at whatever period it may have been made. Upon that ground it seems to me to be impossible to divide into two the dung made upon the farm, seeing that for the reasons I have mentioned it is all to be expended on the land.

It appears to me that the Sheriff-Substitute took the right view in this case and that we ought accordingly to revert to his judgment.

LORD ADAM—I also am of the opinion that the view of the Sheriff-Substitute in this case is the right one. The case of *Brand's Trustees* settles the question of the threshing-mill, while the case of *Murray's Trustees* settles the question of the dung.

As to the threshing-mill, there can be no doubt that it is attached to the building or house in which it is erected. Now, the case of *Brand's Trustees* was decided with reference to the physical attachment of the various subjects to the *solum*, and that being so, it covers the present case. It also settled this further point that the principle of the decision applied in cases where the tenant died during the currency of the lease.

As regards the dung, I hold it to be settled by *Murray's Trustees*. Besides, there is an implied common law obligation, which is binding on the tenant, namely, that he shall incorporate into the land all dung made on the farm during the year. Thus in a question between heir and executor this dung is *destinatione* heritable.

I further think with your Lordship that it is impossible to draw any distinction between dung made on the farm prior and subsequent to the death of the tenant, and upon the whole matter I agree with the view taken by the Sheriff-Substitute and think that we ought to revert to his interlocutor.

LORD M'LAREN—When we examine the decision of the House of Lords in the case of *Brand's Trustees*, and especially when we look at Lord Cairns' opinion, we see that it is largely founded upon the principle that whatever is physically attached to the soil is part of the inheritance. His Lordship adopts in the most absolute form the principles of the civil law in regard to accession to heritable estate.

In treating of the rule of modern law by which fixtures which have been attached for the purpose of trade, and in a lesser degree fixtures which have been attached to an agricultural subject, are immoveable, his Lordship shows that this is not a part of the law of succession and it in no way interferes with it. Machinery from the time of its erection and its physical attachment to the soil becomes a part of the inheritance, but in view of an implied contract to that effect the tenant may exercise his right to remove it at the end of the lease.

That was settled by decision before the case of *Brand's Trustees*. The point which was settled in that case was, that the rule as to accession governs the rights of the owners of a limited estate as much as those of the owners of the fee.

Accordingly, in a question between the heir and executor of a deceased tenant the heir was held to be the owner of the machinery because he was the owner of the soil. There is no doubt a contract right in such a case on the part of the tenant to remove these fixtures, but as the Lord Chancellor says in the case of *Brand's Trustees* it must be exercised by the owner for the time being, a position which cannot be predicated of the executor at the time of the tenant's death. The principles of the decision in *Brand's* case are as applicable to the case of agricultural subjects as they are to minerals. I also agree that the Sheriff-Substitute has come to a right result with reference to the dung.

In regard to what was produced during the lease, there is no doubt that in accordance with one of the recognised rules of agriculture, it was appropriated to the uses of the farm, and so became heritable *destinatione*. As regards what was produced afterwards, I cannot hold it to be the property of the executors. In the course of production it was annexed to the soil and became the property of the landlord. Upon these grounds I fail to see that any distinction can be drawn between the dung made on the farm prior to the death of the tenant and subsequently.

Upon these grounds I concur with your Lordships in thinking that we should revert to the interlocutor of the Sheriff-Substitute.

The Court recalled the interlocutor of the Sheriff and reverted to that of the Sheriff-Substitute.

Counsel for the Pursuers—Low—Watt. Agent—Andrew Urquhart, S.S.C.

Counsel for the Defender—Asher, Q.C.—Ure. Agents—Ronald & Ritchie, S.S.C.

Friday, February 28.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

MORE (LIQUIDATOR OF THE FLORIDA MORTGAGE AND INVESTMENT COMPANY, LIMITED) *v.* BAYLEY.

Public Company—Liquidation—Liability for Calls—Transfer to Person without Means.

A land mortgage company purchased an estate from a syndicate. Bayley, a member of the syndicate, consented to accept the value of his shares in cash, debentures, or fully paid-up shares. A share certificate was issued in Bayley's name, who when he discovered that there was a call of £4 a share on his allotment, refused to accept the shares. It was finally arranged with the secretary of the company that Bayley should transfer his shares to Doyle, his servant, whom the secretary knew to be without means. The transfers (one of which was prepared by the secretary of the company), though in fact gratuitous, bore to be for a valuable consideration, and

were passed by the directors, the company being at that date in good repute.

In an application by the liquidator of the company for the rectification of the register, by the substitution of the name of Bayley for that of Doyle, *held* that the evidence showed that Bayley never consented to accept shares with liability attached; that the transaction with Doyle was a gift without trust or reservation for the benefit of the transferor, and for the convenience of the company, and could not subject him to any liability.

Observed (*per* Lord M'Laren) that *restitutio in integrum* being impossible no alteration could be made on the register of shareholders.

The Florida Mortgage and Investment Company, Limited, was incorporated under the Companies Acts 1862 to 1883 on 25th November 1884, and upon 5th November 1888 it was resolved that the company should be wound up voluntarily. On 27th November an order was pronounced continuing the winding-up subject to the supervision of the Court.

Francis More, chartered accountant, Edinburgh, the liquidator of the company, on 3rd December 1888 made a call of £3 per share upon all the shareholders of the company, and among those included in the A list of contributories was James Doyle, 42 Newington Causeway, Surrey, who was entered as the holder of 430 shares.

On 25th June 1889 the said liquidator presented a note to the Court for the rectification of the register of members of the company by deleting the name of James Doyle, and substituting therefor the name of Edward Hodson Bayley, whom he alleged to be the real owner of these shares.

The liquidator averred—"From inquiries which he has instituted the liquidator has ascertained that the said James Doyle is a labourer in the employment of the said Edward Hodson Bayley; that the said shares were transferred to him to be held for behoof of the said Edward Hodson Bayley; and that the said £130 and £300, or any other sufficient consideration, was not paid for the same. The liquidator believes and avers that the said James Doyle was then, and still is, a person without means, and that the said transfers to him were not *bona fide* absolute transfers, but were made to him in order that he might hold the said shares for the said Edward Hodson Bayley, the real owner thereof, with the view of the latter escaping liability in respect thereof, while he at the same time retained the real proprietary interest therein. These facts were, however, purposely withheld from the company, who would have objected to the transfers if the facts had been disclosed to them. The said James Doyle has failed to pay the said call or any part thereof."

