it. He bought his shares upon the terms of the prospectus, and from that it might be inferred that he had read it, at least in a question with the defenders, to whom he was bound by its terms, and who were therefore barred from denying that he had bought on the faith of it. That he had so bought might be inferred without actual proof; see *Smith* v. *Chadwick*, February 18, 1884, 9 App. Ca. 187, *per* Lord Blackburn at p. 196, and *Peek* v. *Gurney*, July 31, 1873, L.R., 6 App. Cas. 377, at p. 410. It was not necessary that he should have relied on the prospectus alone — *Andrews* v. *Mockford*, [1896], 1 Q.B. 372, or that it should be proved that the fraudulent concealment in the prospectus was what influenced him in taking shares—*Arnison* v. *Smith*, April 12, 1888, 41 Ch. D. 348, at p. 359. The prospectus was fraudulent at common law, or at any rate in virtue of the Directors Liability Act 1890, section 3, in respect of the false representations set forth in condescendence 12. It was also fraudulent in terms of the Companies Act 1867, section 38, in respect of the omission to mention

the contract of 18th August—*Cornell* v. *Hay*, April 25, 1873, L.R., 8 C.P. 328; *Askew's case*, June 25, 1874, 22 W.R. 763, not reversed on this point (see L.R., 9 Ch. 664); *Charlton* v. *Hay*, November 10, 1874, 31 L.T. (N.S.) 437; *Twycross* v. *Grant*, June 2, 1877, 2 C.P.D. 469, *per* Cockburn, C.-J., and Brett, L.-J., at pp. 527 and 546; *Sullivan* v. *Mitcalfe*, June 30, 1880, 5 C.P.D. 455, *per* Thesiger and Bagallay, L.-J.J., at pp. 460 and 465; see also Buckley on the Companies Acts, 570; Palmer's Company Precedents, 85; Lindley on the Law of Companies, 91. As to the waiver clause, (1) it was at least doubtful whether such clauses were valid—Lindley on the Law of Companies, 92; see also Palmer's Company Precedents, 86. But (2), apart from that, the defenders could not benefit from the clause in this case, because either (*a*) it was obtained by the false representation that the contracts concealed were trading contracts, whereas the contract of 18th August 1892 was not a trading contract, and the defenders could not take benefit from their own fraud; or (*b*) it only applied to trading contracts, and did not waive compliance with section 38 as to contracts not connected with the properties as a going concern. This latter view was supported by the use of the word "such" in the relative clause in the prospectus. Even if it was ambiguous, it must be construed *contra proferentem*. The contract embodied in the clause was with the company, not with the defenders. In any view, they could not found on this clause, and at the same time deny that M'Morland bought on the faith of the prospectus. The defenders here were in a fiduciary position towards the company and the shareholders, and were consequently not entitled to take a private benefit to themselves, at any rate without disclosing it to the persons whom they invited to become shareholders—*Henderson* v. *Huntington Copper and Sulphur Company*, January 12, 1877, 4 R. 294, *per* Lord Young at p. 301, and November 29, 1877, 5 R. (H.L.) 1, *per* Lord Cairns, L.C., at p. 3; *Erlanger* v. *New Sombrero Phosphate Company*, February 26, 1877, 5 Ch. D. 73, *per* Jessel, M.R., at p. 113; and July 31, 1878, 3 App. Cas. 1218, *per* Lord Blackburn at p. 1267. This was what had been done here. The Woods were the real vendors, and the true price was £30,000. The other £30,000 was given to the defenders in consideration of lending their names and influence. The agreements of 30th June and 18th August 1892 were mere steps in getting up a company. It made no difference that in form there was a sale to the promoters—*Bland's Case* [1893], 2 D. 612. M'Killop's representations to M'Morland in their conversation, which resulted in M'Morland taking shares, were fraudulent. He spoke favourably of the company, whereas it was then financially rotten. He represented himself as an investing shareholder, whereas he was primarily a promoter receiving 600 shares for his services as such. It was fraud on his part to conceal this fact. A half truth might be the worst misrepresentation—*Peek* v. *Gurney*, *cit.*, *per* Lord Cairns at p. 403.

