Counsel for the Appellant—M. P. Fraser —Spens. Agents—Cuthbert & Marchbank, S.S.C.

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Tuesday, March 20.

FIRST DIVISION.

[Lord Pearson, Ordinary.

MILN AND GILL *v.* ARIZONA COPPER COMPANY.

(*Ante*, June 16, 1899, 36 S.L.R. 741, 1 F. 935).

Company — Transfer of Shares — Shares Transferred to Company "for Behoof of Class of Shareholders"—Power of Company to Hold fully Paid-up Shares in its own Name.

No illegality attaches to a company holding shares in its own name where the shares are fully paid up and involve no liability upon the holder. If the transfer of the shares to the company is unqualified, it will have the effect of a surrender of the shares; if qualified by a trust for a particular class of shareholders of the company, a title may be made up in name of a nominee, subject to a declaration of trust in favour of the class indicated.

By an agreement between a company and the vendors of the company's property it was narrated that the directors of the company had intimated certain claims against the other parties in connection with the formation and management of the company and its property, which were denied by the vendors; and further, that a certain sum of cash was needed to extricate the company from difficulties, and that by the agreement the claims and disputes were compromised. The vendors held certain deferred shares which had been issued to them as fully paid up and payable to bearer. They undertook under the agreement to transfer these in favour of the company "or their nominees for behoof of the preferred shareholders." The whole of the deferred shares were transferred to the company with the exception of a certain number which had been acquired by the public.

An action having been raised by a holder of some of these deferred shares and also of preference shares, for declarator that the transferred shares were held by the company in trust for the preference shareholders and belonged beneficially to them, the company maintained that the effect of the transfer was a surrender of the shares to the company as a whole and not for the benefit of the preferred shareholders as a class, and alternatively, that if the latter were the true meaning of the transfer, the transaction was an illegal one, on the ground that the company could not traffic in or hold its own shares, or procure a benefit for one class of its shareholders as against the remainder.

The Court *held* that the transaction was not *ultra vires* of the company, that the shares in question were held in trust for the preferred shareholders, and that they belonged beneficially to that class.

Company — Shareholder — Resolution of Majority of Shareholders — Resolution Affecting Contract Right—Ultra vires.

By an agreement between a company and the vendors of its property the latter undertook to transfer certain deferred shares held by them to the company or their nominees, to be held by them "for behoof of the preferred shareholders."

Thereafter a new company was incorporated, and one of the objects of the company as stated in the memorandum of association was to execute an agreement with the old company. One term of this agreement was, that "the rights of the preferred shareholders of the new company to certain of the deferred shares thereof shall be the same as the rights of the preferred shareholders of the old company are under the agreement first above mentioned" (being that referred to above) "to certain of the deferred shares thereof." One of the articles of the association bore that any right "attached to the preferred or any other particular class of share may be modified by agreement between the company and any person purporting to contract on behalf of that class," provided such agreement were confirmed at two separate general meetings of the holders of shares of that class.

An agreement was entered into between the company and persons contracting on behalf of the various classes of shareholders, and confirmed as above set out, which provided, *inter alia*, for the consolidation and division of the shares, and contained the following provision—"the holders of preferred shares and deferred shares shall . . . have no right to or any interest in or in respect of any deferred shares previously held by the company or any other party whatsoever, either for behoof of the company or of the preferred shareholders thereof."

Held that this constituted an extinction of the right of the preferred shareholders to the deferred shares to which they were beneficially entitled, that it was not authorised by the article of association above quoted, and was *ultra vires* of the company, and that as it formed a material part of the agreement the whole scheme as embodied therein fell to be reduced.

(Sequel to the case reported *ante, ut supra.*)

The Arizona Copper Company, Limited, was originally incorporated on 11th August 1882

for the purpose of acquiring and working certain copper mines in Arizona, U.S.A.

By the 5th article of the memorandum of association it was provided—"(V.) The nominal capital of the company is divided into 160,000 preferred shares of £5 each, upon which a payment of £5 on each share shall be made, and 75,000 deferred shares of the nominal value of £1 each, to be issued as provided by the articles of association, but upon which no payment shall be made; with power to increase the capital as provided by the articles of association."

By the articles of association it was provided, *inter alia*—"20. All or any of the rights and privileges attached to the preferred or any other particular class of share may be modified by agreement between the company and any person purporting to contract on behalf of that class, provided such agreement is confirmed by an extraordinary resolution passed and confirmed respectively at two separate general meetings of the holders of shares of that class, and all the provisions hereinafter contained as to general meetings shall, *mutatis mutandis*, apply to every such meeting, but so that the quorum thereof shall be for members holding or representing by proxy one-tenth of the nominal amount of the issued shares of the class. 38. The directors may at any time accept the surrender of any share or shares from any shareholder on such terms as they shall think fit, and thereafter dispose thereof for behoof of the company."

Of the preferred shares upwards of 150,000 were taken up by the public. The deferred shares were issued to the vendors as fully paid, an agreement to that effect being duly filed in the registrar's office, and were represented by share-warrants payable to bearer. In 1883 5050 of them were sold by the vendors to the public.

In 1883 claims were made by the company against the original Scottish directors and against Mr Underwood and Mr Green, two American gentlemen, in connection with the formation and management of the company and its title to the property. These claims were compromised by two agreements executed in May and June 1884, to each of which the company was a party.

The first of these was dated May 16, 1884, and was between the company and Mr Underwood. The company in respect of certain covenants undertook to relieve Mr Underwood of liability in respect of certain claims, and Mr Underwood undertook, *inter alia* — "(*Eleventh*) That the second party hereby agrees to transfer and deliver to such person as may be named by the first party, or by Shearman and Sterling as their agents, all the deferred shares of stock which he and the said W. R. Green now own in the said first party, the same amounting to not less than forty - six thousand (46,600) shares, and agrees to procure the transfer and delivery to the person so named, not only of all those shares of deferred stock which he and the said W. R. Green now hold, but also those which either of them has sold to other parties; and that he shall and will execute or procure to be executed and delivered a formal transfer of all such shares whenever called upon to do so; or in case the second party is unable to procure such transfer and delivery of the shares sold as aforesaid to other parties, he agrees to indemnify the first party against all claims and liability thereon, and against all claims and demands for dividends thereon to the extent of three thousand (£3000) pounds sterling." Mr Underwood was unable to reacquire all the shares which had been issued to the public.