Bayley lodged answers, in which he averred that he had parted with the said shares absolutely to Doyle, who was his coachman, and who had been for eighteen years in his service; that in June 1885, at the date of the transfer, the prospects of the company were remarkably good, and that the company did not get into difficulties until October 1888. He had no beneficial interest in the said shares, the transfer of which were *bona fide* absolute.

From a proof allowed by the Lord Ordinary (KINNEAR) it appeared that the company had been formed for the sale and purchase of land in Florida, including an estate which belonged to a syndicate in England which included the respondent, who had contributed £293, 12s. towards the original purchase. Although the respondent was not a party to the sale, the company ascertained his interest in the estate, and the directors issued a certificate for 300 shares in his name, and offered it along with debentures for £130 as the amount of the purchase price owing to him. The respondent at first demurred to this proposal, but finally consented to abide by any agreement made by a Mr Adderley, one of the syndicate, on the assumption that if shares were allotted to him, these, as vendor's shares, would be fully paid up.

The following correspondence took place between Mr Cæsar, the secretary of the company, and the respondent:—

On 2nd April 1885 the secretary wrote—"Some weeks ago I sent Mr Hanbury a share certificate in your favour for 300 shares of this company, of which he acknowledged receipt. Your name was accordingly put down for that number, but on looking into the matter Mr Hanbury now finds that your shares should be £215 and your debentures £215, and he has sent me the original certificates to be altered. This is, as you may be aware, almost an impossibility, and my object in writing is to know if you will take £300 shares, and £130 debentures instead of the above numbers."

And on 7th April—"I have to thank you for your telegram reading, 'I will to same proposal as Adderley,' in answer to mine of this date informing you that Mr Adderley had agreed to take 300 shares and £130 debentures, as proposed to you; and I understand your telegram to mean that you will do as Mr Adderley has done."

And on 20th April the respondent wrote—"I have received from Mr Hanbury share certificate for 300 shares, and from Mr Adderley cheque for £100. I do not understand this, and must ask you to cancel the shares and let me have the amount due to me wholly in debentures or cash. What I wrote to you was that I would accept the same proposal as Mr Adderley, and he advises me that there will be due to him and to me £215 in ordinary shares and £215 in debentures. Please favour me with full explanation by return of post."

Cæsar replied on 22nd April—"In answer to your letter of 20th inst. I would refer you to my letter of 7th inst., in which I stated that Mr Adderley agreed to take three hundred shares = £300, and debentures £130. You having agreed to do the same, your names were entered on the register, which of course cannot be changed. At the same time, if you wish to dispose of the difference, or 85 shares, I shall endeavour to

get a purchaser for you. Mr Adderley writes you that £215 in shares and £215 in debentures was the arrangement, and so it was originally, but was subsequently varied to a small extent as above. To my mind the shares are better than the debentures."

Bayley replied on 23rd April—"In reply to your letter of yesterday, I never agreed to take any shares at all, and shall not accept any with a liability attached. In all such cases as this, whatever shares are allotted, they are always fully paid-up shares. In any case it does not appear that Mr Adderley had consented to take £300 in shares at the time when you originally informed me that he had, so that my consent, which was contingent upon his, falls to the ground. I have no objection, however, to avoid giving you trouble, to take £300 in shares, but they must be fully paid up, or, as you say that you would not sell your own shares at par, I have no objection to receive cash at par for my shares and debentures for the balance; but I distinctly refuse to accept any liability for calls."

On 2nd May Cæsar wrote—"I have today received a letter from Mr Adderley, in which he states that he did not know when he wrote me that the shares were not fully paid up, and from some other statements it seems that he must have written you that he had not agreed. I therefore send you a copy of his letter, upon the faith of which I wrote and telegraphed you on 7th April that he had consented, and if you read it along with the fact that Mr Adderley had gone carefully over the prospectus, you will be satisfied that my letter was not exactly or in any way what you more than hinted it was.

"*Copy Letter.* "*5th April* 1885.

"Sir,—You can make out my shares and debentures as you wish, £300 ordinary shares, and £130 in debentures."—Yours truly, C. L. ADDERLEY."

On 11th May Bayley wrote—"Will you kindly send me a copy of prospectus, as I have not seen one, and also copies of minutes which relate to my shares and debentures? I am not wishful to be obstructive, but I wish to have all the facts before me."

On 12th May Cæsar wrote—"As requested I enclose a copy of the original prospectus. There have been no minutes in connection with your shares and debenture as the directors only meet monthly just now, but at the meeting held last week I submitted the correspondence about the matter, and it was minuted 'These gentlemen have accepted the shares, and we cannot vary the arrangement.' Please let me hear at your earliest convenience, that this matter may be settled and the debentures issued."

On 21st May Bayley wrote—"I am obliged by your letter, but it does not give the information I require, and unless you can give it to me briefly in a letter, I should be glad if you would send me copies of the agreements referred to in the prospectus so that I can see for myself. (1) What I want to know is—What is my legal position, and what amount I am entitled to receive, 1st, in cash; 2nd, in debentures; 3rd, in shares. (2) Have I the option of taking payment in whichever of these three forms I choose? I have accepted and shall accept no liability for calls unless upon full consideration and with all the facts before me."

On 22nd May Cæsar replied—"I sent a copy of the agreement referred to in the prospectus to Mr Adderley, but as it is rather long to copy unless it is necessary, I may tell you that it is simply and solely an agreement between Mr Hanbury and others in America and this company for the sale and purchase of Sarasota tract. The vendors therein agree to take £10,000 in shares of £5 (£1 called), and £10,000 in debentures, the balance in cash. Neither you nor Mr Adderley are mentioned in the matter, and no one would have known that you had any interest unless Mr Hanbury had stated so, and also stated that you received your interest in shares and debentures and cash *pro rata* with him. What your interest is we do not know, and does not affect the company in any way; and I am simply writing you to oblige Mr Hanbury, as we have really nothing to do with your private settlement with him. I cannot, therefore, answer your questions, as we have no information on the subject, and if you are not satisfied with the statement which I have sent you, and which I got from Mr Hanbury for the purpose of simplifying matters, I must refer you to him. Your connection with this company therefore simply is, that having an interest in Mr Hanbury's share of the purchase price, and being entitled to about £215 in ordinary shares and £215 in debentures, as per Mr Hanbury's statement sent you, I wrote asking you and Mr Adderley to take payment of your £215 shares and £215 debentures, as follows—£300 in ordinary £5 shares (£1 paid) and £130 debentures. Mr Adderley agreed to this request, and I sent you lately copy of his letter. I wrote you that he had agreed, and you also agreed to do the same."

