on the whole matter, I am of opinion that we ought to dismiss the appeal.

Lord Young—I am of substantially the same opinion—that is to say, I think the pursuer has entirely failed in his case, and that not because of contributory negligence on his part, as the Sheriff-Substitute puts it, but because the fault imputed to the defenders as ground of action has not been established but negatived by the evidence. The few observations which I have to make will only have reference to one ground of judgment, though it will be the same in the actual result as that reached by the Sheriff-Substitute. The action substantially lies on this medium in point of fact. Some ten years before the accident this buoy got shifted from its proper place and was standing on the chart which people are entitled to look to for their safety in a wrong and dangerous place, where it acted as a trap and decoy, and this fatal change was attributable to the negligence of some officer of the defenders in not having put it down in a proper place where it was before when it was lifted to be cleaned. The pursuer in cond. 15 says—"The buoy, instead of being on the west side of Fairlie Patch, as indicated on said chart, was on the south-east or shore side thereof. The west or sea-side of the Patch was the proper place where the buoy in question ought to have been, and in construing the foresaid rule of the road the master of the pursuer's vessel relied on its being there. In the place the buoy was situated at the time of the casualty referred to, it, in following out the foresaid rule of the road, was a trap to lead vessels upon the rock, instead of being a beacon to ward them off the danger." And in cond. 16—"The said buoy at Fairlie Patch was placed in the position it was at the time of the foresaid casualty by the officers of the defenders, or by some one for whom they are responsible. At all events, it had been in that position for such a length of time before the casualty that its position must have been or ought to have been within the knowledge of the defenders and their officers for whom they are responsible. In so placing the buoy, or allowing it to remain in the position it was at the time of the casualty, the defenders misled the master of the pursuer's vessel, and were the cause of the casualty referred to."

This is a distinct enough averment in point of fact that there was a proper position in which it originally was on the chart, but that by the fault of the defenders it got shifted into a dangerous position, and in consequence the accident occurred. The pleas-in-law are also conform to that. The Sheriff-Substitute on the evidence found in point of fact that "the defenders were in fault in having the red buoy placed by them to indicate the position of the said shoal in a wrong position, and not in accordance with the code or system of buoys generally observed and recognised in Scottish waters. It is there I differ from the Sheriff-Substitute, and I agree with your Lordship. In my opinion it is not proved that the buoy was shifted. There is evidence on the subject, but the import of the whole is that it is not sufficiently proved that it was shifted. I think it was on the south side till after the accident; it was shifted to the north by Mr Stevenson, according to whose evidence (and it is the import of the whole) either position was right. I agree with your Lordship there is no evidence that it was in a wrong position, nor that it was shifted from a right position to a wrong one. The purpose of the buoy was mainly to call the attention of those navigating the waters, and who were not from habitually haunting those waters well cognisant with them, to a danger, and therefore to the necessity of consulting their charts.

So putting the judgment, and simply negativing the sole ground of action in fact put forward by the pursuer, is, I think, the best course we can take, though I agree in thinking that the captain probably got into the danger by taking the rule of the road in a wrong sense. I should therefore be satisfied with a judgment negativing the statement that this buoy had been shifted, and that it stood in a wrong and dangerous position at the time of the casualty.

Lord Justice-Clerk—I desire to add to what I have said that I entirely agree with Lord Young, but the view I have taken as to the rule of the road is, I think, quite sufficient to prevent success on the part of the pursuer.

Lord Craighill—I concur in the ground of judgment proposed by Lord Young.

Lord Rutherfurd Clark—I am of opinion that the defenders are entitled to absolvitor on the ground that the pursuer has failed to prove that the buoy was shifted or put down, or ever was, in a wrong place.

The Court pronounced this interlocutor—

"Find that it is not proved that the buoy mentioned in the record was shifted and placed in a wrong position by the defenders: Therefore sustain the appeal; recal the interlocutor of the Sheriff-Substitute appealed against; of new assoilzie the defenders from the conclusions of the action," &c.

Counsel for Pursuer (Appellant)—Trayner—R. V. Campbell. Agents—Cumming & Duff, S.S.C.

Counsel for Defenders (Respondents)—Ure. Agents—Campbell & Smith, S.S.C.

Wednesday, February 6.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

GREAT NORTH OF SCOTLAND RAILWAY COMPANY *v.* URQUHART.

