CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

THE COURTS OF THE PROVINCES

AND FROM

THE EXCHEQUER COURT OF CANADA.

1886
*March 27.
*Nov. 8.

JAMES H. BEATTY, HENRY BEATTY AND JOHN D. BEATTY (Plaintiffs) .... APPELLANTS.

AND

SYLVESTER NEELON, JOHN C. GRAHAM AND GEORGE CAMPBELL (Defendants) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Joint Stock Company—Misrepresentation by promoters of—Action by individual shareholders—Delay in bringing action—Parties.

Individual shareholders in a joint stock company cannot bring an action against the promoters for damages caused by alleged misrepresentations by the latter as to the prospects of the company when formed, the injury, if any, being an injury to the company, not to the respective shareholders. (Strong J. dissenting).

If the shareholders could bring such action a delay of four years, during which they suffered the business of the company to go on with full knowledge of the alleged misrepresentations, would disentitle them to relief. (Strong J. dissenting.)

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*PRESENT.—Sir W. J. Ritchie C. J. and Strong, Fournier, Henry and Gwynne JJ.

1886

BEATTY
v.
NEELON.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of Wilson J. in the Chancery Division (2).

This was a suit brought by certain shareholders in the North-West Transportation Company against other shareholders who had been the promoters of the company. The bill was filed after the company had been in operation for some four years, and alleged that the plaintiffs and defendants had been owners of rival lines of steamers and the defendants proposed to the plaintiffs that the two lines be amalgamated and a joint stock company formed to run them; that the proposition was carried out and the company formed, the stock being divided between the two lines, plaintiffs receiving the larger share; that the defendants had represented that their line had a four years' contract with the Government to carry the mails from Windsor to Duluth, for which the subsidy was $2,500 a year, and that they also received a bonus from the town of Windsor of $2,000 a year; that the representation as to the mail contract was false, the defendants only having a contract from year to year, which was discontinued after the company was formed; that the plaintiffs would not have agreed to the distribution of shares that was made if they had known the true state of affairs as to this contract; that the defendants had received the Windsor bonus for one year and the plaintiffs were entitled to this amount and the amount of the mail contract for three years as damages. The defendants denied the alleged misrepresentations, and claimed that the plaintiffs, by their delay and conduct in permitting the business to proceed for so long a time without making any claim for relief, they having, the defendants alleged, full knowledge of the true state of affairs from the time the company was formed, were not enti-

(1) 12 Ont. App. R. 50. (2) 9 O. R. 385.

1886

BEATTY
v.
NEELON.

tled to claim relief now.

The cause was heard before Wilson J. in the Chancery Division and resulted in the plaintiffs obtaining judgment for $9,500, being the amount of the postal subsidy for three years and the Windsor bonus for one year. The Court of Appeal reversed this judgment, holding that the plaintiffs, by their delay and conduct, were disentitled to relief. The plaintiffs then appealed to the Supreme Court of Canada.

McCarthy Q.C., and *McDonald* Q.C. for the appellants.

Previous to the formation of the company the plaintiffs were in partnership under the agreement. They had at that time a right to sue or they could not sue now. The company had no rights by contract but only by assignment. *Kelner* v. *Baxter* (1); *Scott* v. *Lord Ebury* (2); *Willmott* v. *Barber* (3). If the company should sue the action would be because they had not received property worth $9,500, and the shareholders guilty of the deceit would participate in the benefits of the action.

We say that we have a right to maintain a common law action for deceit; if not, we have a right to relief in equity. In the first we have to establish moral fraud; in the other misrepresentation is sufficient, though not made intentionally. *Arkwright* v. *Newbold* (4); *Rawlins* v. *Wickham* (5); *Urquhart* v. *MacPherson* (6).

As to what will amount to misrepresentation see *Smith* v. *Kay* (7); *Cater* v. *Wood* (8); *Boswell* v. *Coaks* (9); *Redgrave* v. *Hurd* (10).

This court should consider the evidence in this case and are not bound by the decision of the court below

(1) L. R. 2 C. P. 174.
(2) L. R. 2 C. P. 235.
(3) 16 Ch. D. 105.
(4) 17 Ch. D. 301.
(5) 3 DeG. & J. 304.
(6) 3 App. Cas. 831.
(7) 7 H. L. Cas. 750.
(8) 19 C. B. N. S. 286.
(9) 27 Ch. D. 424.
(10) 20 Ch. D. 1.

1886

BEATTY v. NEELON.

Ritchie C.J.

where it is contradictory. *Grasett* v. *Carter* (1).

We submit that there has not been such delay as to disentitle the plaintiffs to recover.

Robinson Q. C. and *W. Cassels* Q C. for the respondents.