The respondent deponed—"(Q) Is your position that you never were a shareholder for these 300 unpaid shares?—(A) That was arranged at a personal interview between the secretary and myself. My view is that I never held those shares with the liability attached. (Q) You held them, but without the liability attached?—(A) Mr Cæsar wrote me pressing me very strongly to accept them with the liability, and I wrote to him again and again saying I would not accept any shares not fully paid up, and then he wrote me that he was coming to London, and I met him there. The letters show that the matter was to be arranged at a personal interview, and it was arranged at that interview. I have no writing about the matter beyond the correspondence and the transfers of the shares. (Q) Were you aware that you were registered as the holder of these 300 shares on 17th February 1885?—(A) I became aware of that when I received the certificate, which was about April or May, and I forthwith repudiated it. . . .

I had agreed at that interview to take £430 in shares, on the understanding that they were to be made a present to my servant. James Doyle is my coachman. . . . Mr Hanbury sent me the certificate for the 300 shares, and directly I saw there was liability I said I would not take them. (Shown transfer by witness to Doyle, dated 29th June 1885)—I did not get £300 for those shares from Doyle. I did not get anything from him; I gave them to him as a present. He was not a man who could be expected to buy shares. When I gave them to him I knew there was £4 per share unpaid. (Q) Was not your reason for putting these shares into Doyle's name that they were unpaid shares, and that he was a man of straw?—(A) I arranged with Mr Cæsar that I should make them a present to Doyle. I first of all said I would not take them at all, and Mr Cæsar said it would put the company to great inconvenience if I did not take them, and tried to persuade me to take them. I said I would not take them if there was liability, and he said couldn't I dispose of them to somebody. I said nobody would buy them with that liability, but I would make them a present to a faithful servant of twenty years' standing, and he said that would do, and he would make out the transfers. He carried out that arrangement, and sent up the transfers, and, as arranged, I got them signed and sent them back to him. He sent one form of transfer filled up, the consideration being £130 paid by Doyle to Colonel Dunne; and I filled up the other one on the same lines, namely, £300 paid by Doyle to me. Mr Cæsar wrote and said I might fill up the transfer as for nominal consideration or real; but he sent one filled up as a sample, and I drew up the other on the same lines. . . . I said over and over again to Mr Cæsar that nothing would induce me to take them, but to get him out of a difficulty I presented them to Doyle, and Mr Cæsar took down Doyle's name and address, and afterwards sent me the transfers. (Q) Was not the reason that you did not sell them because you knew that nobody would buy them?—(A) I knew I could not have sold them. (Q) Was not the reason of that, that it was much more probable that they might become a liability than a lucrative asset?—(A) No, I cannot say that, because Mr Cæsar told me they were likely to pay well. (Q) It is your state of mind I want?—(A) My state of mind was derived from Mr Cæsar. (Q) Was it not because you believed that those shares were much more likely to become a liability than a lucrative asset that you thought nobody would buy them?—(A) No, certainly not. I did not attempt to sell them, because there was no market for them. (Q) Is not that merely another way of saying nobody would buy them?—(A) No, when shares are on the market you can buy them, but this was a company newly floated, and it is very difficult to sell the shares of a company newly floated with liability upon them, particularly when they are not quoted. I don't think any stockbroker could have sold them. (Q) Did you not think it was fully as probable that those shares would become a liability as a lucrative asset?—(A) Not at that time; the thing looked quite promising, and Mr Hanbury, who knew all about it, was very sanguine. I never paid anything for the shares; the certificate was sent to me, the shares having £1 paid and a liability of £4. On that assignment there would be a liability of £1200. I was quite aware that Doyle could not pay any part of that, and the secretary was aware of it also, because I told him."

Cæsar deponed—"After the correspondence had gone on for some time I had a meeting with Mr Bayley in London at the City Liberal Club. The meeting was by appointment, and in reference to the shares. I have no recollection of Mr Bayley mentioning the name of a man Doyle at that meeting. He did not make any reference to a trusted servant of twenty years' standing. I gave him the information he desired about the position of the company. I afterwards got a letter from him dated 16th June 1885; that was the first intimation I had of a man Doyle in connection with those shares. I had not heard the name before. I had only the one meeting with Mr Bayley. In compliance with the letter of 16th June I would probably write Mr Bayley with the transfers to be filled up in the name of Mr Doyle."

On 16th June 1885 Bayley wrote to Cæsar—"I shall be glad if you will allot the £430 due to me entirely in shares in the name of Mr James Doyle at the above address. I return the certificate enclosed."

Doyle deponed—"My wages are 30s. a-week. I got 430 shares of the Florida Company transferred to my name about June 1885. I did not pay anything for them. If calls upon those shares had been made to the extent of £1720 or anything like it, I would not have been able to meet them. My means simply consist of my wages. The shares were presented to me by my employer. I did not take any steps to find out what kind of company the Florida Company was, and I don't know yet. Mr Bayley did not tell me, and I don't know now what the business of the company was. I never got anything out of the shares, and I have never paid anything. Mr Bayley never told me whether there was any liability attaching to the shares. He never told me whether they were fully paid up or not, and I asked no questions. I did not care. At one time Mr Bayley wanted one share back, and I transferred it to him. I would not have given him all the 430 back if he had asked them. I gave him the one share back, so that he would see to the meetings for me. If he had asked the shares back I should have considered the matter. (Q) You never got the certificates of those shares?—(A) No. Mr Bayley kept them; I gave them to him to take charge of them for me. The papers and circulars from the company came to me, and I handed them to Mr Bayley. I did not read them; as soon as I saw what they were I handed them straight to him, and he took charge of them. (Q) Wasn't that because the shares were really his, and not yours, although they stood in your name?—(A)

No. (Q) Can you give any other reason for not even reading them?—(A) No. I did not take any interest in the company. (Q) And he did apparently?—(A) Yes, he conducted for me."