Public Company—Director—Director obtaining Personal Benefit to the Prejudice of the Company.

In an action of implement and adjudication by a railway company against one of its own directors, founded on an alleged agreement between him and the company to the effect that, in order that the company might acquire a field adjoining one of their stations for increased station accommodation, he should, jointly with the company, buy the whole estate of which that field

formed part, taking the title in his own name, and conveying the field to the company for a price proportionate to the price of the whole, —*held* (*rev.* judgment of Lord M'Laren) that on the proof the company had failed to prove any such agreement, and that the defender, who had purchased the whole estate for himself, was, notwithstanding his position as director, free to contract or not with the company, and therefore under no obligation to communicate to them the purchase of the field.

In 1879 the Morayshire Railway Company desired, for the purpose of enlarging their station accommodation at Elgin, to acquire a field of the extent of 6 acres or thereby immediately adjoining their station there, and forming part of a small estate called Milnfield. At that time, and up to the amalgamation of the company with the Great North of Scotland Railway Company, which took place in February 1881, the defender in this case, Alexander Urquhart, was a shareholder and chairman of the board of directors, and James Jameson, solicitor in Elgin, was also a shareholder and one of the directors—he was also law-agent of the company, and was the defender's man of business.

The estate of Milnfield was advertised for sale by auction on the 4th of April 1879, but the sale was afterwards adjourned to the 14th. On the forenoon of the 4th a meeting of the directors of the Morayshire Railway Company was held, at which the defender and Jameson among others were present. The minute of this meeting bore, *inter alia*—"The secretary stated that the lands of Milnfield are advertised to be sold by public auction on the 14th current, and that it would be desirable, in the interest of the company, to purchase the park, of about 6 acres, adjoining the railway station at Elgin, for railway purposes. After consideration, it was resolved to make an effort to secure the park referred to, and Mr Jameson was instructed to watch the sale and endeavour to secure it for the company." . . . This minute was signed by the defender as chairman of the company. The instruction had reference to the sale on that afternoon which did not take place. The date "14th" April was filled in by the secretary in the evening after the sale was adjourned.

Milnfield was exposed on the 14th, and bought by Jameson in his own name for £2610, being £150 above the upset price.

The next meeting of directors was held on 2d May following, the minute of which bore:—"*Last Minutes.*—The minutes of meeting of 4th April 1879 were read and approved of.

"*Lands of Milnfield.*—Mr Jameson reported that he had purchased the Milnfield property for the chairman, for the sum of £2610; that the park adjoining the station was secured for the railway company; and that the whole property would have to be conveyed to Mr Urquhart in the first place, and the park would then be reconveyed by Mr Urquhart to the railway company at the price to be agreed upon. The price to be fixed at next meeting, after Mr Urquhart had time to consider the matter." . . . This minute also was signed by the defender as chairman.

Immediately after the purchase on the 14th of April, Jameson had notified the fact to the secretary of the company, who at once wrote the defender as follows:—" . . . After a very keen competition 'Milnfield' was knocked down to Mr Jameson for you and the railway company for £2610; the park adjoining the station to go to the railway company."

Jameson subsequently, acting as law-agent for the defender, obtained a disposition and assignation of the whole lands in favour of the defender, he (Jameson) being a consenting party thereto, and expede a notarial instrument thereupon.

The present action was raised against the defender Urquhart by the Great North of Scotland Railway Company—Jameson being also called for his interest—in May 1883, concluding that the defender ought to be ordained to dispone the six-acre park to the company, the pursuers paying in return for the said disposition the sum of £400, or such other sum as the Court should fix as the proportion effeiring to the park, of £2610, the price of the whole of Milnfield. In the event of the defender's failure to comply, there was a conclusion for adjudication of the park from him on consignation by the pursuers of £400.

The agreement alleged by the pursuers was to the effect that Jameson, acting for the company, on the instructions of the directors (including the defender), was to watch the sale, and endeavour to secure the park, and that he being also agent for the defender had agreed with him that he (Jameson) was to attend the sale for both the company and the defender, and bid for the whole of Milnfield, the defender to convey the six-acre park to the company for a price proportionate to the price of the whole lands on a fair valuation. They averred that in actually making the purchase Jameson acted as agent for the company in purchasing the park, and for defender in purchasing the rest of the property. The manner in which the title was taken to the whole in defender's name they averred to be merely for convenience in making up the title.

