generally concur. It seems to me that the pursuer has really nothing to found upon except the presumption arising from the fact that he was born in wedlock. This is a strong presumption, but it is not absolute. In the present case the presumption is displaced by a body of evidence which tends irresistibly to an adverse conclusion—(1) During the year preceding the birth the spouses were living apart in a state of voluntary separation, and non-access is proved in the only way in which the negative of a general fact can be proved. (2) At a period corresponding to the conception of the pursuer, Mrs Tennent is proved to have had adulterous intercourse with Petherick. (3) The child was registered by the mother as Petherick's son, and the birth was concealed from her husband. (4) Major Tennent only came to know of the existence of his wife's child through the demand made for aliment by a third party, and when made aware he expressed himself in the strongest terms as to his wife's conduct, and repudiated the paternity. (5) On this occasion Major Tennent and his wife treated the pursuer as Petherick's child, and Petherick acknowledged liability for its maintenance. (6) From that time until Major Tennent's death there was a complete estrangement between the spouses, as is shown by the alteration in Major Tennent's mode of addressing his wife when he had occasion to write to her, and by the terms of the letters.

Lastly, Mrs Tennent never represented the pursuer to be her husband's child when she had the strongest motives for doing so if she could have truthfully, or even with any hope of imposing on her husband, made such a representation. When she did at a later period of her life assert the pursuer's legitimacy, she did not even then deny the adulterous intercourse with Petherick, but alleged that on one occasion about the same time she had intercourse with her husband, a statement which rests upon her *ex post facto* assertion, unsupported and uncorroborated by any vestige of evidence.

In these circumstances I conceive that the case of the pursuer has entirely failed.

The LORD PRESIDENT—That is the judgment of the Court.

The Court adhered.

Counsel for the Pursuer—D.-F. Balfour, Q.C.—Hay. Agents—Reid & Guild, W.S.

Counsel for the Defender—Comrie Thomson—Low. Agents—Douglas & Miller, W.S.

Tuesday, July 8.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

LEE *v.* CRAWFORD.

Public Company—Title to Sue—Action by One Shareholder against One Director for Repayment of Money to Company.

A shareholder in an incorporated company brought an action on behalf of himself and the other shareholders against one of the directors to have money advanced by them and lost replaced in the coffers of the company.

Held that there being no exceptional circumstances averred, and no allegation that the company had refused to sue, the pursuer had no title to bring such an action.

The Scottish Provident Investment Company (Limited) was founded in 1873, and registered under the Companies Acts 1862-67, "to receive money by way of loan, deposit, or otherwise; to lend money on security of land, houses, or other heritable subjects; to make advances for improving, building, buying or disburdening dwelling-houses or other real or leasehold estate in Scotland, to be heritably secured thereon, and to be repaid within such a period, not exceeding twenty-five years, as may be arranged; and the doing all such other things as are incidental or conducive to the attainment of the above objects." The nominal capital was £100,000, and the subscribed capital was £50,000 in 10,000 shares of £5 each, on which £1 per share was called up at the time of issue.

Bethune John Lee, Duddingston Park, near Portobello, purchased in 1885, when he was not yet of age, 200 shares at 2s. 9d. each.

In March 1889 he brought an action, on behalf of himself and the other shareholders of the said company, against John Knox Crawford, S.S.C., Edinburgh, one of the directors and chairman of the board, to have him ordained, "In the first place, to repay or make payment to the said The Scottish Property Investment Company (Limited) of the portions still due and unpaid of the amounts of the company's funds lent by the defender and his co-directors and officials to (1) Charles Prentice, chartered accountant, lately managing director of said company; (2) to John Christie Deans, Solicitor in the Supreme Courts of Scotland, Edinburgh, lately secretary and law-agent of said company; (3) to Crawford, Beattie, and Deans (the said John Knox Crawford, William Hamilton Beattie, architect, valuator of said company, and the said John Christie Deans), with interest on said loans respectively from the dates when they respectively were advanced until repayment; . . . . and in the second place, to make payment to the said Bethune John Lee of the sum of £1000 sterling, with the interest thereof at the rate of £5 per centum per annum from the date of citation in this

action until payment," as damages. He averred that the directors, of which the defender was one, in dereliction of their duty, had made advances of various amounts at different times to, *inter alios*, the gentlemen named in the conclusions of the summons, that these had not been repaid, and that the company had suffered loss accordingly. He further averred that he had been induced to become a shareholder through the misrepresentations of the defender and his co-directors, as set forth in the condescendence.