At the time of the transfer, and for more than two years after, the company was in good repute, and it was not expected that any call would be made in respect of the shares. Bayley retained no interest in the shares. After the transfer had been completed, Doyle re-transferred one share to Bayley in order that the latter might look after his interests, but the directors refused to register the re-transfer until a call on the shares had been met.

As to the state of knowledge of the directors about Doyle at the time the transfer in his favour was passed, Mr Pearson, one of the directors, deponed as follows—"I knew nothing of James Doyle. Article 29 of the articles of association contains this provision—'The directors may decline to register any transfer made to any person not approved of by the directors.' If we had been told that Doyle was a labourer in the employment of Mr Bayley, and that instead of giving £430 for the transfers he had given nothing, and that he was wholly unable to pay the amount that was not called up, I personally would not have agreed to the registration of the transfers. I have no doubt that would have been the view of the other directors also. If we had agreed to the registration, knowing those facts, it would have been acquitting without consideration £1720 of the capital of the company, to the prejudice of the creditors and also of the other shareholders. I would not have considered it according to the duty of a body of directors to do such a thing. Knowing the gentlemen I was associated with in the directorate, I am sure if they had known the real character of the transaction they would not have registered the transfers. (Referred to minute of 2nd August 1885)—That minute records that the directors declined to entertain a proposal to transfer one share from James Doyle to Mr Bayley until the call on the shares was paid. A call had been made on the shares at that time. The directors did not think they would be justified in passing the transfer until the call had been paid. I had no idea at that time that Doyle was a man of straw."

And this was so far corroborated by Mr Paterson, one of the law-agents of the company, in the following passage in his evidence—"So far as I remember, there was nothing said to throw any doubt upon the truth of the statements which the transfers contained as to consideration. If anything had been said, it would have attracted my attention, and I expect I would have been asked about it as agent. I remember its being stated at a subsequent meeting that Doyle had been discovered to be a man of straw, and severe remarks were made by some of the directors to the effect that it was very wrong of Mr Bayley to pass his shares to a person unable to meet the calls. It was new at that time to the directors, as well as to me, that Doyle was a person of that kind. I know the provision in the articles under which the directors have power to decline to register transfers. If they had been apprised of the true state of the facts, I think they would have refused to pass the transfers to Doyle."

On 11th January 1890 the Lord Ordinary (KINNEAR) refused the prayer of the note.

"*Opinion.*—The purpose of this application is to remove the name of James Doyle from the register of shareholders and from the list of contributories, and to substitute the name of the respondent in both lists. Doyle's name has stood on the register since June 1885. But it is said that the respondent has all the while been the true owner of the shares, and that he obtained the registration of Doyle's name by a fraudulent misrepresentation.

"The company was formed for the purchase and sale of lands in Florida among other purposes, and in particular, for the purchase of a certain estate which had been acquired by a number of gentlemen in England.

"The respondent had advanced a sum of £293, 12s. as a contribution for the original purchase of this estate by the gentlemen who afterwards became vendors to the company; and on this account had an interest in the transaction between the company and the vendors. But he was not a party to the contract, and had no direct communication with the company until after it had been completed, when his interest in the matter was stated to the directors by a gentleman named Hanbury, who was one of the vendors, and who appears to have acted on their behalf in carrying out the sale. In consequence of the information given them by Mr Hanbury the directors issued a certificate for 300 shares in the name of the respondent, and proposed that he should accept these shares, and certain debentures for £130, as the amount to which he was entitled. The respondent was not satisfied with this proposal. But he ultimately agreed to accept the same terms, whatever they might be, which might be made for himself by another of the vendors, Mr Adderley.

"The result was that Mr Adderley agreed to the terms which had been originally proposed to the respondent; and the directors accordingly held the respondent bound to accept the shares they had issued in his name, and put his name upon the register as the holder of these shares.

"This would have probably concluded the matter as between the company and the respondent notwithstanding his original dissatisfaction; but he had assumed that whatever shares were to be allotted to him must, as vendor's shares, be fully paid up. It turned out that they were £5 shares, with only £1 paid up; and as soon as the respondent became aware that he was then asked to take shares with a liability of £4 upon each, he intimated to the company that he declined to accept them; that he would accept no shares with a liability attached; and that if he was to take shares at all they must be fully paid up. A cor-

respondence followed upon this statement of his position, in the course of which he was informed by the secretary that the directors held that he 'had accepted the shares, and that they could not vary the arrangement.'

"The respondent answered, in effect, that he had not had sufficient information, and that he 'had accepted and would accept no liability for calls except upon full consideration and with all the facts before him,' and it was ultimately agreed that a meeting should take place between him and the secretary in London, when the matter might be arranged.

"A meeting took place accordingly, on the 15th of June, and the respondent's statement is that on this occasion the secretary pressed him to accept not only the 300 shares already issued in his name, but also 130 shares more in place of the £130 of debentures which had been originally offered to him; that he refused to do so, on the ground he had stated in correspondence, viz., that he had never accepted, and would not accept, shares with a liability attached; that the secretary then pointed out that he was putting the company in a great difficulty, because the shares stood in his name in their books, that the shares could not be sold because they were not quoted on the Stock Exchange; and that in order to relieve them of this difficulty he ultimately said that while he would not accept them himself, he should make a present of them to his old servant Doyle; and that the secretary agreed to this being done, knowing that Doyle was a servant with no means, who could not be expected to meet his liabilities if calls should be made upon the shares. In consequence of this arrangement two transfers were prepared in favour of Doyle, one of 130 shares standing in the name of Colonel Dunne, and the other of 300 shares standing in the respondent's name. The first of these transfers was complete when transmitted to the respondent by the secretary, and bore to proceed on consideration of the payment of £130 by Doyle to Colonel Dunne. The respondent filled up the consideration of the second, taking that prepared by the secretary as a model, and accordingly stated as the consideration the payment of £300 to himself. Doyle, when he was told what his master proposed, said that he was much obliged, and accepted the shares. He afterwards asked the respondent to take care of the transfers, as he had no proper place to keep them. The respondent agreed to do so. But both the respondent and Doyle swear positively that the transaction was an out-and-out gift to Doyle; that the shares were made over to him absolutely as his property, and that the respondent retained no interest in them whatever.

