dwelling-house may be absent from home for considerable periods of each year without the power or liberty of returning when he pleases. The case of a man who joins the militia during the year, and goes out for eight weeks' training is an example of that. It occurs to me as strange that if such an objection be tenable it should not have been raised and sustained and applied in practice during the years which intervened between the Act of 1868 (when the household qualification was introduced in burghs) and the Act of 1884. During that period the qualifications were closely scrutinised, and not less keenly contested than they appear to be now, and my experience as a Sheriff in the revisal of the registers for the burghs of Stirling, Dumbarton, and Perth is that such an objection was unheard of where the voter's occupancy was clear, and the dwelling-house in question was his only or ordinary habitation during the twelve months. The case of *Manson*, 7 Macph. 329, was the case of a man who had voluntarily abandoned his dwelling-house in order to take employment elsewhere. It decided no such question as is raised here.

I regard the objection therefore as one which cannot be sustained without introducing a new principle in the administration of these enfranchising statutes, and my opinion is that it is not well founded. I think that if a man is *bona fide* the occupier of a dwelling-house, and if that dwelling-house is, as in this case it was, his ordinary and proper habitation during the twelve months required by the statute, his temporary absence during a portion of the twelve months, caused by confinement either in a prison or in a hospital for infectious diseases, does not prevent him acquiring a qualification as an inhabitant-occupier. The continuity of his residence or inhabitancy does not appear to me to be affected by such compulsory absence during a portion of the period of twelve months. Upon this point I think that the case of *Rogers*, 16 D. 1005, has a distinct bearing.

I concur therefore in thinking that the determination of the Sheriff in this case was right.

Lord Kinnear—I have come to the same conclusion as your Lordships, but I am unable to agree in thinking that the decisions of this Court upon the construction of the Poor Law Amendment Act are precedents for the determination of this case, because these are decisions upon the interpretation of a statute regulating very different rights, and expressed in altogether different terms. The Representation of the People Act, which we have to consider, does not require continued residence for any specified period as a qualification for voting, and therefore I do not find it necessary to consider whether imprisonment for the period of four months out of twelve would break the continuity of a residence if that had been, which I think it is not, one of the conditions which the statute provides for the qualification of a voter. What we have to consider is, whether this voter is or is not what is ordinarily meant by an inhabitant-occupier, and for the reasons given by Lord Lee, apart from his observations on the Poor Law Amendment Act, I think that M'Guire is an inhabitant-occupier of the house in question. I do not think that in coming to that conclusion we are doing anything at all different from what has been done by the English Court in any of the cases cited to us. I think that the decisions of the English Court upon the construction of the Statute of 1884 should be received with great respect, and if on the construction of that statute we had found they had come to a decision different from that at which we are inclined to arrive that would have given me great difficulty. But I do not find that any of the decisions of the English Court are inconsistent with the views which your Lordships have expressed.

The Court dismissed the appeal and affirmed the judgment of the Sheriff.

Counsel for the Appellant—Maconochie. Agents—J. & F. Anderson, W.S.

Counsel for the Respondent—Patten. Agents—J. & A. Peddie & Ivory, W.S.

COURT OF SESSION.

Friday, December 21.

FIRST DIVISION.

[Lord Trayner, Ordinary.

GENERAL PROPERTY INVESTMENT COMPANY *v.* MATHESON.

Bankruptcy—Liquidation—Limited Company—Articles of Association—Purchase by Company of its own Shares—Reduction of Transfer—Rectification of Register—Companies Act 1882, *sec.* 5.

It is *ultra vires* of a limited company, incorporated under the Companies Acts, to purchase its own shares, and any such transaction is void.

The 35th section of the Companies Act 1862 authorises the Court in an application for rectification of the register of a company, either to refuse the application, or, "if satisfied of the justice of the case," to make an order for rectification thereof.

By the 4th article of association of a company incorporated under the Companies Acts with limited liability, shareholders wishing to sell their shares were bound to offer them to the company. A shareholder transferred his shares to the company in 1876, and his name was removed from the register, the company's name being placed thereon instead, and he was thereafter in no way treated as a shareholder. This and similar transactions were known to a number of the shareholders. There was some evidence that the shareholder might have disposed of his shares to a third party had the company refused them. In 1886 the company went into liquidation. Part of the debt due by the company had been incurred while the name of the shareholder in question was still on the register. At the instance of the liquidator, the Court, in respect that it was *ultra vires* of the company to purchase its own shares, reduced the transfer, and *ordained* the names of the trustees and executors of the shareholder to be placed on the list of contributories.

The General Property Investment Company

(Limited) was incorporated under the Companies Acts 1862 and 1867 on the 8th February 1876. The object for which the company was established was described in article 3 of its memorandum of association to be as follows—"To purchase or acquire heritable property of every description within the United Kingdom, and any heritable rights or other rights vested in or secured over heritable property, and to hold, manage, improve, build upon, lend upon, deal with, feu, sell, or dispose of the same in every legitimate way, with power to borrow money on security of property purchased or acquired, or on debenture or by way of deposit, and the doing all such other things as are incidental or conducive to the attainment of the above objects." The company had no power under its memorandum of association to purchase its own shares.