The other agreement was dated 28th, 29th, and 31st May, and 5th June 1884. The parties to it were (1) the company; (2) four of the Scotch vendors; (3) the American vendors; and (4) a fifth Scotch vendor whose position was not quite the same as that of the others, contained, *inter alia*, the following provisions:—"Whereas the directors of the first party have intimated certain claims against the second, third, and fourth parties in connection with the formation and management of the said company and the title to their real estate in America, which claims are disputed and denied by the said second, third, and fourth parties; . . . and whereas it has been represented to the second, third, and fourth parties that it is necessary in order to aid in extricating the company from pressing embarrassments that a sum of £30,000 in cash should be forthwith made available to meet such claims; and whereas, without admitting any liability therefor, and in consideration of the transfers hereinafter referred to, and also in consideration of the discharges and others hereinafter mentioned —(1) The third party agrees to provide £7000 by abandoning the claims mentioned in article 10 hereof; and (2) the second parties agree to pay or provide £21,000; and whereas the fourth party, while also denying all liability in respect of said claims, but being desirous to give assistance in extricating said embarrassments and to enable these presents to be the more effectually carried out has consented to provide £2000 on the conditions mentioned in article 11 hereof — and with the view of compounding, compromising, and settling all disputes and avoiding litigations the parties hereto have agreed to enter into these presents: Now this agreement witnesseth, and it is hereby agreed and declared that the said claims, disputes, and threatened litigations are hereby compounded, compromised, and settled between the parties on the following terms and conditions, viz.— . . . (*Seventh*) The second parties agree to transfer in favour of the first party or their nominees, for behoof of the preferred shareholders, all the deferred shares at present held by them in the Arizona Copper Company Limited, as follows:—Thomas Jarron Gordon, 5500 shares; James Duncan Smith, 5500 shares; William Lowson, 5500 shares; Mitchell Thomson, 4950 shares. . . . (*Eleventh*) The said fourth party, in order to enable the said arrangement to be carried out hereby agrees to transfer to the first

party or their nominees, for behoof of the preferred shareholders, 5500 deferred shares of the said Arizona Copper Company Limited, presently held by him. He further hereby stipulates that the first party shall procure, and the first party hereby oblige themselves to procure, without any further payment by the fourth party, the transfer from the fourth party's name of 3000 shares of the Arizona Trust and Mortgage Company, Limited, for which application had been made in name of the said fourth party, and shall free and relieve him of all calls, demands, and payments of every description for or in respect of said shares. (*Twelfth*) It is hereby provided that in the event of an agreement entered into between the said Frank Livingston Underwood and Shearman and Sterling, counsellors-at-law, New York, of date on or about 16th May 1884, being found to contain a stipulation to the effect that the said Frank Livingston Underwood shall transfer or surrender to the first party or their nominee all deferred shares which were at any time allotted to or held by him and Willard Reed Green, the said provision shall be and is hereby modified to the effect of making it only obligatory on the said Frank Livingston Underwood to transfer or surrender all deferred shares held by him at the date of these presents, being not fewer than 21,500, and to transfer or surrender all deferred shares presently held by the said William Reed Green, and any deferred shares which the said William Reed Green has sold or assigned under a penalty for the non-delivery of those sold or assigned shares at the rate of £750 for every 500 of said shares, but declaring that the penalty shall in no event exceed £1500." . . .

The total number of shares thus transferred was 26,950. On 5th August 1884 the new Arizona Copper Company was incorporated. By the memorandum of association it was stated—"III. The objects for which the company is established are—1. To adopt, execute, and carry out an agreement proposed to be entered into immediately after the incorporation of the company between the Arizona Copper Company, Limited (therein called the Old Company) and the liquidators thereof, of the first part, and the company (that is this company, therein called the New Company) of the second part, relating to the transference of the business, property, and undertaking of the Old Company to this company. . . . V. The capital of the company is £875,000 divided into 160,000 preferred shares of £5 each, and 75,000 deferred shares of £1 each."

By the articles of association it was provided, *inter alia*—"8. All or any of the rights and privileges attached to the preferred or any other particular class of share may be modified by agreement between the company and any person purporting to contract on behalf of that class, provided such agreement is confirmed by an extraordinary resolution passed and confirmed respectively at two separate general meetings of the holders of shares of that class, and all the provisions hereinafter contained as to general meetings shall, *mutatis mutandis*, apply to every such meeting, but so that the quorum thereof shall be for members holding or representing by proxy one-tenth of the nominal amount of the issued shares of the class."

On 6th August 1884 an agreement was entered into between the old and new companies, containing the following provisions:—"*First.* The old company and the liquidators thereof shall sell, and the new company shall purchase, the business, property, and undertaking of the old company, including every asset, heritable or moveable, real or personal, of whatever nature and wheresoever situated, belonging to or vested in the old company or the liquidators thereof, or which the old company has power to acquire, or which is held in trust for the old company, or to which it has right in law or equity, and also including all calls due on shares, with the full benefit of all contracts and agreements, but subject always to all mortgages, charges, liens, and incumbrances affecting the said property and assets or any part thereof. *Second.* Without prejudice to the preceding article, it is hereby provided that the new company shall be entitled to the full benefit of all rights conferred on the old company by the following agreements, viz.—[the two quoted above]—Declaring that the rights of the preferred shareholders of the new company to certain of the deferred shares thereof shall be the same as the rights of the preferred shareholders of the old company are under the agreement first above mentioned to certain of the deferred shares thereof. *Third.* The new company shall pay and discharge all the debts, liabilities, and obligations of the old company, and shall adopt, perform, and fulfil all contracts and engagements undertaken by it, including those in the agreements mentioned in the immediately preceding article (in so far as not already fulfilled), and shall free and relieve the old company and the liquidators thereof of and from the said debts, liabilities, obligations, contracts, and engagements, and of and from all actions, proceedings, expenses, damages, claims, and demands in respect thereof. *Fourth.* The new company shall pay and free and relieve the old company and the liquidators and contributories thereof of and from the whole expenses of and incident to the winding-up of the old company and carrying the said sale into effect. *Fifth.* The shareholders of the old company shall be entitled to shares of the new company as follows, viz.—(*first*) each holder of preferred shares of the old company shall, except as mentioned in article seventh hereof, be entitled in respect of each such share held by him, to require the new company to allot to him, or to his nominee or nominees, one £5 preferred share of the new company, with the sum of £5 credited as having been paid thereon; and (*second*) each bearer of a warrant for deferred shares of the old company shall be entitled in respect thereof to require the new company to issue to him

a warrant of the new company for the same number of deferred shares of that company as is embraced in the warrant of the old company held by him, with the sum of £1 credited as having been paid on such deferred shares of the new company: Declaring that for the purposes of this clause each person to whom the old company shall have contracted to allot shares shall be reckoned a shareholder thereof in the same way as if the shares had already been issued to him; and also declaring that each shareholder of the old company who shall take the benefits by this clause offered to him shall accept the same in full satisfaction and discharge of all claims and demands in respect of his interest as a shareholder in the property and assets of the old company."