Argued for the defenders—It was not proved that M'Morland bought on the faith of the prospectus. There was no evidence that he did. Indeed, on the evidence the contrary might be affirmed. The evidence and also the probabilities all tended to show that he bought on M'Killop's recommendation. But that was unnecessary, because the *onus* lay on the pursuer to prove positively that he read and bought on the faith of the prospectus—*Smith* v. *Chadwick*. *cit.*; *Arnison* v. *Smith*, *cit*; *Sullivan* v. *Mitcalfe*, *cit.*, *per* Thesiger, L.-J., at page 460; *Arkwright* v. *Newbold*, February 28, 1881, 17 Ch. D. 301, *per* Cotton, L.-J., at page 324. This *onus* the pursuer had not discharged. The letter of application could not avail the pursuers, because if it did, then it would never be necessary for an original shareholder to prove that he bought on the faith of the prospectus, as all such shareholders obtained their shares by letter of application. That was not the law. Cases cited *supra*. If this were so, the pursuers' case so far as based on the prospectus must fail. But even if it were otherwise, the contracts of 30th June and 18th August were not within the scope of section 38. They were independent contracts for the sale of the collieries to the defenders, not contracts for payment of promotion money to them. A vendor to a company did not require under the section to disclose the contract by which he himself became possessed of the property he was selling—*Craig* v. *Phillips*, April 4, 1876, 3 Ch. D. 722; *Gover's Case*, March 19, 1875, L.R., 20 Eq. 114, Dec. 1, 1875, 1 Ch. D. 182, *per* James, L.-J., at page 187, *per* Bramwell, L.-J., at page 192, and *per* Mellish, L.-J., at page 191; *Sullivan* v. *Mitcalfe*, *cit.*, *per* Bramwell, L.-J., at page 470, and *per* Baggallay, L.-J., at page 467; *Twycross* v. *Grant*, *cit.* *per* Bramwell, L.-J., at page 496, *per* Kelly, C.B., at page 506, and *per* Cockburn, C.-J., at page 533. Even if this was a contract for promotion-money, it did not need to be disclosed under section 38. The waiver clause was valid. Lindley's statement on the subject, relied on by the pursuers, was not supported by authority. Palmer's Company Precedents, *loc. cit.*, and Buckley on the Companies Acts, 574. This clause covered the contracts in question. The word "such" did not refer to trading contracts, but to the words "as may be required under section 38." From the fact that the vendors and promoters were the sole directors, any business man such as M'Morland must have inferred that they had some interest adverse to the shareholders, and if shares were taken by him in spite of that knowledge his representatives could not now complain. As to the case under the Directors Liability Act, it was necessary for the pursuers to prove that M'Morland bought on the faith of the prospectus, and that he was deceived. Moreover, the statements founded on by the pursuers were true. Further, M'Morland did not rely on M'Killop's having carried on the business before, but on his managing it in the future, and on his

having inspected the coalfield and put his money in, and on the personal confidence reposed in him from experience. M'Killop's statements in conversation were not fraudulent. He believed in the concern at that time, and quite reasonably expected the shares would be taken up. The defenders Fraser and M'Killop put their own money into the company after M'Morland took his shares. The company was a genuine commercial venture with good prospects of success, but it failed through want of capital. Mere non-disclosure of the contracts was not fraudulent unless it amounted to active misrepresentation, which it did not in this case, or unless information were asked—*Peek* v. *Gurney*, *cit.*, *per* Lord Chelmsford, L.C., at page 390, and Lord Cairns at page 403.

