ion, per Lord Deas, that the difference of opinion among the judges founding an appeal in certain cases must be a *substantial* difference.

The interlocutor of 15th February in this case was as follows:—"The Lords having advised the reclaiming note for William Roy, No. 10 of process, and heard counsel for the parties—Recall the interlocutor of the Lord Ordinary submitted to review: Repel the two first pleas, in so far as they are stated as preliminary pleas, to exclude the action on the ground of incompetency: Reserving their effect, *quoad ultra*, to be considered along with the merits of the case: Find the defenders liable to the pursuers in expenses since the date of the Lord Ordinary's interlocutor reclaimed against; allow an account to be given in, and remit to the auditor to tax and report to the Lord Ordinary, and remit to his Lordship to decern for the expenses."

The defenders craved leave to appeal. They stated that they were of opinion that there was a difference of opinion on the Bench in delivering judgment on 15th February, but as the pursuer contended that the judgment was unanimous, they craved leave to appeal.

At advising—

Lord President—I think this is an interlocutor disposing of a dilatory defence, and not disposing of it in the way of dismissing the action; and therefore it falls under the 5th section of the Judicature Act. Notwithstanding that, it is of course competent for us to grant leave to appeal, but I must say I never saw a clearer case for refusing it.

Lord Currichill—I am of the same opinion.

Lord Deas—This is a mere question of procedure, and the matter is not finally determined. It may or may not be a disadvantage to the defenders to have it determined in this way in the meantime; but while, no doubt, you must look to the result of the defender succeeding in his appeal, you must also look to the other result, that he may fail. I think it right to call attention to this too, that on another occasion, when there was some difference of opinion, the House of Lords held that the difference must be a substantial difference; and, even assuming there might be some difference here, it would require to be shown that the difference was substantial, and I do not think that would be an easy matter.

Lord Ardmillan—I think this is a case in which it is the obvious intention of the Act of Parliament to prevent appeals at this stage. This is purely a question of procedure. The plea might have been disposed of in three ways; it might have been at once sustained, and the action dismissed; or it might have been repelled; or it might have been repelled only as preliminary, reserving its effect to be considered along with the merits of the action, and that was the case here.

Agents for Petitioners—Wilson, Burn & Gloag, W.S.

Friday, March 13.

JAMIESON, OFFICIAL LIQUIDATOR OF THE GARPEL HÆMATITE COMPANY (LIMITED), PETITIONER.

Partnership—Contributory—Limited Liability—Liquidator—Title to Sue—Bona fides—*Fraud.*

Articles and a memorandum of association were subscribed by the intending partners of a limited company, bearing that the "nominal capital of the company is £105,000, divided into 1000 shares of £105 each, whereof £100,000 is paid up, and £5000 remains to be called." A petition was presented by the official liquidator, in the winding-up of the company, alleging that the statement as to paid-up capital was false, that, in fact, no part of the subscribed capital was paid up, and that the subscribers to the memorandum and articles knew this to be the case; and craving the Court to settle a list of contributories as proposed by him, and make a call of £30 per share. In a question between the petitioner and certain parties, who had purchased shares from original shareholders subsequent to the formation of the company, and who disputed their liability for more than £5 per share or such part thereof as remained unpaid, *held*, by a majority of the whole Court, that the petitioner was entitled to a proof of the grounds upon which he contended that the names of these parties ought to be placed on the list of contributories. Opinion, by majority, that the limit of liability depended not on the *bona fides* of purchasers of shares, but on the *fact*, how far the amount of the shares was paid or unpaid. *Held*, that to the effect of enforcing any statutory liability of the shareholders to the creditors of the company the liquidator represents the creditors.

This was a petition at the instance of George Auldjo Jamieson, accountant, official liquidator of the Garpel Hæmatite Company (Limited), in the judicial winding-up of the company under "The Companies Act 1862," 25 and 26 Vict., c. 89.

In 1857 Mr and Mrs Cathcart let to John Hall Holdsworth, Joseph Holdsworth, and Edward Sinclair, their heirs, assigns, and sub-tenants, for a rent, or a lordship, in the option of the landlord, the hæmatite iron ore and other minerals in the estate of Craigengillan, belonging to Mrs Cathcart, in the County of Ayr. A small quantity of minerals was raised by the lessees, and they continued in possession as lessees during 1857, 1858, and 1859, but paid neither rent nor lordship. In 1858 a joint-stock company was projected, for the purpose of raising funds to work the iron ore in the lease. On the 27th February 1858, a memorandum of association was subscribed by J. H. Holdsworth, J. Holdsworth, and Sinclair, along with other six parties, which bore that "the nominal capital of the company is £105,000, divided into 1000 shares of £105 each, whereof £100,000 is paid up, and £5000 remains to be called." The articles of association contained the same clause, and declared that "the company may from time to time make such calls upon the shareholders in respect of the sum of £5000, now remaining unpaid on their shares, as they think fit, provided that such call shall not exceed, at any one time, 10s. per share," the calls to be at intervals of not less then three months, and due notice to be given of all such calls. The mineral lease before mentioned was assigned to the company in June 1858, and the assignation intimated to the lessors. In 1861 the lessors raised an action of declarator of irritancy and payment against the original lessees, against Staples, Andrew, and Smith, who alleged an interest in the lease, and against the company, and in 1862 and 1863 obtained decrees declaring the lease to be at an end, and for payment. The lessors, and another leading creditor of the com-