On 12th May 1898 a scheme was proposed by the directors for reconstructing the share capital of the company. The proposals were contained in a statement of that date which was issued to the shareholders, and were submitted to a meeting of the company on 20th May 1898.

The statement contained the following proposals, *inter alia*:—"2 and 3 Preferred and Deferred Shares.—The directors consider that it would be advisable to get rid of the deferred share issue. While they are of opinion that these deferred shares possess little or no value, they consider that it would be advantageous to make such arrangements with the shareholders thereof as would merge these shares, at par value, with the preferred share issue, which, after providing for the outstanding deferred shares, may be taken at £640,000. The company controls 69,950 of the deferred shares, and the directors have already arranged with the holders of 3505 of the 5050 deferred shares in the hands of the public to fall in with the above proposal, so that 73,455 out of the 75,000 shares may be taken as assenting."

On 19th and 20th July 1898 an agreement was entered into between the company and three persons purporting to contract on behalf of three classes of shareholders, viz., the holders of A preference shares, of preferred shares, and of deferred shares. The agreement contained the following terms:—. . . . "And whereas it being now intended that the rights and privileges of the various classes of shares should be modified as hereinafter set forth, this agreement is entered into in order to set out these modifications, with a view to the same being confirmed in manner before recited. Therefore the parties have agreed, and do hereby agree, as follows:—(*First*) The company and the second, third, and fourth parties contracting as aforesaid agree that the rights and privileges attached to the 'A' preference shares, the preferred shares, and the deferred shares of the company shall be modified to the effect and intent involved in the following resolutions, which are to be submitted in order to the same being passed and confirmed by the company in general meeting as special resolutions—(1) That each preferred share of the company of £4 shall be divided into four shares of £1 each. That two of these shares shall be called preference shares, and be entitled to the rights and privileges hereinafter declared to appertain to preference shares, and that the remaining two of these shares shall be called ordinary shares, and shall be entitled to the rights and privileges hereinafter declared to appertain to ordinary shares. (2) That each of the 75,000 deferred shares of the company of £1 shall be divided into two shares of 10s. each. That one of these shares shall be called a deferred preference share, and that the other of these shares shall be called a deferred ordinary share. (3) That the 75,000 deferred preference shares of 10s. each arising from the sub-division of deferred shares, shall be consolidated and divided into 37,500 shares of £1 each, and that the shares so arising shall be called preference shares, and be entitled to the rights and privileges hereinafter declared to appertain to preference shares; and that the 75,000 deferred ordinary shares of 10s. each, arising from the sub-division of deferred shares, shall be consolidated and divided into 37,500 shares of £1 each, and that the shares so arising shall be called ordinary shares, and be entitled to the rights and privileges hereinafter declared to appertain to ordinary shares. . . . . (7) That upon the sub-division of shares provided for in the first and second, and the consolidation and division provided for in the third of the foregoing resolutions taking effect, the holders of preferred shares and deferred shares shall cease to have any rights as such, other than the rights which they will have as the holders of the shares arising therefrom, and that without prejudice to such general provision, they shall have no right to or any interest in or in respect of any deferred shares previously held by the company or any other party whatsoever either for behoof of the company or of the preferred shareholders thereof, or in respect of any shares or stock arising therefrom in accordance with the preceding resolutions, and the board are hereby authorised and empowered to do all such deeds and execute all such documents as may be necessary to effectually surrender, extinguish, and cancel the said deferred shares held as aforesaid, or the shares or stock arising therefrom as aforesaid." . . .

This agreement was afterwards confirmed by resolutions passed at separate meetings of each class of the shareholders, and at extraordinary general meetings of the company.

Mr Gill, S.S.C., a holder of preferred shares and of 400 deferred shares, and Mr Miln, a holder of 70 deferred shares, protested against the proposed scheme, and thereafter raised an action against the company and against the directors. The summons contained a conclusion (*First*) for the reduction of the agreement of 19th and 20th July 1898, of the resolutions following thereon, and the following, *inter alia*, conclusions:—"(*Third*) it ought and should be found and declared, by decree foresaid, that it is illegal and *ultra vires* of the com-

pany and of any meeting of deferred shareholders to modify the rights and privileges attached to the deferred shares as proposed in the foresaid agreement, or to do anything having the effect of extinguishing or abrogating the deferred shares of the said company, and merging or commuting them into preferred shares or into other shares arising from the sub-division of preferred shares, with only the rights and privileges attached to preferred shares or the shares arising therefrom as aforesaid, without the consent of each holder of a deferred share; and (*Fourth*) the defenders ought and should be interdicted, prohibited, and discharged, by decree foresaid, from so extinguishing, abrogating, merging, or commuting the deferred shares of the said company without the consent of each holder of a deferred share, and of each person having right to be a holder of a deferred share; and (*Fifth*) it ought and should be found and declared, by decree foresaid, that the 26,950 deferred shares fully paid of the Arizona Copper Company, Limited, incorporated on 11th August 1882, which formerly belonged to the second and fourth parties to the agreement immediately hereinafter mentioned, and were transferred by them to that company for behoof of the preferred shareholders of the said company, in implement so far and in terms of an agreement between and among the said last-mentioned company and William Lowson of Balthayock and others, dated 28th, 29th, and 31st May and 5th June, in the year 1884, were held by the said last-mentioned company in trust for behoof of the preferred shareholders thereof, and now belong beneficially to the holders of the preferred shares of the present Arizona Copper Company, Limited." . . .

The case so far as regards the remaining conclusions is reported *ante ut supra*.

The pursuers pleaded—"(1) The foresaid agreement of 19th and 20th July 1898 and relative resolutions being *ultra vires* of the company, as above set forth, should be set aside in terms of the reductive conclusions of the summons. (4) The foresaid scheme as embodied in the foresaid agreement and resolutions being illegal and improper, and the directors having by concealment and misrepresentation procured the adoption of it, all as above set forth, the directors ought to bear personally the whole expenses caused to the company in connection with the said scheme, and the pursuers are entitled to decree in terms of the second conclusion. (5) It being illegal and *ultra vires* of the company to extinguish, abrogate, merge, and commute the deferred shares, the pursuers are entitled to declarator and interdict, in terms of the third and fourth conclusions of the summons. (6) The 26,950 fully paid deferred shares transferred to the old company for behoof of the preferred shareholders having been held in trust by the old company for behoof of the preferred shareholders, and the preferred shareholders of the present company being beneficially entitled thereto, the pursuers are entitled to decree in terms of the fifth conclusion."