At advising—

LORD JUSTICE-CLERK—The late Mr Patrick M'Morland, a coalmaster in Glasgow, applied for and had allotted to him certain shares in a company which was at the time being formed to take over certain interests in collieries, with their machinery, goodwill, &c., under a limited company to be called The Bryndu Coal and Coke Company Limited. The pursuers, as the trustees under his trust-disposition and settlement, sue this action to have it found and declared that the prospectus issued by the promoters was fraudulent within the meaning of section 38 of the Companies Act 1867, and that those who issued the prospectus are bound to make reparation for damage sustained by Mr M'Morland through his taking shares on the faith of the prospectus, and the summons concludes for £5000 of damages. There is further a special conclusion inserted in respect that certain of the parties being bankrupt, declarator should be pronounced finding that the damages sustained form a just and lawful debt of the bankrupts. The alleged fraud consisted in the failure to disclose in the prospectus that in addition to the agreement set forth in the prospectus, by which the company were to pay £60,000 to the vendors, half in cash and half in paid-up shares, other agreements had been entered into by which James and William Wood, who were in right of the collieries and business, sold them to themselves and the other defenders for £30,000, these gentlemen then becoming the vendors to the company at £60,000. It is further averred that the prospectus was fraudulent in respect it described the business as "now carried on" by the two Woods and Messrs Fraser and M'Killop, whereas it had never been carried on by the latter but only by the Woods.

These questions arise in the case — (1) Whether it is proved that the deceased took shares on the faith of the prospectus? (2) Whether, if he did so, the prospectus was fraudulent in respect of its not setting forth the agreement between the Woods and Fraser and M'Killop, and therefore struck at by sec. 38 of the Companies Act 1867? (3) Whether, upon the assumption that section 38 applied, its force was taken away in this transaction by a clause in the prospectus setting forth that there were various contracts which it would be inexpedient to publish, and that all applicants for shares must be deemed to waive the insertion of dates and names of the parties to any such contracts as may be required under section 38 of the Joint Stock Companies Act, and to accept the above statements as a sufficient compliance with the Act? (4) Whether at common law it can be held upon the evidence that Mr M'Morland was induced to become a shareholder by false representations made to him by either of the Woods or by Fraser or M'Killop.

It appears that in June 1892 Messrs Wood, who carried on business as a firm, entered into an arrangement by which they sold to themselves as individuals, and to Mr George Anderson and William Fraser, the Bryndu and certain other collieries at a price of £30,000, and that subsequently on 18th August of the same year an arrangement was entered into in similar terms, but bringing in Mr M'Killop as one of the purchasers. On the same day these five gentlemen entered into an agreement to sell the same subjects to one Robert King, upon the narrative that a company was about to be formed, and that articles of association had been signed by these five on behalf of the vendors, and that the sale to King was on behalf of the company and in terms of the articles of association. By that agreement the price was £60,000, and this agreement was set forth in the prospectus issued with a view to obtaining subscriptions of shares. The previous agreements were not disclosed in the contract.

After considering the proof and the documents put in evidence, with the very full and able debate from the bar upon them, I have been unable to see any ground for holding that any false representations were made to Mr M'Morland to induce him to take shares in the company, which would at common law give him a claim against the defenders or any of them. I believe that Mr M'Killop, who was Mr M'Morland's friend, and had for many years been his partner, acted in the *bona fide* belief that the collieries were a good speculation in recommending them to Mr M'Morland for investment, and as Mr M'Morland's action in taking shares was the direct consequence of communication with Mr M'Killop, I see no ground for holding that there was any misrepresentation made to him.

Upon the question whether the non-disclosure of the agreement of August in the prospectus was to be deemed fraudulent under section 38 of the Companies Act of 1867, very forcible arguments on both sides were laid before us, and much instructive authority was quoted. I agree, however, with the Lord Ordinary in thinking that a decision of this somewhat difficult question is unnecessary in this case, as it may be decided on another ground. And if it is unnecessary to decide whether the prospectus should have referred to the agreement, it is also unnecessary to decide whether upon that assumption the clause of waiver in the prospectus affords a suffi-

cient answer, in respect that the buyer of shares did so on the understanding set forth in the prospectus that he "must be deemed to waive the insertion required under subsection 38." These are both very important points, and would call for very careful consideration were it necessary to pronounce a definite opinion upon them. Upon the latter I have formed a pretty definite opinion, but I think it better not to express it. For I am of opinion with the Lord Ordinary that it is sufficient for the decision of this case that it is not proved that Mr M'Morland took shares on the faith of the prospectus. Indeed, the evidence seems to show that he had never seen it. I think it must be held that when one who has bought shares seeks reparation for loss said to be caused by his acting on a statement, or a failure to include a statement in a prospectus, he must show that he was deceived or misled thereby, and that he acted upon the prospectus to his prejudice. That seems to me to be the plain import of the case of *Arkwright*, 17 Ch. D. 301, which was quoted to us.

