[HIGH COURT OF AUSTRALIA.]

POTTS . . . . . APPELLANT;
PLAINTIFF,

AND

MILLER . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 19-21; *Dec.* 12.

Starke, Dixon and Williams JJ.

*Fraud—Damages—Measure of damage—Inducement to take up shares in company—Real value—Ascertainment—Subsequent events—Evidence—Admissibility—Company's books and balance-sheet.*

The measure of damage in a case in which a person is induced by fraud to take up shares in a company is the difference between the amount he paid for the shares and the real value of the shares at the time of allotment, and not at any subsequent period, although subsequent events may throw light on the value at the time of allotment.

The admissibility, in an action for deceit, of a company's books and balance-sheet for the purpose of proving the result of its financial operations and, in particular, the value of shares in the capital of the company discussed.

Decision of the Supreme Court of New South Wales (Full Court): *Potts* v. *Miller*, (1940) 40 S.R. (N.S.W.) 351; 57 W.N. (N.S.W.) 135, affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales, Robert Gilroy Potts claimed from Hyman Miller on two counts the sum of five thousand pounds.

The first count alleged that the defendant by fraudulent representations induced the plaintiff to underwrite and subscribe for 4,000 shares of £1 each and 2,000 shares of 1s. each in the capital of the company then about to be incorporated and known as Australian and New Zealand Theatres Ltd., whereby the plaintiff lost what he paid for the shares, they being of no value. The second count

alleged an agreement by the defendant that in consideration of the plaintiff agreeing to underwrite and subscribe for the 4,000 shares the defendant would pay to him all calls made in respect of the shares in excess of the sum of 7s. 6d. per share, and breach of this agreement.

The fraudulent representations alleged to have been made by the defendant were (*a*) "that one Ray Vaughan and one Claude Carter, each of whom was well and favourably known to the plaintiff, had agreed to underwrite and subscribe for 4,000 shares of £1 each in the capital of the" company then about to be incorporated, and (*b*) "that the defendant and another person had themselves jointly underwritten and subscribed for 9,000 shares of £1 each in the capital of the said company."

A copy of a draft prospectus prepared in February 1938 by the promoters of Australian and New Zealand Theatres Ltd., a company registered on 1st June 1938, was put in evidence. The main objects of the company were declared to be to take over and operate as a going concern the theatrical and concert portion of the business carried on in Australia and New Zealand by J. C. Williamson Ltd. and to lease from that company certain theatres in Australia and New Zealand, its concert business, wardrobes, properties, scenery and effects, together with certain intangible rights. For all these things the new company was to pay by way of rent or hire the sum of £984 per week, that is, at the rate of £51,168 per annum. The estimated annual earnings of the new company were stated to be £101,500, and the estimated annual expenses to be £79,100, leaving an estimated annual surplus of £22,400. The nominal capital of the new company was fixed at £105,000, divided into 100,000 A shares of £1 each bearing a preference dividend of ten per cent, and 100,000 B shares of 1s. each which ranked for dividend after the A shares. It was stated in the prospectus that 50,000 of the B shares had already been subscribed for in cash and that the remainder of the capital would be issued, the subscribers of the A shares being entitled to take up one B share for every two A shares allotted.

On 25th or 26th March 1938 the defendant proposed that the plaintiff should underwrite 4,000 A shares, and on 26th March 1938 the plaintiff executed an underwriting agreement by which he underwrote 4,000 A shares on the basis of the draft prospectus dated 8th February 1938, subject to the condition that at least 75,000 A shares were underwritten before 30th April 1938 and that any allotment made to him was made before that date. On 28th April 1938 all the underwriters executed an agreement extending their respective

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underwriting agreements by substituting 30th May for 30th April.

The plaintiff paid 2s. 6d. per share on application, and on 6th June 1938 4,000 A shares were allotted to him. On 24th June 1938 he paid 2s. 6d. per share due upon allotment and a first call of 2s. 6d. per share.

By five further calls, the last on 28th February 1939, the remainder of the amount payable on the A shares was called up. On 20th February 1939 the company sued the plaintiff for calls unpaid. On 3rd March 1939 the plaintiff filed a statement of claim in the equitable jurisdiction of the Supreme Court seeking to be relieved of the shares on the ground of misrepresentation, and on 20th March 1939 he filed equitable pleas in the action at law. In his statement of claim and in his pleas he set up the second of the two representations in a somewhat different form. He alleged that it had been represented that the defendant, that is, Miller, had applied for the allotment to him of 4,500 shares.

The company appeared to have carried on operations until about 12th May 1939, when, having failed to pay rent or hire, it suffered J. C. Williamson Ltd. again to take over the theatrical and concert portion of its business. What happened thereafter did not appear.

The company did not pay any dividends.

The plaintiff stated in evidence that in March 1938, when, at the defendant's invitation, he was considering the question of underwriting some of the shares, one of the proposed directors told him in relation to the theatrical business that "anything is a gamble." The director said that he remarked to the plaintiff: "This is a theatrical venture, and they are all speculative and highly so. Money can be made very rapidly but it can be lost equally rapidly and more so. It is a good thing if the company makes money but there is every possibility of the company losing money."

Shortly after he obtained them the plaintiff sold 500 of his shares at £1 per share.

The defendant gave evidence that about November 1938 the plaintiff asked him to try and dispose of his shares and said that he would take 10s. per share. A few days afterwards he told the plaintiff that he had a buyer at 10s., but the plaintiff said that he had changed his mind and wanted 15s. per share. The plaintiff, however, denied in his evidence that the defendant told him that he could sell the shares at 10s. per share.

The trial judge rejected as inadmissible evidence by the chairman of directors and the auditor of the company, and also the company's books and balance-sheet, tendered by the plaintiff on the question

of the value of the shares and also as to the history and conduct of the company's business.

The jury returned a verdict for the plaintiff on the first count and awarded damages in the sum of £1,312 10s. A verdict was returned for the defendant on the second count.

On an appeal by the defendant the Full Court of the Supreme Court held that the plaintiff had failed to establish that he had suffered any damage directly resulting from the fraud alleged by him, and had failed, therefore, to prove the existence of one essential ingredient in the tort of deceit. The verdict and judgment for the plaintiff on the first count was set aside, and a verdict and judgment for the defendant was entered in the action. A cross-appeal by the plaintiff, on the ground that evidence was improperly rejected and therefore that a new trial restricted to damages should be granted, was dismissed: *Potts* v. *Miller* (1).

From that decision the plaintiff appealed to the High Court.

Further facts appear in the judgments hereunder.

*Windeyer* K.C. (with him *Myers*), for the appellant. The non-success of the company so soon after its formation is prima-facie evidence that the value of the shares was less than as represented, and, therefore, that the appellant suffered damage. The onus is upon the respondent to show that the non-success of the company was due to an intervening cause. That prima-facie evidence of damage is sufficient to support the verdict of the jury. The question whether there has been damage is an independent one; it is not complicated by the question whether the misrepresentation is or is not as to value. The value of shares as at the time they were subscribed may be proved by subsequent events (*Fawcett* v. *Johnson* (2)). The capital was insufficient to meet the commitments and obligations. The purchase price of the shares which, owing to the misrepresentation, the appellant agreed to and therefore was bound to pay, was more than the value he received (*Fawcett* v. *Johnson* (2); *Lamb* v. *Johnson* (3)). He is entitled to the difference as damages (*Twycross* v. *Grant* (4); *Peek* v. *Derry* (5); *Broome* v. *Speak* (6); *Shepheard* v. *Broome* (7); *Macleay* v. *Tait* (8); *McConnel* v. *Wright* (9)). The minutes of proceedings at meetings of the directors of the company, and also other records of the company,

(1) (1940) 40 S.R. (N.S.W.) 351; 57 W.N. (N.S.W.) 135.
(2) (1914) 15 S.R. (N.S.W.) 51.
(3) (1914) 15 S.R. (N.S.W.) 65.
(4) (1877) 2 C.P.D. 469, at pp. 483, 489, 503, 504.
(5) (1887) 37 Ch. D. 541, at pp. 577, 578, 591-593.
(6) (1903) 1 Ch. 586, at pp. 606, 622.
(7) (1904) A.C. 342, at p. 347.
(8) (1906) A.C. 24, at p. 31.
(9) (1903) 1 Ch. 546, at pp. 549, 551-553.