The defenders, the company, pleaded—"(4) The proceedings complained of having been orderly carried out in terms of the Companies Acts and the constitution of the company, and having been *intra vires* of the company, the defenders should be assoilzied. (6) In respect that the 26,950 deferred shares are and can only be held for behoof of the company, and not merely of the preferred shareholders thereof, the pursuers are not entitled to decree in terms of the fifth conclusion of the summons."

The Lord Ordinary (PEARSON) on 19th January 1900 pronounced the following interlocutor—"Finds and declares, under the fifth conclusion of the summons, that the 26,950 deferred shares, fully paid, of the Arizona Copper Company, Limited, incorporated on 11th August 1882, which formerly belonged to the second and fourth parties to the agreement of 28th, 29th, and 31st May and 5th June 1884, and were transferred by them to that company for behoof of the preferred shareholders thereof, were held by the said company in trust for behoof of the preferred shareholders thereof, and now belong beneficially to the holders of the preferred shares of the present Arizona Copper Company, Limited: Finds that the seventh article of the agreement and relative resolutions sought to be reduced is contrary to the rights of the preferred shareholders as above declared, and is *ultra vires* and not warranted by the terms of the eighth article of the articles of association of the company: Reduces, decerns, and declares in terms of the reductive conclusions of the summons: *Quoad ultra* dismisses the action so far as the conclusions are not previously disposed of, and decerns: Finds the defenders entitled to expenses from the date of closing the record to the date of the reclaiming-note of 6th April 1899: *Quoad ultra* finds the pursuers entitled to expenses so far as not already disposed of," &c.

Opinion.—"For the circumstances in which this action was brought I may be allowed to refer to the first seven paragraphs of my previous opinion.

"Three of the conclusions of the summons have now been disposed of, namely, the second and sixth, which sought to impose liability upon the directors, and the seventh, which raised the question how far the dividend on the preference shares was a cumulative dividend.

"There remain the first, third, fourth, and fifth conclusions. Of these the three former conclude for reduction of the reconstruction scheme of July and August 1898 on general grounds, and for a relative declarator and interdict on a narrower and more special ground. The fifth conclusion seeks for declarator that a parcel of deferred shares of the original company, 26,950 in number, were held by that company in trust for behoof of the preferred shareholders thereof, and that they now belong beneficially to the holders of the preferred shares of the present company, and fall to be distributed among the preferred shareholders rateably, or as nearly as may be in proportion to their respective holdings of

preferred shares. In the view I take of the case it will be convenient to consider in the first instance the circumstances which give rise to this fifth conclusion.

"The original company, which was incorporated in 1882, had a nominal capital of £875,000, divided into 160,000 preferred shares of £5 each, and £75,000 deferred shares of £1 each. The latter were vendor's shares. They were issued to the vendors as fully paid, the contract being duly filed in the Registrar's office, and they stand and have all along stood upon share warrants 'to bearer.' It is averred, and not disputed, that in 1883 the vendors had sold 5050 of these deferred shares to the public. Of the preferred shares upwards of 150,000 were taken up.

"In this state of matters claims of large amount were made by the company against its original Scottish directors, and also against two American gentlemen, Mr Underwood and Mr Green, in connection with the formation and management of the company and its title to the property. These claims, which had to some extent issued in litigation, were compromised in May and June 1884 by two agreements, to each of which the company was a party.

"The first in date is an agreement between the company and Mr Underwood, which was executed in New York on 16th May. It contains a large number of covenants of a most onerous character. *Inter alia*, Mr Underwood agreed by article 11 to transfer and deliver to such person as might be named by the company or their agents all the deferred shares which he and Green then owned in the company amounting to not less than 46,000 shares, and also to procure the transfer and delivery to the person so named of all deferred shares which either of them had sold to other parties; and in case he should be unable to procure such transfer and delivery of the shares which had been sold, he agreed to indemnify the company against all claims and liability thereon, and against all claims and demands for dividends thereon, to the extent of £3000. This was to some extent modified by the 12th article of the next agreement. But it seemed to be agreed at the discussion before me that this resulted in 43,000 deferred or vendors' shares being given up to the company on the part of Underwood and Green; and it is common ground that these shares are not now in issue and are not affected by any trust.

"The second agreement deals (among a great number of other things) with the 26,950 deferred or vendors' shares which are the subject of the fifth conclusion of the summons. It is dated in May and June 1884; and the parties to it are—(1) the company; (2) four of the Scottish vendors; (3) the American vendors Underwood and Green; (4) a fifth Scottish vendor whose position was not quite the same as that of the others. It narrates that it had been represented to the second, third, and fourth parties as necessary that a sum of £30,000 in cash should be forthwith made available 'in order to aid in extricating the company from pressing embarrassments'; that those parties had agreed to provide this sum, the Scottish vendors providing £23,000 of it; and that the claims, disputes, and threatened litigations between the parties were thereby compounded, compromised, and settled. The stipulations of the agreement are very various, and range over a wide field. But among them there occurs this stipulation in articles 7 and 11, viz., that the second and fourth parties agree to transfer 'in favour of the first party (*i.e.* the company) or their nominees, for behoof of the preferred shareholders,' all the deferred shares then held by them in the company, amounting in all to 26,950 deferred shares.

"As I have said, these vendors' shares have never been represented by certificates entering the register of members. They stood then, as they have all along stood, upon share-warrants to bearer. And as the result of this stipulation the warrants representing these 26,950 shares were simply handed over by the second and fourth parties to the company, in whose custody they have remained ever since. They have indeed remained dormant in this sense, that as the position of the company has not permitted of any dividend being paid on the deferred shares, nobody seems to have paid much attention to them until recently. But as a period of prosperity has now opened, it becomes important to determine their legal position.

"Now, as I understand it, one of the pursuers (Mr Gill) was at the date of the agreement of 1884, and is still, a holder of preferred shares in the company; and his contention is that the expression 'for behoof of the preferred shareholders' must be read in its plain and natural meaning, and imports that the 26,950 deferred shares were put in trust for the preferred shareholders, himself among the number. It is true that since then the original company has come to an end, and a new one—the existing company, incorporated in 1884—has taken its place. But an agreement of date of 6th August 1884 was entered into between the old and the new company by which it was provided (article 2)—(1) that the new company should be entitled to the full benefits of all rights conferred on the old company by the two agreements I have narrated, and (2) 'that the rights of the preferred shareholders of the new company to certain of the deferred shares thereof shall be the same as the rights of the preferred shareholders of the old company are under the agreement of May and June 1884 to certain of the deferred shares thereof.' I take it therefore—and I do not think it is for the defenders to dispute it—that the rights of the original preferred shareholders to these deferred shares, whatever they were, were carried over into the existing company.