There can be no doubt that the ascertained facts disclose a somewhat extraordinary state of matters. The directors set forth on the face of the prospectus were the same persons, and the only persons, disclosed in it as being the promoters and the vendors to the company of the subjects to be purchased. Thus, as the Lord Ordinary points out, it was plain upon the face of the prospectus that the directors had an interest adverse to the company. Whoever proposed to invest was informed that he was buying from those who were getting up the company. It is very difficult to understand how anything but an unbounded faith in the integrity of these persons could lead to an application for shares in such circumstances. But if a purchaser did not see the prospectus, but relied only on advice obtained from a gentleman in whose advice he had confidence as regards such a matter, I cannot hold that he or those who represent him can obtain damages from those who put out the prospectus, on the ground that he was fraudulently deceived into making the purchase. In such circumstances he cannot show that he was deceived by the statements in it or by the omissions in it, and that he being so deceived acted upon it to his prejudice. I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD YOUNG concurred.

LORD TRAYNER—The pursuer bases the claim made in this action upon two grounds: (1) that the prospectus of the company in which the late Mr M'Morland took shares, was fraudulent, under the terms of sec. 38 of the Companies Act 1867, in respect the contract or agreement of 18th August 1892 was not disclosed in that prospectus, and (2), misrepresentation and concealment at common law. The defenders meet the second of these grounds of action with a denial, and with regard to the first, maintain that the contract in question was not one disclosure of which was required by statute, but that even if it was, the late Mr M'Morland waived his right to challenge the prospectus on that ground, as well as all his rights and securities (if any) "in connection therewith, whether under the said section or otherwise."

I agree with the Lord Ordinary in thinking that the pursuers have failed to establish any claim on the ground of misrepresentation or concealment at common law. The evidence of Mr M'Killop, the only defender who saw or spoke to Mr M'Morland on the subject of the company in question, very distinctly negatives the pursuer's averments. His is the only evidence now available as to what passed between him and Mr M'Morland, unless it be the statements contained in Mr M'Morland's letters. These statements, so far as they go, which is not far, appear to me to support Mr M'Killop's evidence, and in no sense and to no extent to contradict it. I think it due to Mr M'Killop to say that there is no foundation in anything which appears before us, for the suggestion that he deceived or wished or intended to deceive his friend either by misrepresentation or concealment.

The first ground of action can only be pleaded by one who took shares in the company "on the faith of such prospectus." Now, I agree also with the Lord Ordinary in thinking that there is not sufficient evidence to show that Mr M'Morland took his shares on the faith of the prospectus. I think one might go further, and say that there is no evidence in support of the view that he did so. That Mr M'Morland saw the prospectus in some newspaper is probable but by no means certain. Still less is it certain that he ever read it or relied on it in applying for shares. My opinion on this matter is that Mr M'Morland applied for shares solely on the ground that Mr M'Killop represented it to be, what he thought it was, an investment which promised favourable results. If that is so, then the first ground of action fails the pursuers equally with the second, and the defenders are entitled to absolvitor.

The Lord Ordinary indicates an opinion that the contract of 18th August 1892 was one that should have been disclosed had it not been that the promoters and directors of the company were themselves the discharged vendors. How that circumstance may affect the duty to disclose imposed by the 38th section of the Act of 1867 I do not think it necessary to consider. But I reserve my opinion entirely on the questions whether the contract referred to was one which in any case the promoters or directors were bound to disclose, and what, assuming the duty of disclosure to be affirmed, would have been the effect of Mr M'Morland's waiver in his letter of application for shares.