"If this story is true there is no ground for taking Doyle's name off the register and putting the respondent's in its place. It is said that he transferred his shares for a nominal consideration to a man of straw in order to escape liability. But it has been decided in a great variety of cases that that is not in itself a ground for invalidating a transfer. No doubt such a transfer will be viewed with suspicion if it is made at a time when the company is in difficulties, and when a liability for calls has already attached. But even in that case the transaction will be sustained if there be no trust or reservation for the benefit of the transferor, and if no fraud or deceit has been used to obtain the registration of the transfer. And the respondent's position is much more favourable. There was no immediate liability which he was bound to meet as a shareholder. The company was just beginning business, and everybody concerned appears to have taken a very sanguine view of its prospects. But the shares were not fully paid up; and the desire to reject them upon that ground was perfectly legitimate. The respondent appears to have thought that he was under no obligation to accept them. I am not disposed to uphold that view, because I think that, whether a contract had been made for him by Mr Hanbury or not (as to which there is no sufficient evidence), he had bound himself to accept the terms agreed to by Mr Adderley. But at all events he was not in the position of a shareholder in an insolvent company who is trying to escape liability for debts already accrued. His desire to avoid future liability was perfectly legitimate, and there was no reason why he should not do so by making a gift of the shares to his servant, if the gift was absolute, and if the transaction was not tainted with fraud.

"The petitioner, however, maintains that the gift to Doyle was merely simulated; and that the respondent remained the true owner of the shares. It is said to be incredible that he should have given away 430 shares in a promising adventure for no consideration; that his statement is self-contradictory, because the reason he alleges for rejecting the shares would have led him to accept the £130 of debentures instead of exchanging them for shares; that he kept the transfers in his own possession, and that in 1888 when the company was supposed to be in difficulties, he obtained a re-transfer of a single share in order that he might be able to attend the meetings of the company.

"The argument from the supposed improbability of the gift does not appear to me to be of much weight. The respondent says that the amount of his advance was to be repaid; and the shares represented merely his profit on the transaction. There is nothing incredible in his statement that he preferred to give up the chance of profit and get rid of the shares rather than to accept them with a contingent liability to the extent of £1200 or £1500. The other considerations to which I have adverted might have been more material if there had been any direct evidence of an understanding that he should recover the shares if the company were successful. But both he and Doyle swore distinctly that the gift was absolute. The case against him is one of fraud, supported by perjury; and it is impossible to hold such a case to be proved by

mere suppositions, or by any evidence that is not conclusive. The observations of Lord-Justice Mellish in *Masters'* case (L.R., 7 Chanc.) appear to me to be very applicable to the present. The transferor and the transferee 'both swear that the transaction was real, and although that may not be conclusive yet in order that we may say judicially that the statement is not true the contrary must be brought home conclusively.'

"The question is one of credibility, and it is right to say that both the respondent and Doyle gave their evidence with apparent candour; and they are not contradicted by any evidence which can be weighed against their positive statement. I am unable to attach any weight to the contrary evidence of Mr Cæsar, the secretary, because although there is no imputation whatever against his truthfulness, he has no recollection of any of the circumstances that are in dispute. A witness who does not remember anything that passed at an interview cannot say from memory what did not pass; and it was obvious that throughout his evidence Mr Cæsar was not speaking from memory, but from his present impression as to the course which he must have taken, or ought to have taken, in circumstances which he did not distinctly recal.

"The second ground alleged for setting aside the transfer is, that the respondent procured their registration by the false statement that they were made for a full consideration in money; because, if the directors had known them to be gratuitous, they would have inquired as to the solvency of the transferee, and would certainly have rejected a transfer in favour of Doyle. To support this contention it is necessary to show, *first*, that the false statement as to the consideration was intended to deceive; and secondly, that it did in fact deceive the directors. I think neither of these points is made out. The respondent's answer is sufficient, that the secretary was well aware that nothing was to be paid by Doyle, and that in stating the consideration as he did he was simply following the form of transfer which the secretary had sent to him. His statement is confirmed by the terms of the transfer of Colonel Dunne's shares and by the correspondence. In transmitting the transfers the secretary says—'You may fill up the transfer of the 300 shares either with a nominal or a real consideration.' Mr Cæsar's explanation of this passage in his letter does not appear to me satisfactory. But it is intelligible if he knew that the shares were not to be sold to Doyle, but made over to him as a gift.

"Nor does it appear to me to be proved that the directors were deceived. I assent to the observation of the Dean of Faculty, that directors who are left in ignorance of a material fact must be supposed to have been ready to act—as it would have been their duty to act—if they had known it. But the evidence of the directors who were examined is, that they have no recollection of the circumstances attending their admission of the transfers in question. This is not, to my mind, sufficient evidence that the secretary in presenting the transfers for their sanction did not report what had passed at his meeting with the respondent, or that his report was not in accordance with the respondent's statement. The importance to be attached to the statements of these gentlemen that they would not have passed a gratuitous transfer without inquiry appears to me to be diminished by the consideration that when the transfers were passed they were very confident of the prosperity of the company, and also because they were aware that the respondent had refused to accept the shares, and maintained that he was under no liability to do so.

"Assuming that the transfer of the 300 shares which originally stood in the respondent's name could be set aside, the alleged misrepresentation would appear to me to afford no ground in law for putting his name on the register, in respect of the 130 shares transferred to Doyle from Colonel Dunne. There was no contract of any kind between the company and the respondent that the latter should take these shares. The only agreement that was ever made with respect to them was that they should be allotted to Doyle."

The petitioner (the liquidator) reclaimed, and argued—That the evidence clearly showed that from the outset Bayley knew that Doyle was a man of straw, and quite unable to meet the calls in respect of these shares; and further, that he deceived the directors by filling in a fictitious consideration when in reality he had made a gratuitous transfer of these shares to avoid liability for calls. In such circumstances the transfer could not stand—*Chinnock's* case, January 31, 1860; Johnson's Chan. Dec., 714. Doyle really was a trustee for Bayley, who was deeply interested in the company—Buckley on Companies Acts, sec. 22, pp. 25, *et seq.*; *Hyam's* case, 1 De Jex, Fisher, & Jones, 75; *European Assurance* Arbitration Cases, 28 Law Times, appendix, and *Simpson's* case at pp. 778 there. Whenever there was a taint of fraud in any transaction to escape liability for calls, the transaction could not stand—*Lund's* case, March 4, 1859, 27 Bevan, 465.