pany, applied for judicial winding-up of the company, under the Companies Act 1862; and, in December 1864, an order for winding-up was pronounced, and the present petitioner was appointed liquidator. The liquidator, in virtue of powers granted by the Court, sold the whole property of the company discovered by him, realising therefor about £111. After various investigations, and a litigation with Mr Andrew, the London solicitor of the company, the liquidator obtained access to the register of shareholders. He then presented this petition for the purpose of settling a list of contributories to the company, making a call at the rate of £30 per share on the contributories, and for various other purposes. He alleged in his petition that the statement in the memorandum and articles of association that £100.000 of the nominal capital was paid up, was altogether false; that, on the contrary, no part of the subscribed capital was paid up, and when the company commenced business it had no capital or funds whatever paid; that none of the original members who subscribed the memorandum of association paid a single farthing of the subscribed capital to the company, or to any one for its behoof; and that the whole subscribers to the memorandum and articles of association knew perfectly that no part of the subscribed capital had been paid up. He alleged that the capital was described as paid up for the fraudulent purpose of enabling the members either to borrow or to dispose of their shares on favourable terms. He suggested a list of contributories as correctly setting forth the parties who were shareholders in the company as at 11th November 1863, being one year before the commencement of the winding-up, and the parties who were said to have acquired shares since that date. Several transfers, he alleged, had been made fraudulently, and merely with a view to avoid the liabilities incurred by the parties granting these transfers, to persons possessed of no means. He proposed to make a call of £30 per share.

Answers were lodged for Alfred Waterhouse, James Elijah Jennings, and Henry Lewis. Mr Waterhouse was not an original member of the company. In December 1858 he purchased 50 shares from Mr J. H. Holdsworth at £30 per share. In 1859 he acquired 75 shares from Sinclair, and in 1860 he acquired other 175 shares, partly from Sinclair, the rest being forfeited shares which had belonged to Staples, another original shareholder. Waterhouse alleged that he purchased all those shares on the faith of the published statements of the company that £100,000 had been paid up, and that the liability attaching to each share subsequent to the registration of the company was limited to £5 per share. Moreover, he paid all that could be due by him in respect of calls, receiving a discharge in full from the company in 1861. He alleged farther that, on 30th January 1864, he sold his shares to Mr Ford, and the transfer was duly entered in the register of the company. The pleas maintained by Waterhouse were to the effect, (1) that he, being a past member of the company, could only be liable as a contributory in the event of the existing members being unable to pay the call: (2) that he had *bona fide* purchased on the faith of the statement in the memorandum of association, register of shareholders, and stock certificate, that £100 per share had been paid up, and that the £5 had been paid up on all his shares: (3) that the statements in the memorandum, &c., as to the paid up capital were binding on the company, and could not be questioned in winding-up proceedings: (4) that the Court was bound, in the winding-up by the contract of partnership of the company: (5) that all the company's creditors knew that only £5 per share remained unpaid up at the registration; 6) that in fact £105 per share had been paid to the company.

The liquidator, on the other hand, maintained that Waterhouse's transfer to Ford was a mere device—Ford being a man of straw, unable to pay any part of the call—and pleaded that the false statements in the memorandum and register did not bar the liquidator from showing that the shares were not paid up, or relieve the respondent from liability for debt to the extent of the capital really unpaid up.

The other parties had not transferred their shares, but otherwise their position was substantially the same.

The Court, after hearing counsel, in respect of the general importance of the question raised, appointed the case to be argued before the whole Court on the following questions:—

1. Whether the Petition of the Official Liquidator ought to be refused, in so far as it prays that the list of contributories should be settled so as to include the names of the said Alfred Waterhouse, James Elijah Jennings, and Henry Lewis as contributories?

   Or,

2. Whether the Official Liquidator ought to be allowed to establish by evidence the grounds on which he contends that the names of the said parties ought to be placed on the list of contributories?

   Or,

3. Whether the Court ought to direct any inquiry into the origin and history of the Company, and the acquisition of shares in the Company by the said parties, with a view to determine whether they are to be placed on the list of contributories?

   Or,

4. What other course the Court ought to follow with a view to settling the list of contributories, so far as the said parties are concerned?

Gifford for petitioner,
Clark and W. M. Thomson for Waterhouse.
Trayner for Lewis.
Crichton for Jennings.

The consulted Judges returned opinions.

Lord Justice-Clerk—I am of opinion that the petition of the Official Liquidator ought not to be refused "in so far as it prays that the list of contributories should be settled so as to include the names of the said Alfred Waterhouse, James Elijah Jennings, and Henry Lewis, as contributories."

I am further of opinion that the Official Liquidator ought to be allowed "to establish by evidence the grounds on which he contends that the names of the said parties ought to be placed on the list of contributories," and that the Court should "direct an inquiry into the origin and history of the Company, and the acquisition of shares in the Company by the said parties, with a view to determine whether they are to be placed on the list of contributories."

The Company was formed under the Joint-Stock Company Act of 1856. It is now being wound-up under the Act of 1862.

The position of Mr Waterhouse, one of the respondents, is, that within a year of the order by

which the Company was to be wound up, he held 300 shares of the Company. The other respondents were on the register at the time when the winding-up order was pronounced.

By the Winding-up Act of 1856, sect. 63, it is provided that "in the event of any Limited Company being wound up by the Court or voluntarily, any person who has ceased to be a holder of any share or shares within the period of one year prior to the commencement of the winding-up, shall be deemed, for the purposes of contribution towards payment of the debts of the Company, and the costs, charges, and expenses of winding-up the same, to be an existing holder of such share or shares, and shall have in all respects the same rights, and be subject to the same liabilities to creditors, as if he had not so ceased to be a shareholder." By the Act of 1862, the law is so far altered as to declare that "no past member shall be liable to contribute to the assets of the Company, unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act."

The Official Liquidator, who seeks to render Mr Waterhouse liable, appeals to the provision of the statute by which obligations which may have been incurred under the Act 1856 are preserved entire, and pleads that the liability of Mr Waterhouse under the Act of 1856 subsists, and, consequently, that he may be made a contributory before the exhaustion of shareholders who held shares at the date of the order for winding-up.

