H. C. OF A. 1908.

SWEENEY v. KELLY.

the view that the Court was justified on the evidence and course of proceedings before the magistrate in inferring that proper notice was given. In any view there is no ground for granting special leave to appeal.

BARTON J., O'CONNOR J., and ISAACS J. concurred.

Special leave refused.

Solicitor, for applicant, *A. H. Pace*, for *W. J. Vowles*, Dalby, Queensland.

C. A. W.

[HIGH COURT OF AUSTRALIA.]

THE WHEAL ELLEN GOLD MINING COMPANY, NO LIABILITY . . } PLAINTIFFS;

AND

READ . . . . . DEFENDANT.

H. C. OF A. 1908.

MELBOURNE, *Sept.* 4, 5, 7, 18.

HIGGINS J.

Company—Promoter, who is—Secret profits—Amount recoverable.

One who brings a company into existence by taking an active part in forming it or in procuring persons to join it as soon as it is technically formed is a promoter of the company.

In an action by a mining company against the defendant to recover the profit made by him as a promoter of the company, which profit had not been disclosed to the directors or to the shareholders,

Held that, on the evidence, the defendant was a promoter, and that the company was entitled to recover from him his net gain from the transaction as a whole, including the value when issued of shares in the company issued to him which had become worthless, but not including money paid, and shares issued, to him, and paid and transferred by him to others for services rendered him in the formation of the company.

TRIAL of action.

The plaintiffs, the Wheal Ellen Gold Mining Co., No Liability, a company formed and registered in Victoria to purchase and work a gold mine in Western Australia, brought an action in the High Court against the defendant, James Stroud Read, a resident of Perth, Western Australia, the only claim which was tried being one to recover the secret profits made by the defendant as a promoter of the company on the sale of the mine to the company, and interest thereon.

The action was heard before *Higgins* J.

The facts and arguments sufficiently appear in the judgment hereunder.

Starke, for the plaintiffs.

Duffy K.C. (with him *Woolf*), for the defendant.

The following authorities were referred to during argument:— *Manson's Law of Trading Companies*, p. 53; *In re Coal Economizing Gas Co.*; *Gover's Case* (1); *In re Cape Breton Co.*; *Cavendish-Bentinck* v. *Fenn* (2); *Ladywell Mining Co.* v. *Brookes* (3); *Burland* v. *Earle* (4); *In re Olympia Ltd.*; *Gluckstein* v. *Barnes* (5); *In re Lady Forrest (Murchison) Gold Mine Ltd.* (6); *In re Leeds and Hanley Theatres of Varieties Ltd.* (7); *Seddon* v. *North Eastern Salt Co. Ltd.* (8); *Glass* v. *Pioneer Rubber Works of Australia Ltd.* (9); *In re Caerphilly Colliery Co.*; *Pearson's Case* (10); *Buckley on Companies*, 6th ed., p. 410; *In re North Australian Territory Co.*; *Archer's Case* (11).

Cur. adv. vult.

HIGGINS J. read the following judgment:—

Sept. 18.

This action is brought by a Victorian gold mining company formed to work a mine in Western Australia; and the defendant

(1) 1 Ch. D., 182.
(2) 29 Ch. D., 795.
(3) 35 Ch. D., 400.
(4) (1902) A.C., 83, at p. 98.
(5) (1898) 2 Ch., 153; (1900) A.C., 240, at p. 249.
(6) (1901) 1 Ch., 582.
(7) (1902) 2 Ch., 809.
(8) (1905) 1 Ch., 326.
(9) (1906) V.L.R., 754; 28 A.L.T., 64.
(10) 5 Ch. D., 336.
(11) (1892) 1 Ch., 322, at p. 334.

H. C. OF A. 1908.

WHEAL ELLEN GOLD MINING CO., NO LIABILITY v. READ.

is a stockbroker of Perth who purported to sell the mine to Sir Alexander Peacock "for and on behalf of the company." The case came before the High Court merely because the plaintiffs and the defendant are resident in different States. It could have been tried in the Supreme Court of a State; but the federal Constitution has given to the High Court also original jurisdiction in such cases, following in this respect the example of the Constitution of the United States, notwithstanding the dissimilarity in the conditions affecting our Australian Courts. The statement of claim contained originally a claim for damages for false representation as to the value of the mine, and an alternative claim for rescission of the contract. These claims have been abandoned; the former because, as the plaintiffs' counsel believed, he could not spell out any fraudulent representations; and the latter because, in his opinion, there is an executed contract of sale as between the company and the defendant, and, according to *Seddon* v. *North Eastern Salt Co. Ltd.* (1), such a contract is not rescinded by the Court without proof of fraud. At all events, the only claim pressed before me is a claim for the profit made by the defendant as a promoter of the company—a profit not disclosed to the directors of the company, or to the shareholders.