Argued for respondent—The question was one of credibility of parties. If Bayley and Doyle were to be believed, there was an end of the matter, because they both deponed that the transfer was absolute, and that Bayley retained no interest whatever in these shares. There was no illegality in a shareholder transferring his shares to a man of straw in order to avoid liability for calls provided the transfer was out and out, and that there was no attempt at fraud. Bayley's position was clear throughout the transaction; he never consented to take shares with liability attached, and he only became a partner of the company in order to get out of it by transferring to Doyle. The whole transaction was to oblige Cæsar, and with a view to keep the books of the company in order. At the time this transfer was made

the company was in good repute and for two years after. To cause the transaction to be cut down there must be misrepresentation with an intention to deceive, and that was entirely awanting here—*Payne's* case, December 11, 1869, L.R., 9 Eq. 223.

At advising—

LORD PRESIDENT—I am of opinion in this case that the respondent Bayley never agreed to become a member of this company, and this view is fully supported, I think, by the letters which passed between Bayley and Cæsar, the secretary of the company. It appears that Bayley had agreed to advance some part of the money with which this Florida property was to be purchased, and he naturally wished to have some security for the repayment of the sum which he was advancing. He was prepared to take debentures, cash, or fully paid-up shares, but he was not prepared to take anything short of this, and especially he had made up his mind that he would not take ordinary £5 shares, upon which only £1 had been paid up. That being the state of matters when the correspondence opens, the first letter of Cæsar's, dated 2nd April 1885, is in these terms—"Some weeks ago I sent Mr Hanbury a share certificate in your favour for 300 shares of this company, of which he acknowledged receipt. Your name was accordingly put down for that number, but on looking into the matter Mr Hanbury now finds that your shares should be £215 and your debentures £215, and he has sent me the original certificates to be altered. This is, as you may be aware, almost an impossibility, and my object in writing is to know if you will take £300 shares and £130 debentures instead of the above numbers." Now, this letter contains a clear misrepresentation, for there could be no difficulty in altering the certificate, and allotting Bayley 215 shares and 215 debentures, seeing that at that date there was no register. It is clearly established by the evidence of Cæsar that at this time there were no names on the register, and so it becomes apparent that Cæsar commences this correspondence with a misrepresentation. His next letter to the respondent, which is dated 7th April 1885, is in these terms—"I have to thank you for your telegram, reading, 'I will to same proposal as Adderley,' in answer to mine of this date informing you that Mr Adderley had agreed to take 300 shares and £130 debentures as proposed to you; and I understand your telegram to mean that you will do as Mr Adderley has done." Bayley's answer to these letters is on the 20th April, and he there says—"I have received from Mr Hanbury share certificate for 300 shares, and from Mr Adderley cheque for £100. I do not understand this, and must ask you to cancel the shares, and let me have the amount due to me wholly in debentures or cash. What I wrote to you was that I would accept the same proposal as Mr Adderley, and he advises me that there will be due to him and to me £215 in ordinary shares and £215 in debentures. Please favour me with full explanation by return of post." Now, this is a very distinct repudiation by Bayley of any intention of becoming the owner of the 300 shares.

To this Cæsar replies on the 22nd April in these terms—"Mr Adderley writes you that £215 in shares and £215 in debentures was the arrangement, and so it was originally, but was subsequently varied to a small extent as above. To my mind the shares are better than the debentures." Bayley replies to this letter on the following day, and says—"In reply to your letter of yesterday, I never agreed to take any shares at all, and shall not accept any with a liability attached. In all such cases as this, whatever shares are allotted, they are always fully paid-up shares. In any case it does not appear that Mr Adderley had consented to take £300 in shares at the time when you originally informed me that he had, so that my consent, which was contingent upon his, falls to the ground. I have no objection, however, to avoid giving you trouble, to take £300 in shares, but they must be fully paid up, or, as you say that you would not sell your own shares at par, I have no objection to receive cash at par for my shares and debentures for the balance, but I distinctly refuse to accept any liability for calls." Now, it is plain, I think, that down to this date Bayley had come under no obligation to become a member of this company, except upon the condition of having allotted to him fully paid-up shares or debentures.

On the 2nd May Cæsar again writes to Bayley in these terms—"I have to-day received a letter from Mr Adderley, in which he states that he did not know when he wrote me that the shares were not fully paid up, and from some other statements it seems that he must have written you that he had not agreed. I therefore send you a copy of his letter, upon the faith of which I wrote and telegraphed you on 7th April that he had consented, and if you read it along with the fact that Mr Adderley had gone carefully over the prospectus, you will be satisfied that my letter was not exactly or in any way what you more than hinted it was." The enclosure, which was very short, and which so far justified Cæsar's explanation was as follows:—"*Copy Letter. 5th April* 1885. Sir,—You can make out my shares and debentures as you wish, £300 ordinary shares and £130 in debentures." Now, what Adderley plainly intended and expressed in this letter was that his shares should be fully paid up.

Still, there is nothing to attach liability to Bayley, and he, being apparently ignorant of the nature of the company, writes to Cæsar on 11th May, and says—"Will you kindly send me a copy of prospectus, as I have not seen one, and also copies of minutes which relate to my shares and debentures? I am not wishful to be obstructive, but I wish to have all the facts before me." To this Cæsar replies on the following day as follows—"As requested, I enclose a copy of the original prospectus. There have been no minutes in connection with your shares and debenture, as the directors only meet monthly just now, but at the meeting

held last week I submitted the correspondence about the matter, and it was minuted, 'These gentlemen have accepted the shares, and we cannot vary the arrangement.' Please let me hear at your earliest convenience, that this matter may be settled and the debentures issued."

On 21st May, Bayley, who had meantime been looking over the prospectus Cæsar had sent, writes to Cæsar—"I am obliged by your letter, but it does not give the information I require, and unless you can give it to me briefly in a letter, I should be glad if you would send me copies of the agreements referred to in the prospectus, so that I can see for myself. (1) What I want to know is—What is my legal position, and what amount I am entitled to receive, 1st, in cash; 2nd, in debentures; 3rd, in shares. (2) Have I the option of taking payment in whichever of these three forms I choose? I have accepted and shall accept no liability for calls unless upon full consideration and with all the facts before me."