This court should not reverse the decision of the Court of Appeal on matters of evidence. *Hale* v. *Kennedy* (2); *Smith* v. *Chadwick* (3); *Sanderson* v. *Burdett* (4).

The plaintiffs cannot maintain this action as the money, if recovered, would belong to the company. I do not admit that the company could not sue on the contract with the promoters. See Brice on *ultra vires* (5).

In order to succeed plaintiffs must prove fraud. *Kennedy* v. *The Panama Mail Co.* (6).

McCarthy Q.C. in reply cited Holdsworth's case (7); Brice on *ultra vires* (8); Pell's case (9).

SIR W. J. RITCHIE C.J.—I do not feel called upon to express any opinion as to the objection (assuming the case was sustained by evidence) that the proceedings should have been by and in the name of the North West Transportation Company, because I think the evidence did not warrant the conclusion at which the learned Chief Justice in the court of first instance arrived.

As to the question of the contract for carrying mails from Windsor to Duluth once a week at the rate of $100 a trip, the learned Chief Justice says: —

> The parties are as much opposed to each other upon that part of the case as it is possible for them to be.

Again he says:—

> I am, upon the whole, led to adopt the plaintiffs' account of what

(1) 10 Can. S. C. R. 105.
(2) 8 Ont. App. R. 157.
(3) 9 App. Cas. 187.
(4) 18 Gr. 417.
(5) P. 676.
(6) L. R. 2 Q. B. 580.
(7) 5 App. Cas.
(8) P. 747.
(9) 5 Ch. App. 11.

took place at the time of the negotiations with respect to the $100 a week subsidy, rather than that of the defendants, although I do so with some degree of doubt as to the Windsor bonus.

I think the burthen was on the plaintiff of making out his case without leaving any reasonable doubt. I agree with the observations of the learned Chief Justice of Ontario:—

That this suit was brought, after great and wholly unexpected delay, after the company had been four years in full operation, and with full knowledge on plaintiffs' part of the alleged misrepresentations almost from the beginning. That it was a case, under all the extraordinary circumstances, which a court of justice should have required to be proved with undoubted clearness.

I take it there is no proposition better established than that fraud must be distinctly and clearly proved; that the law will presume in favor of honesty and against fraud. As Parke B. said in Shaw appellant and Beck respondent (1):—

Defendants who seek to set an instrument aside as fraudulent must establish fraud, upon the universal principle that every transaction in the first instance is assumed to be valid, and the proof of fraud lies upon the person by whom it is imputed.

Therefore, unless the alleged fraud is established beyond a reasonable doubt, the presumption in law would be that the proceeding on the part of the defendants was fair and honest. The agreement is a fair and valid one on its face, and has been accepted and acted on for years after notice by all parties of the alleged grievances; by which acting, if the plaintiffs' contention is right, they were, from time to time, receiving less, and the defendants more, in the way of dividends than they were respectively entitled to, and this without, apparently, any complaint or remonstrance or effort to have the alleged wrong rectified.

The evidence is most contradictory, and there were material discrepancies, on several points, on both sides, the defendants most distinctly denying that the repre-

(1) 8 Ex. 392.

1886
BEATTY v. NEELON.
Ritchie C.J.

sentations sworn to by the plaintiffs were ever made. It then, in my opinion, becomes most important to look at the conduct of the parties, and their dealing with the subject matter in dispute, with a view of ascertaining with which side such conduct has been most consistent.

On the 29th of December, 1876, the agreement was entered into between the plaintiffs and the defendants and one Graham, since deceased. A company was formed and incorporated, and a charter obtained, on the 5th of March, 1877. Some time in May, 1877, James Beatty says that he discovered the alleged misrepresentations as to the Windsor contract and bonus and brought it before the board meeting of the company in the next month of June. Though thus aware of what the plaintiffs alleged was the true state of the case immediately after the incorporation, no steps whatever were taken by either the plaintiffs or the corporation (the latter the party really damnified by the misrepresentations, for the injury, if any, was clearly to the joint adventure) for a rescission of the contract or the dissolution of the company, and a re-conveyance of the property conveyed to the joint adventure.

On the contrary, the business of the company was carried on in the ordinary course in the seasons of 1877-8-9 and 1880 and subsequently, and it was not until the 21st of February, 1881, that this suit was commenced, in which plaintiffs obtained a decree, and in which suit, before the Court of Appeal, plaintiffs sought to support a decree giving them the two items of $7,500 and $2,000, to be paid to them personally, which, it is abundantly clear, they could by no possibility be entitled to receive, because, if the representations had been true, these sums would not have belonged to the plaintiffs, but would have been received by the corporation, to be dealt with as the other assets of the

company, and out of which they, the plaintiffs, could only receive, by way of dividends, their proportionate shares. How, then, is it possible that these plaintiffs could be entitled to what the decree gives them, namely, the whole extent of these items or assets as their own in undisputed right? The items, then, as said by the Chief Justice of Ontario, are not damages to which the plaintiffs are entitled, and none other are claimed or shown.