The defender denied that it was resolved at the meeting on 4th April to secure the park for the company, and averred that at a previous meeting he had expressed his disapproval of that project for certain reasons. At the meeting on the 4th, when calculations were submitted by the secretary as to the purchase of the park on the footing that it could be got only by his buying the whole estate in the first instance, he (defender) said that if he was to be the purchaser he would not agree to these calculations, but would make his own arrangements on a different basis, and would not agree to a joint purchase. He gave no instructions to Jameson to purchase the property or any part of it for him. He was from home from the 11th to the 24th of April, and only heard of the purchase on his return, when, after considerable hesitation, he agreed to take over the subjects. He had received the letter above quoted from the secretary, but as he considered that the latter had no authority to write the letter, he did not reply to it. He disputed the accuracy of the minute of meeting of 2d May. He had at that meeting denied that there was any joint purchase made by his authority. He was willing to let the company have the park at a fair price, which he fixed at £1244, brought out by a detailed statement.

The pursuers pleaded—"(1) The said James Jameson having, with the consent and approval of the defender, accepted the mandate of the

Morayshire Railway Company to purchase the park in question for them, and having purchased the same accordingly, and having subsequently taken the title in the defender's name with the defender's consent, as mere matter of convenience in conveyancing, the defender is bound to convey the said subjects to the pursuers, as representing the said company, on payment of a sum representing the just and proportionate value thereof as compared with the price of the whole of the estate of Milnfield. (2) The defender having been a director of the said company, and having acted as such in the matters alleged, he is not entitled to found as against the company upon a title obtained by him in his own name. (3) Assuming that the purchase of the park in question was made by the said James Jameson and the defender solely for the defender's own behoof, the said purchase was fraudulent, and was made in breach of good faith, and in violation of the defender's duty as director of and trustee for the shareholders of the Morayshire Railway Company, and the defender was bound to communicate the benefit of the said purchase to the Morayshire Railway Company; he therefore is now bound to convey the said park to the pursuers at the purchase price thereof. (4) On whatever footing the park in question was purchased, it having been agreed between the parties that the same should be conveyed to the Morayshire Railway Company, the defender is now bound to convey the same to the pursuers at the purchase price thereof, and is not entitled to make a profit from the re-sale of the same to them."

The defender pleaded, *inter alia*—"(3) The pursuers not being entitled to buy, and not having bought, the park in question, the present action is unfounded, and the defender ought to be assoilzied. (4) *Separatim*, the defender being willing to sell the park in question to the pursuers at a fair price, the present action is unnecessary."

The Lord Ordinary allowed a proof.

The secretary of the company deponed that the minutes above quoted were accurate as to what took place at the meeting, and that the defender concurred in the resolution set forth in the minute of the meeting of 4th April. He stated also that the defender did not dispute the accuracy of the calculations which he (witness) had submitted to him at the meeting. He could not say whether anything was then said about a joint purchase, but instructions were given to Jameson to secure the park for the company, and to arrange his own mode of doing so. On the evening after the adjournment of the sale on 4th April the defender called on him and told him "that he had decided to try and purchase the estate for himself with the view of giving us the park. He had notes with him with reference to the prices and allocations. He proposed to buy the whole property including the park, that the park should be given to the railway company, and that he should feu the rest of the ground." They then went into calculations, and witness stated £400 as the sum the company would give for the park. Defender did not object to that calculation; but first objected to £400 as the price at a meeting of directors on 14th May. The company meant at the meeting on the 4th that the defender should make a joint purchase, but he could not say that the term "joint purchase" was ever used between him and the defender.

His evidence so far as related to what took place at the meetings was corroborated by several other directors.