Now, Bayley's position up to this point is a very plain one, and Cæsar does not say that he ever thought that Bayley at that time had consented to become a member of the Company.

Cæsar accordingly writes to Bayley on 22nd May in these terms—"Your connection with this company, therefore, simply is that having an interest in Mr Hanbury's share of the purchase price, and being entitled to about £215 in ordinary shares and £215 in debentures, as per Mr Hanbury's statement sent you, I wrote asking you and Mr Adderley to take payment of your £215 shares and £215 debentures as follows:—£300 in ordinary £5 shares (£1 paid), and £130 debentures. Mr Adderley agreed to this request, and I sent you lately copy of his letter. I wrote you that he had agreed, and you also agreed to do the same." But he omits to say that Bayley had agreed solely because Adderley had agreed; and as Adderley did not consent to take ordinary shares, Bayley was not bound to take them either, seeing that he only consented to take shares on the condition that they were fully paid up.

Then Cæsar goes up to London in order to see Bayley, and if possible arrange matters with him, and Bayley in his evidence gives a very clear account of what took place at that interview.

On the other hand, Cæsar has no distinct recollection of anything that passed on that occasion, and yet it is clear that he must have been sent up to London by the directors of the company in order to come if possible to some arrangement with Bayley, and further, he must upon his return have submitted some kind of report to his directors of what had taken place there.

Now, Bayley's account is that he distinctly refused to become a member of the company, but that he was willing that Doyle should become a member in respect of the 430 shares; and there is one piece of written evidence which bears out Bayley's view of this transaction, and that is his letter to Cæsar of 16th June—"I shall be glad if you will allot the £430 due to me entirely in shares in the name of Mr James Doyle at the above address. I return the certificate enclosed." Now, there is no explanation given of this letter, but it is clear from its terms that at that date Bayley's name was not upon the register, because he directs Cæsar to allot to Doyle, and he underlines the word 'allot' so as to emphasise his understanding of the arrangement of the previous day. If his understanding of the arrangement of the previous day was erroneous, then undoubtedly Cæsar should have at once written to him and corrected it. He did not do so, and that because Bayley's account of what took place at that interview, and the substance of which was repeated in his letter, was correct.

Now, apparently these are the whole facts upon which it is sought to make the respondent a shareholder of this company.

It was urged that by signing the transfer in favour of Doyle, Bayley departed from his first contention that he was not a shareholder of this company. No doubt Bayley signed this transfer, but he did it under protest all the while that he was not a member of this company. And that really was the case, for he was only entered on the register in order that he might carry through the arrangement with Cæsar regarding the transfer of the shares to Doyle.

But the next matter which has to be considered is, whether there was throughout this transaction any deceit practised upon the directors. They admit that they saw and signed the transfers and all the papers connected therewith. They must also have seen the correspondence, and they could not but be aware all along that the consideration mentioned in the transfer was fictitious, in addition to which they had Bayley's frequently repeated protests that he would not be a member of the company if any liability was to be incurred for uncalled capital.

Seeing, then, that the directors consented to the transfer to Doyle, and having at the time all these facts before them, they cannot now be heard to say that they were deceived by Bayley or that he is now escaping in consequence of his deceit.

Another question was raised in the course of the discussion, namely, as to whether this was a *bona fide* transfer, or whether the effect of the transaction was not merely to constitute a trust by Doyle in favour of Bayley. It does not, however, appear to me to be at all necessary for the decision of the present case to enter into that question. I shall only say, if it were necessary to determine this point, that with the very clear evidence before us both of Doyle and Bayley it would be very difficult to view this in any other light than as a *bona fide* transfer.

It is possible that a close examination of this transaction might disclose circumstances of a somewhat suspicious character, but these are not sufficent in my mind to overcome the direct testimony of both these witnesses.

There can be no doubt that Doyle could stand in this transfer as against any claim which could be made either by Bayley or

by anyone in his interest. Supposing, for example, that after this transfer had been executed Doyle had died and these shares had, through the prosperity of the company, risen in the market, Doyle's executors would not have been under any obligation to have handed back these shares to Bayley.

Upon the whole matter, I think that the Lord Ordinary has come to a right decision, and that we should adhere to his interlocutor.

LORD ADAM.—I am of the same opinion, and without again going over the corespondence between Bayley and Cæsar, to which your Lordship has so fully referred, I shall only say that I am satisfied that up to the 15th June, and to the transfer which followed upon the 16th, Bayley had never consented to become a partner of this company.

Upon the 6th of May the directors had come to a resolution that as Adderley and Bayley had accepted the shares, they, the directors, could not vary the arrangement, and this was the state of matters when Cæsar and Bayley met in London. The result of that meeting was that Bayley consented to sign the transfer of the 300 shares in favour of Doyle. But all this was done by him under an arrangement with Cæsar. Throughout the whole transaction Bayley had held to the view he had adopted at the outset, that he would not accept shares to which any liability attached. He became a partner of this company simply in order that he might cease to become one, and that the transfer to Doyle might be formally carried out.

If the directors accept transfers on such a footing, and it is clear that they knew what was going on, then they cannot now be heard to say that they have been deceived.

I consider that the true position of Bayley prior to the 16th June when he directed Cæsar to allot the shares to Doyle is a question of great importance, because if at that date his name was properly on the register then the present application of the liquidator may be granted and Bayley's name may be restored in substitution for that of Doyle. Upon an examination of the correspondence as well as upon a consideration of the evidence of the parties I am satisfied that Bayley never consented to become a partner of this company, that at 16th June 1885 he was not a partner, and that the account which he gives of this whole transaction is the true one. That being the state of matters, it is clear that his name cannot now be entered on the register of shareholders.

With regard to the question whether or not the directors had been in any way deceived by the actions of parties, and had passed this transfer in favour of Doyle under error, I agree with your Lordship that it is not necessary for the determination of the present question to inquire, and upon the whole matter I agree with your Lordship that the interlocutor of the Lord Ordinary ought to be adhered to.

LORD M'LAREN—I concur in the result at which the Lord Ordinary has arrived, and think that the liquidator of this company cannot obtain the rectification of the register which he seeks, but I do so upon the grounds which have been stated by your Lordship and by Lord Adam.