If the plaintiff's statement be the true version of the conversations, is it reasonable to suppose that a matter resting on the recollection of transactions and conversations which took place seven or eight years ago would be allowed to remain so long unsettled? Or is it reasonable to suppose that the plaintiffs, with the knowledge they possessed, would have sought no redress, but, on the contrary, have gone on with the business, allotted the shares on a basis they now claim to have been entirely wrong, and have allowed the defendants to deal with shares to some of which they now claim the defendants were not entitled? Or is it reasonable to suppose they would have allowed the defendants, or whoever held the stock, to receive from year to year large dividends to which they were not entitled, and by which their own dividends were diminished, and not until after four years' business institute these proceedings, and then remain three or four years longer before bringing such proceedings to a hearing?

I do not put forward these considerations as anything in the nature of a bar, but simply as matters worthy of consideration in determining as to the credit to be given to the conflicting statements, and as showing that the contract as acted on was considered by the parties as valid and binding. At any rate, as establishing a fair inference that the profits had been divided

1886
BEATTY v. NEELON.
Ritchie C.J.

on the basis originally agreed on.

Under all these circumstances, I think the conduct of the parties is entirely consistent with, and confirms, the views presented by the defendants, and is equally inconsistent with, and discredits, those of the plaintiffs; and therefore I think the Court of Appeal was right, on the merits and facts of the case (apart from any legal question as to the right of the plaintiffs to sue) in allowing the appeal and dismissing the action, and therefore this appeal, in my opinion, should be dismissed with costs.

STRONG J.—This is a suit in equity to compel the defendants to make good certain representations, upon the faith of which the plaintiffs were induced to enter into a preliminary partnership with the defendants and subsequently to constitute with them a joint stock company.

The alleged representations were that the defendants had a contract with the Government for carrying the mails weekly from Windsor to Port Arthur, Lake Superior, for which they were to receive $100 per trip, and of which contract two years were to run, and further, that they were entitled to a bonus from the town of Windsor of $2,000 a year, of which one year was yet unexpired. These contracts were to form part of the defendants' contribution to the partnership and company.

In my opinion the evidence establishes beyond all controversy that such representations were in fact made, that they were so made to induce the plaintiffs to enter into an agreement, that the plaintiffs acted on the faith of them, and that they were untrue. But it is sufficient to say that the plaintiffs' witnesses proved the case made by the bill, and that it was for the learned Chief Justice of the Queen's Bench, who

presided at the trial, to determine whether their statements or those of the defendants were most entitled to credit. The Chief Justice having found in favor of the plaintiffs, that finding ought to be conclusive as regards the facts.

It is, therefore, to be considered now as decisively established that the defendants made the representations in question and that their statements have since turned out to be untrue. It results that they must either have been made by Campbell, who was the chosen spokesman on behalf of the defendants, with consciousness of their untruth, or recklessly without having taken the pains to make enquiries and to verify his assertions from sources of information which were obviously within his reach. In either point of view the plaintiffs are entitled to a remedy for that which was a direct and proximate cause of the injury resulting to them from having put faith in the representations of the defendants. That proximate and direct injury and damage, was the loss of such a proportion of the monies which would have arisen from the contract and bonus (had these sums been received) as would have been allotted to the plaintiffs as holders of $\frac{19}{25}$ of the capital stock of the company. I think the conclusion drawn by the Chief Justice of the Queen's Bench from the evidence before him, that the payments under the contract of $100 a week should be estimated at 25 weeks for each year, was correct. This estimate would make the gross receipts from that source $7,500 for the three years. The Windsor bonus amounting to $2,000 being added, the aggregate amount which ought to have been received by the company in order to carry out the representations made to the plaintiffs, was $9,500 of which amount $_{19}$ would have been the plaintiffs' share. If any deduction was to be made from this in respect of extra expenditure or loss in per-

1886
BEATTY
v.
NEELON.
Strong J.

forming the service required to fulfil the contract and earn the bonus the defendants should have proved it as reduction of damages, but this they have failed to do.

That the plaintiffs were entitled to an equitable remedy to compel the defendants to make good their representations cannot, in my opinion, be a matter of the least doubt.