It is certainly difficult, in the face of the provision of the 176th section of the Act of 1862, to direct the name of a party who is not actually on the register at the date of the winding-up order, to be put upon the first list of contributories. If its directions in that statute are literally carried out, there must be an exhaustion of actual shareholders by a process of separate contributions before parties who had ceased to be shareholders when the process of winding-up commenced could be placed upon the list. But obligations under the Act of 1856 are declared not to be affected, and the rights and obligations of creditors, as fixed by the Act of 1856, would be unquestionably altered by the conversion of an obligation direct, primary, and unconditional, into one that is contingent, and of the nature of an obligation of cautionary.

Assuming, therefore, that there was a direct obligation to pay up the unpaid portion of shares contracted under the Act of 1856, I am unable to see how, consistently with the keeping up of the direct and primary obligation, the list of contributories can omit the name of a party liable. I come on this ground, though not without difficulty, to the conclusion that Mr Waterhouse's position in this question is not really different from that of the other respondents.

The Official Liquidator offers to prove, with a view to this question, that Mr Waterhouse parted with the shares "fraudulently, and merely with a view to avoid the liabilities incurred by the parties granting these transfers." He says that the transfer was made not as a true transfer of shares in a going company, but when the Company had been deprived of its mineral lease, and had given up trading; when it was possessed of no effects, and when the holding of the shares involved nothing but liabilities. It is further said that the party to whom the transfer was made was possessed of no means. It is described as a device to evade liability. Were it necessary to consider how far this alleged condition of the fact could effect Mr Waterhouse, I should be disposed to hold that, as an intention to evade liability is not *in se* fraudulent, but legitimate, in reference to companies,—the one essential characteristic of which is that the shares are transferable;—and as transfers may be made down to the date of the commencement of the winding-up, when they are no longer permitted, the averments were not relevant. My view proceeds upon the separate ground already indicated.

The case of the respondents being essentially the same, the question turns on the liability of the respondents to make good by contribution a portion of the unpaid amount of the shares which they held in the company.

There is no doubt, if the averment of the liquidator is true, that there remains an amount *de facto* unpaid on each share, greater than the amount which the respondents are called upon to contribute. The case averred by the liquidator is, that the shares, the amount of each of which is £105, are certainly unpaid to the extent of £100 out of the £105, which is their total nominal amount. The defence is, that the averment is irrelevant in a question with them. It is said, in the first place, that the memorandum and articles of association bear that £100 out of each share is paid up, and that being so stated in the memorandum of agreement, it is conclusive. And it is further said that the register of shares, on the faith of which the respondents say they purchased shares, contains a statement to the same effect.

The respondents were not original shareholders —they acquired their shares by transfer. It is affirmed by the official liquidator, in condescendence article 15, that "they knew, or ought to have known, that the shares were not paid up," and that the slightest inquiry might have disclosed this. This statement must be construed as containing no offer to establish that the shares were acquired *in mala fide*, or in the actual knowledge of the fact of the shares being unpaid. The respondents are, I think, entitled in this question to have it held that they purchased the shares presuming and believing that the statements in the memorandum and articles of association and register were correct, and that the shares were paid up to the amount of £100.

The official liquidator says that, according to the constitution of such companies under any of the Joint-Stock Companies Acts, if the amount of shares is not paid up, the unpaid amount constitutes assets of the company; and if assets of the company, the holder is liable to contribute to the amount actually unpaid. He refers, in support of this statement, to the statutes which treat the amount of shares unpaid as assets of the company, and especially to the 38th section of the Act of 1862, which declares, "*that every present and past member of such company shall be liable to contribute to the assets of the company, to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up*, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following,"—which is, (4) "That *in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member.*" A similar provision is in the Act of 1856.

It seems to me very clear that this provision of

the statute attaches general liability to shareholders for the debts of the company, subject, in the case of a company "limited by shares," to the amount of the shares unpaid. The leading provision applies to companies unlimited; and therefore there seems to be no question that the declared statutory liability of shareholders is payment, so far as necessary to liquidate company obligations, to the amount of shares which may be unpaid. The statutes confer on companies formed under them corporate powers; but guard against the freedom from liability which the creation of a corporation might infer without such reservation, by positively providing for unlimited liability where the company is formed as an unlimited company, and providing, in the case of *companies limited by shares*, for liability to the amount of each share that may not be paid up.

The statutory liability seems, therefore, to attach, according to the state of the fact as to payment or non-payment of the amount of the share. If the share is *de facto* not paid up, the amount so unpaid constitutes an asset of the company, and the shareholder must pay, because his responsibility for debts of the company is only limited by the payments made on the share. If the unpaid portion of this be an asset of the company, it must be recoverable from the holder of the share. If his responsibility is general, and is restricted only to the amount of his share unpaid, there can be no relevant answer under the statute except one, affirming the fact of payment; and if that is disputed, actual payment would seem necessary to be instructed. The respondents say that the shares must be held as paid up to the extent of £100, because it was so set forth in the memorandum of agreement and register. If the statement be contrary to the fact, as the liquidator undertakes to show, then the respondents' pleas go to affirm a limitation of liability not only where the amount of the shares is not really paid up, but where shares are said, in certain instances, to have been paid or held by parties, who, on fair grounds, believed them to be so. If there be any limitation of liability in such a condition of the fact, it is not a limitation in terms of the statute, but a limitation of liability different from that for which the statute provides. Limitation of liability, according to a belief of the the fact, or limitation of liability by reason of some one having averred a fact, or of a fact being to be found averred in some writing, are vitally different. If a statute says that there shall be liability according to the fact, the existence or non-existence of the fact is, in my judgment, the question and only question at issue.

