

HOUSE OF LORDS.

Tuesday May 24.

WATERHOUSE v. JAMIESON.

(Ante, vol. v, p. 372.)

Partnership—Contributory—Limited Liability—Liquidator—Title to Sue—Bona Fides—Contract. Articles and a memorandum of association were subscribed by the intending partners of a limited company, bearing that the "nominal capital of the company is £105,000, divided into 1000 shares of £105 each, whereof £100,000 is paid up, and £5000 remains to be called." A petition was presented by the official liquidator, in the winding up of the company, alleging that the statement as to paid-up capital was false, that, in fact, no part of the subscribed capital was paid up, and that the subscribers to the memorandum and articles knew this to be the case; and craving the Court to settle a list of contributories as proposed by him, and make a call of £30 per share. In a question between the petitioner and certain parties, who had purchased shares from original shareholders subsequent to the formation of the company, and who disputed their liability for more than £5 per share or such part thereof as remained unpaid, held, with minority of the whole Court of Session, that the petitioner was not entitled to a proof of the grounds upon which he contended that the names of these parties ought to be placed on the list of contributories; and that the amount of the purchaser's liability was to be determined by the contract under which he was *bona fide* induced to become a shareholder.

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

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

tioned was assigned to the company in June 1858, and the assignation intimated to the lessors. In 1861 the lessors raised an action of declarator of irritancy and payment against the original lessees, against Staples, Andrew, and Smith, who alleged an interest in the lease, and against the company, and in 1862 and 1863 obtained decrees declaring the lease to be at an end, and for payment. The lessors, and another leading creditor of the company, applied for judicial winding-up of the company, under the Companies Act 1862; and, in December 1864, an order for winding-up was pronounced, and the present respondent was appointed liquidator. The liquidator, in virtue of powers granted by the Court, sold the whole property of the company discovered by him, realising therefor about £111. After various investigations, and a litigation with Mr Andrew, the London solicitor of the company, the liquidator obtained access to the register of shareholders. He then presented a petition for the purpose of settling a list of contributories to the company, making a call at the rate of £30 per share on the contributories, and for various other purposes. He alleged in his petition that the statement in the memorandum and articles of association, that £100,000 of the nominal capital was paid up, was altogether false; that, on the contrary, no part of the subscribed capital was paid up, and when the company commenced business it had no capital or funds whatever paid; that none of the original members who subscribed the memorandum of association paid a single farthing of the subscribed capital to the company, or to any one for its behoof; and that the whole subscribers to the memorandum and articles of association knew perfectly that no part of the subscribed capital had been paid up. He alleged that the capital was described as paid up for the fraudulent purpose of enabling the members either to borrow or to dispose of their shares on favourable terms. He suggested a list of contributories as correctly setting forth the parties who were shareholders in the company as at 11th November 1863, being one year before the commencement of the winding-up, and the parties who were said to have acquired shares since that date. Several transfers, he alleged, had been made fraudulently, and merely with a view to avoid the liabilities incurred by the parties granting these transfers, to persons possessed of no means. He proposed to make a call of £30 per share.

Answers were lodged for Alfred Waterhouse, James Elijah Jennings, and Henry Lewis. Mr Waterhouse was not an original member of the company. In December 1858 he purchased 50 shares from Mr J. H. Holdsworth at £30 per share. In 1859 he acquired 75 shares from Sinclair, and in 1860 he acquired other 175 shares, partly from Sinclair, the rest being forfeited shares which had belonged to Staples, another original shareholder. Waterhouse alleged that he purchased all those shares on the faith of the published statements of the company that £100,000 had been paid up, and that the liability attached to each share subsequent to the registration of the company was limited to £5 per share. Moreover, he paid all that could be due by him in respect of calls, receiving a discharge in full from the company in 1861. He alleged farther that, on 30th January 1864, he sold his shares to Mr Ford, and the transfer was duly entered in the register of the company. The pleas maintained by Waterhouse were to the effect, (1) that he, being a past member of the company, could

only be liable as a contributory in the event of the existing members being unable to pay the call; (2) that he had *bona fide* purchased on the faith of the statement in the memorandum of association, register of shareholders, and stock certificate, that £100 per share had been paid up, and that the £5 had been paid up on all his shares; (3) that the statements in the memorandum, &c., as to the paid up capital were binding on the company, and could not be questioned in winding-up proceedings; (4) that the Court was bound, in the winding-up, by the contract of partnership of the company; (5) that all the company's creditors knew that only £5 per share remained unpaid up at the registration; (6) that in fact £105 per share had been paid to the company.