He pleaded—"(1) The defender having been guilty of malversation in office, culpable neglect of, and culpable and fraudulent violation of duty as a director in misapplying, or being a party to misapplying the company's funds, the pursuer is entitled to decree by the Court ordaining him to make good to the company the funds so misapplied or lost. (2) The defender having expressly authorised or assented to loans by the company to himself and other directors and officials of the company, and such having been *ultra vires*, he has made himself a principal in the fraud, and is personally, conjunctly and severally, liable in reparation. (5) The acts complained of not being within the powers of the directors, or of the corporation, and not authorised by the memorandum of association or by the Companies Acts, the pursuer is entitled to raise the present suit. (7) The pursuer Bethune John Lee is entitled to recover from the defender the amount of the loss and damage sustained by him in consequence of the defender's malversation in office, and of the false and fraudulent misrepresentation and concealment of the company's affairs on the part of the defender, by himself, or in conjunction with other officials, or homologated by him."

The defender pleaded—"(1) No title to sue. (2) All parties not called. (3) The statements of the pursuers are not relevant or sufficient to support the conclusions of the summons."

It appeared that the advances complained of had been repaid with the exception of a sum somewhat exceeding £700 still due by the said Mr Prentice, and of a sum of £2000 still due by the said Mr Deans. It further appeared that the pursuer had never taken any steps by calling a meeting of the shareholders or otherwise to have proceedings taken against the directors by the company, and that at a general meeting of shareholders held on 25th June 1889—to which the pursuer had been duly called, but which he had failed to attend—the following resolution had been unanimously adopted:—"The meeting having considered the report by the Committee of Investigation, and the statement by the directors in reply thereto, consider it unnecessary to take any action upon the report, and discharge the committee."

Upon 13th February 1890 the Lord Ordinary (KYLLACHY) dismissed the action *quoad* the 1st conclusion of the summons, and *quoad* the 2nd conclusion allowed the pursuer a proof of his averments.

"*Opinion.*— . . . The question is, whether the pursuer Bethune John Lee is entitled to have his case sent to proof, and, if so, whether the proof should extend to his whole averments, or only to part of them? The defender contends (1) that as regards the greater part of those averments, the pursuer, as an individual shareholder, has no title to sue, and that as regards the rest, the statements are not relevant, or at all events are sufficiently negatived by the documents on which he founds.

"There is no doubt a wide distinction between the two sets of conclusions which the action includes. The leading conclusions are directed to have the defender ordained to replace in the coffers of the company, *inter alia*, certain loans alleged to have been made to certain of the directors and officials of the company. . . .

"The remaining conclusion, which raises a different set of questions altogether, is a conclusion for £1000 damages, in respect that the pursuer was, as he says, induced to purchase his 200 shares by false and fraudulent reports and balance-sheets issued by the defender and his co-directors. . . .

"The defender maintains with respect to the illegal loans to directors and officials that the pursuer, as an individual shareholder, has no title to complain—the transactions alleged being such as it was in the power of the company to ratify, and as to which therefore, if the company are satisfied, no individual shareholder has the right to complain.