The parties who deal with companies formed under these statutes would seem to be entitled to rely on recovering against shareholders the debts due to them to the actual extent of the unpaid shares held by them. As the absolute liability of shareholders for the debts of the company is affirmed, and is restricted only by the amount of the share which shall have been paid up by the creditor, it is difficult to see how, if the statutes are to be carried out, the creditor should not have right to get payment of that unpaid amount, whatever that amount may turn out to be.

The word "payment" is certainly not to be limited to the case where payment in actual cash has been made. If good consideration in money be given and received for the shares, whether in money, goods, rights to leases, goodwill of trade, or other valuable considerations, the shares will fall to be held as paid. If the payment is not merely colourable, and the transaction otherwise free from objection, the value given and received will fairly fall to be computed just as payment of a call would be. Consideration has there been given in what the company and the party dealing with the company consider as equivalent to money. The inquiries proposed to be instituted in this case may possibly show that there was a conveyance of rights in consideration of the receipt of shares of which £100 in the case of each share is to be held as part consideration. There is nothing in the present state of the case to indicate such a condition of the fact, nor do the averments very clearly state such a case; but the offer on the part of the official liquidator, on the relevancy of which our decision of the present question must turn, is to negative the existence of any such arrangement, or any other arrangement by which consideration was given for the £100 per share.

The respondents rely on the fact of a statement appearing in the memorandum and articles of association and the register, as to payment.

So far as the memorandum and articles of association go, they comply with the statutory requisites prescribed by the Act 1856, under which the company was formed. These requisites, so far as bearing on the question here raised, are:—

"(4) The liability of the shareholders, whether it is to be limited or unlimited.

"(5) The amount of the nominal capital of the proposed company.

"(6) The amount of the shares into which such capital is to be divided, and the amount of each share." The articles of association correspond.

The liability of the company is limited, but limited according to the amount of shares. It is no otherwise restricted. The statute does not contemplate and provide for any statement as to the amount paid up on each share being introduced into the articles of agreement. Such a statement has truly nothing to do with the things required in the memorandum. It provides for the amount ot the share being stated in order to fix the amount of each shareholder's liability; a declaration as to the fact of payment of part of the share is plainly the statement of an extrinsic fact—a fact for the statement of which in this document there is no warrant. The company had not reached a stage at which such payments could be anticipated to be made. There is nothing stated going to the creation of the shares, which was the matter in hand, but only to the fact of payment of £100 out of £105 of the nominal amount of the share, a statement which, *as it stands*, and without explanation, can be construed only as an actual payment of money upon these shares by the parties holding them to the amount of £100,000. The statement may possibly admit of explanation, but as it stands there is nothing but a statement of actual payment, an averment not established by the mere fact of its being stated, and as to which the official liquidator offers to establish that the allegation is "false." He avers that not one farthing was paid; that the lease, which may be said to have formed a consideration for the £100,000, "was intrinsically of no value whatever." And further, that "the capital was described as paid up for the fraudulent purpose of enabling the members either to borrow or to dispose of their shares on favourable terms." The offer to prove seems to be on offer to negative a statement introduced by some one in a place where no such statement was ever meant to be, and which cannot

be held as vested by statute with any presumption in its favour.

The respondents contend that the introduction of this statement of payment is an act of the company, and that the official liquidator who represents the company, cannot be permitted to contradict what the company have done. It is said that the official liquidator represents the company, and cannot maintain what the company could not impeach or challenge. This argument seems to me to rest upon a total misapprehension of the position of the liquidator and the process of winding up. The primary object of the proceeding is to realise the company's assets in order to pay debts, as appears very clearly from the 38th section of the Act of 1862; and if the interests of the creditors require it, the unauthorised and illegal acts of the company cannot hinder the realisation. The company, or the officials of the company, cannot defeat rights, if there are rights, in creditors, by the gratuitous or intentional recording, especially in a document where it is altogether out of place, of what is a positive falsehood.

It may be that there was some arrangement as to the shares in their creation. It is enough to say that there is no such statement to be found in the memorandum of agreement, and that the only statement is that £100 has been paid up, while it is offered to be proved that not one farthing was so paid.

If all that was required to limit liability was a declaration that in the memorandum and articles of association the shares were paid up, companies might be formed without one farthing of capital, or without any liability in the parties forming them, notwithstanding the amount of the shares being of very large nominal amount; a result obviously inconsistent with the statutes.

The case of the insertion of the amount paid up in the register of shares is more important, because there the statement is proper and is required by statute.

The register, in reference to what appears in it, is not declared by the Statute 1862, to afford conclusive evidence of the facts stated in it, but *prima facie* evidence only; and the official liquidator proposes to redargue what this register *ex facie* shows by proof to the contrary. So far as any effect conferred by statute on the register is concerned, the register is plainly assailable; and the fact of the evidence it affords being declared *prima facie*, and therefore capable of being redargued, seems almost in itself conclusive against greater effect being given to it. Even if the expression as to *prima facie* evidence were absent, as it is in prior statutes, I should not hold that the evidence of what is to be found in the register is conclusive. Though evidence, it is not evidence excluding all counter-evidence. It is manifest that an entry falsely or erroneously made by some official of the company could not be so absolutely binding as to exclude proof of such falsehood or error, a result which would follow from such construction.

There are no doubt considerations *which might have led the Legislature to exclude the raising of any question with a party acquiring shares in bona fide.* It does not seem to be inequitable that a party purchasing shares in good faith, which are stated to be paid up, should be liable to make good the actual deficiency of amount unpaid, and consequently due on these shares. It is enough to say, however, that the Legislature so enacted as to impose liability without restricting it on such considerations of equity. The Court, if relieving shareholders from a liability positively imposed upon them because of the hardships involved, would be, in my judgment, usurping the functions of the legislature. The statute says that liability shall attach to shareholders where the shares held by them are not fully paid, and that to the amount unpaid. The result of the adoption of the views of the respondents would be, that where a shareholder has acquired his shares in the belief *bona fide* held, that the shares have been paid up, or paid up to a certain amount. they shall be wholly or partially exempt from liability; a result inconsistent with the express declaration of the statute.