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should have been admitted in evidence (*Clarke* v. *Imperial Gas Light and Coke Co.* (1) )—See also sec. 100 of the *Companies Act* 1936 (N.S.W.). Although these records, *simpliciter*, would not have established the truth of the matters there recorded, an inference could have been drawn therefrom that month by month a loss was being incurred on each production. That inference would have a bearing on the value of the shares. The chairman of directors should have been permitted to give general evidence of the nature of the company's business.

*Smyth* (*Shand* with him), for the respondent. There is not any evidence which establishes, or from which inferences can be drawn, that damage was suffered by the appellant. There was not any basis on which the jury could assess the quantum of damage. Evidence of subsequent events is entirely irrelevant unless it is linked up with some inherent defect in the shares and the assets of the company at the time of the allotment (*Shepheard* v. *Broome* (2); *Lamb* v. *Johnson* (3) ). The measure of damage in an action of deceit was dealt with in *Holmes* v. *Jones* (4). In *Peek* v. *Derry* (5), *Twycross* v. *Grant* (6) and the other cases cited on behalf of the appellant there was some evidence of a loss to the particular plaintiff, or there was some evidence that there was an inherent defect, and, also, all the companies concerned had already gone into liquidation. That is not the position in this case. The minutes and other records of the company would not be of any assistance in the matter of determining the value of the shares at the date of allotment. Nominal damages cannot be awarded in proceedings where damage is the gist of the action, as in an action for deceit (*Salmond* on *Torts*, 9th ed. (1936), p. 124; *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 60; vol. 10, p. 90). A new trial should not be granted where, as here, the appellant has failed to prove his case by omitting to supply precise and definite evidence. The books of the company are, in respect of private matters, admissible only against and not in favour of the company. *A fortiori* the books are not admissible in an action between third parties (*Phipson* on *Evidence*, 7th ed. (1930), p. 362). The chairman of directors was rightly prevented from giving as evidence information obtained by him from the company's records. The allegation of fraud or misrepresentation was not proved.

(1) (1832) 4 B. & Ad. 315, at pp. 320, 321, 326 [110 E.R. 473, at pp. 475-478].
(2) (1904) A.C., at pp. 347, 348.
(3) (1914) 15 S.R. (N.S.W.), at pp. 76, 77.
(4) (1907) 4 C.L.R. 1692, particularly at p. 1717.
(5) (1887) 37 Ch. D. 541.
(6) (1877) 2 C.P.D. 469.

*Windeyer* K.C., in reply. The evidence established misrepresentation on the part of the respondent. A distinction is drawn between quantum and the necessary proof of damage (*Halsbury's Laws of England*, 2nd ed., vol. 5, p. 210, note *r*). Upon damage being proved the jury must do its best in assessing the quantum: See *Chaplin* v. *Hicks* (1); *Howe* v. *Teefy* (2); *Carr* v. *Baker* (3).

*Cur. adv. vult.*

Dec. 12.

The following written judgments were delivered:—

STARKE J. An action of deceit was brought in the Supreme Court of New South Wales by the appellant against the respondent. The appellant alleged that the respondent had made the following false and fraudulent representations:—That one Vaughan and one Carter, each of whom was well and favourably known to the appellant, had agreed to underwrite and subscribe for 4,000 shares of £1 each in the capital of a company then about to be incorporated and known as Australian and New Zealand Theatres Ltd., and that the respondent and another person had themselves jointly underwritten and subscribed for 9,000 shares of £1 each in the capital of the company with the view to inducing the appellant to take shares in the company, which, relying upon the representations, he had done to his loss. At the trial of the action, a verdict for £1,312 10s. was found for the appellant. Upon motion on the part of the respondent, and upon motion by way of cross-appeal on the part of the appellant, the Supreme Court set aside the verdict and directed that a verdict and judgment be entered for the respondent and from this decision an appeal is now brought by the appellant to this court.

In an action for deceit, proof of real damage is essential; it is not a question of nominal damages; the foundation or gist of the action is real damage, though it is quite true that if the real damage proved be small the verdict will also be small. In the case now before us, the Supreme Court held that no real damage had been proved. But the respondent, whilst relying upon the decision of the Supreme Court, also submitted that the representations relied upon by the appellant were not proved. This submission should be first considered.

In my judgment, the submission is well founded in respect of the representation that Vaughan and Carter had agreed to underwrite and subscribe for 4,000 shares of £1 each. The proof was that the

(1) (1911) 2 K.B. 786.
(2) (1927) 27 S.R. (N.S.W.) 301; 44 W.N. (N.S.W.) 102.
(3) (1936) 36 S.R. (N.S.W.) 301; 53 W.N. (N.S.W.) 110.

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appellant proposed to the respondent that he should take over 4,000 shares which Vaughan and Carter had arranged to take in the company and which had been reserved for them, but the matter was urgent and had to be completed on the following morning and Vaughan and Carter were out of town and could not complete in time. The representation alleged is that Vaughan and Carter had agreed to underwrite and subscribe for 4,000 shares, whereas the proof is that the respondent was to take up the shares reserved for them and that they were not to subscribe or underwrite those or any shares.

The other representation was that the respondent and another had jointly underwritten or subscribed for shares; that is, they had agreed that if shares about to be offered for subscription were not taken up by others or by the public the underwriters themselves would take them up. At all events, the appellant so understood the representation:—

"I" (the appellant) "asked him" (the respondent) "'What interest have you got in it?' and he said, 'My friend and myself are underwriting 9,000 shares.' . . . Q. And you say he said: 'A friend and myself are taking 9,000 shares between us.' That is what you understood to be the position? A. Quite right. Q. You understood, when he said 'underwriting,' what he was dealing with or telling you was in effect that he was under an obligation to underwrite certain shares where if he had not sold out he would have to take them? A. He also intimated to me he was taking the shares. Q. Did he? A. Yes, he told me he was going to sell and he wanted me to do the same, sell my A shares, which he told me he was going to do, and keep my B shares. Q. You knew that was under the underwriting agreement? A. I did. Q. You never thought he was taking 18,000 shares? A. No, I never. Q. The number of shares dealt with was 9,000? A. 4,500 each. Q. Did they say 9,000? A. Yes. Q. 'He told me that he and a friend were underwriting 9,000 shares'? A. That is correct. Q. You understood from that as far as your taking shares was concerned that he would be obliged to take them assuming he did not get rid of them, he and his friend? A. Yes. Q. In fact, the whole conversation, as you have said, dealt with the question of underwriting? A. And taking shares at the same time. Q. That would involve taking shares? A. Quite right. I said 'What are you going to do?' and he said, 'I will sell those within a fortnight, I will sell your A shares for you.' Q. I do not want you to tell me how, but when I say the whole conversation was about underwriting, it was in connection with an underwriting agreement under which Mr.

Miller" (the respondent) "was stating that he would underwrite shares and if they were not sold to the public he would have to take them? A. No, that is incorrect. Q. You understood then that he was taking certain shares and underwriting others? A. No, I did not understand that he was taking the shares, he was underwriting. Q. He was first of all going to underwrite? A. Yes. Q. And then take the same shares? A. Quite right, in the same position as I did, that was the procedure I had to go through. Q. He and his friend were underwriting 9,000 shares and Miller" (the respondent) "was to take, I suppose, half? A. That is right."