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

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

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

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

Or,

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

Or,

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

Or,

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

The LORD JUSTICE-CLERK and LORDS COWAN, DEAS, NEAVES, ARDMILLAN, KINLOCH, and MURE, were of opinion that the petitioner was entitled to a proof of the averments upon which he contended that the names of these persons should be placed on the list of contributories; the LORD PRESIDENT and LORDS CURRIEILL, BENHOLME, JERVISWOODE, ORMIDALE, and BARCAPLE, thought he should not. Mr Waterhouse appealed.

ROXBURGH, Q.C., and KELLY for him.

PEARSON, Q.C., and SHRESS-WILL in answer.

At advising—

LORD CHANCELLOR—My Lords, the question we have to consider in this case is one with reference to the position of the appellant Mr Waterhouse, in a certain company called the Garpel Hæmatite Company, in which company he purchased 300 shares, under circumstances which I shall presently

have to speak of. Upon the winding up of the company, and upon an official liquidator being appointed, the official liquidator, after the order to wind up the company had been made, and after he had looked into the affairs of the company, proceeded to make out a list of contributories, placing Mr Waterhouse, the appellant's name, upon the list as the proprietor of 300 shares. Mr Waterhouse had disposed of the shares in effect some time before the order for winding up, nearly a year, but not quite a year before. He had disposed of them in January 1864, and the order for winding up was made on the 2d of December 1864. But, in the view I have taken of the matter, that particular question is not, as it appears to me, of importance for the decision of this case, namely, the question of fact,—whether he had or had not before the time of winding up disposed of these shares? For the real point arises in what may be called the form of a demurrer, as we should term it in this country.

The petition for winding up was presented, and then the official liquidator, being desirous of settling the list of contributories, is directed to bring in certain condescendences stating the grounds upon which he seeks to charge this particular contributory, and other contributories, or alleged contributories, and to place them upon the list accordingly, with a view to their subsequently being compelled to pay calls in the matter.

Now, in these condescendences he sets out a case undoubtedly as here stated (and of course I am bound to add that the matter has not yet been admitted to proof, and therefore I must only take it to be as stated)—he sets out on the face of the pleadings a case of the grossest possible fraud on the part of the originators of the company. He states that in effect by their deed the persons who signed the articles of association in the first instance, and then launched the concern with the proper and usual deed for that purpose, conceived the device of calling themselves a company, with a certain amount of capital, £105,000 I think, as to which, however, they recited that £100,000 had been paid, leaving therefore only £5000 to be paid, that is an amount of £5 per share upon every share that any person might be disposed to take in the company. The recital made in the articles of association is alleged by the condescendences to be wholly false. It is stated that no such money had in fact ever been paid; and that no money, in truth, was ever paid, except only some trifling payments made in respect of a lease which the so called company had taken of certain hæmatite mines which they professed to work, but with respect to which up to that time they had in truth made no payments whatever, except some payments of no very great amount to the owners under the lease, for which payments they had borrowed the money; and that therefore the statement of the payment of £100,000 on the shares was in fact wholly untrue and unwarranted. They were the persons who originally put forth the articles of association and the deeds, and invited persons to subscribe the articles, who themselves narrated the circumstances as I have now stated them, namely, that the capital being £105,000, £100,000 was paid. Then, by the articles and by the deed, there was power given in the usual way to the directors to make calls. They were to make calls, of course, only for the amount of the unpaid capital. It is provided so in fact expressly. I need not enter into details of it.