Mr Jameson's evidence was to the following effect —The defender had disapproved of the proposed purchase of Milnfield when it was first mentioned previous to 4th April. The proposal anent the purchase which was made at the meeting on the 4th was made in an informal conversation among those present after the regular business was over. The defender expressed total disagreement with the calculations then submitted by the secretary, and said that if he were to buy the property he would have his own way of counting, that he would have nothing to do with a joint purchase, and that if he were to buy he would buy it for himself. The minute of meeting of the 4th was accurate in stating that he was to make an effort to secure the park. After that he went to the defender and said—"'Now you must buy the ground and give us the park, and if you buy the ground you will be liberally treated by your co-directors, and if there is any extra sum paid it will be put on the price you are to get for the park.' (Q) Anything extra beyond what?—(A) Beyond his idea of the valuation, which was £2200. Defender was angry, and I did not get much civility from him; he was dry and disagreeable. . . He told me that he would attend the sale himself, and buy it for himself—he would have no joint purchase; at the same time he said it was too high, and would not bring the upset price. I heard no more from him, so far as I remember, till he returned from the south about the 20th April." . . . "(Q) On whose behalf did you attend the sale on 14th April?—(A) In point of fact I had no authority from Mr Urquhart to attend the sale. (Q) Did you attend on his behalf?—(A) I did not; I took out the park on my own responsibility. (Q) Did you attend the sale on behalf of the Morayshire Railway Company?—(A) I did not; I took the park—the property—on my own responsibility." He then deponed that he made the purchase in the expectation that the defender would take it over and hand over the park to the company. He made an entry in his scroll diary under 14th April a few days after that—"Mr A. Urquhart, attendance at the sale purchasing Milnfield for you." He made this entry merely on the chance of the defender becoming the purchaser. He afterwards pursuaded him into taking Milnfield. "We were to get the park on the understanding that we would pay a fair and honest price to him—a price that would reimburse him, and not let any loss fall on him for the rest of the ground." He (witness) considered himself bound to do everything he could to secure the park for the company, and he tried to act fairly for both parties.

The defender deponed that the arrangement in contemplation when Jameson attended the sale was that defender should purchase the property and give the park to the company, getting a bonus of £300 over and above the proportional share of the price. He told Jameson that unless he got it at a price that would return him a fair interest he would have nothing to do with it. He did not recollect having a meeting with the secretary on the evening of the 4th April. He never went into calculations with the secretary at any other time than that at the meeting of directors on the 4th April. He did not, before

going to Greenock on the 12th April, tell him that he had instructed Jameson to buy Milnfield for him. After his return home on 24th April he agreed to take the property out of friendship for Jameson. Since the purchase he had made some outlay on the property. He was willing then to hand over the whole estate to the company on getting what he paid for it, and the interest on the money he had laid out, or to keep it, including the park.

The Lord Ordinary pronounced this interlocutor—"Finds that the defender Alexander Urquhart is bound by agreement to convey the subjects libelled and claimed by the pursuers at the fair price or value thereof, assesses said value at £700, and on payment of that amount by the pursuers to the defender, ordains the defender forthwith to dispone and convey to the pursuers by disposition the six-acre park, and decerns.

"*Opinion.*—This claim is one well fitted to be disposed of by arbitration, because there really has been no legal question raised between the parties before me, and I may say I regret that the proposal made by the pursuers, the North of Scotland Railway Company, to refer this matter to arbitration, had not been agreed to. I keep in view in making this remark that the present pursuers were not parties to the contract which they are seeking to enforce. That contract was made with the Morayshire Railway Company, which has now been merged in the Great North of Scotland; and one cannot therefore altogether impute to the Great North of Scotland Company knowledge of the negotiations which preceded this sale, if sale it was. They have taken over the undertaking of the Morayshire Railway Company, and found this unsettled claim remaining; and I think it cannot be said that they took an unreasonable course when they made an offer of, I think, £660, with the alternative of arbitration. However, that has been declined, and I must now deal with the case upon its merits.