Nor can it be said that there are not equitable considerations in such a case bearing in favour of the creditors of the company. They deal with a company of great nominal capital, and of which a large amount is said to have been paid up. Their dealings are regulated accordingly. If they went to the memorandum of agreement or to the register, the company, their debtor, would appear to have had ample means, and they could scarcely hold that all this great sum would suddenly vanish.

But whatever view may be taken of the relative position of the parties in respect of hardship, it seems to me sufficient that the statute has excluded the question by declaring the unpaid amount of shares assets of the Company, and imposing liability on shareholders for the amount of their shares which is unpaid. The rights of creditors and the obligations of shareholders are made contingent upon a fact. If shareholders are deceived, they have recourse against the parties by whom deception is practised upon them; in taking shares they must incur the hazard of liability for the amount on each share unpaid. Against that hazard they must protect themselves by inquiry, or rely on the honesty of the parties with whom they deal. If it be true that the slightest inquiry would have satisfied them as to no payment having taken place, as the liquidator alleges, and as an examination of the documents before us seems to some extent to confirm, they may have no very well founded cause of complaint. But the question seems to me resolved by the statute, and applying its provisions as I read them, plainly fixing liability in the circumstances as averred by the liquidator, I come to a conclusion adverse to the pleas of the respondents.

Lords Cowan, Neaves, and Mure held that the liquidator ought to be allowed to establish by evidence the grounds on which he contended that the names of the respondents ought to be placed on the list of contributories. They concurred with the Lord Justice-Clerk in holding that the liquidator was not *eadem persona* with the company, but that, to the effect of enforcing any statutory liability of the shareholders to the creditors of the company, he represented those creditors. The statement of £100,000 being paid up was a gratuitous statement for which there was no room in the documents employed. It means that the shareholders, after becoming liable for the £100,000, had paid it—a matter of plain fact, capable of being contradicted—and the liquidator offered to disprove it. If payment was never made, it seemed impossible to hold that the creditors of the company could be thus defeated, by being deprived, on the one hand, of the statutory liability of the shareholders, and, on the other, of the benefit which might have resulted from the capital having been actually impressed into the company's hands. As to the position of

the respondents as transferees, and the defence that third parties purchasing shares *bona fide* were entitled to rely on the statement of £100,000 being paid up at the time of the constitution of the company, the first answer was that transferees, in a question with the public and the company's creditors, could be in no better position than the original shareholders. The transferees, and not the creditors, should have the duty imposed upon them of proceeding against the parties who ought to have *de facto* made forthcoming the capital of the company, and who falsely pretended they had done so. Secondly, the terms of the writings on which the respondents founded were not consistent with the requisitions of the statute, and not such as to have entitled the purchasers to rely without inquiry upon the nominal capital being paid up to the extent of £100,000 at the date of the constitution of the company. If such entries in the register were to have the effect contended, a company could at once exempt the shareholders from all liability, though they had never advanced a shilling of their subscribed capital. Their Lordships also held, with the Lord Justice-Clerk, that the limitation of liability in the 61st section of the Act 1856, and the 38th section of the Act 1862, was not the *bona fides* of the parties, but the simple fact, whether and how far the amount of shares is paid or unpaid.

Lord Benholme concurred as to the position of the liquidator; but held that he was not entitled to insist on any of the respondents being placed on the list of contributories. The memorandum and articles, and the register of shares, were open to the public. This publication warned intending creditors from giving undue credit to the company. On the other hand, this statutory publication of the register of shares must have been intended to assure intending purchasers of shares that the statement therein contained might be relied on. The proposal of the liquidator involved a perversion of the contract which the purchaser conceived he was entering on by becoming a shareholder. It was one thing to set aside a contract which was unfair or corrupt, but quite another thing to give that contract a binding force altogether different from its own distinct terms. His Lordship referred, in support of this opinion to the case of *Butcher* (Law Journal, 32, p. 57, Chancery). And the case of the respondents, who were not original shareholders, seemed stronger. Here, too, the liquidator merely alleged that the respondents knew, or ought to have known, that the shares had not been *de facto* paid up. But were creditors entitled to hold, as against purchasers of shares, that the latter ought to have known these details, while they themselves, with the same means of knowledge, were perfectly innocent in their ignorance? On the whole matter, the petition, so far as the respondents were concerned, ought to be refused.

Lord Jerviswoode agreed with Lord Benholme.

Lord Ormidale thought that, before farther answer, the petitioner ought to be allowed to establish the grounds on which he contended that the names of the parties ought to be placed on the list of contributories.

Lord Barcaple, while concurring with all their Lordships as to the position of the liquidator, was of opinion that a party who purchased shares on the faith of the register in regard to the amount paid up on them, and in ignorance of anything wrong in the statement which it contained, was entitled, when called upon as a partner to contribute for payment of the debts of the company, to maintain that, by the contract into which he entered by taking the shares, and the provisions of the statute, he only became liable for the amount appearing on the register as still unpaid. But he thought that if the liquidator asked a proof that the nominal capital was not paid up, and that the respondents knew that fact when they acquired their shares, the petitioner ought to be allowed, before answer, a proof to that effect, but to that effect only.

In consequence of the difference of opinion among the consulted Judges, the case was appointed to be argued before Lord Kinloch.