It appeared from the evidence that the respondent and six other persons had underwritten shares not subscribed for or underwritten by other persons, firms or companies, but not exceeding 9,000 shares. It was stipulated, however, that the liability of the respondent and the other persons to subscribe should be divided by the number of the underwriters (seven in fact) and that each subscription or underwriting from any other person, firm or company should be applied in pro-rata relief of all the seven underwriters.

The representation alleged, however, is that the respondent and another person had themselves jointly underwritten and subscribed for 9,000 shares of £1 each. But that statement, if made, which was of course for the jury, was not accurate, for the liability of the respondent and the other underwriter under the agreement, which they signed, did not exceed one-seventh of 9,000 shares. In my opinion, a question of fact thus arose for the determination of the jury whether the statement, if made, was or was not false and fraudulent and whether it did or did not materially influence the appellant to take shares in the company. The charge to the jury, as recorded in the transcript, did not bring home to the jury the critical facts for their consideration in connection with this representation and, taken in conjunction with the finding on the representation as to Vaughan and Carter and the verdict, vitiates that verdict.

But that would be immaterial if the Supreme Court be right in its view that the appellant had failed to establish an essential ingredient of the appellant's cause of action, namely, that he had suffered damage from the fraud alleged by him. The measure of damage in cases in which a person is induced by fraud to take up shares is the difference between the amount he subscribed or paid for the shares and the real value—not the market value—of the shares on allotment. "Although the value of the shares is not to be ascertained at the subsequent period so as to take into account for the benefit of the plaintiff events subsequent which depreciated

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their value, yet those events, if they show that the company was originally, with the capital which it had got, a company which was worthless, may . . . be taken into account as evidence of what was the value of the shares immediately after they were allotted to the plaintiff" : See *Peek* v. *Derry* (1).

Australian and New Zealand Theatres Ltd. was incorporated on 1st June 1938 under the *Companies Act* 1936 of New South Wales. Its main object was to take over and operate as a going concern the theatrical and concert portion of the business carried on in Australia and New Zealand by J. C. Williamson Ltd. An agreement had been made with J. C. Williamson Ltd. which was adopted, I gather, by the company, for the leases of certain theatres and for acquiring other assets, properties, and effects of J. C. Williamson Ltd. incidental to the business taken over by the company. The share capital of the company was £105,000 divided into 100,000 shares of £1 each and 100,000 shares of 1s. each. About 75,000 of the £1 shares were issued and about 69,500 of the 1s. shares. The capital in respect of the £1 shares was payable 2s. 6d. per share on application, 2s. 6d. per share on allotment, and the balance in calls as required not exceeding 2s. 6d. per share at intervals not less than one month. The capital in respect of the 1s. shares was payable 6d. per share on application and 6d. per share on allotment. All the capital subscribed was called up by 28th February 1939. It was not proved, I think, how much of the subscribed capital was paid up : the appellant paid 10s. per share in respect of the £1 shares and 6d. per share in respect of 2,000 1s. shares, and on 2nd June 1939 a judgment for the balance was obtained against him by the company. The subscribed capital of the company could not therefore have much exceeded £75,000. The appellant sold 500 of his £1 shares for 20s. each shortly after allotment and refused to sell the balance of those shares at 10s. per share. The company has never paid any dividends. It paid rent under the leases, which it had acquired, up to 29th May 1939, when it ceased to make the payments reserved under the leases and the lessors entered and took over the theatres and other properties incidental thereto. The company has not, I gather, been wound up, but it is uncertain on the evidence whether it still carries on business. But the sudden failure of the company is not, I think, hard to understand if the statements made in its prospectus and shown to the appellant were true. It was doomed, I should think, from its incorporation. Apart from its capital, the only assets belonging to it were the leases

(1) (1887) 37 Ch. D., at p. 592.

and properties acquired from J. C. Williamson Ltd. But these assets were acquired on onerous terms: namely, a rental of £984 per week or £51,000 per annum. And its administrative expenses in salaries and other expenditure were estimated at £19,500 per annum and contingencies and taxes at another £8,600 per annum, totalling £79,100 per annum. Against this, the only revenue that was not wholly speculative and uncertain was from sublettings of theatres, estimated at £40,000 per annum. The other estimated income depended upon successful theatrical and concert seasons and from "Rents shows," which were dependent upon successful seasons. The company's venture was, therefore, as a barrister-at-law, who became chairman of the directors of the company, warned the appellant, "speculative and highly so." "Money," he also told him, "can be made very rapidly, but it can be lost equally rapidly and more so . . . It is a good thing if the company makes money but, as I told you, there is every possibility of the company losing money." The barrister was a true prophet, and a wise one, if the appellant had deigned to consider his advice, instead of relying, as he said, upon the representations of the respondent.

The company was unsuccessful in its business operations, and its capital was not sufficient long to withstand the serious drain upon its resources. But what happened was what any reasonable man would contemplate and a jury was entitled, in my judgment, to take the facts related into its consideration as a matter of business, when considering the real value of the shares taken by the appellant on the day of the allotment. Would any reasonable person say that the real value of shares on the day of allotment of such a venture was twenty shillings in the pound or the sum the appellant agreed to pay for them? In my opinion, that value was a matter of sound business, judgment and experience and the jury was in as good a position to exercise that judgment as anyone else. It is difficult, I agree, to understand the basis upon which the jury awarded £1,312 10s. damages, which is equal to 7s. 6d. per share upon 3,500 £1 shares. It is possible that the figure was taken from the second count of the declaration, but that only makes the verdict more incomprehensible.

In my opinion, there was evidence of real damage in the present case for the consideration of the jury. Evidence upon the question of value of the shares was also rejected. The chairman of the directors of the company, a barrister-at-law with a certain amount of business experience, was called to prove the assets of the company, its profit and loss account, and the value of its shares on the date

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of the allotment of the appellant's shares. According to the transcript, the learned trial judge said that if it was based upon anything the witness knew he would reject it and if on opinion then on the ground of lack of qualification. But who was better qualified than the chairman of directors of the company, who knew its position and had been concerned in its operations from the commencement, to give evidence of the value of the company's shares on that day? In my opinion, that evidence should have been received. Documents purporting to be the minutes, the profit and loss account, and balance-sheet of the company were also tendered but rejected. Minutes are evidence of the acts of a company, but the fact that they were the minutes of Australian and New Zealand Theatres Ltd. does not seem to have been proved, and the profit and loss account and the balance-sheet also were not formally proved. The latter were rejected, it was said at the Bar, because the appellant was not in a position to produce and verify the original material upon which the books were founded. The books might have been proved, I should think, by the evidence of some officer whose duty it was to keep or supervise the keeping of the books, that they had been kept in the ordinary and regular course of business and that the transactions of the business were truly recorded therein. On the other hand, it was said that the books were rejected because the books did not prove themselves and the appellant tendered no evidence of their accuracy. If so, the books were rightly rejected. It is for a party tendering evidence to make clear to the trial judge the purpose for which the evidence is tendered and how it becomes relevant and admissible: See *National Mutual Life Association of Australasia Ltd.* v. *Godrich* (1). In the present case, the appellant failed in that duty and cannot now complain of the rejection of the minutes and books of account.

A verdict and judgment for the defendant should not be entered. But I agree that the verdict of the jury in favour of the plaintiff for £1,312 10s. should be set aside. It was based upon two representations, one of which was not proved and the direction to the jury upon the other was insufficient and did not bring home to the jury the critical facts for their consideration. Further, the charge upon damages was very general and did not bring before the jury the relevance of the estimates in the prospectus.

In my opinion the appellant should have a new trial, if he so desires, but perhaps it is not improper to add that he seems to have a rather shadowy case.

(1) (1910) 10 C.L.R. 1, at p. 39.