That a representation not true in fact made to induce another to enter into a contract and which is an element in inducing the contract entitles the party who has acted upon it to a decree compelling the other party to make his representations good or, to put it more plainly and directly, to substantial damages, is, I think, clear upon authority; and it makes no difference whether the representation be made with conscious falsehood or only with reckless and careless disregard of the obligation of ascertaining the real facts before hazarding any assertion upon which the opposite party is to act. To deny such a proposition would be to overrule at least three cases of the highest authority, in all of which this principle was most distinctly propounded and acted upon, viz: *Burrowes* v. *Lock* (1); *Slim* v. *Croucher* (2); *Rawlins* v. *Wickham* (3). It is said that these cases have been overruled by *Redgrave* v. *Hurd* (4). But in the first place I do not construe the language of the Master of the Rolls in that case as importing any intention to overrule the long series of cases which has settled this principle of liability in courts of equity, and, secondly, I deny that it was competent for a single judge in a court of first instance to overrule the cases already cited, all of which were decisions of appellate tribunals.

In *Barry* v. *Croskey* (5) Wood V.C. says that it is essential to entitle a party, complaining of a misrepre-

(1) 10 Ves. 470.
(2) 1 DeG. J. & F. 518.
(3) 3 DeG. & J. 316.
(4) 20 Ch. D. 1.
(5) 2 Johns. & H. I.

sentation, to relief that he should be able to show (1st) that the representation is false; (2nd) that he has acted upon the faith of it; and (3rd) that he has been damnified from so acting; and, further, that the damage so resulting was not remote but immediate. Here, I am of opinion that we have all these elements of liability. The statements of Campbell were made with the intention on the part of the defendants that they should be acted upon by the plaintiffs, and they were so acted upon, and immediate, and direct injury resulted to the plaintiffs in this that they did not receive or get the benefit of moneys which they would have received and have had the benefit of if the representations had been true. The case is, therefore, in my judgment, eminently one for equitable relief and indemnity. As I have already said, the objection that some deduction ought to be made in respect of increased expenditure in performing the service under the contract and to give a title to the bonus, is met by the consideration that for all that appears the profits and earnings on freight of goods and fares of passengers earned by the vessels which would have been employed on this mail service would have more than recouped the expenditure. If this were not so, it was for the defendants to have proved there would have been a loss entitling them to a reduction of damage. But there is no such proof, and in the absence of it it is to be presumed that the whole amounts represented to be payable under the contract and bonus would have been net profit to be carried to the credit of the profit and loss account, undiminished by any charge for losses.

I cannot, however, agree with the Chief Justice of the Queen's Bench, that the measure of damages which the plaintiffs are entitled to receive is the whole amount of $9,500. I think they must be restricted to a share of it, proportioned to the amount of their shares

1886

BEATTY v. NEELON.

Strong J.

in the capital stock of the company, namely, $\frac{19}{25}$, which would amount to $7,220, for which amount, together with costs, I am of opinion, the plaintiffs were entitled to a decree. This appeal should, therefore, be allowed with costs.

FOURNIER J.—The evidence is clear and sufficient that the plaintiffs are entitled to no relief. The Court of Appeal have unanimously so declared and I concur in dismissing the appeal with costs.

HENRY J.—I agree with the conclusion of the learned Chief Justice, and I am further of opinion that Beatty was not, in any way, misled, that he had an opportunity of knowing, or of ascertaining, by inquiry, as to the true state or position of the subsidy; and I think, that the suit, to be successful, should have been instituted in the name of the company The contract was with the company, not with Beatty, and it was a failure of representation to the company, and it was the company that was injured and not Beatty alone, and it being the company the action should have been brought in the name of the company I cannot understand how a mere stockholder can bring an action for a wrong alleged to have been done to the company. It was the company's stock that was affected and I think the injury, if any, was to the company.

I am of opinion also from the evidence, and I think there is evidence to sustain the position, that no injury was done. I think it was shown that to carry out the services would cost more than would be realized from them.

Taking all these matters into consideration I think the appeal should be dismissed.

GWYNNE J.—In no view which can be taken of this case can the action, in my opinion, be maintained.

1886
BEATTY
v.
NEELON.
Gwynne J.

The action is in the nature of the old common law action of deceit, although instituted in the Court of Chancery before the passing of the Judicature Act. The plaintiffs undertake to prove :

1st. That the representation which is made the foundation of the action was made by the defendants

2nd. That it was made falsely and fraudulently.

3rd. That the plaintiffs were thereby induced in the agreement which they entered into with the defendants, and set out in the bill, to consent that the defendants should respectively have allotted to them, in the joint stock company which they agreed to form, a greater number of shares than, but for such representation they would have agreed should have been allotted them ; and,

4th. That the plaintiffs have suffered actionable damage from such false and fraudulent representation.