"The reply made by the defenders on this head is, that the expression 'for behoof of the preferred shareholders' is open to construction, and that in the circumstances it must be read as meaning the company as a whole. Their contention is that the parties intended these 26,950 vendors' shares

to be given up or surrendered to the company just as the 43,000 American vendors' shares were surrendered and are agreed not to be now in issue; and that in fact the scheme was to wipe out the deferred shares and to leave the company with only the preferred shareholding. It is pointed out that even as regards the 5050 vendors' shares which had found their way into the hands of the public, the New York agreement stipulated that Mr Underwood should procure these to be also transferred or delivered to the company, and failing his doing so he undertook to guarantee the company against claims in respect of these shares or their dividends to the amount of £3000.

"One can figure circumstances in which the stipulation in favour of the preferred shareholders would have been open to construction, and might have been construed as equivalent to a stipulation in favour of the company. I thought that such circumstances might possibly exist in the present case, and that these being proved or admitted might compel the inference that the contracting parties so intended; but reading the expression in the light of the documents and of the admitted facts I do not feel at liberty to draw any such inference. In the first place, the contrast in the language used as to the 43,000 and the 26,950 shares is most marked. The one *prima facie* imports a trust; the other does not. Nor is this a mere chance variance in language between a New York agreement and an Edinburgh agreement. For the latter contains within itself, in the very next article to the words now under construction, a reference to and a modification of the former agreement, which shows that the distinction must have been present to the minds of the contracting parties.

"Then it is said that on the pursuers' construction the transaction was *ultra vires*, and that the defenders' contention should be adopted on the principle '*ut res magis valeat quam pereat.*' A company cannot hold its own shares so as to become a member of itself, and cannot traffic in its shares, and further, it cannot so use its funds as to procure a benefit for one class of its shareholders as against the remainder. All these objections, it is said, attach to the construction contended for by the pursuers.

"In my opinion this is not so. I think the fallacy underlying the defenders' position is this, that they assume that the words, 'for behoof of the preferred shareholders,' express something stipulated for by the company. Now, they occur in an agreement of great complexity, entered into by parties whose precise position towards one another in all the matters dealt with by the agreement has not been cleared up. In such a case one can only say that all the stipulations are part of a mutual contract, and enter into the consideration. Some of the stipulations are plainly on the one side, some as plainly on the other. Thus the discharge of the company's pecuniary claims against the other contracting parties is clearly a stipulation by those parties and against the company. So it may be said that the agreement to transfer or deliver the deferred shares to the company or their nominees is a stipulation against the parties who undertake to do it. But I see no warrant for saying that the qualifying words 'for behoof of the preferred shareholders' are part of the company's stipulation, as against the other parties to the contract. *Prima facie*, they seem to me more likely, and at all events just as likely, to have been stipulated for by the other contracting parties in order to qualify what might otherwise have been read as an absolute transfer. The words being apt to create a trust, one expects the qualification to be imposed by the truster and not by the trustee. It might have been different if the defenders had been able to show that the other contracting parties had no interest at all in the destination of those shares, or were not in a position to stipulate about it. But although (oddly enough) the particulars as to the amount of preferred shares then held by those parties have not been cleared up, it was admitted that they or some of them held some preferred shares, and the agreement itself shows in its fifth article that two of the contracting parties were to obtain ten thousand more of them as fully paid.

"It appears to me that a similar fallacy underlies the defenders' other objections on this head. It will not do to isolate articles 4 and 7 of this complex agreement, and to say that because the claims which were being discharged by the fourth article were due to the company, therefore the deferred shares which were to be delivered under article 7 were practically paid for out of the assets of the company, and that these could not be lawfully devoted to purchasing a benefit for a particular class of shareholders. The whole agreement was a compromise, as it bears to be. The company were stipulating for the best terms they could get from parties who were not admitting but were disputing their claim. And these parties, being interested as they undoubtedly were to some extent in the preferred shares, may quite naturally and lawfully have stipulated with the company that they would only hand over the vendors' shares on certain conditions as to the persons who were to have an interest in them.

"No doubt such a trust as the pursuer contends for might be difficult, and may be difficult to work out, but it is not unworkable, and the fact that the vendors' shares are represented by share warrants to bearer relieves it of some of the difficulties which might otherwise have attended it.

"The particular mode of working it out proposed in the fifth conclusion is that these deferred shares fall to be distributed among the preferred shareholders rateably, or as nearly as may be in proportion to their respective holdings of preferred shares. Now, it may turn out that this proposal as stated is impossible, for it may on the statement of it lead to the splitting of shares into fractions, and the pursuer has not shown that it would not. The conclusion

contains no alternative, as that the shares should be realised and the price divided, or that they should be held by the company, or (if there should be any difficulty in that) by the company's nominee. Accordingly, I think this latter part of the fifth conclusion must be dismissed.

"I have been considering the fifth conclusion apart from the others. It remains to consider the reductive conclusion, and the effect upon it of the view I have expressed as to the fifth conclusion.

"Now, if that view is right, I do not see how the seventh article of the agreement and relative resolutions can be supported. That article distinctly provides (among other things) that the preferred shareholders 'shall have no right to or any interest in or in respect of any deferred shares previously held by the company or any other party whatsoever' for behoof of the preferred shareholders thereof. And it proceeds to empower the board to do all such deeds and execute all such documents as may be necessary to effectually surrender, extinguish, and cancel the said deferred shares held as aforesaid or the shares or stock arising therefrom. It is true that this latter clause does not operate of itself to cancel the shares, and that the meaning may be, and I think is, to empower the board to take all necessary steps to procure this to be done. But the preceding words which I have quoted amount to a stipulation contrary to the rights of parties, and the question is, whether it can be justified under article 8 of the articles of association, upon which the agreement bears to proceed. That article provides that 'all or any of the rights and privileges attached to the preferred or any other particular class of share may be modified' by such an agreement. In my opinion this does not warrant such an extinction of beneficial rights as is attempted in article 7 of the agreement. The interest of the preferred shareholders in the 26,950 deferred shares does not seem to me to be a 'right or privilege attached to a particular class of shares,' and I think that even if it were, the proposal goes far beyond a 'modification of it.'

"I should be disposed to support, if I could, a rearrangement which had the assent of so large a majority of the shareholders, and if it should prove defective in part to support the rest of it. But I do not see how that can be done. I cannot reform the scheme. And as in my view it fails in a material part, I think the whole scheme must go. I therefore pronounce decree of reduction.

"As to the third conclusion I have had some difficulty. I cannot affirm it, nor either alternative of it, as it stands, and when that is the case with a declaratory conclusion, it affords a reason rather for dismissing it than for altering it. I therefore propose to include this and the relative conclusion for interdict in the decree of dismissal, and the more readily because I do not think this will in any way hamper the pursuer in working out his remedy. But he is entitled, in my opinion, to a finding as to the scope of article 8 of the articles of association."