LORD MONCREIFF—I think that the Lord Ordinary is right, and I am satisfied with the grounds on which he places his judgment. As to the ground of action founded on the 38th section of the Companies Act of 1867, I think it is not proved that Mr

M'Morland took the shares on the faith of the prospectus. Mr M'Morland being dead, we had not the advantage of his evidence, but it appears very clearly from the letters which he wrote to his agent on 17th and 23rd November 1892 that in agreeing to take the shares he relied entirely upon his partner Mr M'Killop's declared confidence in the concern (the *bona fides* of which I see no reason to doubt), and the examination which he had personally made of the mines. In the latter letter he says—"Had Mr M'Killop not been interested and surveyed the mine for himself, I would not have put a penny into it, as I don't believe much in mining unless the subjects are good, from good authority, and also the management." From his business relationship with Mr M'Killop it is plain that Mr M'Morland must have known perfectly well what collieries Mr M'Killop was personally carrying on, and cannot have been influenced by the erroneous supposition that Mr M'Killop had been carrying on the Bryndu Collieries previous to the formation of the company. Mr M'Killop says "he (that is, M'Morland) was led to associate himself with the company entirely through my individual position and connection with it." So far as I can see from the evidence before us, that is the truth. It may be assumed—I think it must be assumed—that M'Morland saw the prospectus, but I do not think it is proved that he bought on the faith of it, or that he was induced to buy by misrepresentations made to him by any of the defenders.

In this view it is not necessary to consider the next question, viz., whether the minute of agreement of 18th August 1892 was or was not a contract of which notice should have been given under section 38 of the Companies Act of 1867. I prefer to reserve my opinion upon that point, and also on the question whether, assuming that notice should have been given of the contract, Mr M'Morland's waiver contained in his letter of application was or was not effectual to free the defenders from liability. If the case depended on these questions, I think, looking to their importance and the great difference in judicial opinion in the English courts, that it would have been proper to submit the questions to the whole Court or a Court of seven Judges.

The Court adhered.

Counsel for the Pursuers—Vary Campbell—Wilson. Agent—Keith R. Maitland, W.S.

Counsel for the Defenders — Dean of Faculty, Q.C.—Ure—M'Clure. Agents—J. W. & J. Mackenzie, W.S.

Friday, November 6.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

SMITH'S JUDICIAL FACTOR *v.* NEILL'S TRUSTEES.

Succession—Vesting—Survivorship Clause—Whether Vesting a morte or on Realisation and Distribution.

In his trust-disposition and settlement a testator directed his trustees "at the first term of Whitsunday or Martinmas making twelve months after my death, or as soon thereafter and from time to time as the same may be realised, to divide and pay over the residue of my estate equally amongst all my four children above named, their heirs or assignees respectively." This direction was qualified by a destination-over to the issue "of my said children dying leaving lawful issue" and a survivorship clause providing that "should any of my said children die without being married or leaving lawful issue, then the provisions hereby made in their favour shall fall to and be divisible amongst my other surviving children, including the issue of anyone who may have died, such issue always coming in their parents' room."

The periods at which different parts of the estate could be realised were necessarily different, and some of them were subsequent to the expiry of the year from the testator's death.

There was no liferent protected by the trust.

In a special direction as to the retention by the trustees of a daughter's share of residue until she attained the age of thirty-two or was married, her interest in residue was referred to as "her capital" and "her means and estate," and the interest was payable to her.

Held (*reversing* the judgment of Lord Kyllachy) that the presumption that a clause of survivorship refers to the period of distribution was overcome by the indications of a contrary intention, and that there was vesting *a morte testatoris.*

Young v. *Robertson*, February 14, 1862, 4 Macq. 314, and *Howat's Trustees* v. *Howat*, December 17, 1869, 8 Macph. 337, *distinguished.*

By trust-disposition and settlement, dated 5th September 1839, David Neill, who died in 1847, conveyed to trustees his whole estate, heritable and moveable, then belonging or which might belong to him at the time of his death, for the trust purposes therein set forth. The material parts of the trust-disposition and settlement were as follows:—"*Third*, Out of the remainder of my said estate, after paying all my debts and others foresaid, and any legacies or sums which I may by any memorandum, promissory-note, or any other writing under