Now to be actionable the damage must not be remote, but must be shown to be the natural, reasonable and necessary result to the plaintiffs and occasioned by the act complained of.

The casue of action as stated in the plaintiffs' bill of complaint is that the plaintiffs being owners of a line of steamers running from the town of Sarnia to Duluth, on Lake Superior, and the defendants being owners of a line of steamboats running from the town of Windsor to Duluth, upon the 29th day of December, 1876, entered into an agreement executed under their hands and seals whereby they agreed to form themselves into a joint stock company for the purpose of carrying on the business theretofore carried on by their said respective lines of steamers, and also extending their operations to such other places as might be deemed advisable. That the stock of the said company should be the sum of $250,-000 in five hundred shares of $500 each, distributed among the plaintiffs and defendants severally and

1886
BEATTY
v.
NEELON.
Gwynne J.

respectively in certain proportions in the agreement stated. That the plaintiffs thereby agreed to transfer to the company so to be formed three steamers then used by them, namely : The "Quebec," the "Ontario" and the "Manitoba," together with the good will of their said business and all their interest in any contracts into which they had entered in respect of said vessels, and all the boats, tackle, rigging, furniture, &c., &c., belonging to the said vessels and used therewith, and the defendant Neelon agreed to transfer to the said joint stock company the steamer "Sovereign" and all the boats, tackle, rigging, furniture, &c., belonging to her, and the defendants Graham and Campbell agreed to transfer to the said joint stock company the steamer "Asia" and all her boats, tackle, rigging, furniture, &c., &c., and all the defendants agreed that all the good-will of the business carried on by the defendants with the said steamers, and all contracts and connections of them and by them in connection with the said line of steamers should be included in such transfer; and it was further agreed that a charter of incorporation should be applied for with all reasonable despatch, and in the meantime the parties agreed to enter into and to form a partnership under the name and style of the North-West Transportation Company and to carry on the said business theretofore carried on by the said respective lines of steamers, and to become partners in the said business, until they should procure the said charters of incorporation, and that the rights and liabilities of the said partners, respectively, should be in the proportions represented by the different shares therein mentioned as allotted, or to be allotted, to them respectively in the said proposed joint stock company. And the said parties to the said agreement thereby further agreed that the said steamers, &c., &c., and all and every matter and thing which they had agreed,

should form the capital stock and become the property of the said proposed company, and should, until the said act of incorporation should be obtained, be and become the property of the said co-partnership, and that as soon as a company should be incorporated for the purposes aforesaid, then and immediately thereafter all and every part of the property, stock and assets of the said partnership should forthwith, and by proper and suitable deeds of conveyance, be transferred to and become the property of, and be possessed and enjoyed by, the said incorporated company; but so as to secure to each of the partners parties thereto an allotment of paid-up stock in the said incorporated company in value, and in such proportions as therein set forth, and that the said copartnership into which they had thus by the said agreement entered should thereupon be dissolved, and the said joint stock company should stand in the place thereof, both as to ownership of assets, assumption of liabilities, and fulfilments of contracts and engagements. The bill then alleges that the mail contracts of each of the said lines was discussed and considered, and was a most material and important element in determining the proportions in which the capital stock of the said proposed joint stock company should be distributed between the plaintiffs and defendants respectively, and that the defendants, well knowing this, and for the purpose of misleading and deceiving the plaintiffs, and for the purpose of increasing the value to be placed on their steamboats and other property to be contributed by them to the said company, falsely and fraudulently represented to the plaintiffs that they, the said defendants, had a written contract with the Government of the Dominion of Canada for the carrying of Her Majesty's mail on their said steamboats from Windsor to Duluth, aforesaid, for four years from the spring of one thousand eight hun-

1886
BEATTY
v.
NEELON.
Gwynne J.

dred and seventy-six, under which they were receiving, and would receive, and would be entitled to receive, during said period of four years, for each and every trip of each of their said steamboats from Windsor to Duluth, the sum of one hundred dollars, and that the plaintiffs, relying on the said statements of the said defendants as to the said mail contract, as the defendants well knew, and believing the same to be true, entered into the said agreement, whereby the said capital stock was agreed to be distributed as follows, namely, 380 shares to the plaintiff and 120 shares to the said defendants. The bill then alleges that the said joint stock company was formed and incorporated by letters patent of the Dominion of Canada under the name of the North-West Transportation Company upon the 5th day of March, 1877, and that subsequent to the date of the said agreement, and before the issue of the said letters patent, the plaintiffs and defendants agreed between themselves that the stock of the said company should consist of 600 shares of $500 each, which should be distributed between them in the proportions to which they were by the said agreement to receive the said 500 shares, and that at the time of the issuing of the said letters patent the said stock was allotted and distributed between the plaintiffs and defendants, as follows:

To the plaintiff, James H. Beatty, 205 shares.