The articles of association of the company were those of Table A of the Act of 1862 with certain modifications. Articles 3, 4, and 5 were as follows—"(3) The regulation No. 4 of said table is hereby modified to the effect that only £1 per share shall be at present called up, and another £1 per share on 15th May next, and the balance may be called up on three months' notice. (4) No shareholder shall transfer his shares until he has at first made offer of them to the company at the then market price. (5) Any shares acquired by the company may be retained as the property of the company, or disposed of in such manner as the company in general meeting thinks fit to direct."

The company bought considerable properties in Dundee, London, and Edinburgh, and for the years 1877, 1878, and 1879 paid dividends of 12 per cent. In 1886 it became insolvent. A winding-up order was pronounced on 16th December 1886, and Mr Myles, accountant in Dundee, appointed official liquidator.

The capital of the company, so far as issued, consisted of 4250 shares of £10 each, but at the date of the liquidation a number of the shares were held by and stood in the name of the company. Of these 250 shares had been acquired by the company from Robert Matheson, 25 Abercromby Place, Edinburgh, in the following circumstances—When Mr Matheson joined the company it was understood that he was to be, and he was accordingly on 3rd February 1876 appointed, architect of the company. Having found, however, that this position could not be occupied by him consistently with an office he held under Government, he offered his shares to the directors on 19th May 1876. On 5th June 1876 the directors intimated their willingness to purchase Mr Matheson's shares, and to pay him £254, 11s. 10d., being the amount paid upon the shares, with interest at 5 per cent. from the time at which payment had been made. The above sum was paid to Mr Matheson on 22nd June 1876, and a transfer was signed by Mr Matheson on 23rd June, and by three directors and the secretary of the company on 7th October 1876. Thereafter in the books of the company these shares stood in the name of the company. Previous to the liquidation of the company calls had been made on the shareholders payable as follows—£1 per share on or about 10th May 1876; £1 per share on 1st November 1880; 10s. per share on 7th February 1882; 10s. per share on 7th August 1882; 10s. per share on 9th November 1882; 10s. per share on 26th June 1883; 5s. per share on 1st May 1884; 5s. per share on 10th October 1885; 5s. per share on 10th January 1886; £3, 5s. per share on 23rd November 1886 After the company was in liquidation the liquidator called up the remaining £1 per share of unpaid capital on 30th June 1887.

Mr Robert Matheson died on 5th March 1877, and on 2nd November 1887 the company and Mr Myles, the liquidator, raised an action of reduction against Mrs Matheson and others, the trustees and executors of Robert Matheson, to reduce the transfer above mentioned, and also an entry in the books of the company dated 31st October 1876 of the names of the company as holder of the said 250 shares, and for payment of the sum of £254, 11s. 10d. received by Mr Matheson from the company, with interest from the date on which it had been received by him, and of the amount of the calls which had been made, with interest from the date at which such calls became due.

On February 25th 1888 the company and Mr Myles presented a note to Lord Kinnear, Ordinary, in the liquidation, to vary the list of the contributories of the company by having the names of the trustees and executors of Robert Matheson placed thereon in respect of 250 shares of the company.

The pursuers in the action pleaded—"(1) The sale and transfer of shares by Robert Matheson to the company condescended on being illegal and invalid, and inconsistent with and in violation of the Companies Acts 1862 and 1867—(*a*) The said transfer should be reduced as concluded for; and (*b*) Decree should be pronounced in terms of the petitory conclusions of the summons."

The defenders pleaded—"(3) The defenders should be assoilzied in respect of the lapse of time since the transfer was granted and accepted, and of the actings of parties, and the change of circumstances condescended on. (4) *Restitutio in integrum* being impossible, the defenders should be assoilzied. (6) The company and the shareholders and creditors thereof having acquiesced in and adopted and homologated the said sale and transfer, the pursuers are barred from now maintaining their present claims. (8) The pursuers' whole claims being inequitable and contrary to the justice of the case, the defenders should be assoilzied."

A proof was allowed in the action, from which the following facts appeared:—Of the 4250 shares issued, 1250 were acquired by the company. Of these a number were re-issued, leaving 758 in the hands of the company at its liquidation. Mr Matheson's shares were never re-issued. At least a number of the shareholders were aware of these transactions.

In the minute of the fourth annual general meeting of shareholders of the company, held on 31st October 1879, the following paragraph occurred:—"It was mentioned that Messrs Adam Curror, Kenneth Matheson, and Robert Craig, who held 250 shares each, had during the past year surrendered their shares to the company without any price being paid for them, and after consideration it was resolved that these 750 shares, along with 250 shares previously acquired by the company from Mr R. Matheson should be allotted equally amongst all the existing share-

holders prepared to accept thereof."