That being the state of affairs, the company was launched out into the world, and the public were invited to take shares. Under the Joint-Stock Companies Registration Act of 1856 the public were invited to engage in the adventure. Mr Waterhouse did engage in the adventure, and became a purchaser of shares. He was not an original shareholder, but he purchased shares in the market. The directors are alleged to have pursued the same fraudulent course with which they commenced their proceedings, and to have registered accordingly in the Public Register all the various shares of the company, just as if they were paid up, stating how much was paid up upon every share. They registered them, stating that £100 had been paid out of the £105 per share. And when persons like Mr Waterhouse became purchasers, they issued to such persons, and to Mr Waterhouse in particular, a certificate of shares which represented the shares purchased to be paid up shares of the company.

The official liquidator having told the story which I have narrated, and other things, which I abridge from the condescence, then states these further facts, which I think as well to read as they are stated. He says at the end of the 8th condescence—"The whole subscribers to the memorandum and articles of association knew perfectly that no part of the subscribed capital had been paid up." That of course does not include Mr Waterhouse, who was not an original subscriber to the memorandum or articles of association. Then he says—"The books of the company, it is believed and averred, will show that no part of the capital was paid up." Then he further avers, in condescence 15, page 19 of the case—"The whole of the respondents (this will include Mr Waterhouse as one of the respondents to the petition of the official liquidator) knew or ought to have known that the nominal capital of the company was not paid up, and that the statement that £100,000 of the capital had been paid up was utterly false. The slightest inquiry would have disclosed this—it might have been discovered from a simple inspection of the books of the company, which books were extant till shortly before the present liquidation commenced. The fact that the £100,000 was not paid up was also known to all the officials of the company, as well as to its members; and if the respondents had asked, as they ought to have done before becoming shareholders, they would have learnt the true state of matters, and that the £100,000 was still unpaid."

Now, this point having arisen, as I have said, in the same way as a demurrer would arise in our proceedings, the question we have now to determine, my Lords, is not whether the statements and allegations made in these condescences are proved, but whether they ought to be admitted to proof; in other words, whether, if taken to be true as stated upon the ordinary rules of pleading, where the alternative as presented is to be taken most strongly against the pleader, if that view be taken of the case, then are there, or are there not, facts sufficiently and adequately stated here to entitle the petitioner in the Court below, the official liquidator, to enter into proof? The course taken by the Court below, after consideration of the case, was to direct a certain number of matters to be proceeded with by the interlocutor of the 19th July 1867—"The Lords having heard counsel for the official liquidator, and for Alfred Waterhouse, James Elijah Jennings, and Henry Lewis, on the

petition of the official liquidator, in respect of the general importance of the questions raised, appoint counsel to be heard before the whole Court, on a day to be afterwards fixed, with a view to the Judges giving their opinions in writing on the following questions—(1) Whether the petition of the official liquidator ought to be refused in so far as it prays that the list of contributories should be settled so as to include the names of the said Alfred Waterhouse, James Elijah Jennings, and Henry Lewis, as contributories? or (2) Whether the official liquidator ought to be allowed to establish by evidence the grounds on which he contends that the names of the said parties ought to be placed on the said list of contributories?" That is in effect and substantially the inquiry which in the course of the subsequent proceedings a majority of the Judges decided to be the fit and proper inquiry. And that is the question which we have now submitted for us to consider, namely, whether or not the Judges in the Court below have been right in admitting the official liquidator to proof of these allegations contained in the condescences to which I have referred?

Now, my Lords, what the official liquidator affirms is this, that the original scheme was fraudulent; that the sum of £105,000 ought to be regarded as the capital of the company, being so stated in the articles, but that the directors state at the same time that the £100,000 has been paid. He says that the £100,000 has not been paid, and that the circumstance of the directors stating in the articles that it has been paid can make no difference as to the liability of the persons who entered into engagements, and who so held forth to the public that that was the capital of the company, towards those who became creditors of the company, and who now seek to be paid under the winding up, and who have a right to hold the shareholders to the facts stated on behalf of the company. They say, in the first place, the engagement that you entered into was that your capital was £105,000, and of that you recited that £100,000 had been paid. And further, as regards Mr Waterhouse, who purchased his shares in the public market, on the terms which I have described, it is said that he well knew, or might have known, the true state and circumstances of the case.