DIXON J. The promoters of Australian and New Zealand Theatres Ltd., a company registered on 1st June 1938, prepared a draft prospectus in the preceding February of that year. The main objects of the company were declared to be to take over and operate as a going concern the theatrical and concert portion of the business carried on in Australia and New Zealand by J. C. Williamson Ltd. and to lease, for varying terms, certain theatres of that company, its concert business, wardrobes, properties, scenery and effects, together with certain intangible rights. For all these things the new company was to pay a rent or hire of £984 a week, or £51,000 a year. The prospectus estimated that the new company's administrative expenses would amount to £19,500 a year, and allowed a sum of £3,000 for contingencies and £5,600 for income tax. Its total expenditure, according to this forecast, would amount to £79,100. Under five headings the prospectus estimated the annual revenue at £101,500. The nominal capital of the company was fixed at £105,000, divided into 100,000 A shares of £1 each bearing a preference dividend of 10 per cent, and 100,000 B shares of 1s. each, which ranked for dividend after the A shares. The draft prospectus stated that 50,000 of the B shares had already been subscribed for in cash, and that the remainder of the capital would be issued, the subscribers of the A shares being entitled to take up *one* B for every *two* A shares allotted. Underwriting agreements for various quantities of shares were entered into by different persons, and by 24th March 1938 66,000 A shares had been thus underwritten. Most of the agreements contained a condition that the underwriter was not bound to subscribe for his quota unless 75,000 A shares had been underwritten before 30th April 1938. On 24th March 1938, a further underwriting agreement was executed by which the signatories underwrote so many of the A shares to be offered as were not subscribed for or underwritten between that date and the date the company went to allotment, but not exceeding 9,000 of the A shares in all. It was provided that each subscription or underwriting received in the meantime should operate in relief of the obligation undertaken by the signatories and that the liability of each signatory should be limited to a proportion of the number for which all were liable obtained by dividing that number by the number of persons who should sign the agreement. In the event, seven persons signed the agreement. When they did so is not distinctly proved, but the evidence as it stands supports an inference that all had signed on 24th March. The defendant's signature appears on the document second in order. On 25th and 26th March 1938, the defendant proposed that the plaintiff should underwrite

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4,000 A shares, and on 26th March 1938 the plaintiff executed an underwriting agreement by which he underwrote 4,000 A shares on the basis of the draft prospectus dated 8th February 1938, subject to the condition that at least 75,000 A shares were underwritten before 30th April 1938 and that any allotment made to him was before that date.

In the present action the plaintiff complains that he was induced to underwrite and subscribe for 4,000 A shares by two fraudulent misrepresentations on the part of the defendant. It appears that among his acquaintances the plaintiff numbered two, by name Ray Vaughan and Claude Carter, whom he described as well and favourably known to him. The first misrepresentation alleged against the defendant is that he stated that these gentlemen had agreed to underwrite and subscribe for 4,000 shares in the capital of the company then about to be incorporated. The second misrepresentation alleged is that the defendant stated that he himself and another person unnamed had themselves jointly underwritten and subscribed for 9,000 A shares. The jury found that each of these representations was made and that each was false and fraudulent. The jury further found that the representations were made with intent to induce the plaintiff to act upon them and that he was in fact induced to act upon them and suffered damage amounting to £1,312 10s., a figure representing, as it would seem, 7s. 6d. a share on 3,500 shares. The plaintiff transferred 500 of his 4,000 shares at par and retained only 3,500.

The questions for consideration are whether these findings can be supported and, if not, whether there should be judgment for the defendant or a new trial. It is necessary, however, before dealing with these questions, to state briefly the course of events so far as they appear from the evidence. Before 30th April 1938 it was found necessary to extend the time for allotment. In the meantime, however, namely on 12th April, a further 5,000 shares were underwritten. With the plaintiff's 4,000 shares this brought the total underwritten to the required number of 75,000, thus entirely relieving the defendant and the six other signatories of the agreement of 24th March from the obligation they had undertaken. On 28th April 1938 all the underwriters, including the defendant and the plaintiff, executed an agreement extending their respective underwriting agreements by substituting 30th May for 30th April. The plaintiff says that he was deceived into executing this document by the defendant's representing that he also was interested in the company. The plaintiff paid 2s. 6d. a share on application and on 6th June 1938 4,000 A shares were allotted to him. A further 2s. 6d. became

due upon allotment, and a first call of 2s. 6d. was also made. He paid these sums on 24th June 1938. By five further calls, the last on 28th February 1939, the remainder of the amount payable on the A shares was called up. On 20th February 1939 the company sued the plaintiff for calls unpaid. On 3rd March 1939 the plaintiff filed a statement of claim in equity seeking to be relieved of the shares on the ground of misrepresentation and on 20th March 1939 he filed equitable pleas in the action at law. In his statement of claim and in his pleas, he set up the second of the two representations in a somewhat different form. He alleged that it had been represented that the now defendant had applied for the allotment to him of 4,500 shares. The company appears to have carried on operations until about 12th May 1939 when, having failed to pay the rent or hire, it suffered J. C. Williamson Ltd. again to take over the theatrical and concert portion of its business. What happened after that does not appear.

The first question arising is whether the evidence adduced by the plaintiff supports so much of the declaration as alleges a representation that Vaughan and Carter had agreed to underwrite and subscribe for 4,000 shares. What the evidence imputes to the defendant is a statement that 4,000 shares had been held in reserve for Vaughan and Carter, who had arranged to take them but who had gone out of town, and an invitation to the plaintiff to take them instead. In cross-examination the plaintiff gave the following answers:—"Q. He did not say they were going to underwrite any shares? A. No, he did not. Q. You never understood that they were going to underwrite any shares? A. No, I did not." Upon this evidence I do not think that it was open to the jury to find that the first alleged representation was proved. As declared upon, its essence is that Vaughan and Carter had bound themselves to take 4,000 shares. I would understand this to mean that the plaintiff had been induced to follow their example. But the proof is the contrary. It is that the defendant was to take the 4,000 shares because Vaughan and Carter had failed to underwrite them.

The second question arising relates to the allegation that the defendant was guilty of fraud in representing that he and another person had themselves jointly underwritten and subscribed for 9,000 shares. In his evidence in chief the plaintiff said no more on this subject than that on 25th March he asked the defendant what interest he had in the company. To which the defendant replied in these words: "My friend and myself are underwriting 9,000 shares." The plaintiff added, in cross-examination, that he did not ask who the friend was, but the defendant also intimated to him

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that he was taking the shares, and the plaintiff understood that the defendant and his friend were underwriting shares as he was doing and were each taking half of 9,000. In an action of deceit the intention of the defendant and not the understanding of the plaintiff is the important question. The existence of an underwriting agreement for 9,000 shares on the part of the defendant and others no doubt formed the foundation for whatever the plaintiff did say, but a question arose whether the defendant deliberately misstated the obligation he had undertaken in order to influence the plaintiff's judgment and, if so, whether so much of the defendant's statement as exceeded the truth formed an operative inducement to the plaintiff. It appears to me that the circumstances were such as to place a heavy burden on the plaintiff in satisfying the jury upon these questions. To begin with the plaintiff had in both earlier proceedings alleged a different form of representation. Then it was necessary to be sure that before 25th March more than one other signature besides the defendant's had been placed upon the document of 24th March; and next that the defendant understood and, as he spoke, had in mind the true effect of the proportionate limitation of the responsibility of the signatories. Further, as the statement was made in answer to a question, some doubt might well exist whether it was intended as an inducement. Last, the plaintiff's reliance on so much of the statement as conflicts with the facts is open to serious question. For, in the course of the case, strong evidence was given that the plaintiff was induced to subscribe for his shares by much more cogent considerations than a belief that the defendant had undertaken a responsibility for 4,500 as opposed to 1,285 shares in the company. It is true that, if the representation be treated as continuing or as repeated, it became untrue on 12th April when the remaining 5,000 shares were underwritten. But if the fraud were based upon this view, further findings of fact would have been necessary. Upon all the foregoing matters, the proofs offered lacked precision and no very exact investigation was made. The charge to the jury did not call their pointed attention to the difficulties in the way of a finding for the plaintiff. The actual finding of inducement combined both representations together as a basis for the plaintiff's action. In my opinion the verdict upon this alleged misrepresentation cannot be allowed to stand.