There was some evidence to the effect that Mr Matheson or his trustees might have disposed of the shares had they been refused by the company. Since May 1876 no dividend had been paid or intimation of any calls made to them. As to the dividends the evidence was to the effect that these had been paid in respect of estimated and not realised profits in 1878 and 1879. The liquidator's state of accounts showed a deficiency of £8933, and a probable dividend of 6s. 6d. per £, subject to expenses. Some of the liabilities had been incurred prior to the transfer of the shares by Mr Matheson.

Mr Myles in his examination on this point said—"With reference to the liabilities at present attaching to the company, there are some that were incurred prior to the purchase of Mr Matheson's shares by the company. There is a bond to H. R. Cunnynghame for the sum of £3000, which is not all paid up. The money was received on 15th May 1876. Then there is £800 of Clarke's trustees' bond. No claim has been made in respect of that—indeed, that has been paid up by a sale of the property by the bondholders since the liquidation. (Q) With regard to Cunnynghame's bond, there is a deficiency in the subject of security? — (A) Upwards of £1100 is the amount of the claim in the liquidation. (Q) The heritable subjects not having been sold?—(A) They are interested in the property that has been sold by Clarke's trustees, but they will get nothing out of it.—(Q) To some extent the security over which their bond extended has been realised?—(A) Yes, but by a prior bondholder, and they get no benefit. I am quite satisfied that the deficiency is not overstated in the claim that has been made; I think it will probably be more."

By section 35 of the Companies Act 1862 it is provided as follows:—"If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act . . . the person or member aggrieved, or any member of the company, or the company itself, may . . . as respects companies registered in Scotland by summary petition to the Court of Session, or in such other manner as the said Courts may direct, apply for an order of the Court that the register may be rectified; and the Court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied with the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained."

The Lord-Ordinary (Trayner) on 10th March 1888 pronounced the following interlocutor in the action of reduction—"Finds that it was *ultra vires* of the General Property Investment Company to purchase from the late Robert Matheson the 250 shares mentioned on record, and that the transfer of said shares, now sought to be reduced, was illegal: Finds, further, that the pursuer, as liquidator of said company, is entitled to recover, and that the defenders are bound to make payment to him of the sum of £254, 11s. 10d., being the amount paid by said company to the said Robert Matheson in respect of said transfer, with interest thereon at the rate of five per cent. from the date of citation to this action till paid: *Quoad ultra* supersedes further consideration of the cause *in hoc statu*: Grants leave to reclaim.

"*Opinion.*—The pursuers in this case seek decree against the defenders, the representatives of the late Mr Robert Matheson, in the first place for reduction of a pretended transfer by Mr Matheson to the company of 250 of the company's shares; and secondly, of a pretended entry in the books of the company, dated 1st October 1876, of the names of the company as holders of the 250 shares. These reductive conclusions are followed by a conclusion for payment of over £3000, made up of £254, 11s. 10d. paid by the company to Mr Matheson in respect of the transfer, and the balance, of calls made on and said to be payable in respect of the 250 shares in question. The defenders say that no notice of any calls have ever been given to them, and that they should be assoilzied from the conclusions relating to the calls.

"The last of the calls is one made since the company went into liquidation, and it is quite obvious that with that I cannot meddle; that is a matter that must be disposed of in the liquidation. With regard to the other calls, I am not in a position to pronounce any judgment at present. No argument whatever has been addressed to the Court on one side or the other with regard to the question raised by the defenders' fifth plea. It is stated by the defenders that no notice was sent to them or to Mr Matheson that the calls in question had been made, and I might almost assume that to be true, because at the date of the respective calls Mr Matheson's name was not on the register of the company, having been removed in respect of the transfer now sought to be reduced.

"What effect the absence of due notice may have upon the question of the defenders' liability for the calls is a matter I may have to consider and determine. But I think it advisable to supersede consideration of that matter at present, for a nice question has been raised by the defenders as to whether in the whole circumstances of this case they are now subject to be put on the register of the company as representing Mr Matheson, and thereby made liable as contributories. The defenders' argument is based upon certain words in the Companies Act of 1862, and undoubtedly may give rise to some difficulty. At all events, it involves some nice considerations, and I am not disposed to throw any difficulty in the way of the defenders pleading that right which they have, if it is a right to exemption, before the Judge who is taking charge of the liquidation.

"Therefore at this moment, desiring not to prejudice anybody's rights, I am to supersede consideration of this case *quoad* the calls to enable either the pursuer to apply to the Judge in the liquidation to have the defenders put upon the register of shareholders, or to allow the defenders, if they think right, to take any steps for their own protection against such liability as would thereby be imposed. What I propose to do in the meantime is to find that the transfer in question was illegal and invalid, and that the defenders are liable in repayment of the sum paid by the company in respect of that transfer.

It might have been supposed that on that finding I should at once have proceeded to the logical conclusion of reducing the transfer; but I do not do that in the meantime, because if I were to reduce the transfer it might have the effect of restoring Mr Matheson's name to the register, and that might be settling the whole question against him, and practically against his representatives, and I do not desire to do that in the meantime. All that I shall do is to find that the transfer was illegal; that the defenders are bound to repeat the price; and *quoad ultra* supersede consideration of the case."