It appears that in January 1907 the mine belonged to a party consisting of Maynard, Johnston, and others; that Johnston requested the defendant to form a small company with not more than £14,000 capital; that he wanted for his party £1,000 in cash, £2,000 in gold to be won from the mine, and £3,000 in fully paid £1 shares. The defendant consented, but said he would require 10 per cent. commission on the nominal capital for his services, and that Martin and Phillips, solicitors in Perth, would prepare the agreement. An agreement was prepared accordingly, and signed on 17th January. It is not an agreement of agency; it is not an agreement for sale; it merely gives the defendant an option of purchase for two calendar months. If he exercised the option, and not otherwise, the Maynard party were to get £3,000 and 3,000 fully paid shares of £1 each in a company "to be formed by" the defendant, having a capital not

(1) (1905) 1 Ch., 326.

greater than £14,000. But the defendant was not to pay any money of his own if he exercised his option. He was merely to pay £1,000 out of the moneys subscribed by the public for shares, and £2,000 out of the gross proceeds of the first gold won, as well as to provide for the Maynard party 3,000 fully paid shares. Unless a company were formed by the defendant, there could be no purchase by the defendant; and the consideration in money and shares was all to come from the company and the subscribers to its shares. The company was to have all gold extracted after 17th January. The defendant was at liberty to form the company anywhere that he chose. He at first attempted to float the company in Perth, on a prospectus which stated that the agreement of 17th January could be inspected at "the office of the company" (the defendant's office in Perth); that it was made by the defendant "on behalf of the proposed company"; that the consideration was £3,000 in money and 3,000 shares (as aforesaid); that "the promoter" (himself, in fact) was to receive 10 per cent. in cash, or cash and fully paid shares out of the nominal capital of the company; that the defendant was broker, and secretary *pro tem.*, and would receive applications for shares; and that Martin and Phillips were to be the solicitors. But the attempt was not successful under such a prospectus, in the State in which the mine was situate, and in which the defendant resided. So the defendant came to Melbourne; called on Mr. Noall of the Stock Exchange; and was introduced by Noall to one Hamilton, a stockbroker. There is some difference, not very material, in the versions of the interviews which followed. The only witnesses examined before me were Strangward and the defendant; and the story which follows may be taken as my findings on the evidence. The defendant told Hamilton that the "vendors" wanted £1,000 cash, £2,000 out of gold from the mine and 3,000 fully paid shares; and that he himself wanted £2,000 in cash, £2,000 out of gold from the mine and 4,000 fully paid shares; and that the capital was not to exceed £14,000. Hamilton naturally inferred that the defendant meant to keep the extra £1,000 cash and extra 1,000 shares as profit for himself, and ingenuously asked "Where do I come in?" So the defendant agreed to let Hamilton have half of his profit

H. C. OF A. 1908.

WHEAL ELLEN GOLD MINING CO., NO LIABILITY v. READ.

—£500 and 500 shares—"if he could find a buyer." That is, no buyer—no payment. Hamilton said "Peacock is the man for this business;" and he took the defendant to the office of Sir Alexander Peacock (15th February). Peacock is described as a legal manager, and secretary for mining companies; but he has also taken part in the flotation of many mines. They conversed with Strangward, Peacock's manager. Hamilton said that the defendant had come out "to float" the Wheal Ellen mine—that he wanted "to find a buyer"; the defendant showed Strangward specimens, reports, papers, &c.; told him what the "vendors" (Maynard's party) wanted, and what the defendant wanted (as already stated). Strangward admits that he knew what "advance in price" (as he terms it) the defendant wanted, (£1,000 cash and 1,000 shares); and the defendant left with him the agreement with the Maynard party. Hamilton said that he would be responsible for 4,000 shares; Strangward said his office would be responsible for 4,000 shares; it was agreed that the brokerage would be sixpence per share; and Strangward stipulated that the management was to be in Peacock's office. Peacock was to get 6d. per share for brokerage for the shares issued except those issued through brokers. Hamilton said, while Strangward made notes, "I'm afraid you'll have to give something more—it is sometimes necessary to give shares away"; and the defendant said that he would give 250 more shares. He denies that he knew who was to receive these shares at the time; but he thought that these shares were to be distributed by Peacock "for greasing palms"—for bribing the proposed board of directors. Strangward intended to consult a mine manager of Peacock's in Western Australia; but there was no need as the shares were "rushed" within an hour or two by Hamilton's acquaintances and other persons on the strength of the defendant's specimens. It turns out that Hamilton, whom the defendant was employing and paying to assist him in floating the company, issued a circular inviting subscription; and in this circular he clearly represented the Maynard party as the vendors, and as getting the whole of the purchase consideration to be given by the company. Hamilton placed 4,000 shares. The defendant at once telegraphed to Johnston as to his success, and