Now, my Lords, I read that most strongly against the pleader, and I read it as an allegation that Mr Waterhouse ought to have known that the capital was not paid up. The pleader who prepared the condescences proceeds to set out why the respondents ought to have known this true state of the circumstances. He goes on to say "the slightest inquiry would have disclosed it." In other words, he says that if Mr Waterhouse had inquired he would have discovered it from a simple inspection of the books of the company, which books were extant shortly before the present liquidation, and the fact that the £100,000 was not paid up was also known to all the officials of the company, as well as to its members, and if the respondents had asked, as they ought to have done before becoming shareholders, they would have learnt the true state of matters, and that the £100,000 was still unpaid.

Now, my Lords, I confess that this case appears to me to raise a question of considerable importance, and it is one which at first affected my mind with some degree of doubt as to what was or was not the exact position of Mr Waterhouse as regards the creditors of the company, in which company

he had taken shares under the circumstances I have described.

A preliminary point indeed was raised, but none of the learned Judges in the Court below, differing as they did upon the main point, differed upon the point I am about to mention, namely, whether or not the official liquidator, as representing the company, could institute proceedings of this character; whether he could, as on behalf of the creditors, raise the controversy in question? It is said to the official liquidator, "you, as the representative of the company, are bound yourself by the statements of the company, and you have no right to raise for the benefit of creditors, as against the individuals now constituting the company, this question that you attempt to raise in contravention of the proceedings which the company had themselves taken in the course of their dealing with the company's affairs." I apprehend, my Lords, that it is unnecessary to come to any precise determination upon that point here, in my view of the case; but if those acts be thoroughly sifted, and there will no doubt be something to be said about them on a future occasion when the proper time comes, and the official liquidator—who in that capacity is bound to collect all the assets of the company and distribute them by direction of the Court among the creditors—is in a position in which he may assert rights as against the company, and assume a position against the members of the company, which the company itself possibly might not be in a position to assert as against one of its members, Mr Waterhouse.

But now passing that question, the real and substantial question in the case appears to me to be this, whether or not a person taking shares in a company established under a deed which recites, however untruly, that £100,000 has been paid, and engaging by his signature to that deed to meet all the contributions which remain to be levied, but which are not to exceed £5 a share, the rest having been paid; whether, moreover, a person having purchased shares in the market on which the representation is that £100 has been paid up upon each share, and receiving certificates of those shares signed by the directors themselves, who were competent to act in the matter, and who gave such certificates, stating that £100 per share had been paid up, can afterwards, at the instance of creditors of the company who discover and state that in truth no such payment has ever been made by the original holders of the shares, but that in reality the shares had been taken and issued to the public without the fact being known that while they were £105 shares, only £5 or some very small amount had been paid up upon them,—whether such a shareholder can be sued on behalf of the creditors of the company for the £100 per share which remains unpaid?

That question being raised between the creditors and the alleged shareholders, one has to consider what the exact position of such a shareholder is, and especially to consider how far, regard being had to the whole policy of these Acts of Parliament, shareholders can set up the defence which Mr Waterhouse does by his counsel upon the present occasion, that he is not liable to the creditors beyond the amount which he has covenanted or contracted by the deed to pay, namely, the extra sum beyond the £100 per share, which was stated to be already paid. He says that I am not obliged to pay more than that amount which is represented in the certificate delivered

to me to remain unpaid in respect of those shares.

The Judges in the Court below differed considerably in opinion. We have the advantage of the opinions of almost all the Judges upon the subject, and their opinions have varied very considerably upon this point. I confess, after some considerable hesitation, I have come to the conclusion that as regards the true construction of instruments of this description between the company, on the one hand, and the shareholders with whom they are about to deal, on the other, a shareholder is entitled to say—the contract I have entered into must be found in the deed into which I have entered. For all purposes, as between me and third persons, I am only to be held to have entered into those engagements which the deed itself represents me to have entered into; and as regards the shares which I have taken and purchased in the company—I having a certificate which certifies that a certain amount per share has been paid, which certificate is duly registered as the Act requires, for the very purpose of protecting the shareholders on the one hand, and the creditors on the other, with a statement of what money has been paid upon the shares—I am entitled to say, in default of any fraud, or any negligence that can be charged against me, that I am only liable upon that contract I have entered into—I am only liable to the extent of the money which appeared by the certificate itself to be given me by the officers of the company to be unpaid.