The Lord Ordinary in the liquidation reported the note by the liquidator, and the answers thereto by the trustees of Robert Matheson, to **the Court.**

The defenders in the action reclaimed, and argued—(1) By section 35 of the Act 1862 the Court had to be satisfied of the justice of the case before rectifying the register in the manner proposed by the pursuers. That section had received an equitable construction. In this case there were the strongest considerations against rectifying the register. Matheson had only been on the register for a few months, and had been off for ten years, and he could have sold his shares to a third party if the company had not taken them. The shareholders were quite aware that he had sold his shares to the company, and creditors could have learnt from the balance-sheets that the company had purchased some of its own shares, Creditors, as representing the company, were subject to all the equities to which the company was subject. If the liquidator succeeded in having the reclaimers put on the register, he proposed to make them liable for calls, to pay not only creditors who had had claims on the company at the time he was on the register, but subsequent creditors also. That would be a far greater injustice than if his application were refused—*in re Dronfield Silkstone Coal Company*, December 20-21, 1880, 17 Ch. Div. 76; *Trevor* v. *Whitworth*, July 11, 1887, 12 App. Cas. 409, 440, opinion *per* Lord Macnaghten; *in re Kimberley North Block Diamond Mining Company*, June 2, 1888, W.N. 126; *Joint-Stock Discount Company* (*Sichell's* case), 3 L.R., Ch. 119, *per* Lord Cairns, 122; *Gardeners* v. *Victoria Estates Company* (*Limited*), July 18, 1885, 12 R. 1356. (2) Where a person applied, as the pursuers did here, for *restitutio in integrum*, they must comply with the condition that it should be really *in integrum*. It would not be enough to credit the trustees with the dividends paid by the company. Indeed, the company being in liquidation, *restitutio in integrum* was impossible—*Graham* v. *Western Bank*, February 2, 1864, 2 Macph. 559, and March 8, 1865, 3 Macph. 617, *per* Lord Curriehill, 631; *Addie* v. *Western Bank*, July 9, 1865, 3 Macph. 899, and May 20, 1867, 5 Macph. (H. of L.) 80.

The pursuers and respondents argued—(1) The transaction between the company and Matheson was not voidable merely, but was *ab initio* void. The case of *Trevor* v. *Whitworth* put it beyond doubt that the action of the directors was *ultra vires*. The *dicta* of Lord Macnaghten relied on by the defenders were *obiter*, and contrary *dicta* might be found in the opinion of the Master of the Rolls—*Ashbury Railway Carriage and Iron Company* v. *Riche*, 7 Eng. & Ir. App. 653, *per* Lord Cairns, 672. The liquidator represented the company as a corporation, and thus all shareholders, present or future, and all creditors. Creditors, if aware of such transactions, were bound to know that they were contrary to law, and that such transferences were void. The company would not be barred by *mora* from getting a transaction recalled which was void as being *ultra vires*. Particular creditors and shareholders at the time might be barred, but subsequent creditors and shareholders could not be barred. This was not the kind of case where the Court would refuse the liquidator's application under section 35 of the Act 1862—*National and Provincial Marine Insurance Company ex parte Parker*, 2 Ch. App. 685; *in re Gresham Life Assurance Society*, 8 Ch. 446; Buckley on the Companies Acts, sec. 35, notes. In the case of a shareholder who had paid up his shares in something else than cash, and who appeared on the register as fully paid up, though the creditors could not have relied on him, yet years afterwards, if it were discovered that he had not paid in cash, payment might be demanded—*in re Canadian Oil Work Corporation* (*Hay's* case), 10 Ch. 593; *Huntington Copper Company* v. *Henderson*, January 12, 1877, 4 R. 294, and November 29, 1877, 5 R. (H. of L.) 1. Here there were creditors who had been creditors when Matheson was on the register, and the transactions which brought the company down had at least been initiated before he left. (2) *Restitutio in integrum* was no doubt impossible, but the doctrine of the requirement thereof had never yet been held necessary where a transaction was not merely voidable but void—*Graham* v. *Western Bank*, *supra*, 5 Macph. (H. of L.) 86; *Clark* v. *Dickson*, April 26, 1888, 27 L.J., Q.B. 223; *Houldsworth* v. *City of Glasgow Bank*, March 12, 1880, 7 R. (H. of L.) 53.