"The claim is for the conveyance of the piece of land consisting of 6 acres 2 roods and 13 perches, which has been referred to as the 6-acre field, part of a little estate of 30 acres called Milnfield, and that estate immediately adjoins the station of what was the Morayshire Railway Company at Elgin. The Company very urgently desired to become the possessors of this field with a view to increased station accommodation. It appears from the evidence that this had been in the view of the directors and of the secretary for a considerable time before the property came into the market, and as soon as Milnfield was advertised for sale the secretary very properly called together the directors and pointed out to them the importance of acquiring Milnfield, or at least so much of it as was needed for their purpose. The first meeting which he called failed to take effect, because there was not a quorum of directors present, and the matter was considered on the 4th of April, the day on which the sale had been advertised to take place, although in point of fact it did not take place till ten days later. Now, at this meeting of 4th April it does not appear from the minutes that any reference had been made to Mr Urquhart, the chairman, as a possible competitor with the company, or as a person who might be willing to join with them in the acquisition of the estate; but we know that before the meeting took place it had been proposed to Mr Urquhart by the secretary of the company that he should purchase the estate under an arrangement by which the company were to acquire the 6 acres from him; and although no agreement was made, that proposal was under consideration at the time when the meeting of 4th April was held. Now, the minute bears that 'it was resolved to make an effort to secure the park referred to, and Mr Jameson (that is, the company's agent) was instructed by the directors to watch the sale, and endeavour to secure it for the company.' I am quoting from the record, and I have no doubt it is substantially, if not textually, a correct representation of the minute. Mr Urquhart was present at this meeting, and it appears to me, that being a party to the minute under which the company's agent was instructed to secure the park for the company, he could not be a competitor with the company for those 6 acres without giving them due notice of his intention. At least, he could not do so without separating his interests in the sale from those of the company. Now, Mr Jameson was the agent both for the company and for Mr Urquhart individually, and if Mr Urquhart was to take up an antagonistic position, I think he was bound to make such a statement either then or before the sale, as would have enabled the company to secure the services of an independent representative at the sale. But if Mr Urquhart intended, while purchasing the property, to carry out the wishes of the directors for the acquisition of the 6-acre field, then he was quite entitled to go on, saying it may be nothing to anyone—nothing that would be likely to raise the price of the property—and employing a gentleman who had the interests both of himself and the company in his hands. Now, although under the influence of disagreement parties have come to differ in their accounts of what actually took place in the interval between the meeting of 4th April and the sale, I think there is a high degree of probability that all the intermediate arrangements were in fact made in the view of carrying out the resolution of the company according to its spirit and intention, and certainly I see nothing in the evidence inconsistent with such an intention. I don't think it necessary to attempt an analysis of the different conversations that took place between Mr Urquhart and the secretary on the one hand, and Mr Urquhart and Mr Jameson, who held a twofold relation, on the other; but I think that before Mr Urquhart started for Greenock, which I think he did on the 11th or the morning of the 12th April, he had left it to Mr Jameson to act according to his judgment and discretion in the purchase of this property for the benefit of himself and of the company. It is quite true that before the defender went so far, it had been suggested to him by Mr Jameson that in the event of the property going too high, going above its fair value, and in respect it was important for the company to secure their part at any price, the company might not be unwilling to relieve the defender of any loss that might be sustained on the purchase within the limit of £300. I think no blame attaches to Mr Jameson for that suggestion. I don't think he had any power to make such an agreement, and certainly it was a delicate thing for a gentleman in the position of the chairman of a board of directors to stipulate in such terms. But it is quite plain