The defenders the Arizona Copper Company reclaimed.

The pursuer Mr Miln at this stage withdrew from the case.

Argued for reclaimers—1. The effect of the transfer of deferred shares under sections 7 and 11 of the Edinburgh agreement of May and June 1884 was practically a surrender of them to the company. The company was entitled to accept such a surrender, because the transaction was equivalent to a payment of money by the company by giving up its claims in return for these shares. The respondents' contention that they were to be held in trust by the company "for behoof of a limited class of shareholders," was untenable, because such a transaction was illegal, the company not being able to hold shares for such a class, and in return surrender assets belonging to the company as a whole. That was clearly an onerous stipulation in the agreement, which must be for the benefit of the whole company. Accordingly, these shares were transferred to the company by the only legal method provided by its articles of association—that was to say, by surrender, and the effect was that the shares were in the position of unissued shares. The effect of the respondents' contention would be to create an illegal trust, for it was not competent for a company to purchase its own shares and hold them in its own name, and it made no difference to say they were held for behoof of another—*Trevor* v. *Whitworth*, 1887, L.R., 12 App. Cas. 409, at p. 424; *British and American Trustee and Finance Corporation* v. *Couper* [1894], App. Cas. 399, at p. 414; *in re Sovereign Life Assurance Company* [1892], 3 Ch. 279, at p. 288. There was no power in the memorandum of association for the company to hold shares in trust, and the trust was one that could not possibly be worked out. Accordingly, when these shares were found in the hands of the company they must necessarily be held as the property of the company. 2. But assuming this was a well-constituted trust, had there been any violation of the trust by the reconstruction scheme? If the right to these deferred shares passed with these preference shares, which was the only method in which such a right could pass to the new preference shareholders, for they could have no personal right apart from their shares, then it could only be a right appropriate to and "attached to" such shares in the sense of article 8 of the articles of association of the new company. That being so, it was a right which in terms of that article the company had power to modify, and this was what had been done. It was said that there was no power to alter the conditions in the memorandum of association, and that it was a special condition that one of the "objects" of the new company was to carry out an agreement by which the new preference shareholders were to have the same rights as the old preference shareholders. That might be so, though the case of *Ashbury* v. *Watson*, 1884, L.R., 28 Ch. Div. 56, on which the respondent

relied, was doubtful law. But it was not a case of varying the conditions, for here the company was carrying out the agreement in its fullest sense, and was merely modifying it to a certain extent. The proposals embodied in the seventh article of the agreement of 1898 did not amount, as the Lord Ordinary had held, to an extinction of the right of the preference shareholders, but only to a modification. The result of them was, that instead of receiving the benefit in the form of shares issued to them, they received it in the form of increased dividend and the greater value of the capital. It was said that the conditions of article 8 of the articles of association had not been fulfilled, because the class entitled to these deferred shares had not been represented at the meetings. But if the company truly were the holders of the shares in trust, and did not choose to attend the meetings in the capacity of trustees, how would that invalidate the resolutions? and, on the other hand, could the company as such attend its own meetings? (3) Even if the seventh resolution in the reconstruction scheme were held bad, the remainder of the scheme would still hold good, being quite distinct and separable from that one part—*Cleve* v. *Financial Corporation*, 1873, L.R. 16 Eq. 363.

Argued for respondent—(1.) The meaning of the words of transference was perfectly clear, and they admitted of no other interpretation than that put upon them by the respondent—that was to say that in receiving the share warrants in terms of the agreement the company became a trustee and held these shares for behoof of the preferred shareholders. The reclaimers' argument amounted to this, that if the words were construed according to this, their only natural meaning, then the company made an unlawful bargain, and accordingly all the shares accrued to it. That would be a very anomalous result, and it was not justified by the principles of law and decisions to which the reclaimers appealed. All that was shown by these decisions was that a company could not acquire and hold shares for its own beneficial interest. It had never been decided that a company could not hold shares in trust for somebody else—*Cree* v. *Somervail*, 1879, L.R. 4 App. Ca. 648; Buckley on Companies Acts, p. 46 (note on section 22 of Act of 1862). On the contrary, the reclaimers' contention that the transference was merely a surrender to the company was an illegal one—*Hope* v. *International Financial Society* 1876, L.R. 4 Ch. Div. 327; *General Property Investment Company* v. *Craig*, January 15, 1891, 18 R. 389. Moreover, the reclaimers' method of taking one part of the agreement and construing it separately was not the right one. It must be read as a whole, and so reading it the respondents' interpretation was obviously correct. Even if it were illegal for the company to hold the shares as trustees, the right course to follow was not that the company should appropriate the shares, but that it should hand them over to a third person who could legally hold them. (2) The next question was, how had the rights of the preferred shareholders to these deferred shares been treated by subsequent transactions, and the answer was that by article 7 of the agreement of 1898 they had been extinguished. It was clear from the statement of the directors preceding this agreement that they intended to "get rid of" these deferred shares, and that was precisely what in point of fact had been done, and it was *ultra vires* of the company to do so. By the agreement of 1884 between the old and the new companies it was expressly stipulated that the preferred shareholders in the new company should have the same rights in the deferred shares as they had in the old company, that was to say, they had a right to 26,500 deferred shares held in trust for them by the company. Then by the memorandum of association of the new company one of the objects of the company was declared to be to carry out this agreement. The only power to which the reclaimers could point as authorising them to deal with these shares as they had was that contained in article 8 of the articles of association. But the right of the preferred shareholders was not one conferred on them by the articles of association, which admittedly might be modified, but by the agreement which the memorandum stated it was one of the objects of the new company to carry out. That object being a condition of the memorandum was by law not susceptible of alteration by the company—*Ashbury* v. *Watson*, 1884, L.R. 28 Ch. Div. 56, 1885, L.R. 30 Ch. Div. 376; Buckley on section 12 of Companies Act 1862. But in any view could this be held to be a "modification" of the rights attached to the preferred shareholders in the sense of article 8? Clearly it was not a modification, but an extinction of the right, and it was therefore not authorised by that article—*Mercantile Investment and General Trust Company* v. *International Company of Mexico* [1893], 1 Ch. 484 (note). Nor had the so-called modification been carried out in the manner prescribed by article 8, since the class of shareholders having a right to these shares had not been represented. So in any case this irregularity would vitiate the proceeding. If the respondent was right in his contention with respect to these deferred shares, then the whole of the agreement of 1898 must go. It was all part of one scheme for the readjustment of capital, and one part being bad the whole of it must fall. *In re Imperial Bank of China, India, and Japan* 1866, L.R., 1 Ch. 339.