I think it stands to reason, on consideration of the whole matter, that the principle which induced your Lordships in the case of *Oakes v. Turquand* to decide against a shareholder, notwithstanding his representing that he had been fraudulently and by misrepresentation induced to take shares in the Overend & Gurney Company, and which decision of your Lordships appears to have considerably influenced the minds of some of the learned Judges who decided this case, I think those principles upon which your Lordships so decided have really no bearing whatever upon the present question. There the only question was this—Mr Oakes had undoubtedly become a member of the company. Of that there was no question, he knew all the objects for which the company was founded, and the term of its constitution, and he entered into the ordinary engagements into which every shareholder entered. Then he said, I entered into those engagements, but I seek to be relieved from them, because I was induced to enter into them by misrepresentations made, without which I should not have become a shareholder. But this House held that whatever rights he might have acquired against other persons, as it regarded the outer world, he had confessedly become a shareholder, having executed an instrument by which he was bound, and upon which every creditor had a right to believe that the whole thing was based, and that he could not extricate himself from his difficulty after the winding up, although before the winding up he might have taken steps to liberate himself from the engagements into which he had been led by those misrepresentations.

But here the question is, what is the engagement itself? The only engagement this gentleman entered into was an engagement to pay up the £5 per share upon all the shares which he had taken. His case rests upon two grounds—first, that the deed itself so stated, and the purchaser

must be supposed to have known that when he acquired his shares; and, secondly, that his acquisition of the shares was in direct conformity with the representations of the deed, and the shares were handed over to him as being shares upon which this sum of money had been paid up, and although it is true (as some of the learned Judges observed) that there is nothing in the Act of Parliament which makes it the duty of the directors to state in the memorandum of association what amount has been paid up, I do not conceive that that by itself can vary the position of this question as to any contract he has entered into. He says,—you cannot make a new contract for me. There may be some good ground for creditors taking such remedies as they may be advised on the ground of those representations which were made, and possibly (though it is not for me now to express my opinion upon the subject) it may be competent for them to say—as to you directors who have subscribed a memorandum of association saying that you have taken so many shares among you, I hold you to the amount which you said was paid up upon the shares, which is £100 per share, and your saying that the money was never paid will not, as between you and me, render you the less liable for the contract you have entered into.

The principal reliance of those who arranged the case for the respondent was placed upon that section of the Act which declares that a person becoming a shareholder in one of the joint-stock companies under the Act of 1856 is to be liable to creditors in the first instance generally, but, secondly, with an exception as regards limited companies, with reference to the amount of money paid up. The argument was that the liability was not in respect of money said to be paid up, but in respect of money actually paid up. No doubt that it is perfectly true that no set of persons could have represented themselves to be a company with a large capital, and have induced persons to trade with them, and could afterwards turn round and say, just before you traded with us we registered in the public register a statement that so much capital was actually paid up—it is the fact that is to be looked to, and not the statement made. But the case, as regards innocent parties who entered into the contract, appears to me to be in a different position, and that which at first created difficulty in my mind vanished on reflection. The doubt I had was as to the true construction of these Acts, which undoubtedly were intended to confer great privileges upon limited companies, exempting the owners of shares from liabilities which would otherwise extend to the whole of their property, but which, at the same time while granting those great privileges, were intended to confer security upon creditors, and which therefore directed that there should be certain statements made (which of course were intended to be true statements) for the information of those creditors, and I had to consider how far any person concerned in such a company could be entitled to say, as against a creditor pursuing his remedies, The statements made there are untrue; I have entered into engagements with a company which has so many shares; I have taken so many of those shares; they are £105 shares; I have not paid more than £5 upon them, but then the persons who held them before me stated that they were all paid up. It was upon that ground, no doubt, that this case was assimilated in the Court below to the case of *Oakes v. Turquand*, namely,

that this person could not free himself from the consequences of a fraudulent engagement into which he had entered.