Johnston telegraphed his congratulations (15th February). The defendant left with Strangward his agreement with the Maynard party; and Peacock (*per* Strangward) enclosed it in a letter instructing Mr. Phillips, solicitor, of Melbourne, to prepare an "option," defendant to Peacock, on the defendant's terms. Phillips made out an agreement between the defendant as vendor, and Peacock as purchaser "for and on behalf of the company." The suggestion that there should be an agreement between the defendant and Peacock came first from Strangward. This agreement was signed on 18th February. It was in the form of a contract of sale of the mine by the defendant to Peacock, on the terms which the defendant had demanded. Under the agreement, Peacock was to promote and "form a company"—a curious provision in an agreement expressed to be made "on behalf of" the company which he was to form. The company was to pay all the costs of this agreement, of incorporation, of rules, &c. The agreement did not in any way disclose the previous agreement with the Maynard party, did not disclose that the defendant was not the owner of the mine, or that he held a mere option of purchase, or that the real owners were to receive a smaller consideration. Any director or shareholder of the company who might ask for leave to inspect the agreement would think that the defendant was the owner as well as the vendor—would not learn that the real owners were to receive only £6,000 out of the £8,000. There was no allusion in this agreement to the fact that under an agreement with the real owners the defendant was to form the company. On the same day, 18th February, the defendant wrote Peacock a letter requesting him out of the £2,000 cash consideration coming to him to pay £500 to Hamilton or order, and the balance, £1,500, to the defendant's order at the Western Australian Bank, Perth; to hand scrip for 500 shares to Hamilton or order, and to deliver scrip or letter of allotment for 3,250 shares to defendant's order at the same bank; and the letter said:—"The residue of shares 250 is my contribution towards the promotion consideration as arranged, which please retain for disposal as you may deem fit. Thanking you in anticipation, and also tendering my thanks for your good offices, Faithfully yours. J. S. Read." The misty generality

H. C. OF A. 1908.

WHEAL ELLEN GOLD MINING CO., NO LIABILITY v. READ.

of the last direction, as well as the gratitude of the apparent vendor to his apparent purchaser, should be noticed. The defendant says that these shares were to be paid for a service to be done to him, and that he expected Peacock to bribe the directors. By the "good offices" of Peacock, the defendant says that he meant the service of carrying the transaction through and so promptly. No evidence has been put before me to show what was done by Peacock with the 250 shares; but Strangward says that there is no certificate in Peacock's office for any but 12 of these shares—and these shares are in Peacock's name, and bear his personal signature as manager, and as transferror in blank. Endorsed on this letter is a receipt dated 19th March on the part of Hamilton for his £500 cash and 500 shares. (There is an undated signature of Peacock also endorsed, appended to certain words; but these words were not put in evidence; and the facts therein stated were not proved to me). Before he left Melbourne on 20th February the defendant says that he consented to act as agent or advising director for the company in Western Australia. The first meeting of the shareholders was held on 22nd February, Hamilton in the chair; and the first directors were appointed by the rules then adopted—Maurice Joseph, J. D. Oswald, Alexander Dick, the defendant, and Hamilton. One of the purposes of the company, as stated in the rules, was "to adopt and carry into effect with or without modification" the agreement of 18th February, Read to Peacock; but there has not been any resolution passed, either by the shareholders or by the directors, purporting to adopt the agreement; and there has been no written novation of the agreement. At the same meeting Peacock was appointed to be the first legal manager of the company. Each director was to hold 100 shares in his own name. Peacock and Strangward were both present at this meeting; but although they held the agreement made with the Maynard company, it was not then, or subsequently, disclosed to the shareholders, or to the directors; nor was the position of the defendant disclosed, or the profit which he was making by the sale. According to the minutes, Hamilton announced to the meeting that he was sharebroker as well as shareholder of the company, and that he could not accept office