At advising—

LORD M'LAREN—Two questions are raised under this reclaiming-note. The first relates to the construction and effect of a clause in an agreement between the Arizona Copper Company, as first constituted, and certain of its promoters and original directors, whereby these gentlemen agreed to transfer to the company or its nominees "for behoof of the preferred shareholders" all the deferred shares then held by them in the company's undertaking, amounting

to 26,950 shares of the nominal value of £1 per share. The agreement is dated May and June 1884, and shortly thereafter the company was reconstructed, the new memorandum of association being dated 4th August of that year.

The second question relates to the effect of the reconstruction of the company, and especially to the effect of certain alterations made upon its articles of association fourteen years later upon the rights of parties under the agreement of June 1884. I shall call this the Edinburgh agreement, to distinguish it from an agreement executed about the same time at New York between the company and its promoters in America. The Lord Ordinary has upheld the Edinburgh agreement, and has granted decree of reduction of the deeds and resolutions altering the company's articles of association to the prejudice of the rights acquired by the preferred shareholders under that agreement.

The company is reclaimer and defender. The pursuer Mr Gill is a holder of preferred and deferred shares in the company.

In explanation of the long delay in raising these questions it is stated that the deferred shares, the right to which is in dispute, were until lately of very little value. But from causes with which we are not concerned, the business of the company has become more profitable, and it is now in a position to pay dividends on its deferred shares. The decision of the Court in the first branch of this case, to the effect that the preferred shareholders are entitled to cumulative preferential dividends, affects only the value of the respective shares and does not in any way touch the points raised under the present reclaiming-note.

In dealing with the first question I do not think it necessary to say much regarding the history or cause of granting of the agreement of June 1884. As there is no proof in the cause, and neither party desires a proof, the agreement must be taken to be self-interpreting. The deed narrates that the directors of the company had intimated certain claims against the other parties to the agreement "in connection with the formation and management of the said company, and the title to their real estate in America," which claims are disputed and denied by the other parties; also, that it is necessary "in order to aid in extricating the company from pressing embarrassments" that a sum of £30,000 in cash should be forthwith made available to meet said claims. The agreement is therefore of the nature of a compromise, and it may be assumed that the obligations undertaken in the 7th and 11th articles to transfer the deferred shares then held by the second and fourth parties (amounting in all to 26,950 shares) was part of the consideration given for the withdrawal of the claims put forward by the company against these gentlemen. When it is considered that the whole of the deferred shares were vendors' shares for which nothing had been paid, and that the company is stated to have been in embarrassed circumstances at the time, this was doubtless a proper and reasonable concession, because, although the deferred shares were probably of little value at the time, it was important to the company in the view of the possible improvement in its circumstances, to get rid of its contingent liability to pay one-half of its surplus profits as dividend to the holders of the deferred shares. I may here mention that about this time the company entered into another agreement with two gentlemen in America (Underwood and Green), who (as vendors I presume) held the remainder of the deferred shares, for the transfer or surrender of these deferred shares. But except as throwing light on the object or motive of the company in seeking for restitution of the deferred shares, nothing turns on this agreement. Underwood and Green had parted with I think about 5000 of their deferred shares, and under their agreement with the company these gentlemen were to do their best to buy up this stock, or to indemnify the company against the possible claims of its owners.

Now, if Mr Underwood had been able to reacquire the shares which he had put into the market and had transferred them to the company by way of surrender, it would have been absolutely immaterial whether the promised transfer of shares per the Edinburgh agreement had taken the form of a surrender to the company or of a transfer in favour of the preferred shareholders; because in the case supposed there would be no members of the Arizona Copper Company remaining except the preferred shareholders, and whether the deferred stock was to be held for them, or whether it was to be allowed to sink into the company, in either case the whole profits of the mine would go to the preferred shareholders.

But as Mr Underwood was not able to reacquire all the deferred shares which he had sold, the distinction between surrender and trust came to be of very great moment. Under the company's articles of association the surplus profits (after paying 10 per cent. on the preferred shares) were to belong, to the extent of one-half, to the holders of the preferred shares, and the other half to the holders of the deferred shares. Now, if the deferred shares to be restored under the Edinburgh agreement (26,950 in number) were to be surrendered this would not have benefitted the company one farthing, because in the case supposed the preferred shareholders would draw their half of the surplus profits, and the other half would then go to the fortunate holders of the 5000 deferred shares which had been put into the market and could not be repurchased. But if the 26,950 were to be held in trust for the preferred shareholders, according to the apparent meaning of the agreement, the dividends accruing on these shares would go to increase the income payable to the preferred shareholders, and the owners of the 5000 shares referred to would only receive their rateable share of the surplus profits instead of dividing one-half of the surplus profits amongst them.

If I have made my meaning clear on this point there can be no dubiety as to my answer to the first argument against the interlocutor, which was to the effect that the promised transfer of deferred shares under the Edinburgh agreement was a virtual surrender of the shares to the company. The promise or undertaking given (7th and 9th clauses) is to transfer these shares "to the first party (the company) or their nominees for behoof of the preferred shareholders." The plain and natural meaning of these words is that the deferred shares are to be held in trust for the preferred shareholders, and as I have shown that a surrender would not have benefitted the general body of shareholders for whom the company were acting, but would have operated only in favour of the few outside holders of deferred shares, I think that the suggested construction is quite inadmissible.

It was further maintained against the Lord Ordinary's judgment that the 7th and 11th heads of the agreement are illegal or ineffectual, because a company is legally incapable of holding its own shares. It is of course indisputable as a general rule, that a company is disabled from acquiring shares in its own undertaking to which liability attaches. The reason is that by such purchase or acquisition the uncalled capital of the company is reduced, because in the event of the company going into liquidation the liability of the insolvent company is substituted for that of a shareholder who is presumably solvent. An exception is admitted in the case where a shareholder being unable to pay calls which are due, surrenders his shares, but this is only an apparent exception; in the case supposed, creditors are not prejudiced, because the extinction of the obligation of a bankrupt shareholder can injure nobody.

Now, it is plain enough that a transfer of fully paid shares in a company to the company itself or its nominees does not in fact diminish the capital of the company available for distribution among its creditors, because, according to the hypothesis, the shares only represent a claim upon the income of the company, and the holders of the shares are not liable to be made contributories in liquidation. I therefore cannot hold that the judgments in *Frear* v. *Whitworth* and the other cases cited have any application to the case of a transfer of fully paid shares. There may be a theoretical difficulty as to a company holding fully paid shares in its own name; and in the case of an unqualified transfer perhaps the correct view would be that the shares are extinguished, as in the case of a transfer by an insolvent shareholder. But this is not the case of an unqualified transfer; the obligation, as I read it, is to transfer the shares in trust for a particular class of shareholders to the company or its nominee. The shares are bearer-shares, and, as I understand, they were simply deposited with the company, and as regards title are still impersonal. So far as I can see there is nothing to prevent the company from now registering these shares in the name of a nominee who would be willing to hold them and to execute a declaration of trust in favour of the preferred shareholders. In any view, if the agreement imports a trust for the benefit of the deferred shareholders, it would, in my opinion, be contrary to the established principles of equity that the beneficiaries should lose their right because of a difficulty in making a title in name of the suggested trustee, and the only effect of the objection would seem to be that new trustees or a judicial factor would have to be appointed to whom the shares would be made over for the purposes of the trust.