At advising—

LORD SHAND—The General Property Investment Company, with reference to certain of whose shares the present question has been raised, was incorporated under the Companies Acts of 1862 and 1867 in February 1876, with a capital of £42,500, the shares being divided into 4250 shares of £10 each. The object of the company was practically to speculate in land. They proposed to purchase lands which were likely to rise in value, to hold them for a time, and then to sell them as advantageously as they could, and they carried on business for about ten years till December 1886, when they became insolvent. This Court then pronounced an order for winding-up the company, and Mr Myles was appointed liquidator. It appears that during the existence of the company a number of the company's own shares were purchased by the directors, one of the articles of association purporting to confer on them a power to make such purchases. Part of these shares were re-allocated, mainly, if not altogether, to existing shareholders, but when the liquidation came into force the company had in their hands no fewer than 758 shares of their own stock. The late Mr Matheson had been an original shareholder of the company to the extent of 250 shares. He paid the deposit upon these shares, but shortly after having done so he found that the reason which had induced him to con-

nect himself with the company no longer existed, because, while he had anticipated professional employment as a valuator for the company, he found that his engagements otherwise would not admit of his taking such employment, and accordingly an arrangement was made between him and the directors that the company should purchase his shares. This they agreed to do, and to repay the deposit of £1 on each share, with interest of 5 per cent. to date. The company accordingly accepted a transfer of the shares. A call, I believe, had been resolved on by that time, but of course it was not enforced, the transfer having been accepted before it became payable, and it appears that Mr Matheson's name was removed from the register or stock ledger, and the shares carried to an account of shares re-purchased by the company. Mr Matheson died in 1877, and for ten years, and indeed until this liquidation occurred, no more was heard of these shares by anyone representing him. The company went on doing business, paying large dividends for one or two years, but these dividends ceased, and then calls were made, and I believe an additional call of £1 has been made since the liquidation commenced, exhausting the whole nominal capital. It appears, I think, that Mr Matheson might, and probably would have sold his shares to a third party in the market, or to some other shareholder, if the company had not bought them, and his executors after his death had no reason to anticipate any responsibility in connection with these shares, so that undoubtedly the case now presented, viz., that the contract must be set aside and Mr Matheson's trustees placed on the register of the company is one of very great hardship. There can be no question of that. But, on the other hand, the liquidator, founding as he was bound to do on the strict principles applicable to joint-stock companies under the statutes, has brought proceedings for two purposes—1st, an action of reduction to have the transfer by Mr Matheson set aside, and the price which he received repaid to the company with interest, with a conclusion also for payment of the calls made by the company and by the liquidator. That action depended before Lord Trayner, who has given findings to the effect, first, that it was *ultra vires* of the company to enter into the transaction with Mr Matheson; and second, that the pursuer is entitled to recover the sum of £254, being the amount paid by the company to Mr Matheson, and interest. In addition to that action there is before us a note presented to Lord Kinnear, in which his Lordship, as Judge in the liquidation, is asked to put the trustees and executors of Mr Matheson on the register in respect of their holding of these shares, and there again there is a claim made for the payment of calls. That note has been simply reported to the Court to be taken up with the action of reduction, and we have now to deal with both proceedings.

So far as regards the action of reduction, I think that although a defence was urged against any decree for payment of calls, on the ground of the lapse of time that has taken place and the actings of parties, it was scarcely maintained that there was any legal ground upon which the defenders could resist the conclusions in so far as the Lord Ordinary has given effect to them. His Lordship has found that it was *ultra vires* of the company, under the Joint-Stock Companies Acts of 1862 and 1867, to become purchasers of their own shares, and upon that ground he has found that the transaction was illegal, and that the price must be repaid. If there was any argument against that view of the Lord Ordinary, I have only to say that I think the point has been clearly settled by the decision in the case of *Trevor* v. *Whitworth* in July 1887, shortly before this action was raised, and as we have already had occasion to refer to that case very fully in the case of *Klenck*, which has just been disposed of, I shall say no more than this, that I think it clearly decides that a transaction of this kind is not merely voidable, but is void, as being *ultra vires* on the part of the company. It is a transaction which not only the directors had no right to enter upon, but which even the company themselves at a meeting of all the shareholders could not adopt, because it was directly in the teeth of the Statute of 1862. It is to be observed with reference to the opinions given by the learned Judges in the House of Lords that the judgment is the result of a careful examination of the provisions of the Statutes of 1862 and 1867, and is strongly placed upon the ground that creditors dealing with companies limited under the Companies Acts are entitled to look to the capital as disclosed in the memorandum of association as the fund to meet their debts, and that a company cannot cut into that capital by any such proceeding as purchasing back its own shares any more than they can by issuing shares at a discount. Now, that being so, it appears to me that we must plainly adhere to the interlocutor of the Lord Ordinary so far as it goes.