that the £300 was named as an outside sum, and the conversation really amounted to nothing more than this, that in the opinion of the two gentlemen, the chairman and the agent of the company, they might safely make this purchase, trusting to the fairness and liberality of the directors to take into consideration any loss that might be incurred, the defender purchasing the property as an investment, and at the same time with a wish to oblige the company of which he was chairman. Mr Jameson gives a different account of the matter altogether, because he says that even with this proposal before him Mr Urquhart had declined to have anything to do with the property, and that he (Jameson) really purchased the property entirely on his own responsibility, trusting to his client ratifying it. No doubt something must have been said, or left unsaid, that made Mr Jameson think he was entitled so to represent the matter. But I prefer to take Mr Jameson's impressions at the time as deduced from his actings—from what he did after the conversation—rather than his present impressions; and we know that he bought the estate, feeling, as he told us, quite sure that his purchase would be ratified, which I think is just equivalent to saying that he had authority to make the purchase. Then to complete this matter, in the minute of the next meeting of the directors of the Morayshire Railway Company, held on 2d May, it is recorded, 'Mr Jameson reported that he had purchased the Milnfield property for the chairman for the sum of £2610, and that the park adjoining the station was secured for the railway company.' What follows is not very material, and then it concludes, 'The price to be fixed at next meeting after Mr Urquhart has had time to consider the matter.' Mr Urquhart was present at this meeting and agreed to this minute, and even if there were more doubt than I think there is as to the meaning of the agreement, he cannot be allowed to maintain, as it has been maintained for him today, that there was no agreement, because it appears under his hand that as the result of the purchase which he had made, the park adjoining the station had been secured for the railway company. Mr Mackintosh's view was, that it must either be held that Mr Jameson had made the purchase to the extent of the 6-acre field for the company, with all the conditions which he says Mr Jameson, as representing the company, had attached to it, or if that is not agreed to,—if there is a misunderstanding—then there shall be no contract. This would be a very unfavourable case for applying that rule of law,—which is sometimes used for the resolution of extreme cases,—where the parties are not agreed, that there is no contract, and the parties are to be remitted to their rights, because in this case it would be impossible by such a solution to do equity between the parties; there could be no *restitutio in integrum*. The sellers of the property—the representatives of the deceased Mr Milne—of course could not be asked to take back their property, and the result is that the property must either be divided or it must go to one or other of the two parties to this action. If I give it to either the one or the other, I think that would not be disaffirming the contract. But the conclusion I have come to is, that there was a contract, but that no price was fixed. Mr Urquhart had not consulted any of his co-directors as to the price at which the 6-acre field was to be given off, and I do not think that the company can be bound by an alleged agreement as to price between their chairman and his agent, one of them professing to represent his own interest, and the other the interest of the company. I don't think that they professed to do anything of the kind, and there was no agreement about the price. It is quite a legal sale—a sale for a price to be afterwards settled. Under such a contract the law implies a sale for a reasonable price. Now, I think Mr Urquhart would have probably obtained some concession from the directors if he had not taken up the position that he was entitled to fix his own price. That is a position which no director of a public company can take up in dealing with his company. The law naturally looks with great jealousy at all contracts between a director and a company for whom he acts; but there may be cases such as the present, where it is so clearly for the interest of both parties that they should contract, that it would be too *doctrinaire* to apply the disabling rule, and where all that is necessary is that proper precautions are taken to ensure fairness in the transaction. In such cases a fair and reasonable price must be either settled by agreement between the director and his colleagues, or by neutral arbitrament, that being, I think, the proper course to be taken in this case.

"It falls to me, then, to determine the true value of the field which is to be conveyed to the company, and various modes of valuation have been suggested." . . . . . .

[*His Lordship then mentioned the grounds on which he arrived at the conclusion that the value of the field was* £700].

The defender reclaimed—The pursuers had failed to prove any agreement with the defender to make a joint purchase of the estate and hand over the park to the company. In that event his position was not affected by his being a director of the company. He was an independent purchaser, and was entitled to offer the ground at his own price, which was a fair one. In a contract of sale where no price was fixed, the price was the market price—Benjamin on Sales, 3d ed., p. 83.

The pursuers replied—The evidence showed an agreement to make a joint purchase, from which defender could not now resile. But even apart from any agreement, he was precluded by his position as a director from making a profit out of the transaction to the prejudice of the company—*Benson* v. *Heathorn*, 1 Younge & Collyer's Chan. Rep. 326.

At advising—

Lord Young—The Lord Ordinary has decided this case on the ground that the defender sold the land in question to the pursuers (or their predecessors, the Morayshire Railway Company) "for a price to be afterwards settled," which his Lordship thinks means "a reasonable price," and being of opinion that £700 is a reasonable price, he has ordered the defender to fulfil his contract by conveying the land on payment of that sum. The record is so loose and inartistic that it is hard to say what are the grounds of action relied on, for several seem to be indicated. A contract of sale between the pursuers (or their predecessors) and the defender is certainly not

alleged or made the ground of any plea-in-law. Doing my best to collect a ground of action from the record and the evidence taken together, I venture to represent it thus, that Mr Jameson purchased the property as an agent on the joint mandate of the railway company and the defender, for both of whom he acted—for the company as regards the six acres in question, and for the defender as regards the residue—the principals having previously agreed to divide the subject between them accordingly on equitable terms, and that the defender, in whose name the title to the whole was taken, is bound to give effect to this agreement. I have said on "equitable terms" as the most reasonable and plausible way of representing the pursuer's intention, although they in fact ask a conveyance of the six acres on payment of "a just proportionate value thereof as compared with the price of the whole estate," and so represent their contract with the defender.