For these reasons I think the Court should adhere to the Lord Ordinary's declaratory finding to the effect that the 26,950 deferred shares in question belong beneficially to the holders of the preferred shares of this company.

The effect of subsequent arrangements upon the rights of the preferred shareholders under the Edinburgh agreement has now to be considered in connection with the conclusions for reduction. The Lord Ordinary has treated this part of the case less fully than the other, and I think it admits of being briefly stated. Soon after the execution of the Edinburgh agreement the Arizona Copper Company was reconstituted. The date of the new memorandum of association is 12th August 1884, and its first object is declared to be to adopt, execute, and carry out an agreement provisionally drawn up between the old company and the present or new company. The agreement in question, which is dated 6th August 1884, provides, under article second, "that the rights of the preferred shareholders of the new company to certain of the deferred shares thereof shall be the same as the rights of the preferred shareholders of the old company are under the agreement first above mentioned (the Edinburgh agreement) to certain of the deferred shares thereof." This is followed by a declaration (article 5) that "each bearer of a warrant for deferred shares of the old company shall be entitled, in respect thereof, to require the new company to issue to him a warrant of the new company for the same number of deferred shares of that company as is embraced in the warrant of the old company held by him, with the sum of £1 credited as having been paid on such deferred shares of the new company." If this has not been done, the position of the preferred shareholders in right of the 26,950 shares held in trust for them appears to be that they are creditors in the obligation to issue shares to that extent in the present company in exchange for the shares of the old company to which they acquired right. On this subject it may suffice to say that the rights of the preferred shareholders to the profits of the 26,950 deferred shares is exactly the same as it was before the reconstitution of the company.

The interference with their rights which is sought to be reduced was brought about by an agreement made in July 1898 between the company and certain persons proposing

to contract on behalf of the various classes of shareholders thereof, for the alteration of certain of the articles of association of the company, followed by resolutions framed by the company and by the several classes of shareholders on 29th July and confirmed on 16th August 1898. The effect of the alterations thus made on the articles of association was practically to obliterate the distinction between the preferred and the deferred shareholders, because in each class the shares were divided into preference and ordinary shares, and then the resulting shares were consolidated into shares of twice the value and half in numbers. I do not need to enter into the detail of the new articles of association, under which this objection was carried out. The material point is, that by the 7th article of the agreement it is provided that upon this sub-division and consolidation taking effect "the holders of preferred shares and deferred shares shall cease to have any rights as such, other than the rights which they will have as the holders of the shares arising therefrom, and that without prejudice to such general provision they shall have no right to or interest in or in respect of any deferred shares previously held by the company or any other party whatsoever, either for behoof of the company or of the preferred shareholders thereof."

The aim and object of this provision is to nullify the pre-existing rights of the preferred shareholders to the profits of the deferred shares held in trust for them. It is not disputed that this is its meaning, and the only question is, whether it was within the power of the company with the assent of a majority of the preferred shareholders to extinguish the trust. The articles of association empower the company by going through certain forms to divide and also to consolidate shares; and if the agreement of 1898, and the resolutions following upon it, had been confined to division and consolidation of shares, it may be that the suggested amendment of the articles of association would have been quite in order. But the clause just quoted, which dispossesses the preferred shareholders of their beneficial right to the 26,950 deferred shares, is neither division of shares nor consolidation of shares, but is in substance the transfer of a right of property derived from contract from a privileged class to the whole body of shareholders. Now, I am unable to admit that it is within the powers of any company, even with the assent of a majority of the class of shareholders who are interested in maintaining a contract, to set aside that contract. Nothing less potent than an Act of Parliament can take effect upon a contract right, and it is not the practice of the Legislature to interfere with such rights except upon public grounds. So far as I can see the preferred shareholders are to receive no equivalent for the deprivation of their rights under the Edinburgh agreement of 1884; but this is only a detail, because in the view I take this amendment of the articles of association would be *ultra vires* of the company even if an equivalent were given.

I have considered whether it would be possible to uphold the amendment of the articles of association in so far as it relates to the division and consolidation of shares, and to limit the decree of reduction to the provisions affecting the validity of the agreement of 1884. But it appears to me that the scheme of division and consolidation proceeded on the basis of the surrender of the rights of the preference shareholders under the deed of 1884, and that if that basis were withdrawn the new arrangement might have a very different effect from what was intended. We cannot be sure that the assent of all the parties whose assent was necessary to the validity of the agreement of 1898 would have been given to that agreement in an altered form, and therefore a partial reduction would not, in my opinion, meet the requirements of the case.

While I think that the Lord Ordinary's judgment reducing the proceedings complained of is entirely sound, I would suggest a variation of its terms for the purpose of suspending the effect of the judgment for a reasonable time. The effect of an immediate reduction of the agreement of 1898, and the resolutions following upon it might be to throw the affairs of the company into confusion, because the new shares issued in conformity with the resolutions would be invalidated, and there is no machinery in force for restoring the shares which were given in exchange. I therefore propose that we should find that the writings challenged are reducible, and that the pursuer is entitled to have decree of reduction in this action, and to continue the cause for a limited time. This will give the company an opportunity, if so disposed, of making such arrangements regarding its share capital as may be just and consistent with the rights of the preferred shareholders under the agreement of 1884. With this variation I propose that we adhere to the judgment of the Lord Ordinary.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Adhere to the said interlocutor except in so far as it reduces, decerns, and declares in terms of the reductive conclusions of the summons, and in place thereof find that the writings called for are reducible at the instance of dissentient shareholders, and that the pursuer is entitled to have decree of reduction thereof as concluded for, and before pronouncing such decree continue the cause until next sederunt day: Find the respondent John Gill entitled to expenses," &c.

Counsel for Pursuer—Dean of Faculty (Asher Q.C.)—Solicitor-General (Dickson Q.C.)—Findlay. Agents—Gill & Pringle, S.S.C.

Counsel for Defenders—Ure, Q.C.—W. Campbell, Q.C.—Clyde—Graham Stewart. Agents—Davidson & Syme, W.S.