To the plaintiff, Henry Beatty, 120 shares.

To the plaintiff, John D. Beatty, 52 shares.

To the defendant, Sylvester Neelon, 103 shares.

To the defendant, John C. Graham, 60 shares.

And to defendant, George Campbell, 60 shares.

But that said distribution and allotment was made having regard to the original basis of distribution of stock as set forth in the said agreement. The bill then alleges that the plaintiffs and defendants were the first

directors of the said company until the 3rd March, 1878, when the defendant Campbell ceased to be a director, and thereafter the plaintiffs and the defendants, other than Campbell, have continued to be and still are at the time of the filing of the bill of complaint, namely, on the 21st February, 1881, directors of the company and the defendant Neelon the president thereof.

The bill then alleges that the plaintiffs contributed to said company everything required from them by the said agreement of the 29th December, 1876, and among these things a mail contract which the plaintiffs had to carry mails from Sarnia to Duluth, under which the said joint stock company had been in the receipt of $7,000 per annum, and have received in all therefrom the sum of twenty-one thousand dollars. And that after the formation of the said company, and the issuing of the said letters patent, and after the defendants had received their said stock, the plaintiffs for the first time learned that the said defendants had no written or binding mail contract with the Government as represented by them as aforesaid, but had merely a verbal agreement with said Government from year to year, and that the government after the formation of the company refused to continue said verbal agreement or to pay said sum of one hundred dollars per trip as represented by the said defendants in respect of said mails, and that although the said steamboats entitled thereto have continued to run from Windsor to Duluth aforesaid, the said company have wholly lost the said sum of one hundred dollars per trip, whereby also the plaintiffs have suffered loss as such shareholders by reason of the said misrepresentations. The bill then alleged that the defendants had a contract with the town of Windsor to receive from that corporation the sum of $6,000 for running a steamer

1886
BEATTY
v.
NEELON.
Gwynne J.

once a week during the season of navigation for three years, one year of which had yet to run when the agreement of December, 1876, was entered into, and that although the defendants had received the whole of the sum of $6,000, and although the service for the third year was performed by the said joint stock company, yet the defendants refused to pay, or to account to the said company for the sum of $2,000, the proportion applicable to the service during such third year, or any part thereof.

Assuming the representations to have been made as alleged, it is nevertheless apparent from this bill that the material substance of the agreement of December, 1876, was that the defendants as promoters jointly with the plaintiffs of the contemplated joint stock company would transfer their steamships, &c., &c., and the goodwill of their business and all contracts, &c., &c., to the said joint stock company when formed, for which they were respectively to be allotted and receive the number of shares in the paid-up capital stock of the company in the bill mentioned, and that, until the company should be formed, the plaintiffs and defendants should jointly possess and enjoy the said steamships, &c., &c., &c., in partnership for the purpose of carrying on the business together for their joint benefit in like proportions to the number of shares agreed to be allotted to each in the company. This agreement enured to the benefit of the company when formed. Now the company was formed on the 5th of March, 1877, before ever the season of navigation had commenced, before therefore the business could have been carried on by the plaintiffs and defendants in partnership, and before the plaintiffs could have derived any benefit from the contract assuming it to have been in existence, and the company on the said 5th of March became absolutely entitled, under the terms of the said agreement of

December, 1876, to a transfer of all the property, rights and contracts and assets, agreed by the instrument to be transferred to them, including the said contract and all benefit to be derived therefrom.

Now, when the deeds, which, by the said instrument had been agreed to be executed, transferring to the company the said property, rights, contracts and assets by the plaintiffs and defendants respectively, were, in fact, executed, or in what terms they were drawn, does not appear, but we must, on the statements of the bill, take it that they were executed so as to pass to the company every thing, which by the articles of agreement as set out in the bill was agreed to be transferred, so that if the defendants had, as is alleged, obtained shares allotted to them in the capital stock of the company based upon the allegation of their having such a mail contract as is alleged in the bill and for a greater amount than, but for such allegation, would have been allotted to them and than they would have been entitled to receive, all recompense, indemnity and satisfaction of whatsoever nature, in respect of such excess in said allotment must needs be made to the said joint stock company as the only party entitled to receive the same. That recompense, indemnity or satisfaction could have been obtained, as it appears to me, in one or other of two ways only, namely, either 1st. By the defendants giving up the shares so allotted to them respectively in excess of the number of shares they should have received, or 2nd. By making good the representation by paying over to the company the $100 per trip, which the steamer which should have performed the service, if the contract had existed would have received. But by the bill it appears that while the plaintiffs and defendants were the directors of the company, and in fact the only shareholders therein, it was in May, 1877, discovered there was no such mail