But the further questions under the conclusions for reduction and the petition have now to be disposed of. The first question is, is the transfer to be reduced, and I think it follows from what I have said that there must be decree of reduction of that transfer. The next question is, whether Mr Matheson's representatives are to be put upon the register as the holders of these shares. That is resisted by the executors on the ground, as I have said, of the lapse of time and the circumstances I have already referred to. It is stated, and I think it is made out upon the proof, that at least a number of the shareholders were aware that the company was purchasing its own shares. We have the fact that in the books of the company the shares after the delivery of the transfer were no longer in Mr Matheson's name or in the name of his executors, but that they stood in the name of the company, and the balance-sheets circulated among the shareholders, at least after 1881, made it clear that the company had purchased and themselves become holders of a large number of their own shares. It was further said that but for the conduct of the company Mr Matheson would have sold his shares to a third party, and in any view that his executors would have so sold them shortly after his death in 1877. That being so, it was contended that under section 35 of the Statute of 1862—which, in dealing with the amending of the register by putting on a shareholder's name, uses the expression that the Court shall do so "if satisfied of the justice of the case"—it would not be in accordance with the justice of the case that we should adopt that course here and replace the name of Mr Matheson's executors

as representing him upon the register. On the other hand, it appears from the proof that there has been a very large amount of debt incurred by the company, and that there is one special debt of very considerable amount which was incurred before the transaction with Mr Matheson for the purchase of his shares took place at all. Mr Myles is examined on that point, and he says—"There is a bond to H. R. Cunnynghame for the sum of £3000, which is not all paid up. The money was received on 15th May 1876. Then there is £8000 of Clarke's trustees' bond. No claim has been made in respect of that—indeed that has been paid up by a sale of the property by the bondholders since the liquidation. (Q) With regard to Cunnynghame's bond there is a deficiency in the subject of security?—(A) Upwards of £1100 is the amount of the claim in the liquidation. (Q) The heritable subjects not having been sold?—(A) They are interested in the property that has been sold by Clarke's trustees, but they will get nothing out of it. (Q) To some extent the security over which their bond extended has been realised?—(A) Yes, but by a prior bondholder, and they get no benefit. I am quite satisfied that the deficiency is not overstated in the claim that has been made; I think it will probably be more." So that we have an existing debt of upwards of £1100 incurred before Mr Matheson sold his shares to the company, and a number of debts incurred afterwards. In that state of matters the question is, whether the liquidator is to be precluded from the remedy which he asks, of putting Mr Matheson's executors on the register. I do not think the defenders can successfully resist the liquidator's demand to that effect. If the law—the legal right of the company—be clear, then it follows that the justice of the case requires that effect shall be given to that right. Now, the ground on which the case of *Trevor* v. *Whitworth* was decided was that the purchase of the shares was *ultra vires* of the company. The transfer is therefore an absolute nullity, and when it is maintained for the respondents that the company have adopted or homologated what was then done the reply is obvious that a company of this kind, carried on under the statutes with the limited powers which these statutes confer, can no more by adoption or homologation make a proceeding of this kind legal than they can lawfully enter into the original transaction itself. It is a nullity originally, and the company cannot homologate or adopt a nullity, for that is equally *ultra vires.* And so upon that ground I think the case for the respondents fails. It is clear also that there are creditors who are not satisfied—creditors to a large amount, whose debt existed before this transaction took place, and they are entitled through the liquidator to have it found that the proceeding whether originally or by adoption was *ultra vires* and could not prejudice them. Then there are creditors for large amounts whose debts were afterwards contracted. I do not express any final opinion, but the leaning of my opinion is to the effect that even later creditors are entitled to get behind a transaction of this kind, because they are entitled to say that they must have the whole capital of this company in the condition in which the shares were issued to the shareholders, in so far as the shareholders have not validly transferred their shares, that they are entitled to realise that capital, and that they are entitled through the liquidator to cut down a transaction of this kind. The views that I have now stated as to this being clearly *ultra vires* of the company, and as to the effect of a transaction of that kind being such that it cannot be adopted even by homologation, I think are strongly borne out by the decision of the Court in the case of the *Ashbury Railway Carriage Company*, which has been so often referred to in cases of that kind as to the powers of joint-stock companies. There was a reference in the argument for Mr Matheson's executors to an important part of the opinion of Lord Macnaghten in the case of *Trevor* v. *Whitworth,* where he discusses the judgment in the case of the *Silkstone Colliery Company,* and where his Lordship indicates a strong opinion that although the judgment was bad, in so far as it was held that the company could purchase back its shares he indicates very strongly that he thinks it was well decided in the result, because of the actings of the company subsequent to the re-purchase of its own shares, and because of the position in which the company was when the claim to put the shareholders again on the register was first made. I shall only say, with reference to the views his Lordship expressed on this point, that this case differs materially from that of the *Silkstone Colliery Company* in this important particular, that in that case there was no creditor claiming who had been a creditor when the re-purchase of the shares was made by the company. The creditors all claimed on debts subsequently incurred. But further, his Lordship's *dicta* on this point were *obiter*, not entering into the grounds of judgment, and it appears to me that if it be just as much *ultra vires* of a company to homologate a transaction of this kind as it was to enter into it originally, the actings of the company subsequent to the transaction cannot make it effectual and binding on the company in liquidation. If the case had been one of a shareholder's liquidation only, there might be room for the argument that shareholders, and certainly shareholders who were parties to a transaction of this kind, would be barred from insisting on a former shareholder being brought on the register after all that had occurred, but the case does not bring any point of that kind up for consideration. Then, although it may be quite true that had this question been raised at a much earlier date Mr Matheson or his executors might have sold the shares to a third party, this can be no answer to the liquidator's claim, for his reply is that the nature of the transaction as being void, it was open to challenge under the statutes at any time, and the shareholder was bound to know this was the law. What I have said now leads, I think, first, to our proceeding a step further than the Lord Ordinary has done, viz., to the granting of a decree of reduction of the transfer, and in the next place, to the putting of Mr Matheson's executors on the register.