Lord Kinloch held that the petitioner ought to be allowed to establish by evidence the grounds on which he contended that the names of the parties in question should be put on the list of contributories. He was entitled to proceed according to the reality of the case, and not according to the statements by the shareholders in the memorandum and articles. The shareholders could not take benefit by a falsehood committed by themselves. Every one was entitled to rely on the fact that the true and real capital of the company was £105,000. And in point of law there was no distinction between original shareholders and parties who purchased from them. The practical result would be that, in becoming a partner of such a company, no man could trust implicitly to the statements of the register, but would require to inquire into the actual condition of the company.

At advising—

Lord President—I am of opinion that the petition of the liquidator ought to be refused in so far as it prays that the list of contributories should be settled so as to include the names of Waterhouse, Jennings, and Lewis as contributories.

The memorandum of association states the nominal capital of the company at £105,000, but further states that £100 per share has been paid up, and that consequently there remains only £5 per share to be called. If this statement were true it does not seem to be maintained that there would on that account be anything irregular in the constitution of the company, or that a company of limited liability may not be brought into existence with its capital paid up to this extent, and be effectually registered and so incorporated under the statutes.

But the liquidator alleges that the statement is not true, but is the reverse of truth; that in fact no part of the capital was paid up, and that the statement was introduced into the memorandum by the projectors and original shareholders for the fraudulent purpose of deceiving the public and all persons who should hereafter deal with the company either as creditors or as purchasers of shares.

The liquidator contends that if he shall succeed in proving his averments as to the falsehood of this statement, he will be entitled to settle the list of contributories so as to render all, whether original shareholders or subsequent purchasers of shares, liable for the whole nominal capital represented by their shares—viz., £105 per share, except in so far as they or any of them have actually paid calls.

On the shares held by the respondents, £5 per share has been paid, so that it is only on the assumption that the liquidator's averments, if proved, will be sufficient to render the respondents liable as contributories for £105 per share that the liquidator proposes to put them on the list.

It appears to me that, if the liquidator's averments are true, the Garpel Haematite Company was not entitled to incorporation under the statutes as a company of limited liability—that, being in its constitution not an honest company for the prosecution of a legitimate business, but a mere fraudulent device to cheat the public, assuming the disguise of a company incorporated under the Statutes, the original shareholders who acted in concert in the creation of this fraudulent association are not entitled to the protection or privileges of the Statutes whether as regards the limitation of their liability or any thing else. And I cannot doubt that in such circumstances any creditor or other party interested would find an adequate and complete remedy at common law by insisting in the appropriate action for setting aside the registration of the company with all its consequences and effects, and so opening the way for a personal and unlimited liability on all who were concerned in the formation or management of this fraudulent association.

But if this company was not entitled to incorporation under the Statute, and if its registration may be set aside on the ground of fraud, it seems to me obvious that the shareholders of the company are not entitled to the benefit of the statutory process of liquidation; for winding-up under the Statutes is a privilege conferred by the Statutes on the shareholders of such an incorporated company for the purpose of distributing or apportioning in an easy and equitable manner the liabilities of the shareholders *inter se*, and at the same time expeditiously realising the assets of the company for the payment of its creditors. But whether this statutory proceeding be a benefit to the shareholders or not, I am unable to see how it can be applied to the case of a company, the incorporation of which (with all its consequences) is good for nothing, as having been obtained by fraud.

Had the question been raised between the liquidator and one of the original shareholders, whether he should be put on the list to the effect of making him liable as a contributory to the *limited* amount of £105 per share, I should have greatly doubted whether the allegations of the liquidator are relevant; for their legitimate and obvious effect is, not to extend the liability of an original shareholder to a large but still limited amount, but to establish against him an unlimited liability, to which it is impossible to subject him in a statutory winding-up.

But the present respondents are none of them original shareholders, but all purchasers of shares in open market. They are therefore, *prima facie*, not accessories to the fraud, but the dupes and victims of the fraud.

It will conduce to clearness to select the case of one, the leading respondent Waterhouse. The company having been registered in March 1858, Waterhouse made his first purchase in December 1858, from an original shareholder, of fifty shares, for which he paid £30 per share. In the course of the year 1859 he purchased several other parcels of shares until he came to hold in all 300 shares, for all of which he paid the ordinary market price in open market.

When Waterhouse made these purchases the memorandum of association, as registered, announced that the nominal capital was paid up to the extent of £100 per share. In the register of shareholders, also, the shares purchased by him were all entered as shares on which £100 per share had been paid. When he paid the price he received from the sellers, along with his transfers, certificates from the directors of the company in favour of the sellers that these were free shares to the extent of £100 per share, and when he went to the officials of the company to be registered as purchaser, he was registered as owner of these shares described as free shares to that extent. He has since paid calls which completely exhaust the £5 per share, which was represented as the amount not paid up.

The liability which Waterhouse undertook in becoming a partner of the company was thus constituted and defined by writing—by statutory writings, perfectly regular and complete. I am of opinion that neither as regards his copartners nor in a question with creditors of the company can his liability be extended further. The public were fully certiorated by what appeared in the register of shareholders, that the shares purchased by him were free shares to the extent of £100 per share. They had exactly the same access to information as Waterhouse had. The publication of the memorandum of association, and of the register of shareholders, is not, in my opinion, intended for the benefit of creditors only, but of intending purchasers of shares also. I think the one is as much entitled to rely on the information thus disclosed as the other. And when it turns out that the information so published is a mockery and a cheat, it will not do for one set of dupes (the creditors) to turn round on the other set of dupes (the purchasers of shares), and say, "You must be liable to us for a fraud in which you did not participate, and that beyond the amount of liability which you were, by the fraud, induced to undertake." If, indeed, Waterhouse, as purchaser, had been induced, by fraudulent representations, to undertake a greater liability as partner, he could not escape from that in a question with creditors, on the ground that he had been deceived by the company or its partners. But he is willing to pay, and has paid, all that he ever undertook to pay, and all that the public had any right to rely on his paying, as a shareholder of this limited company.