as director if any one objected; but he failed to disclose the far more important fact that he was getting from Read £1,000 in cash and shares. The company was registered on 28th February 1907. In the meantime, according to the defendant's version, he told Johnston (of Maynard's party), after reaching Perth about 25th February, that the matter would be completed in due course. The defendant did not exercise his option of purchase in writing; but he says that he exercised his option by giving Maynard's party the cash consideration and shares on 16th March. "Before I closed with Maynard and others I had sold at a profit." On 1st March the first meeting of directors was held, Joseph, Oswald, Dick and Hamilton present; and at that meeting it was resolved, on Hamilton's motion, to request the defendant to appoint a temporary mine manager, and also to appoint the defendant attorney and representative of the company. On 5th March Peacock (*per* Strangward) sent to the Western Australian Bank at Perth a draft for the £1,500, and share certificates for the 3,250 shares, as directed; and by letter of 6th March requested the defendant to send a receipt for the £2,000 and the 4,000 fully paid shares. He also informed the defendant of his appointment as attorney for the company. By the same mail Phillips, the company's solicitor in Melbourne, forwarded to Martin and Phillips, solicitors of Perth (who had acted for the defendant already) certain documents, including the power of attorney enabling the defendant to act for the company in Western Australia, the agreement of 17th January by which the Maynard party gave to the defendant an option of purchase, and the agreement of J. S. Read with Sir A. J. Peacock dated 18th February 1907. On 14th March the completed transfer of the lease was handed out of the bank to Martin and Phillips for registration in the name of the company, and at the same time the draft for £1,500 and the 3,250 shares were handed to the defendant. It has to be observed that in the transfer of the lease no mention is made of the defendant as an intermediate purchaser; and the consideration expressed as moving to the Maynard party is £2,000 and 4,000 shares, and "the contingency to pay £2,000 out of the first gold won." To this transfer is annexed a statutory declaration made by the defendant, as the

H. C. OF A. 1908.

WHEAL ELLEN GOLD MINING CO., NO LIABILITY v. READ.

attorney of the company (for he executed the transfer as attorney for the company), to the effect that the consideration as expressed is "the true and only consideration paid by the transferee for the above mentioned interest either in cash or in shares." I have no explanation why this false consideration was filled in. The transfer, and the accompanying declaration, would certainly mislead persons who should wish to search into the transaction on behalf of the company. The defendant had got back from Melbourne his agreement with the Maynard party, and the transfer, if inspected at the office of titles, would show (falsely) that the Maynard party had received the full consideration given to the defendant. The defendant assures me that he left everything to the solicitors, Martin and Phillips; and that he signed the declaration merely for purposes of stamp duty. Messrs. Martin and Phillips have not been asked to explain their part in preparing or approving the untrue transfer; and, as the plaintiffs' counsel has expressly withdrawn all charges and all claims except for undisclosed profits as a promoter, I think it is better, for the purposes of my decision, to treat these facts as merely strengthening the view that there was no disclosure of any sort of the defendant's profit to the company. On the same date, 14th March, the defendant sends to Peacock his receipt for the £2,000 and the 4,000 shares; admits that he has received £1,500 and certificates for 3,250 shares; expresses his gratification at being appointed "local director and attorney to the company"; and states that his office is to be the registered office of the company in Western Australia. On 16th March the defendant, as he says, paid £1,000 cash, and gave certificates for 3,000 shares (in Peacock's name) to the Maynard party. The defendant has thus got as net profit £500 in cash, and 250 £1 shares in the company. The defendant has proved that out of his gross profit (as I may call it) £500 cash and 500 shares have gone to Hamilton, who "found the buyer"; and that 250 of his shares have gone to Peacock. No money was paid for any of these shares by the defendant, or by Hamilton, or by Peacock.