But there remain questions about two matters which have not been fully discussed, and which, in any judgment that we now pronounce, must be reserved for consideration. I refer to the question as to the liability for calls, and also as to the right to credit for dividends. On that

matter I should like to say that tt appears that the calls were never intimated to Mr Matheson's executors, and naturally they could not be intimated because they were not treated as shareholders. It is clear, therefore, that in the absence of intimation till the service of the summons of reduction, an important question must arise in regard to the interest in any view which can be debited on account of calls. On the other hand, Mr Matheson's executors say that all the other shareholders during the period which elapsed after the re-purchase by his company of the shares in question received large dividends for some years, and they claim credit for these dividends, with interest applicable to them. In regard to these dividends the liquidator has intimated that he is to maintain that they were paid out of capital and not out of profits. I must say I was not satisfied on the argument I heard that this has been made out on the proof, but that question remains for consideration, and all I shall say about it now is, that it will not do after property has come down greatly in value during subsequent years to look at the question in the light of that great depreciation, as the leading element to guide us with reference to what the directors did at the time when there was no such depreciation, but when property was rising in value. They may have been sanguine, but if they honestly believed that the properties had largely risen in value so as to warrant the payment of dividends, the very purpose of that company was to take advantage of such rise in value, and to pay dividends accordingly. But a second point may further be urged for Mr Matheson's executors, that if they are to be put in the position now of having to come into this company and to pay calls as if they had been in the company all along, they would have got dividends as the other shareholders did, and it is very hard to say that they shall not get the benefit of that at all events, which in the case supposed would have been so much money in their pockets. I mention these matters for the purpose of leading up to this, that I think all that might very properly form a subject for settlement as between the parties. Equitable considerations fairly come in in questions of this kind. Of course Mr Myles must do his duty as liquidator, but it appears to me that there are materials, on the grounds I have now stated, for an arrangement with reference to the interest on these calls, and with reference to the dividends, and I hope parties may ultimately see their way, instead of spending more money in litigation, to arrange these matters without further proceedings.

Lord Mure—I entirely concur in the view that Lord Shand has now expressed. I see no answer that can be made to the objection taken to the purchase of the shares by the directors from Mr Matheson. The sale was null and void from the first in law, and therefore it must be set aside. That involves the affirmance of the Lord Ordinary's findings in fact, and the pronouncing of a decree as Lord Shand proposes. It also involves this, that the names of Mr Matheson's executors must be placed on the register. It is a hard case unquestionably in the circumstances, and if I could see my way to any other course which would save Mr Matheson's representatives from the loss which this will lead to, I should be very glad to adopt it, but having regard to the nature of the transaction, I see no ground for relieving them to any extent at present. I sympathise very much in the suggestion that Lord Shand has thrown out as to the questions that may hereafter occur. If this question had been raised by the shareholders alone, and were not a question with creditors, there are certain words in the statute which appear to me to give the Court a power of considering that class of question, because the shareholders were equally to blame in what was done. But these questions do not arise here, and when they do arise, the consideration as to how far justice and equity may not reqnire some modification of the proposals which may be made with a view to the demands that may arise in the circumstances is a matter upon which I can give no opinion in the meantime.

Lord Adam—With reference to the first question here, I think upon the authorities and upon the reason of the case there can be no doubt that the sale must be reduced and set aside, because I think it was a clear and absolute nullity—a sale which the company had no power whatever to enter into. Therefore upon that point I concur with Lord Shand, and the sale being a nullity I should have thought that it followed almost as a matter of course that Mr Matheson's representatives should go upon the register. But it has been urged to us that the words of the 35th section of the Companies Act of 1862 apply, viz., that the Court may, if satisfied of the justice of the case, make an order for the rectification of the register. In this case I am satisfied, on the grounds stated by Lord Shand, that it is in accordance with the justice of the case that the representatives should go upon the register; and I do not think it is necessary to consider what the force of these words in the 35th section is, because I am satisfied, in any view of the case, that the register must be rectified by the representatives going on it. But it is obvious that after they are put upon the register questions may arise as to the liability to calls, and as to interest. On these matters I reserve my opinion.