The third question arising in the appeal relates to the evidence of damage. According to the findings of the jury, the plaintiff acted upon the supposed representations. What he did was first to enter into an underwriting agreement, next to extend it, and thirdly to

accept an allotment of shares. In an action for fraudulent misrepresentation inducing the representee to purchase bank stock and pay calls thereon, Lord *Campbell* said that the proper mode of measuring the damages was to ascertain the difference between the purchase money and what would have been a fair price to have paid for the shares in the circumstances of the company at the time of the purchase (*Davidson* v. *Tulloch* (1) ). The measure of damages in an action of deceit consists in the loss or expenditure incurred by the plaintiff in consequence of the inducement upon which he relied, diminished by any corresponding advantage in money or money's worth obtained by him on the other side. Lord *Campbell's* statement means that where the corresponding advantage consists in shares their value should be ascertained as at the time of their acquisition. It might be thought that the application of this rule must depend upon the facts of the particular case ; that the plaintiff is entitled to the full loss caused by his reliance upon the misrepresentation, and that, if, for instance, his reliance continued and he retained the shares and paid calls under the influence of the inducement, the value of the shares at the time of their acquisition should be of little or no importance. But it appears to be treated as an inflexible rule that wherever the purchase or allotment of shares is the consequence of the deceit, the defendant shall receive credit for the fair or real value of the shares estimated as at the time of allotment or purchase : Cp. *Lamb* v. *Johnson* (2) ; *Fawcett* v. *Johnson* (3) ; *Waddell* v. *Blockey* (4) ; *Arkwright* v. *Newbold* (5) ; *Peek* v. *Derry* (6) ; *Cackett* v. *Keswick* (7) ; *McConnel* v. *Wright* (8), per *Romer* L.J. ; *Broome* v. *Speak* (9), per *Buckley* J. (10), and per *Collins* M.R. (11) ; *Stevens* v. *Hoare* (12), per *Joyce* J. In *Clarke* v. *Urquhart* ; *Stracey* v. *Urquhart* (13), however, Lord *Atkin* showed some dissatisfaction with the rigid application that the rule has received ; he said : " I desire for myself to disclaim any intention in this case to decide what is the true measure of damages in an action for deceit of this kind. Both parties have accepted the measure of damages laid down in *McConnel* v. *Wright* (14). I find it difficult to suppose that there is any difference in the measure of damages in an action of deceit depending upon the nature of the transaction into which the plaintiff is fraudulently induced to enter. Whether he buys shares or buys sugar,

(1) (1860) 3 Macq. 783, at p. 790.
(2) (1914) 15 S.R. (N.S.W.) 65.
(3) (1914) 15 S.R. (N.S.W.) 51.
(4) (1879) 4 Q.B.D. 678.
(5) (1881) 17 Ch. D. 301, at p. 312.
(6) (1887) 37 Ch. D. 541.
(7) (1902) 2 Ch. 456, at p. 468.
(8) (1903) 1 Ch., at p. 558, and at pp. 555, 559.
(9) (1903) 1 Ch. 586; (1904) A.C. 342.
(10) (1903) 1 Ch., at p. 605.
(11) (1903) 1 Ch., at p. 623.
(12) (1904) 20 T.L.R. 407, at p. 409.
(13) (1930) A.C. 28, at p. 67.
(14) (1903) 1 Ch. 546.

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whether he subscribes for shares, or agrees to enter into a partnership or in any other way alters his position to his detriment, in principle, the measure of damages should be the same, and whether estimated by a jury or a judge. I should have thought it would be based on the actual damage directly flowing from the fraudulent inducement. The formula in *McConnel* v. *Wright* (1) may be correct or it may be expressed in too rigid terms. I reserve the right to consider it if it should ever be in issue in this House." It should be noticed also that in *Twycross* v. *Grant* (2) *Kelly* C.B. said that he did not agree that the right of the plaintiff is limited to the difference between the price paid for the shares, and the value of the shares either at the time of the purchase or at any given time afterwards until he became acquainted with the suppression; that is, ceased to rely on the representation. Compare also the language of *Lopes* L.J. in *Peek* v. *Derry* (3).

The reason given for the rule is that, if, after the date of purchase, the thing which the plaintiff was induced to buy loses in value owing to accidental or extrinsic causes, that loss is not the reasonable consequence of the inducement. "It is not enough to say that but for the misrepresentation or fraud the purchaser would never have bought, and therefore would not have lost the thing bought. To recover back the whole price, if the thing had any value when bought, he must be in a condition to rescind the bargain and replace it, which here the plaintiff is not, as it is not in his power to make the company take back the shares, or in the power of the company to resume them.

If a man is induced by misrepresentation to buy an article, and while it is still in his possession it becomes destroyed or damaged, he can only recover the difference between the value as represented and the real value at the time he bought. He cannot add to it any further deterioration which has arisen from some other supervening cause" (per *Cockburn* C.J. in *Twycross* v. *Grant* (4)).

This reasoning makes it necessary to distinguish between the kinds of cause occasioning the deterioration or diminution in value. If the cause is inherent in the thing itself, then its existence should be taken into account in arriving at the real value of the shares or other things at the time of the purchase. If the cause be "independent," "extrinsic," "supervening" or "accidental," then the additional loss is not the consequence of the inducement. "If a man buys a horse, as a racehorse, on the false representation that it has won some great race, while in reality it is a horse of very inferior

(1) (1903) 1 Ch. 546.
(2) (1877) 2 C.P.D., at p. 514.
(3) (1887) 37 Ch. D., at p. 594.
(4) (1877) 2 C.P.D., at p. 544.

speed, and he pays ten or twenty times as much as the horse is worth, and after the buyer has got the animal home it dies of some latent disease inherent in its system at the time he bought it, he may claim the entire price he gave; the horse was by reason of the latent mischief worthless when he bought; but if it catches some disease and dies, the buyer cannot claim the entire value of the horse, which he is no longer in a condition to restore, but only the difference between the price he gave and the real value at the time he bought" (per *Cockburn* C.J. (1)).

It is almost unnecessary to say that great difficulty must be experienced in applying this distinction to shares subscribed for in a company promoted to carry on a new or speculative enterprise, when, after the lapse of some time, the shares fall in value or become valueless. Was it because the enterprise was misconceived or hopeless from the beginning or was it owing to misfortunes or difficulties not reasonably to be expected?

The rigidity of the rule is to some extent alleviated by two qualifications. For, in the first place, in finding the fair or real value of shares at the time of purchase or allotment, the fact that it is then possible to sell the shares at a price that will go far to cover the outlay may be disregarded, if that price is delusive or fictitious, is the result of a fraudulent prospectus, manipulation of the market or some other improper practice on the part of the defendant or those associated with him: See *Twycross* v. *Grant* (2); *Broome* v. *Speak* (3).

The second qualification is that the real value of what the plaintiff got must be ascertained in the light of the events which afterwards happened, because those events may show, for instance, that what the shares might have sold for was not their true value or that it was a worthless company (See per *Cotton* L.J. and *Hannen* P. in *Peek* v. *Derry* (4)); or looking back from subsequent events to the earlier state of the company it may appear that at the time the shares were taken the assets of the company did not correspond in value to the money paid: Cf. per *Collins* M.R. in *Broome* v. *Speak* (5).

The burden lies upon the plaintiff of proving that the shares acquired were, at the time when they were allotted or purchased, of less value than the amount paid or payable for them by the plaintiff. For the plaintiff must establish his damage and show that the shares for which he subscribed were not really worth what he paid for them (*Stevens* v. *Hoare* (6), per *Joyce* J.). You begin therefore with the

(1) (1877) 2 C.P.D., at pp. 544, 545.
(2) (1877) 2 C.P.D., at p. 489.
(3) (1903) 1 Ch., at p. 606.
(4) (1887) 37 Ch. D., at pp. 592, 594.
(5) (1903) 1 Ch., at p. 623.
(6) (1904) 20 T.L.R., at p. 409.