As regards the position of creditors, I apprehend there is very little in such a case as this to be said on behalf of creditors, who, in dealing with the company, dealt with them on the footing of their being a company whose shares were to this extent paid up, and which they perceived by the register to be so stated, because on going to that register every creditor, when he saw the fact stated that so much capital had been paid up, would no doubt think he was dealing with a more responsible company than this turned out to be. But, at the same time, he had before him the statement of the fact of the money being paid up, and, therefore, from that he would conclude, as against any one shareholder whom he might be inclined to pursue, that he was holding shares on which £5 only was payable. Therefore the representation made to the creditors was simply to this effect—you are dealing with a company which has shares to a certain amount, but which shares you cannot rely upon for the future to any greater extent than an amount of £5 per share. So far, therefore, as the position of the creditors is concerned, I see nothing to induce me to say that any representation was made to the creditors on the part of Mr Waterhouse which he was not himself fully justified in making. On the part of the directors, they had power and authority—although they had no special direction they had a special duty imposed upon them of stating the amount paid upon the shares which they held; they had a special duty, to those who acquired and took up new shares, to state the facts truly. They performed those duties in a manner which had about it nothing to lead Mr Waterhouse to suspect that they were being performed improperly. He saw on the register, on the one hand, the amount that would be recoverable from the rest of the shareholders by calls; and, on the other hand, he was completely ignorant of any fraud in the transaction. In other words, it comes to the simple point which arose in that case, which is reported in the 22d Law Journal, before the Lord Justice Turner, namely, that you cannot fix and fasten upon this gentleman, Mr Waterhouse, any other than that engagement which he has entered into. If you seek to have your remedy against him because he has contracted with the company to become a subscriber, you must take the whole contract as it was entered into, which was to pay £5 per share.

I had some hesitation in my mind with respect to this case in the first instance, but on consideration I have arrived at the conclusion that the appellant has succeeded upon the point which he has here raised, and that the interlocutor should be reversed, and that the proper direction should be given for placing Mr Waterhouse in a position in which he may no longer be molested. And that will probably best be done by a direction to strike out that particular portion of the order made in the Court below which allowed the parties to go to proof in the matter.

LORD CHELMSFORD—My Lords, the interlocutor finding that the liquidator is entitled to a proof of the averments made by him on record, can only be supported if the averments, when proved, would be relevant to establish the liability of the appellant to be placed on the list of contributors. I have arrived at the conclusion that he is not so

liable. It is clear that, as between the appellant and the company, he had paid all that he was liable to pay; and if the company had continued to carry on its business no call could have been made upon him beyond the £5 he had paid on each of his 300 shares.

It is an essential preliminary to the formation of a company that there should be a memorandum of association, which may or may not be accompanied by articles of association prescribing regulations for carrying on the company. The Joint-Stock Companies Act of 1856 requires the memorandum of association to state the amount of the nominal capital of the proposed company. The memorandum in the present case states the nominal capital of the company to be £105,000, "whereof (it is stated) £100,000 is paid up, and £5000 remains to be paid."

The statement of the paid-up capital is false; and, not being required by the Act to be made, it is contended that it is of no avail against the liquidators upon the winding-up of the company.

In the articles of association, which, when entered into, are required by the Act to contain regulations as to calls on the shareholders in respect of all monies unpaid upon their shares, "it is agreed that the company may from time to time make such calls upon the shareholders in respect of the sum of £5000 now remaining unpaid on their shares as they think fit, provided such call shall not exceed at any one time 10s. per share. Now, by the 10th section of the Act of 1856 the articles of association, when registered, shall bind the company and the shareholders therein to the same extent as if each shareholder had subscribed his name and affixed his seal thereto." Under the agreement thus entered into with the shareholders, the company could not have made calls upon them for more than £5 a share, agreed to be the only amount remaining unpaid.

I think this would have been the case as between the company and the original shareholders, though parties to the misrepresentation as to the paid-up capital, for they must be taken to have agreed that the assumed payment of the £100,000 was to be the basis of their contract. But the case of the appellant, a transferee of shares, is much stronger than that of the original shareholders. He purchased his 300 shares partly from original shareholders and partly from the company (as forfeited shares), and he received certificates stating that he was the proprietor of these shares of £105 each, upon each of which £100 had been paid. The shares thus acquired by the appellant were respectively registered by the company; and in the column headed "Amount paid on each share" is inserted the sum of £100. The appellant afterwards paid the amount of the calls made upon him to the extent of £5 on each share, and received a discharge in full, signed by the secretary of the company, on the 20th June 1861.