Lord President—I concur with all your Lordships in holding that the judgment of the House of Lords in *Trevor* v. *Whitworth* necessarily rules this case so far, and that we must hold, upon that authority, that the sale of shares by Mr Matheson to the company, and the acceptance of that transfer by the company, was a nullity. With regard to the special circumstances of the case which have been founded on by Mr Matheson's executors, the lapse of time during which Mr Matheson's name has been off the register, and the conduct of the company in dealing with these shares as no longer belonging to him, and so forth, I can only say that I have never been able to understand how a statutory company can confirm a nullity, and if they could not by direct resolution confirm a nullity, I do not see how that can be done *rebus et factis.* Acquiescence is nothing at all unless it amount to confirmation or be equivalent to confirmation, and if it be impossible for a statutory corporation to confirm a nullity by direct resolution, it certainly cannot do it in any other way. The judg-

ment proposed, I think, is quite right in so far as we advance a step further than the Lord Ordinary in the reduction has done, and pronounce decree of reduction, and also pronounce decree for repayment of the price paid to Mr Matheson by the company, £254, 11s. But the other question which is raised both by the conclusions of reduction and by the application of the liquidator is a question of novelty, and, I think, of very great importance, and it is one upon which hitherto we have heard no argument. Whether your Lordships will be inclined to remit the hearing of that to the Lord Ordinary in the reduction, or to the Lord Ordinary in the liquidation, or to keep it here and dispose of it directly, I am not disposed to offer any very confident advice, but that would require to be determined before we adjust the terms of our interlocutor. If the parties find themselves in a position to negotiate upon this subject, we might allow the matter to stand over. On the other hand, if there is no prospect of any settlement, perhaps the best plan would be to remit the matter to the Lord Ordinary in the reduction, for it is more directly and properly raised there than anywhere else.

In the action of reduction the Court pronounced this interlocutor:—

"The Lords having considered the reclaiming-note by Mrs Alexa Urquhart or Matheson and others (Matheson's trustees and executors) against Lord Trayner's interlocutor dated 10th March 1888, and heard counsel for the parties, Adhere to said interlocutor: Refuse the reclaiming-note, and decern in terms of the reductive conclusions of the libel; also decern against the defenders for payment to the pursuers of the sum of £254, 11s. 10d. sterling, with interest thereon at the rate of five per centum per annum from the date of citation to this action till paid, reserving all questions of expenses."

On the report of Lord Kinnear, the Court ordered the names of the respondents (the trustees) to be placed on the list of contributories as prayed for, but reserved the question of the respondents' liability for calls, and remitted to the Lord Ordinary to hear parties therein.

Counsel for the Defenders (Reclaimers) in the Action, and Respondents in the Note—Sir C. Pearson—C. S. Dickson. Agents—Horne & Lyell, W.S.

Counsel for the Pursuers (Respondents) in the Action, and the Petitioners in the Note—D.-F. Mackintosh—Salvesen. Agent—J. Smith Clark, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, December 10.

(Before the Lord Justice-General, the Lord Justice-Clerk, Lord Mure, Lord Young, Lord Adam, Lord Lee, Lord Kinnear, Lord Trayner, and Lord Wellwood.)

H. M. ADVOCATE *v.* SWAN.

Justiciary Cases—Criminal Procedure (Scotland) Act 1887 (50 *and* 51 *Vict. cap.* 35), *secs.* 2, 5, *and* 8, *and Schedule A—Indictment—Relevancy—Omission of "Falsely and Fraudulently" from Indictment—Specification.*

The Criminal Procedure (Scotland) Act 1887, sec. 5, enacts that "it shall not be necessary in any indictment to specify by any *nomen juris* the crime which is charged, but it shall be sufficient that the indictment sets forth facts relevant and sufficient to constitute an indictable crime." Sec. 8 enacts that "it shall not be necessary in any indictment to allege that any act of commission or omission therein charged was done or omitted to be done 'wilfully' or 'maliciously,' or 'wickedly and feloniously,' or 'falsely and fraudulently,' . . . or to use any similar words or expressions qualifying any act charged, but such qualifying allegation shall be implied in every case in which, according to the existing law and practice, its insertion would be necessary in order to make the indictment relevant."

J. S. was charged before the High Court of Justiciary on an indictment which bore, "the charge against you is that," time and place specified, "you did pretend to J. H. that you were the son of a farmer in Aberdeenshire, and possessed of a sum of money amounting to £1900 in the Grand Trunk Railway, and that you were about to receive payment of said money, and did thus induce him to give you credit to the amount of £46, 9s. 9d., which you failed to pay, and had no intention of paying." Objection was taken to the relevancy, on the ground (1) that the acts charged were not alleged to have been done falsely and fraudulently, and (2) that the libel did not specify the advantage or benefit which the panel obtained by the use of the false and fraudulent pretences.

The Court (Lord Young expressing no opinion) *held* that the qualifying allegations enumerated in section 8 of the Criminal Procedure Act are to be implied in all cases where without them the indictment would fail to set forth facts relevant and sufficient to constitute an indictable crime, and that the words "falsely and fraudulently" must be implied to qualify the word "pretend" in the indictment, and accordingly *repelled* the first objection, but *sustained* the second objection.

Case of *Dingwall* v *H.M. Advocate,* May 26, 1888, 15 R. (J.C.) 69, *overruled.*

Question (*per* Lord Adam and Lord Kinnear)—Whether an indictment would be relevant which might be read to charge one