If, indeed, it could be alleged that Waterhouse was cognisant of the fraud of the original shareholders, the case against him might be different, though even then I should, for the reasons already stated, have great doubt of the relevancy of such an allegation in a statutory liquidation. But all that the liquidator is able to aver in this direction is, that all the respondents "knew, or ought to have known," that the statement in the memorandum of association was "utterly false," that "it might have been discovered from a simple inspection of the books of the company," that it was known to "the officials of the company," who would have told it to the respondents, if they had asked. These statements I cannot read as meaning that the respondents, or any one or more of them, had any peculiar access to information which was not equally open to all the public. Certainly; they do not amount to an averment of knowledge of the frauds by the respondents. They seem to me not to be averments of fact at all, but reasoning or inferences as to the position of an intending purchaser of shares, and his means of information. If, in this view, the liquidator is to be understood as suggesting that in such cases an intending purchaser will obtain an inspection of all the books of the company on asking for it, or that "the officials" will always be ready to give information as to the

frauds which have been practised in getting up the company, it is needless to waste farther time in commenting upon such statements.

The decision of this case is, in my estimation, a matter of grave importance. For if the doctrine of the majority of the consulted judges shall ultimately prevail, it must either lead to a farther amendment of the law of partnership, applicable to companies with limited liability, or it will to a large extent defeat the object of the Legislature in introducing the principle of limited liability, by greatly narrowing the class of persons willing to embark their capital in the purchase of shares in such undertakings.

Lord Curriehill concurred with the minority in holding that the petition ought to be dismissed, on the ground that it was not competent under the statutes.

Lord Deas concurred with the majority.

Lord Ardmillan—I am of opinion that the petition of the official liquidator "in so far as it prays that the list of contributories should be settled so as to include the names of Alfred Waterhouse, James Elijah Jennings, and Henry Lewis," ought not to be now refused; but the official liquidator ought to be allowed to establish by evidence the grounds on which he contends that the names of these parties ought to be placed on the list of contributories.

I feel that I should be unnecessarily occupying the time of the Court if I were to do more than indicate generally and briefly the grounds on which I have arrived at this opinion. I think it, however, important to mention, in the outset, that the application to this Court, and the appointment of the liquidator, was at the instance of creditors.

I concur in the observations made by Lords Cowan, Neaves, and Mure in their joint opinion, and I have little to add.

The first question is, whether the official liquidator is, in regard to this inquiry, to be viewed as *eadem persona* with the company, entitled to state no pleas and urge no equities which the company could not state for themselves. This is the leading point urged for the respondents. It is said that the memorandum and articles of association and the register of shareholders afford conclusive evidence that £100,000 of the nominal capital of the company was paid up from the first. It is contended that the statements in these documents are conclusive against the company, and against every partner; and that they must also be conclusive against the liquidator—so conclusive as to preclude all investigation.

I am not of that opinion. The point is of great importance. It is the turning point of this case; and it deeply affects the position, the rights, and the duties both of the liquidator and of the Court in procedure under the Winding-Up Act.

To me it appears very clear that the liquidator is not entirely or pre-eminently the representative of the company. He is an official liquidator, an officer of court, acting in the discharge of public duty, and for behoof of all parties interested in the estate. He is especially bound to promote and protect the interests of the creditors of the company. The winding-up of the estate is accomplished, not merely by judicial authority, but by the direct interposition and action of the Court, assisted by the liquidator who is appointed for that purpose.

Now, it is surely the part of the Court, and the duty of the Court, to see justice done to the creditors of the company, and to protect the rights of the creditors even against the partners of the company; and what the Court can do and ought to do in the winding-up must be within the power and the duty of investigation by the liquidator, who is appointed to assist the Court, and who is not so much in the position of an ordinary litigant as in the position of an officer of court making inquiries necessary to enable the Court to conduct the winding-up with justice to all parties.

It is not necessary for us now to decide whether, even if the company, or the liquidator as merely representing the company, were demanding enquiry, they would be precluded from investigating the matters here averred. I am not satisfied that the respondents' pleas would be conclusive even against the company, to the effect of shutting out all inquiry where falsehood and fraud are alleged.

In any view of the merely formal position of the liquidator, we must remember that the winding-up procedure is in the hands of the Court. The ascertainment of the true extent and position of the funds of the company, and of the true liabilities of the partners of the company, with a view to the just realisation and distribution of the whole estate, is a judicial duty. It is not to be discharged in the dark. The light is not to be shut out. The respondents scarcely pretend to say, and they have certainly not suggested any explanation to show, that the statement that £100,000 of capital had been paid up, was true. The liquidator offers to prove it false. The respondents say that it must be received as true without inquiry; and that proof of its falsehood must be refused.

To my mind this is a proposition contrary to the true meaning of the Statute, opposed to the highest equitable considerations, and at variance with all the principles of judicial procedure.

Is this Court to proceed in the winding up, knowing that they are hoodwinked on this matter, that the truth is withheld, and inquiry refused and resisted? I think not. One of the great duties of a Court of Justice is to strip off disguises, to get past obstructions which shut out the light, and to reach the truth, if possible.

But, as I have already said, I do not consider the liquidator as only the representative of the company. The whole structure of the Statute shows that the interests of the creditors were considered and protected by the Legislature, committed to the jurisdiction of the Court, and placed within the scope of investigation by the official liquidator. I need not again refer to the different clauses of the Statute in support of this. They have been pointed out by Lord Deas. I have no doubt on the point, and I do not think that there is any material difference of opinion among us in regard to it. I observe that Lord Benholme and Lord Barcaple, who take a different view of the case in other respects, agree with me on this point; and the case of *Oakes* v. *Turquand and Harding* (H. L., Aug. 1867, Ap. Ca. 325), referred to in the opinions of Lord Deas and of Lord Kinloch, is important as illustrating the position of the liquidator.