1886
BEATTY
v.
NEELON.
Gwynne J.

contract in existence as the plaintiffs now allege the defendants, for the unjust purpose of increasing the amount of the shares in the capital stock of the company to be allotted to them, represented that they had, and of this fact the plaintiffs, and the company, were thenceforth well aware; yet it appears that out of the profits of the business in the years 1877-8-9 and 1880, the defendants were in each year paid by the company dividends upon the shares alleged to have been allotted to them in excess of what they should have received, in which payment the plaintiffs, as directors of the company and the only shareholders therein besides the defendants, must have concurred. The company thereby, and the plaintiffs as directors thereof and as shareholders therein, having the controlling voting power, with full knowledge of the alleged misrepresentation and the alleged wrongful allotment of shares, recognised and affirmed in the most unequivocal manner the correctness of the allotment and the right of the respective defendants to receive such dividends. The plaintiffs further in their bill allege, as in fact and in law must be admitted to be true, that the loss, whatever it is, if any there be, which has been sustained, has been sustained by the company. The allegation is in the 16th paragraph of the bill, where it is alleged that, by reason of the premises, "the said company have wholly lost the "said sum of one hundred dollars per trip," and the plaintiffs add, "whereby also the plaintiffs have suffered loss as such shareholders by reason of such misrepresentation." All the loss that the plaintiffs have sustained is thus alleged to have been sustained, as indeed under the circumstances it could only be, as shareholders in the company, such loss arising by reason of the loss which the company in which they are shareholders are said to have sustained, but no action lies at the suit of shareholders in a company for a loss

sustained by the company, although in such loss the shareholders must necessarily partake. In this respect the action is unprecedented and unmaintainable. Moreover, the loss which in such a case the shareholders sustain is the several loss of each shareholder and is proportionate to the number and amount of the shares held by each, and for such loss, if it were actionable, each must sue for his own loss.

The learned counsel for the appellants, in his argument before us, was obliged to admit that for any loss as shareholders in the company the plaintiffs could not maintain this action; and to get over this difficulty he contended that the plaintiffs, the moment the instrument of December, 1876, was executed, had sustained the loss for which this action is brought, in this that, inasmuch as in point of fact the defendants had not such a contract as they are alleged to have represented that they had, the shares of the plaintiffs in the interim partnership constituted by the instrument were depreciated in value and less saleable. The answer to this contention is twofold: 1st. That no such case is made by the bill. 2nd. Nor could have been successfully, for the agreement in the instrument of December, 1876, is that the partnership between the plaintiffs should continue only until the joint stock company should be formed, and that all the property of the plaintiffs and defendants respectively and their respective rights, contracts and assets agreed to be transferred should continue to be the property of the partnership until the company should be formed, when all should be transferred to the company, and the co-partnership should become dissolved; so that in the interim there were no shares capable of being disposed of or whose intrinsic value could be depreciated, nor could any change whatever in the partnership or its assets or effects have been made without the con-

1886
BEATTY v. NEELON.
Gwynne J.

sent of all the partners. If the partnership had continued in existence, and the business been carried on in partnership by reason of delay in the formation of the company, for the space, say, of a year, during which profits were being made, still the plaintiffs would have sustained no damage necessarily resulting from the misrepresentation; for as the fact of the non-existence of the mail contract was ascertained at the commencement of the season before any profits could have been made, when the profits accruing from the season's business, which, until divided, would be in the possession and control of the partners jointly, should come to be ascertained and divided the plaintiffs had in their own hands the power of protecting themselves by refusing to let the defendants have any profits in respect of the shares in the partnership, if any there were, which the defendants had acquired in excess of what they were entitled to, or would have had, but for their alleged fraudulent representation of the existence of this mail contract. If, with knowledge of the facts, the plaintiffs had agreed to a distribution of profits to the defendants upon the full amount of an interest in the partnership capital, which they were to have only on the faith of the truth of their representation, the plaintiffs could not complain that they had suffered any damage attributable to the alleged misrepresentation. The matter, in such a case, would have been simply one of account between the partners, to be taken under the direction of the court if the parties should differ among themselves. It is plain, therefore, that no loss could have arisen until the defendants received the shares allotted to them by the company, and that the loss, if any there was, was, as stated in the plaintiffs' bill, the loss of the company. This view of the case I have already disposed of. Finally, I am of opinion that it is impossible for us to

say that the Court of Appeal for Ontario, in reversing the finding of the learned judge who tried the case, have come to an erroneous conclusion on the facts of the case. It is impossible to regard the case as turning simply on the degree of credibility to be attached to the testimony of, or upon the weight to be given to the memory of, persons speaking to conversations which had taken place six years previously. There is a mass of other evidence bearing on the material point in issue; in fact, the whole of the dealings and conduct of the parties constitute most important evidence, which must be taken into consideration in order to arrive at a just conclusion upon the point in issue, which is whether any and, if any, what sum of money, or any and, if any, what number of shares, was agreed to be and was allowed and allotted to the defendants as the value of the alleged mail contract. The question is one depending upon the proper inference to be drawn from the whole of the evidence, and, to my mind, the proper inference to be drawn is that there was not. I am of opinion, therefore, that the judgment of the Court of Appeal, in reversing the judgment of the learned judge who tried the case, must be maintained.