The appellant had thus satisfied all his obligations before the 2d December 1864, when the order for winding-up the company under the provisions of the Companies Act 1862 was made by the Court of Session.

It is contended, on the part of the respondent, that, under this winding-up order the liability of the appellant is entirely changed; that it is competent to the official liquidator, who, it is said, represents, not only the company, but also the creditors of the company, to show that the company was founded on misrepresentations, that the allega-

tion in the memorandum and articles of association that £100,000 had been paid was false, and the statement on the register of £100 having been paid on the appellant's shares was also false; and that the liquidator is therefore entitled to make calls upon the appellant to the extent of £100, not actually but only nominally paid on each of his shares.

Upon examining the Companies Act 1862 I find nothing to warrant the assertion that the powers of a liquidator are as extensive and searching into the constitution of a company as is thus alleged. He is appointed for the purpose of assisting the Court in the winding-up of the company, but in all his proceedings he appears to be merely substituted for the company. He is to bring and defend actions, &c., in the name and on behalf of the company; to carry on the business of the company; to do all acts and execute all deeds in the name of the company; and to do and execute all such other things as may be necessary for winding-up the affairs of the company and distributing its assets. I find nothing in these duties which indicate that the liquidators can deal with the shareholders of the company, or with the company itself, on any other footing than the liabilities and relations existing between them at the time of the winding-up order.

The £100,000 part of the capital of the company falsely alleged to have been paid up, ought in some manner to be made available to the company's creditors, and yet even if the question were with one of the original subscribers, a party to the misrepresentation as to the paid up capital, I confess I cannot see my way to a conclusion that the liquidator could have placed him on the list as a contributory to the extent of the £100 per share nominally but not actually paid.

But whatever may be the case of these shareholders, that of the appellant is entirely different. He was no party to any misrepresentation, but purchased *bona fide* under the assurance that there remained only £5 to pay on the shares, and he must have regulated the price which he paid for them accordingly. If knowledge of the statement of the payment of £100 upon each of his shares being untrue would have altered his position, yet the liquidator does not pretend to be able to prove actual knowledge on the part of the appellant, but merely alleges "that he knew or ought to have known that the nominal capital of the company was not paid up, and that the slightest inquiry would have disclosed it."

If before his purchase the appellant had looked to the documents he would have found upon the memorandum, and articles of association, and upon the register, the statutory proof that £100 had been paid upon each of the shares, and if (as he was entitled to do) he relied upon the representations of the transfer, he bought and accepted the transfer upon the footing that he would have no more to pay than £5 upon each of his shares, and he cannot in my opinion be made liable for a larger amount. I think the interlocutor must be reversed.

LORD WESTBURY—My Lords, certain rules and principles which have long been settled are quite sufficient for the determination of this case.

I take it to be quite settled that the rights of creditors against the shareholders of a company when enforced by a liquidator must be enforced by him in right of the company. What is to be paid by the shareholders is to be regarded in that right.

What is due to the company is that only which is in fact recoverable by the company. The question is therefore, has the liquidator, standing in the place of the company, a right to recover from a shareholder to whom the company has given a certificate declaring that the whole amount, save £5, has been paid upon his shares—can the liquidator impeach the memorandum, set aside the articles, reduce the certificate, and recover in the right of the company that which the company could not for one moment, as against a *bona fide* shareholder, be entitled to recover?

I entirely adopt, in a few words what fell from my noble and learned friend sitting opposite me (Lord Cairns) in the case of *Duckworth*, which is reported in the 2d volume of Chancery Appeals, where my noble and learned friend used these words:—"The liquidator represents the creditors only because he represents the company, and through the company the rights of the creditors are to be enforced." Now here the appellant is a *bona fide* holder of shares upon which, no doubt, there was a false statement made by the company of which he had no knowledge, and as to which he was under no obligation to inquire, and therefore he cannot be subjected to liability by having imputed to him a knowledge of the falsehood. Could the company recover against him? If there had never been a winding-up order, the question would not have admitted of a moment's doubt; and the winding-up order does not place the liquidator in a better position against the shareholders than the company were in. I therefore entirely concur in the order which has been proposed by my noble and learned friend.