On the evidence I am of opinion, 1st, that prior to the purchase by Mr Jameson on 14th April 1879 there was no contract whatever between the railway company and the defender; and 2d, that Mr Jameson did not make the purchase as agent for, or on the mandate of, both or either of them, but without authority, and so at his own hand, and at his own risk. The facts are, I think, clear, and although not usual, by no means of an unprecedented character. Mr Jameson knew that the defender (his client) had a fancy for the property, and thought it worth £2200, and that the railway company (also his clients) desired to possess the six-acre park in question. With this knowledge he took it on himself to attend the sale and purchase the property in his own name for £2610 to which he bid it up, trusting that one or other of his clients, or both between them, would keep him scatheless. It is, indeed, only the higher class of men of business who will run such personal risks in the hope of saving their clients, but we have all, I suppose known instances—I could myself mention some. That this was Mr Jameson's purchase is really not doubtful. Nobody says that he had authority from either the railway company or the defender to purchase the property for £2610, or indeed at any price, and he says himself that he had not. It is therefore as clear as possible that he was entirely at the mercy of his clients. The defender, not without demur and showing himself "nasty," consented to relieve him. The railway company probably could not, for it does not appear that they were authorised by their Act to buy this property, and at least they did not. They might, indeed, agree to take the six-acre park, for that I quite understand is within their statutory powers, but to that end their agreement must be with the defender. Is any agreement between them and him established? I have already said, and it is really not doubtful, that there was no such agreement prior to the purchase. Was there any thereafter? I think clearly not. That he was willing to treat with them, and quite hoped to come to such terms as would reduce the extravagant (as he thought) price which by homologating Mr Jameson's unauthorised purchase he had to pay is clear enough, but equally as to that I think that no agreement was ever come to. That he agreed to let the railway company have the six acres at a price proportionate to the price of the whole property, or at a price to be fixed independently of himself, is, in my opinion, an extravagant suggestion, for anything he ever said or wrote on the subject is against it. The only piece of evidence worthy of consideration is the minute of the directors' meeting of 2d May 1879. But that refers to a price "to be agreed on"—"to be fixed at next meeting after Mr Urquhart had time to consider the matter." This is not the language of contract, or of a minute recording a contract. Accordingly, from June 1879 till November 1882, when the railway had passed into other hands, no more was heard, written, or spoken on the subject.

I assent of course to the proposition that a director of a company may not use his position to obtain a benefit to himself at the cost or to the prejudice of the company, and that if he does he will not be permitted to retain the benefit, but ordered to transfer it to the company. This is a general rule founded on an intelligible and wholesome principle, and the chairman of a railway company might no doubt so act as to bring himself under it. It has been applied even in the case of a partner of a company. But I find no facts here to sustain the conclusion that the defender used his position as chairman or director of the railway company to acquire the lands of Milnfield, or was in any way aided by that fact in doing so. He was as free as any other to purchase these lands at the sale, or at least was under no disability from the mere fact of his office, together with the knowledge that a part of them would be useful to the company, which desired to acquire it accordingly. If, indeed, the purchase was made in pursuance of an agreement between him and the company he shall be held to the agreement, and bound to fulfil it without reference to the legal doctrine I am now noticing, although his purchase as chairman of the company might be important as a circumstance in considering the evidence of the alleged agreement. But I cannot assent to the notion that he was not at liberty to decline, as I think he in fact did, to make any agreement for a joint purchase, or that having declined he was debarred from purchasing for himself.

The only other possible view, so far as I see, is, that Mr Jameson made the purchase as agent for the company, and was not at liberty to transfer it to the defender except on such terms as the company approved. But this view is not consistent with the view in which the pursuers allege that Mr Jameson was instructed to watch the sale and endeavour to secure the six-acre park for the company. It is not alleged that the company authorised him to purchase the lands of Milnfield, and it does not appear that they could. All he could do for the company was to try to make an agreement with the purchaser of the whole lands to let the company have the six acres in such terms as the company might be willing to agree to. He could not possibly be sure. It is indeed alleged that he in fact made that agreement with the defender, and that by anticipation, before the purchase, so that he in fact attended the sale as agent for the intending purchasers—for the company to the extent of the six-acre park, and for the defender as regards the rest of the lands, the price to be apportioned according to measurement. Such is

the case, and the only case, averred by the pursuers, and I have already said that it has in my opinion no support from the evidence.

When the defender agreed to relieve Mr Jameson of the purchase which he had made, I think he was quite free to contract or not with the railway company, nor do I see any ground for holding that he was under a legal obligation or moral duty to transfer the whole to the company failing agreement for a part. It is, however, a satisfactory manifestation of his perfect integrity in the whole matter that in the course of his evidence he offered to surrender the whole purchase to the company at the price he paid for it, and that the offer was repeated by his counsel at the bar, and very emphatically rejected by the pursuers.