Prior to the year 1876 the plaintiffs had received $9,000 per annum for the mail service, for which, by their contract of 1876, they were only to receive $7,000. The service to be rendered under this last contract was that a steamer should leave Sarnia twice a week, namely, on Tuesdays and Fridays, calling at Southampton and Fort William only *en route* to Duluth. The $2,000 per annum so deducted from the amount which the Sarnia line had in previous years received was applied by the Postmaster General in procuring an additional mail service by the Windsor line starting a steamer from Windsor every Thursday, calling at eleven places on the way to Duluth, thus giving

1886
BEATTY
v.
NEELON.
Gwynne J.

enlarged benefit to the public and serving numerous additional places on the route. For this service the defendants received in 1876 $100 per trip, and there is no reason to suppose that they would not have received the like sum in the following year if they should have rendered the like service.

Now, the plaintiffs admit that their own contract was terminable at any moment at the will of the Postmaster General, and that they knew that whatever contract the defendants had must have been terminable in like manner. The plaintiffs also knew that in carrying out their mail contract a steamer of the defendants' line had to leave Windsor every Thursday. Now it was this competition and expense caused by this excess of steamship accommodation to do the work that was for them to do, that constituted the motive of bringing about the amalgamation of the two interests into the one joint stock company, and it is admitted by the plaintiffs that to run a separate steamer from Windsor on Thursday, as had been done by the defendants, while other steamers should leave Sarnia on Tuesdays and Fridays, as was necessary under the plaintiffs' contract, would not have at all paid the amalgamated company, and no such steamer could have been run by them; so that we must come to the conclusion that no such thing had been contemplated in forming the amalgamation, as that a steamer should leave Windsor on Thursday additional to their leaving Sarnia on Tuesdays and Fridays and performing the service which the defendants' steamer had performed.

Then, again, we see that what the plaintiffs and defendants used all their influence to obtain for the company when formed was that the Postmaster General would give the $100 per trip to the company to carry a mail from Windsor by a steamer of the company's line leaving Sarnia on Tuesdays or Fridays, for

which such steamer would call at Windsor. In fact, that the company should receive $9,000 per annum instead of $7,000 for the additional service of one of the company calling at Windsor for and carrying a mail from there in one of the steamers that by the contract of 1876 with the plaintiffs they were obliged to start from Sarnia. This would not suit the Postmaster General, whose object in subsidizing the defendants' line was to get the additional service, and on a different day from those on which the steamers of the plaintiffs' line were obliged to leave Sarnia; but a service otherwise than in the manner proposed by the plaintiffs and defendants on behalf of the company would not suit the company. The amalgamation plainly was effected for the express purpose of doing away with the three trips per week which the separate lines had between them made, and so the loss of the benefit of the contract, whatever might have been its terms which the defendants had in 1876, must, as it appears to me, have been foreseen and contemplated as a necessary consequence upon the formation of the joint stock company. All the efforts of the parties to procure the Post Office Department to give the subsidy of $100 per trip, for a totally different service from that for which it had been given to the defendants, supports this view.

Now, although the plaintiffs whose interest it was to get allowed to themselves shares to the amount of the capitalised value of their contract, assuming it to continue in existence for its full period, although it was, in fact, terminable at any moment at the will and pleasure of the Post Office Department, did obtain for themselves this advantage, it by no means follows as a just inference, that the defendants should receive a like benefit in respect of a contract, the terms of which the plaintiffs and the company they were forming could not and would not have fulfilled. The conduct also of

the parties in giving to the defendants yearly their dividends upon the whole number of the shares allotted to them in which the plaintiffs, as directors of the company and as shareholders therein, must be taken to have concurred, is quite inconsistent with the idea that a portion of these shares had been allotted to them only upon the faith of a consideration which had wholly failed. The whole weight of the evidence leads to the opposite conclusion, and the appeal must, in my opinion, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *MacLaren, MacDonald, Merritt and Shepley.*

Solicitors for respondents: *Miller, Cox and Yale.*