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assumption that shares subscribed for are worth their par value. But if that par value has been obtained or arrived at by reference to estimates of assets or other considerations falsely or erroneously stated in a prospectus, it is legitimate, as an argument upon facts, to treat the value placed upon the assets as founded upon the falsity or error and to proceed from that starting point in judging of the true value of the shares. "As a rule of convenience, and indeed almost of necessity, the property which would have been acquired by the company, if all the statements in the prospectus had been correct, must prima facie be taken to be worth the precise sum paid for the property, neither more nor less. This is the prima-facie presumption" (per *Cozens-Hardy* L.J. in *McConnel* v. *Wright* (1)). But this "rule of convenience or of necessity" can be of no assistance in such a case as the present where the representation has no relation to the value of the shares or the nature or quality of the assets or business of the company.

A special difficulty must often arise where there is a market value for contributing shares, which is real and not fictitious. In such a case, as capital is called up, the market price of the shares may consequentially increase but, at the same time, the disproportion of the market price and the paid-up value may grow even wider. How then is the damage to be estimated of an allottee who has retained his shares under the continuing influence of the original inducement and has paid calls? Indeed even in a case like the present, where the value of the shares at the time of allotment is to be sought, not in a market price, but in some estimate of their intrinsic worth, based upon the nature of the concern, it does not appear to be altogether easy to give effect to the conception of a value as at the date of allotment, when the greater part of the share capital was obtained by calls made at a later date and the plaintiff's actual loss results from the calling up of his liability on his shares.

But as the authorities stand, the plaintiff in a case of the present description must establish that the "fair," "real" or "intrinsic" "value" of the shares he subscribed for was at the date of allotment less than the face value for which he made himself responsible, and the amount recoverable is the excess. If the difficulties of doing so are insurmountable, then apparently his action must fail. For here too the burden of proof remains upon the plaintiff. It is for him to show how low is the real value of the shares and he cannot sustain an assessment of damage in his favour based upon a greater reduction of value than might positively be inferred by a reasonable man from all the circumstances appearing in the evidence.

(1) (1903) 1 Ch., at p. 559.

In the present case all that the plaintiff succeeded in proving was the contents of the draft prospectus from which the purpose and nature of the company's enterprise appeared and the fact that after eleven months it failed to pay the rent or hire and J. C. Williamson Ltd. resumed the portion of the business it had leased to the company. The present position of the company, the amount of its assets, the causes for its failure to keep up the payments of the rent, and the terms upon which the business was surrendered to J. C. Williamson Ltd. do not appear.

In my opinion the evidence as it stood was insufficient to show that on 1st or 6th June 1938 the fair value of the shares was less than their face value. We know nothing more about the affairs of the company than may be gathered from an examination of its memorandum and articles of association and an uncompleted and very crude draft prospectus and from its presumptive failure within a year. No investigation of the true nature and history of the company was made. So far as appears the venture was of a speculative character, involved the acquisition of no fixed or enduring assets and depended wholly upon the successful exercise of a right to operate a going concern so as to produce a margin over the amount payable to the proprietors. In these circumstances much more information was needed before any conclusion could be reached as to the original value of the shares. To my mind the whole question of damage was left to conjecture. This absence of proper evidence of actual loss is another reason why the jury's verdict could not be allowed to stand.

But, at the trial, an attempt was made on the part of the plaintiff to adduce other evidence upon the issue of damage. Evidence tendered upon the issue was rejected, wrongly as the plaintiff claims, and the question is whether on this ground judgment ought not to be entered for the defendant but the plaintiff should have a new trial.

The plaintiff tendered certain folios of the minute book recording the proceedings of the board of directors. It was evidence of what the directors did, and, if any part of their actions or decisions threw any light on the value properly attaching to the shares, minutes recording those proceedings ought to have been admitted. The transcript vaguely says that the tender was made to show "what has been the history of the company in relation to the question of the value of the shares." The evidence was rejected and we have no information as to its actual relevance. The balance-sheet of the company, apparently as at 30th June 1939, was tendered, the auditor deposing that it stated the position of the company as disclosed by

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its books. Then "the books" of the company were tendered, though they were not produced in court and no evidence was given as to the course of business or of bookkeeping. The judge at the trial rejected both balance-sheet and books, on the ground that the balance-sheet depended on the books and there was no proof that the books were correct. Then some questions were asked of the former chairman of the company. His opinion of the value of the shares was rejected and, so far as appears, he was not qualified to give such an opinion. He was allowed to state that the company had declared no dividends but not what was his knowledge as to the profits or losses that had been made by the company. The questions were not properly framed and no considered method of proving damage seems to have been pursued or presented in argument to the court. The general course of the company's transactions might, in my opinion, have been stated by an officer of the company who knew the facts and perhaps the former chairman was such a person, but that does not distinctly appear. Upon proof of a proper course of bookkeeping, an accountant might have proved from his examination of the books what was the financial result of the year's operation and further might conceivably have shown the sources of loss. In *Roberts* v. *Doxon* (1), in order to prove that, at the time when a commission of bankruptcy issued, the liabilities of the debtors largely exceeded their credits, the assignee was called. "He produced no papers, but said he collected his information from having inspected their accounts. Lord *Kenyon* thought that though he could not state the particulars of the books without producing them, yet he might speak to the general amount, not by saying that one page was so much and another so much, but what from his general observation he perceived to be the general state of their accounts" (1). In *Meyer* v. *Sefton* (2) the issue was whether a bankrupt had duly executed a settlement of certain property and whether the property had afterwards remained within his disposition. "Evidence was . . . adduced, to show the value of the property; and a witness was produced on the part of the plaintiffs, who had examined the accounts and books of the bankrupt, and it was proposed to examine him as to the result, as a means of ascertaining what the value of the property in question was. This was objected to on the part of the defendants.

*Holroyd* J. was of the opinion that the evidence was admissible; such evidence had been admitted in a case before Lord *Kenyon*, after it had been objected to, where the question was as to the solvency of a party at a particular time. From the very nature of

(1) (1791) Pea. 116 [170 E.R. 99]. (2) (1817) 2 Stark. 274 [171 E.R. 644.]

the case, such an inquiry could not be made in court, and therefore evidence on such a point must be given by someone who had had the means of inquiry, and who could state the result. With respect to the source from which the knowledge of the witness was drawn, in the present instance, a commission of bankrupt had issued, and the documents from which the result was obtained, had been rendered by the bankrupt" (1). In *Symonds* v. *Gas Light and Coke Co.* (2) Lord *Langdale*, in referring to accounts of transactions extending over some years, made observations of a general character on the practice of admitting them as evidence. He said:—"Now with regard to books and documents of the like character, the law has perhaps been rather more cautious in admitting evidence of that sort than is quite suitable to the ordinary transactions of mankind. It is found very often (and there are many cases in the books to that effect), that entries constituting mere hearsay evidence, are the only evidence that can be had on the subject; and that their exclusion would either lead to injustice or to the adoption of another mode of transacting business, calculated to cause a most serious interruption in the transaction of all ordinary affairs. Cases have, from time to time, occurred, where, under special circumstances, accounts of this sort between master and servant, between tradesmen and shopmen, and between banker and customer have, from the necessity of the case and for the convenience of mankind, been admitted as evidence in the cause." When such an occasion arises and the books are allowed in evidence or their production is not insisted upon, an accountant's statement of the result of his examination is receivable as the evidence of a person of skill (*Johnson* v. *Kershaw* (3)). Little English authority will be found explaining the grounds upon which the books of account kept according to an established system in organized business are receivable in evidence as proof, not of the occurrence of some particular fact recorded or indicated by a specific entry or narration, but of the financial progress or result of business operations conducted on a large scale. Common sense has prevailed and such materials are used in practice without objection. But in the United States the theory of the admissibility of the results of a system of accounting has been discussed. In *E. I. Du Pont de Nemours & Co.* v. *Tomlinson* (4) the court treats the practice as an extension of the rule by which declarations in the course of business are admitted where the declarant is no longer available as a witness.