Upon the evidence I am satisfied that Mr Bayley never agreed to take shares in the company, but insisted on his right to be paid either in cash or in debentures for the interest he had in the land which was bought by the company. I think that he was within his rights in taking up that position down to the 15th June, when a meeting took place between Mr Bayley and Mr Cæsar, the secretary of the company, at which it was arranged that the shares should be put into the name of Doyle. That being so, the mere fact that Bayley signed the transfer in favour of Doyle does not seem to me to be sufficient to subject him to liability as a member of the company.

The stock certificate had been made out some months previously in Bayley's name, and there might be a difficulty in cancelling the certificate. That being so, it was not unnatural that Bayley at the request of the secretary of the company should have agreed to execute the transfer, the company having been originally in error in issuing the certificate.

It may be that the arrangement between Bayley and Cæsar, the secretary, was not one which was consistent with the constitution of the company, or which the directors should have authorised. If they were aware of the facts, and sanctioned the transfer to Doyle, then of course their ground of action against Bayley is gone, because the directors had an absolute discretion in regard to the admission of members or partners of the company.

If they did not know the facts, or if these were withheld from them by their secretary, then no doubt, if the company had been a going concern, there might be ground for claiming that Bayley's name should be placed upon the register, and that Doyle's name should be taken off. But it appears to me that the shareholders are unable to obtain such redress under present circumstances, because they are no longer in a position to make *restitutio in integrum*. They cannot replace Bayley in the position in which he was when he executed the transfer, that is, in the position of a vendor who is to receive payment in cash, or the equivalent of cash.

It has been held in cases which are the converse of the present, that although a company may be liable for the misrepresentation of its agent, yet after the company is dissolved a shareholder cannot have his name removed from the register of shareholders on the ground that he was induced by the fraudulent misrepresentations of the company's agent to become a shareholder. That was settled in the case of *Houldsworth* v. *City of Glasgow Bank* (July 4, 1879, 6 R. 1164—*aff.* H. of L. 7 R. 53) upon the ground that after dissolution matters cannot be restored to their original position.

That rule seems to me to be applicable to the present case. It is a rule which has operated with some severity upon shareholders in circumstances where they cannot get the better of a dubious transaction, because they cannot restore the person who was not at fault to the position which he occupied before the date of the transaction.

I may say that if Mr Bayley had agreed to take the shares, and his name had therefore been properly upon the register of the company, I should have taken a different view of the case, because I think he has failed to explain satisfactorily his transaction with Doyle. It was incumbent on him to explain it in defending himself against this application, and I am quite unable to understand why anyone in his position should agree to give up a right to £150 of debentures which were held at the time to be as good as cash, and instead of that to allow £150 of stock to be issued in the name of his servant, unless that servant were a trustee for him.

If it had been necessary to consider that point I should have had great difficulty in concurring in the proposed decision, but for the reasons which have been given I think it is quite unnecessary to consider what was the nature of the real transaction between Bayley and Doyle, because whatever it was, it was part of the bargain between Bayley and Cæsar, the secretary of the company, that the stock should be put into Doyle's name.

LORD SHAND was absent.

The Court adhered.

Counsel for the Petitioner—Low—Orr. Agents—Davidson & Syme, W.S.

Counsel for the Respondent—J. C. Thomson—A. S. D. Thomson. Agents—Philip, Laing, & Company, S.S.C.

Thursday, February 20.

FIRST DIVISION.

[Sheriff of Lanarkshire.

SHAW *v.* CALEDONIAN RAILWAY COMPANY AND RAYNER.

Contract—Gaming—Contract for Payment of Differences.

A had a series of dealings in stocks and shares with B, an outside dealer, in the course of which he executed in favour of B a transfer of certain Caledonian Railway Company stock, which he deposited with B as a security against his indebtedness in future transactions with him. The dealings between the parties continued for ten months, during which delivery of stock was never asked for on either side, the transactions being settled by payment of differences. At the close of the dealings A owed B about £68 which he refused to pay.

In an action by B against the Caledonian Railway Company and A for registration of the transfer, *held* that the transactions between A and B were not gambling transactions in respect that A might have demanded delivery of stock bought from B, or have compelled B to take delivery of stock sold to him, and that the company were bound to register the transfer, and issue a certificate in B's favour.

John Shaw was a dealer in stocks and shares in London, outside the Stock Exchange. He had several places of business, to which prices of stocks and shares quoted on the Stock Exchange were telegraphed by the Exchange Telegraph Company, these prices being shown on a tape run off by an electric machine. There were always two prices for each stock, a higher and lower, being the prices at which the dealers on the Stock Exchange were ready to sell and buy respectively. Shaw was ready to do business at the same prices. In September 1886, John Rayner, 89 High Street, Eccleston Square, London, entered into dealings with Shaw. The dealings were of the nature of transactions on cover—that is, a limit was fixed of one or two per cent, within which the loss to be sustained by Rayner, if the stock went against him, was to be confined, and a sum was lodged by Rayner to cover this possible loss. When Rayner's loss reached the amount of the cover, Shaw was bound to close the transaction by entering into one of an opposite character. In February 1887, Rayner deposited with Shaw a certificate for £80 Caledonian Railway stock, and a deed of transfer of the same in Shaw's favour, as a security against Rayner's indebtedness in future transactions between them. The transactions between the parties came to an end in June 1887, when there was a balance of £67, 18s. 2d. against Rayner, which he refused to pay.

In November 1887 the present action was raised by Shaw in the Sheriff Court at Glasgow against the Caledonian Railway Company to compel them to register the transfer above mentioned, and to deliver to the pursuer a certificate in his favour.

The railway company lodged defences to the action, in which they stated that they had received notices from Rayner forbidding them to register the transfer.

The railway company pleaded—(1) All parties not called. (2) No jurisdiction. (4) The defenders being interpelled by the notices from the said John Rayner from registering the transfer of stock in question, decree of absolvitor ought to be pronounced.

The Sheriff-Substitute (GUTHRIE) sustained the defenders' first plea-in-law, and dismissed the action.

The pursuer appealed to the First Division, and after hearing parties the Court recalled the interlocutor of the Sheriff-Substitute, repelled the first two pleas for the defenders, and appointed them to intimate the dependence of the process to Rayner, certifying him that if he failed within eight days to appear and state objections to the registration of the transfer, judgment