Under the circumstances I have no hesitation in holding that the defendant was a promoter of the company, from 17th January 1907 onwards. The word "promoter" has never been

judicially defined, I believe; but for practical purposes it may be taken to denote those persons who bring the company into existence, *i.e.*, by taking an active part in forming it, or in procuring persons to join it as soon as it is technically formed: *Lindley on Companies*, 6th ed., vol. I., pp. 481-2. In the case of the plaintiff company, the defendant gave the momentum, was the moving spirit from the first. He started, in the words of his agreement with the Maynard party, to "form the company" which was to give them the consideration in money and in shares which they demanded. He employed, as it were, sub-promoters in Hamilton and in Peacock; he dictated to them the capital, the terms of allotment, and the consideration which the company was to give, and how it was to be given; and he gave to Hamilton £1,000 of his own profit, and to Peacock 250 shares, and the legal management; and he committed the further details to the discretion of Peacock. I find also that the property was not acquired by the defendant before he formed the company. There never was any contract binding the defendant as purchaser. Even if his payment to the Maynard party on 16th March is to be taken as an exercise of his option, communicated to that party —which is very doubtful—the property was acquired by the defendant after he had taken up the fiduciary position of a promoter, and after the transfer to the company. I find also that the defendant did not disclose to the company, which he and his agents were promoting, or to its directors, the fact that he was promoting the company or the profit that he was making. Disclosure to Hamilton and Peacock (or Peacock's manager) was not, under the circumstances, disclosure to the company, or to independent persons acting solely in the interests of the company. The person to whom the defendant sold was Peacock "for and on behalf of the company" before it was formed. Peacock became personally liable as purchaser under this form of contract: *Kelner* v. *Baxter* (1); but under clause 10, upon the adoption of *the agreement* by the company in such manner as to render *the same* binding on the company, Peacock was to be discharged from all liability in respect thereof. It is to my mind very doubtful, notwithstanding Mr. *Starke's* admission, and the Victorian decision in *Glass* v.

(1) L.R. 2 C.P., 174.

H. C. OF A. 1908.

WHEAL ELLEN GOLD MINING CO., NO LIABILITY v. READ.

Pioneer Rubber Works of Australia Ltd. (1), whether the agreement has ever become binding on the company, whether Peacock has ever been discharged of his liability to the defendant, or whether the company ever made a contract with the defendant as vendor on the terms of the agreement of 18th February. The form of the transfer of the lease would rather favour the view that the contract to be implied, if any, is a contract between the company and the Maynard party. But these difficulties need not be solved for the purposes of my decision. It is sufficient to say that while he was a promoter, and while he was a director, of the company, the defendant received a profit at the expense of the company. He could have got the mine for the company for £6,000, but he made the company pay £8,000, and kept the difference for himself and his agents. If the company was, at the time of his taking the cash and shares, under no contract with him, he was not entitled to take the cash and shares from the company; if the company was under contract with him, he cannot retain any profit which he made without disclosing to the company fully his position as to the profit, and unless the company, having an independent board of directors, deliberately decided to allow him to have the profit: *In re Olympia Ltd.*; *Gluckstein* v. *Barnes* (2). Two of the five directors, at the least, were not independent—the defendant himself and Hamilton. The legal manager was not independent. Whether Peacock was to get the 250 fully paid shares for himself, or for the directors, is of small consequence. In either case, the agents of the company were being bribed by the defendant. To adopt the metaphor of *Bowen* L.J. in *In re North Australian Territory Co.*; *Archer's Case* (3), the watchdog, without the knowledge of his master, took a sop from the possible wolf. "No man can serve two masters" in one transaction; at all events, without the frankest disclosure. It was the duty of Peacock, and the duty of the directors, to watch the defendant in the interests of the company; but Peacock accepted from the defendant—either for himself or for the directors—an equivalent of £250, and (through Strangward) stipulated for the position of paid legal manager, and for

(1) (1906) V.L.R., 754; 28 A.L.T., 64.

(2) (1898) 2 Ch., 153, at pp. 165-6.