(1) (1817) 2 Stark., at p. 276 [171 E.R., at p. 645].
(2) (1848) 11 Beav. 283, at pp. 286, 287 [50 E.R. 825, at p. 827].
(3) (1847) 1 DeG. & Sm. 260, at p. 264 [63 E.R. 1059, at p. 1061].
(4) (1924) 296 Federal Reporter 634, at p. 640; *Thayer's Cases on Evidence* (Maguire), p. 546.

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"The courts have recognized other cases of unavailability as sufficient. This is particularly true of records of modern industrial activities in which the facts are complex and the persons concerned so numerous that no one of them has an accurate recollection of the whole chain of events, or, indeed, ever had a complete knowledge of it. The record itself in these cases is in effect the best and only evidence of the transaction. If it is identified, and its correctness and regularity are established, there is no sound reason why it should not be accepted as proof of great value. In the case at bar the regularity is fully proved. The records were made contemporaneously with the facts, by persons employed for the purpose by the railroad company in the regular course of business, as part of a system habitually employed, in order that the railroad might have an accurate account to which reference might thereafter be made in the conduct of its affairs. The identity and correctness of the record is proved by the supervising agent and clerk who was charged with the duty to cause the record to be made, and to preserve it for future reference and use. It would not be practical or of value to produce the other participants in the transaction. Indeed, the defendants do not contend that the men who moved the material should be produced. The admissibility of the record is attacked on the ground that the subordinate clerks, who made the final entries in the railroad office, were not called as witnesses or proved to be unavailable. But the clerks themselves could give no testimony based upon personal recollection. They could not testify that they had knowledge of the facts when they made the entries, but could merely say that they correctly transcribed the memoranda reported to them." This passage appears to me to disclose sounder grounds than that directly assigned, viz., the unavailability of the witnesses. It means in effect that where a routine system is established for the very purpose of ascertaining the financial result of business operations consisting in multitudinous individual transactions, then, in spite of the use of living persons as part of the machinery for producing the result, the record is to be treated as the consequence of a system, and where, according to the common understanding and practice of business, the financial consequences would be ascertained from those records, then, when the issue submitted to a court of law is of that character, the court must receive that record as the appropriate evidence. Often when the profit or loss of a business must be determined by a court, it will happen that one or other of the parties has himself caused the accounts to be kept by his servants or agents and, therefore, what they say is receivable against him as an admission. But even in taxation appeals, cases are not infrequent where the party against

whom the accounts are to be used is not the person who caused them to be kept and does not claim under him. The law is not so futile as to reject the only practicable source of information when an issue so arises. In short, the question what is the profit or loss of a business, or what is the financial progress or result of commercial operations, is meaningless unless some system of accounting is recognized and used. But reliance upon American doctrine is unsafe. For it goes much further than English practice. It has been influenced in a great degree by a special development from an English practice of the 16th and 17th centuries, now obsolete, of admitting tradesmen's shop books in evidence, and goes far beyond the computation of profit or loss and financial results of organized business, as far, indeed, as allowing the use of specific entries as narrative statements of particular facts: See 7 Jac. I. cap. 12; 3 *Blackstone* 369; *Phipson* on *Evidence*, ch. 18, 6th ed. (1921), p. 229; *Radthe* v. *Taylor* (1); *Best* on *Evidence*, 12th ed. (1922), 425, par. 503; *Wigmore* on *Evidence* (1904), vol. II., secs. 1537 et seq.

From the foregoing statement it will appear that, subject to the laying of a proper foundation by proof, the plaintiff might have given in evidence whatever part of the results of the company's operations, as ascertained from the books, might have turned out to be relevant to the value of the shares. Before the Full Court the plaintiff relied upon the rejection of the balance-sheet and folios of the minute book; but the learned Chief Justice did not understand the argument on his behalf to go beyond these documents. We have no information which would enable us to judge whether any of the rejected evidence would have advanced the plaintiff's case. We are not in a position to say whether it was even relevant, though it is true that irrelevance was not the ground of its rejection.

The question whether a new trial should be granted is in no inconsiderable degree a matter of discretion. In the present case I think the discretion should be exercised by considering the whole case, including the following matters:—(*a*) the absence of evidence in support of the first misrepresentation alleged; (*b*) the weakness of the evidence in support of the second; (*c*) the inherent difficulty in showing that, in a speculative enterprise of such a very special nature, the true value of the shares as at the time of allotment was below that fixed by the promoters, whose estimates of revenue and expenses have not been attacked; (*d*) the proofs offered and rejected and the conduct of the trial, and (*e*) the grounds relied upon in the Supreme Court. Taking all these matters into account I think that a new trial should be refused.

In my opinion the appeal should be dismissed.

(1) *Thayer's Cases on Evidence*, pp 550-561.

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WILLIAMS J. The appellant sued the respondent in an action at common law in the Supreme Court of New South Wales. The declaration contained two counts. The jury returned a verdict for the plaintiff on the first count for £1,312 10s. and for the defendant on the second count. The defendant appealed to the Full Court of the Supreme Court of New South Wales, which set aside the verdict on the first count and ordered that a verdict and judgment for the defendant should be entered in the action. The plaintiff has appealed against the rule of the Supreme Court and claims that the verdict for the plaintiff on the first count should be restored. By the first count the plaintiff alleged that he had been induced to underwrite and subscribe for four thousand shares of one pound each in a company then about to be incorporated and known as Australian and New Zealand Theatres Ltd. by two fraudulent representations made to him by the defendant, viz. :—(*a*) that Ray Vaughan and Claude Carter, two persons well and favourably known to the plaintiff, had agreed to underwrite and subscribe for 4,000 shares of £1 each in its capital, and (*b*) that the defendant and another person had themselves jointly underwritten and subscribed for 9,000 shares of £1 each therein.

The Supreme Court based its decision on the ground that the plaintiff had failed to give any evidence of damage which could be said to have resulted directly from the false representations complained of.

On this appeal senior counsel for the appellant has submitted that there was evidence of damage and that further evidence of damage which he had tendered had been wrongly rejected, while counsel for the respondent has contended that the rule of the Full Court was correct not only on the ground already mentioned but also because the evidence did not establish the first representation was made while it did establish that the second representation was substantially true.

On 26th March 1938 the appellant signed a contract to underwrite 4,000 shares in the above company which was then about to be registered. Attached to the contract was a draft prospectus. The 4,000 shares were allotted to the appellant on 10th June 1938. The company was formed to carry on the theatrical and concert business then being carried on by J. C. Williamson & Co. Ltd., and for that purpose to lease certain theatres and the necessary equipment from the latter company for terms varying up to twenty-one years. The rent payable to J. C. Williamson & Co. Ltd. amounted to £51,000, but the estimated receipts and expenditure showed a revenue of £101,500 and an expenditure, including the rents, of £79,100, leaving a surplus of £22,400. In addition to tendering the prospectus, the

appellant proved that the company, which commenced business in June 1938, failed to pay the rent after 12th May 1939, and that the landlord thereupon re-entered into possession of the leased premises. There is no evidence of the subsequent history of the company, but it is not in liquidation. The appellant attempted to give further evidence to show that the company's business had been carried on at an uniformly heavy loss from its commencement. He sought to tender the minute books of the company, to give general evidence to this effect by Mr. Asprey, chairman of directors of the company, and to prove the state of the company's affairs by tendering its books and calling the company's auditor to prove the balance-sheet which had been compiled therefrom. This evidence was rejected by the learned trial judge. It is unnecessary to discuss the extent to which this evidence was admissible, because its effect, if admitted, would only have been to prove in considerable detail what the appellant did prove generally, viz., that the company's business referred to in the prospectus had ended in disaster in the short period of eleven months. If the general evidence of failure that was admitted is not evidence of damage, then the details thereof would be irrelevant.