LORD COLONSAY—My Lords, I consider this case to be attended with considerable nicety. It differs from the other cases which were brought before us; and I have come to the same conclusion as my noble and learned friends have come. I am not surprised, however, that there was a difference of opinion upon this case in the Court below. I think some of the Judges in the Court below took an erroneous view of the judgment of this House in the *Overend & Gurney* case (*Oakes v. Turquand*), but the distinction between the two cases has been already pointed out by my noble and learned friend on the Woolsack. We have to deal here with the case of Waterhouse alone. In the Court below two other parties were supposed to be in the same position with him. But they are not appellants here, and therefore we cannot deal with them. We can only deal with the case of Waterhouse; and I think the course to be followed in the case of Waterhouse is just that which my noble and learned friend on the woolsack has suggested—that we should reverse the interlocutors of the Court below, and pronounce in terms almost identical with the first question of the First Division of the Court—Whether the petition of the official liquidator ought to be refused in so far as it prays that the list of contributories should be settled so as to include the name of Waterhouse as a contributory?—I think that the petition ought to be refused in so far as it prays that the name of Waterhouse should be included in the list of contributories.

Interlocutor reversed, and cause remitted to the Court of Session, with instructions to dismiss the petition of the official liquidator in so far as it seeks to include the name of Waterhouse among the contributories.

Agents for Appellant—A. & C. Douglas, W.S., and W. M. Wilkinson, Lincolns Inn Fields.
Agents for Respondent—Henry Buchan, S.S.C., and Williams & James, Lincolns Inn Fields.

Thursday, June 16.

GRAY v. TURNBULL.

Property—Servitude—Boundary. Circumstances in which held (affirming judgment of Court of Session), on a proof, that the respondent was proprietor of a certain small portion of land adjoining the property of the appellant, and that the latter had not a right of way over it.

This was an appeal from a judgment of the First Division of the Court of Session. Mr Turnbull of Bellwood raised an action of declarator and interdict against Mr Gray, solicitor, Perth. The parties were owners of two adjoining fields near Perth, Mr Gray having purchased his field recently. There was a march or boundary between the fields, and at one end of such boundary there was a gate or opening into Mr Gray's field. He cut down part of the fence which Mr Turnbull had lately re-erected, and drove carts into his field over a corner of Mr Turnbull's field, as he alleged. He thereupon raised the present action, as Mr Gray had declined to enter into a reference of the dispute to some third party. The question thus raised between the parties was, whether an angle of the one owner's field, to an extent not larger than eight square yards, was either part of his neighbour's, or at least whether such neighbour had not a right of servitude of way of it, so as to get into his field with carts. The Lord Ordinary, allowing proof, held that the pursuer was right in his description of the proper boundary. The First Division, with a slight variation of description, also decided in favour of the pursuer. Thereupon the defender Mr Gray appealed.

SIR R. PALMER, Q.C., and MELLISH, Q.C., for the appellant, said that though it might appear to their Lordships but a small piece of land that was in dispute, still it was of importance, inasmuch as it was the only access to the appellant's field.

LORD WESTBURY—Is it impossible to find a mutual friend of these two parties who could take charge of this minute quarrel between them and relieve us?

LORD CHELMSFORD—I see from the description that the extent of land in dispute is about eight yards square. The expense of finding out whose property it is must be considerable.

THE LORD CHANCELLOR—This is the third case within the last two weeks where the value of the property in dispute has no proportion to the expense of the litigation. It would be a very proper case for settling in some way.

SIR R. PALMER said he feared that there was no prospect of such a termination of the dispute. Though the land was of no value to the respondent, it was of much value to the appellant.

THE LORD ADVOCATE and MR MACKAY, for the respondent, were not called on.

At advising—

LORD CHELMSFORD—My Lords, the learned counsel for the appellant have argued the case in his behalf with great force and clearness, and they have brought before your Lordships all the evidence which bears upon this question; but I submit to