Lord Craighill — I entirely agree in the opinion which has been delivered by Lord Young. He was good enough to give me an opportunity of reading it, and I agree not only in the conclusion to which he has come, but in all the reasons he has given for that conclusion.

Lord Rutherfurd Clark—I am of the same opinion.

Lord Justice-Clerk—I entirely agree in the opinion of Lord Young.

The Court recalled the Lord Ordinary's interlocutor, and assoilzied the defenders from the conclusions of the action.

Counsel for Pursuers (Respondents)—J. P. B. Robertson — Jameson — Ferguson. Agents — Gordon, Pringle, Dallas, & Co., W.S.

Counsel for Defender (Reclaimer)—Mackintosh —Orr. Agent—John K. Lindsay, S.S.C.

Wednesday, February 6.

SECOND DIVISION.

[Lord Lee, Ordinary.

DUNDEE PROVIDENT PROPERTY INVESTMENT COMPANY *v.* MACDONALD.

Jurisdiction — Statutory Exclusion — Building Societies Act 1874 (37 *and* 38 *Vict. c.* 42), *secs.* 16, 34, *and* 36—*Prorogation—Clause of Reference to Arbitration.*

The rules of a building society, incorporated under the Building Societies Act 1874, provided that all matters in dispute between the company and any member of it should be referred to the Registrar of Building Societies. A member of the society having fallen into arrear in repayment by instalments of an advance made by the society, the society, in terms of a rule providing for such a case, raised an action for the member's removal from the property disponed to the society in security of the loan. The defender stated no plea to the effect that the jurisdiction of the Court was excluded, and on the merits the Lord Ordinary decerned for removal. The defender reclaimed, and argued that the jurisdiction of the Court was excluded. *Held* that, having taken a judgment on the merits without objection to the jurisdiction, the defender could not thereafter be allowed to maintain that the jurisdiction was excluded.

The Dundee Provident Property Investment Company, carrying on business in Dundee, was originally formed under the provisions of 6 and 7 Will. IV. cap. 32, and afterwards incorporated under the Building Societies Act 1874. Isabella Macdonald, the defender, was a member and shareholder thereof.

One of the main objects of the company was making advances of money to members or shareholders on the security of property belonging to them, these advances being made for such periods as the directors of the company might sanction, and repayable, principal and interest, by instalments, all according to the rules and tables of the company, which were binding on every member and shareholder. Rule 31 provided as follows—"When any shareholder who has obtained an advance upon property allows his repayment instalments and interest, or any disbursements made on his account, to fall into arrear to an extent equal to three months' instalments, it shall be in the power of the directors to remove him from the possession or occupancy of the property, to enter into possession thereof themselves, to let the same, and to draw the rents thereof, and that by a letter under the hand of the manager addressed to such shareholder, whether a female, or minor, or insane, or subject to any incapacity whatever, intimating the same, without any other warning or legal process whatever." . . . Rule 38 provided—"All matters in dispute between the company and any member thereof shall be referred to the Registrar of Building Societies in Scotland as sole arbiter."

The defender in 1874 applied for and received, in terms of the rules, an advance of £1100, repayable, principal and interest, by fortnightly instalments, on the twenty years' scale, in consideration of which she granted an *ex facie* absolute disposition in favour of the company in August 1875, a bond and back-bond being also entered into between the parties of same date. The subjects conveyed consisted of a piece of ground at Hilltown, Dundee, and certain dwelling-houses thereon, let chiefly to weekly tenants. The defender occupied one of the dwelling-houses, and collected the rents of the remainder.

The present action was brought in the Court of Session in February 1883 for declarator that the defender had failed to perform the obligations undertaken by her in her agreement with the company relative to the repayment of the advance of £1100, by having allowed the instalments to fall into arrear to the extent of three months' instalments, and that the pursuers were entitled to enter into possession of the subjects conveyed to them by the defender, and that the defender was bound to cede possession thereof. There was also a conclusion for interdict against the defender occupying or possessing the subjects or exercising any right therein or molesting the pursuers in their possession.

The defender stated no objection to the jurisdiction of the Court.

The Lord Ordinary (Lee) after a proof found, declared, and decerned in terms of the declaratory conclusions of the summons, and decerned