The appellant's case was that he was induced to become the holder of 4,000 shares in the company by the false representations complained of. The authorities, which are collected in the judgments of my brother *Dixon* and of the learned Chief Justice of the Supreme Court, show that the measure of damages in an action of deceit is the difference between the amount which the plaintiff paid or became liable to pay for his shares and their real value on the date of allotment. The appellant had disposed of 500 of the shares for one pound each shortly after allotment so that at the date of the trial he only held 3,500 shares. The amount of the jury's verdict shows that it must have calculated the real value of the shares on the date of allotment to be 12s. 6d. each. This calculation would have to stand if there was any evidence to support it. But I agree with the learned Chief Justice of the Supreme Court that there was no such evidence.

The authorities show that if the assets are correctly stated in the prospectus of a company about to be incorporated, their value, in the absence of any evidence to the contrary, must be deemed to be equivalent to the nominal value of the capital about to be issued.

Mr. *Windeyer* contended the fact that the company failed so rapidly was itself prima-facie evidence of damage. He relied particularly on the following statements in the House of Lords made by *Lindley* L.J. in *Shepheard* v. *Broome* (1) :—" It was then contended that there was no evidence that the plaintiff who took shares

(1) (1904) A.C., at pp. 347, 348.

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on the faith of the prospectus had sustained any damage by reason of the untrue statement contained in it. The company failed about a year after it was formed, and the plaintiff has lost the money he paid for his shares. This appears to me to be sufficient prima facie evidence of some damage sustained by the plaintiff by reason of the untrue statements in question. All that has been done by the court as yet has been to decide that the plaintiff has proved enough to entitle him to an inquiry as to the amount of damages which he has sustained by reason of such statements. This is quite in accordance with the usual practice in actions of this kind when brought in the Chancery Division, and it is extremely convenient. It saves the trouble and expense of going into evidence which will be useless if the plaintiff fails to establish any liability of the defendant to him"; and in *Macleay* v. *Tait* (1) :—" Proof that he applied for shares on the faith of a prospectus which is to be treated as fraudulent by sec. 38, and that he obtained them and paid for them and lost his money, is prima-facie evidence, but only prima-facie evidence, of damage by fraud on himself. *McConnel* v. *Wright* (2) goes no further than this." These two statements must be read in the light of two considerations : the first that the Court of Chancery does not itself determine the issue of damages but refers it to one of its officers; and the second that the misstatements or omissions in the cases under review all related to and were capable of affecting the value of the assets as represented in the prospectus. For instance, a statement that a company had acquired a valuable right or property when in fact it had not done so, or an omission to state that a company had agreed to make some payment for which it was not to receive an adequate consideration. This would in itself provide prima-facie evidence that the value of the shares was less than twenty shillings on the date of allotment. Some intrinsic defect having been proved, the subsequent liquidation would be prima-facie evidence that this defect had materially contributed to the failure of the company and in some cases that the company was worthless from the beginning. It would also establish the amount, if any, the shareholder would receive by way of dividend in respect of the shares he had retained. The position is summed up with precision by *James* L.J. in *Shepheard* v. *Broome* (3), where he says :—" I think also that, a prima facie cause of action being established, the plaintiff must be afforded an opportunity by an inquiry of showing whether he has sustained any damage. I express no opinion whether the facts established at the hearing do or do not sustain a claim for damages " (4). It

(1) (1906) A.C., at p. 31.
(2) (1903) 1 Ch. 546.
(3) (1904) A.C. 342.
(4) (1904) A.C., at p. 346.

is clearly stated in the judgments in *McConnel* v. *Wright* (1). For instance, *Collins* M.R. says :—" He had paid his money, and he had got in return for it a property which did not contain the 200,000 Globe shares, in respect of which a profit of so large an amount is said to have been obtained. Therefore the position is this, and anybody assessing the damages will have to consider it : What is the difference between the value of the property as it was represented and the property without this large asset in it, having regard to the possibility, certainty, or uncertainty of that asset ever being in fact acquired ? We now know, no doubt, that it was acquired afterwards ; but that is not the material point. The damages have to be ascertained in view of the facts as they were at the time—in view of the central fact that this asset had not been acquired " (2).

In the present case there is no evidence of any such defect. The correctness of the statements in the prospectus was not attacked. The appellant alleged that the respondent had represented that Vaughan and Carter had agreed to subscribe for 4,000 shares and that he and a friend had agreed to subscribe for 9,000 shares. The evidence established that the shares that the appellant applied for were to his knowledge the 4,000 shares held in reserve for Vaughan and Carter, that these shares were part of the 9,000 shares and the balance of 5,000 shares were allotted to one Chambers. The company therefore received the total amount of capital, namely £75,000, which the appellant had been told was the amount upon which the company would proceed to allotment. If the respondent had led the appellant to believe the company was to receive £13,000 additional capital which it lost because Vaughan and Carter and the respondent and his friend had not agreed to subscribe at all, this would have been some evidence affecting the value of the shares at the date of allotment, because a lack of sufficient capital is often an important and even a decisive element in the failure of a company to establish itself in business. The case was therefore one in which the appellant was bound to adduce some expert evidence to show that the value of the shares in the company, taking into account its assets and the business in which it was about to engage, was less than twenty shillings. Such evidence as exists points in the opposite direction. Several persons, admittedly very experienced in the theatrical business, had subscribed for substantial numbers of shares ; the amount of capital sought was rapidly obtained ; and the appellant was able to dispose of 500 of his shares soon after allotment for one

(1) (1903) 1 Ch. 546.

(2) (1903) 1 Ch., at pp. 553, 554.

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pound each. The appellant failed to adduce any evidence of damage, and, since damages were the gist of the action, he should have been nonsuited on this ground.

In my opinion there was no evidence to establish the first representation. It was proved that on Friday, 25th March, the respondent told the appellant he had reserved 4,000 shares for Vaughan and Carter but they were out of town and would not return until the following Monday, and the shares had to be taken up on the Saturday. The appellant saw Mr. Asprey, as well as the respondent, with respect to underwriting these 4,000 shares, and Asprey advised him to consider it until the Monday as the matter could be left open until then, but the appellant insisted upon executing the agreement on the Saturday. At the time of doing so, therefore, he was well aware that Vaughan and Carter had not agreed to underwrite or subscribe for the 4,000 shares ; if they had done so the shares would not have been available for the appellant.

The evidence as to the second representation is in an unsatisfactory state. The appellant only proved it was untrue to the extent that the respondent represented that he and one other person had agreed to underwrite and subscribe for 9,000 shares, whereas the respondent was in fact only one of seven underwriters and his liability was confined by the agreement to an obligation to subscribe for one-seventh of the shares which the underwriters had eventually to take up. The way the case was put by the appellant's counsel and the learned trial judge to the jury was, however, that the respondent represented to the appellant that he had agreed to become a shareholder in the company, not that he had represented himself to be liable as one of two underwriters whereas he was in fact only one of seven. The substance of the misrepresentation, therefore, was that the respondent had induced the appellant to believe he had agreed to subscribe for shares in the company, and in this respect the representation was true. The appellant on taking up his 4,000 shares reduced the total liability of the appellant and the other six underwriters to subscribe for 5,000 shares but they were still liable for these shares on 26th March. It appears that what has been described as a firm offer to take the 5,000 shares had been received from Chambers and that they were subsequently underwritten by him on 12th April, but on 25th and 26th March the second representation was substantially true in its only material sense, namely, that the respondent was then liable to underwrite and subscribe for shares in the company.

In my opinion the plaintiff ought to have been nonsuited not only on the ground that there was no evidence of damage, but also on

the ground that the evidence did not establish the first representation was made and did show that the second representation was substantially true.

The appeal fails and should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant, *Francis & Francis.*

Solicitors for the respondent, *C. Don Service & Co.*

J. B.