If I am correct in this view, then the demand for investigation is made on behalf of all parties interested; and it is against the official liquidator, not as representing the Company only, but as representing all interests, including the interest of the creditors, that these respondents propose to shut the door, and exclude inquiry.

This they do in respect of the terms of the memorandum and articles of the Association, where the fact that £100,000 of the nominal capital of the company was paid up from the first is set forth, and also in respect of the terms of the register of shareholders. I cannot hold that on either of these grounds, or on both, they can exclude investigation.

On this point I agree with what has been now stated by Lord Deas; and I also agree in the observations of Lord Cowan and others in regard to the statutory import and effect of the memorandum and articles. I do not think that the statement of the amount paid up on each share, or of the aggregate amount of such payment of shares, is within the statutory requisites, or meets the statutory purposes of the memorandum and articles. It is a statement inappropriately introduced where it was not required by statute, and where it is not attended with any statutory effects. If so, it is not from the enactments of the Statute that the statement can derive any absolute presumption of its truth, or any protection against inquiry. The liquidator alleges and offers to prove that the statement is absolutely false, and that the payment of capital said to have been made was never made. Now, when I consider that this statement of falsehood and fraud is offered to be proved by the official liquidator, whom we have appointed to assist us in doing justice and ascertaining truth, I cannot arrive at the conclusion, that we should refuse inquiry—should deliberately shut out the light—and should administer this estate in darkness and ignorance, when light and truth are within our reach.

The same observations apply to the statement in the register. That statement is not conclusive, and, in my opinion, is certainly not beyond the reach of inquiry. But I need not again repeat what has been already so well explained. I am not moved much by the suggestion, that if the facts alleged by the liquidator are proved, this would be a company with unlimited, not limited, liability, and thus not within the Winding-up Act. I do not think this is the case. The limit to £105 per share makes this a limited company. The further limitation to £5 per share, said to be effected by the statement that £100 per share was paid, is what is complained of. I think that the company is within the Winding-up Act on either view, the question being as to the amount of limitation.

In regard to the position of the respondents as being transferees, and not original shareholders, I have nothing to add to what has been so well stated by Lord Deas. We have as yet no materials for forming an opinion in regard to the nature of the transactions by which these respondents acquired their shares. The liquidator is, on that matter, entitled to investigate. The same amount of full and exact averment required from any ordinary litigant cannot be expected from the liquidator, who is in the position of being entitled and bound to inquire; and he has made averments in regard to which I am prepared to allow inquiry. But, even assuming the fact of *bona-fide* transfer, I concur in the opinion of Lord Deas, both as regards our own law and as regards the effect of the important decision in the case of *Oakes*.

On the separate and special point urged onbehalf of Mr Waterhouse, I am of opinion, first, that since he ceased to be a holder of shares within one year prior to the commencement of the winding-up, he must, in terms of sec. 63 of the Act of 1856, be deemed to be an existing shareholder; and secondly, that the liquidator is entitled to instruct, by evidence, his allegation, that Mr Waterhouse's transference of his shares to Charles Ford was made fraudulently, and in order to evade his just liabilities as a shareholder.

This last point is not free from difficulty, for the shares are undoubtedly transferable by law. But all that I say at present is, that a sale of shares to a person known to be a mere name, or a man of straw, made in the knowledge of the position of the transferee, and of the circumstances of the company, and for the sole purpose of evading liability, may be a fraud, and that opportunity of ascertaining the facts ought not to be refused to the liquidator. I am of opinion that, on this point also, the liquidator is entitled to inquiry. But if I am right in regard to the meaning and application of the Act of 1856, this inquiry will not be necessary.

In accordance with the opinion of the majority of the whole court, a proof was allowed to the petitioner.

Agent for Petitioner—H. Buchan, S.S.C.
Agents for Waterhouse—C. & A. S. Douglas, W.S.
Agents for Lewis—Goldie & Dove, W.S.
Agents for Jennings—Murray & Hunt, W.S.

Friday, March 13.

BOWE AND CHRISTIE *v* HUTCHISONS.

Cautioner — Mercantile Guarantee — Construction—Proof. A guarantee given to a firm of wholesale sugar merchants for "sugar," to be sold by them to another dealer in sugar, *held* to cover furnishings of treacle and syrup, the firm stating in evidence that such was the construction of "sugar" in the trade, and the defender leading no evidence to disprove that construction.

Cautioner—Cash transaction—Credit—Giving time to debtor—Bill. Observed that an entry of "Terms cash in fourteen days, less 2½ p. c. discount," in an invoice of goods furnished, did not mean that payment must actually be made within fourteen days, but only that such discount would be given, provided payment was made within fourteen days; and that the seller, by taking three months bills, did not thereby "give time," so as to liberate the cautioner.

Bill—I.O.U.—Holograph. Question as to validity of I.O.U. which was not holograph of granter.

The pursuers, Bowe & Christie, are sugar merchants in Edinburgh, and the defender, Andrew Hutchison, was also a sugar merchant there, and one of their customers; and the action concluded for the sum of £1178, 15s. 2d., as the price of sugar furnished to him. The other defender, John Hutchison, a brother of Andrew, granted to the pursuers, in January 1866, a letter of guarantee, by which he bound himself to the extent of "fifteen hundred pounds sterling, for sugar sold and to be sold" by them to his brother. Andrew, in his defences, pleaded that the pursuers had drawn bills upon him on 8th December 1866 for the whole sum sued for, and that on 24th December he had paid these bills to the pursuer Christie, in the office of their firm in Glasgow. The pursuers denied this, but explained that on 8th December, one of them had at Burntisland, on that day, taken bills from Andrew, by John's advice, and that the same day he had sent them by post, to be signed also by