(3) (1892) 1 Ch. 322, at p. 341.

a brokerage commission on 4,000 shares. It must be said, in Peacock's favour, that, according to the evidence, he did not eventually retain this brokerage commission. But he did not disclose to the shareholders the agreement (which he held) of the defendant with the Maynard party, or the profit of £2,000 which he was aiding the defendant (and those acting under the defendant) to make, or what Hamilton and himself were receiving. I do not like to use language as strong as the facts might seem to warrant. The defendant admits that his attempt to bribe the directors through Peacock is not a moral transaction, and that a director bribed through Peacock would not have an unbiassed mind in relation to the defendant; but he says that such bribing is the "custom" in forming mining companies. This is a startling avowal with regard to a leading Australian industry, especially as coming from the president of one of the chief stock exchanges. But if the practice of bribery is so rife in the promotion of mining companies, it is well to have it made public; and it is my unpleasant duty to expose, so far as the evidence allows me, what has been done in this case, and to say that under no circumstances can such a "custom" be treated as legitimate. This is not a Court of morals; but it is a Court of justice according to law; and as such it condemns both the giver and taker of a bribe. The taking of secret profits by the promoters of companies is not, I regret to say, confined—if I may judge from my experience of the "boom" period—to mining companies. As soon as the intricacies of each such transaction are fully disclosed, everyone sees that the taking of the profit is a fraud; but I have known men, otherwise honourable, to treat it as justifiable "business." I sometimes think that the principles established in the Courts of Equity may be somewhat in advance of the ethics of the financial world. If so, those who engage, directly or as agents, in the promotion of companies will have to revise their ethical standards; for the principles adopted by the Courts in the United Kingdom and in the United States and elsewhere are not likely to be changed. Concealment of the true position of the person who appears to sell, or of the person who appears to buy, is the badge of all these cases; and the very fact that such concealment seems to be essential should make an

H. C. OF A. 1908.

WHEAL ELLEN GOLD MINING CO., NO LIABILITY v. READ.

honourable man look closely into the morality and into the honesty of the transaction in which he is engaging.

The plaintiffs' claim is for return of the £500 cash, and for payment of £320, the value of 320 shares when issued. The defendant got for himself, out of the transaction as a whole, only 250 shares; but it is urged for the plaintiffs that the defendant must make good to the company the difference between the 500 shares which Hamilton got, and the 430 shares which (as plaintiffs' counsel is instructed) Hamilton returned to the company. I cannot concur in this view. Having regard to the claim in this case, a claim for net profits, not for rescission, the plaintiffs are not entitled to receive more than the net gain of the defendant from the transaction as a whole—the amount by which he became richer than if he had not engaged in the transaction. Therefore, the defendant is entitled to be allowed for all sums *bonâ fide* expended (I do not mean *properly* expended, *morally* expended) in earning that net profit—that is to say, as he had to get the assistance of Hamilton the defendant ought to be allowed for Hamilton's remuneration: *Emma Silver Mining Co.* v. *Grant* (1). This is not a case of the nature referred to by Lord *Macnaghten* in *In re Olympia Ltd.*; *Gluckstein* v. *Barnes* (2)—not a case where two confederates, standing in the same relation to the company, jointly receive a profit and become jointly and severally liable for the whole. In this case Hamilton did not stand on the same level as Read; he was the agent of Read and was remunerated by Read out of his £2,000 profit. He was a servant, not a partner; but this fact would not prevent him from being also under the liabilities of a promoter as between himself and the company. The plaintiffs are entitled, however, to charge the defendant with the full amount expressed as paid up on the 250 shares. The shares could easily have been disposed of by the company for £250 (at the least) in February and March 1907; and, even if the shares have since declined in value, the company is entitled to receive the money which the defendant ought to have paid for his shares: *In re Caerphilly Colliery Co.*; *Pearson's Case* (3); *In re Diamond Fuel Co.*; *Mitcalfe's Case* (4).

(1) 11 Ch. D., 918, at p. 938.
(2) (1900) A.C., 240, at p. 255.
(3) 5 Ch. D., 336.
(4) 13 Ch. D., 169.

According to a dictum of Lord *Macnaghten*, in the passage cited from *In re Olympia Ltd.*; *Gluckstein* v. *Barnes* (1), the defendant ought to be charged with penal interest. His conduct was fraudulent, and enured to his own benefit.

Order the defendant to pay to the plaintiffs within two calendar months the sum of £750 *with interest thereon at the rate of* 5 *per cent. from* 14*th March* 1907. *Order the defendant to pay to the plaintiffs the costs of the action except the cost of the issues as to fraudulent representation and as to rescission, which latter costs, as up to* 12*th August* 1908, *let the plaintiffs pay to the defendant. Costs to be taxed and to be set off and the balance paid by the one party to the other. Liberty to apply.*

Solicitor, for the plaintiffs, *A Phillips.*

Solicitor, for the defendant, *J. Woolf*, for *Martin & Phillips*, Perth.

B. L.

(1) (1900) A.C., 240.