"On this part of the case my opinion is with the defender. I do not think the pursuer has any title to complain of alleged transactions which were not *ultra vires* of the company, but were only illegal as between the directors and the company, and were so simply upon the general principles of trust law. Directors are certainly not entitled to make loans, even on heritable security, to their own number, or perhaps even to officials of the company. Neither are they entitled to employ each other upon the business of the company, or to make profit in any way out of their office. But all this is subject to the qualification that the illegality only exists so long as the company does not consent expressly or tacitly to what is done. It is entirely in the company's option to object to such transactions, or to approve and homologate them, and accordingly it is, I think, settled law that if an individual shareholder complains of such transactions his remedy is not to bring an action in Court, but to bring the matter before his fellow-shareholders, and if they agree with him to take action in the company's name. No doubt, where the act complained of is *ultra vires* of the company, as, for instance, if it involves the application of the company's funds contrary to its constitution, any shareholder is entitled to take individual action. The reason is that such acts cannot be validated even by consent of all the shareholders. So also if the individual shareholder, on bringing his complaint before the company, is overborne by an interested majority, or by a majority unfairly obtained, he may have redress in one form or another by applying

to the Court. But it appears to me that, both in principle and authority, the pursuer here is out of Court in respect of the particular complaint which he makes, unless he at least avers and proves that he has taken all due steps to bring the matter before the company, and has been improperly refused the co-operation of the company, or at all events the use of the company's name.

"Now, I think it is quite clear that the pursuer has not put himself in this position. The whole matters complained of have been considered by the company in general meeting, and having heard the directors' explanations, the company have resolved to take no action in the matter. The pursuer was summoned to this meeting, and had an opportunity of attending it, but it does not appear that he did so. Neither does he allege that previous to raising his action he took any steps to bring the matter before the company otherwise.

"If this be so, it is unnecessary to consider whether the recent forfeiture of the pursuer's share for non-payment of calls is in itself a bar to this part of the pursuer's action. There seems to be no doubt that his shares have been forfeited, and, as at present advised, I do not see a good answer to the defender's argument upon that point. But, as I have said, it is not necessary to deal with it.

"I therefore dismiss the pursuer's action so far as relating to the first set of conclusions in the summons. . . .

"(2) It remains to consider whether the pursuer has stated a relevant case in support of his conclusion for damages. His position, as regards this portion of his case, does not strike me as highly favourable. He appears to have bought his 200 shares at the price of 2s. 9d. per share, at a time when the position of the company (as of similar companies) was notoriously depressed. Moreover, the reports and balance-sheets on which he founds as having induced his purchase do not appear to me to have been of a very encouraging character, or indeed to have been otherwise than fitted to put the pursuer upon his guard. At the same time, he makes averments with respect to the profits, such as they were, brought out in the balance-sheets, which I cannot hold as irrelevant, and therefore, on this part of the case, I propose to allow the pursuer a proof before answer of his averments on record."

The pursuer reclaimed, and argued—The advances here made were *ultra vires* of the directors, and the assent of the shareholders could not make their actings the acts of the company—*Ashbury Railway Carriage and Iron Company* v. *Riche*, June 1875, L.R., 7 H.L. 653. The actings here complained of had not in fact been approved by the resolution referred to. Besides that resolution was passed long after the raising of this action. An individual shareholder was only barred from bringing such an action as this if he had given his individual consent to the acts he sought to challenge. It was *ultra vires* of the directors to lend money to each other, and the principle applied to loans to the secretary and to the law-agent of the company—*Ex parte Bennett*, February 1805, 10 Ves. 380; *Aberdeen Railway Company* v. *Blaikie Brothers*, July 1854, 1 Macq. 461; *York Buildings Company* v. *Mackenzie* (1795), there cited. It was competent for a single shareholder to sue an action for damages against one director without calling all the directors—*Leslie's Representatives* v. *Lumsden*, December 17, 1851, 14 D. 213; *Tulloch* v. *Davidson*, June 3, 1858, 20 D. 1045, *aff.* Feb. 23, 1860, 22 D. (H. L.), 7; *Liquidators of Western Bank* v. *Douglas, &c.*, January and March 1860, 22 D. 447; *Liquidators of Western Bank* v. *Baird's Trustees*, November 22, 1872, 11 Macph. 96; *Liquidator of Caledonian Heritable Security Company (Limited)* v. *Curror's Trustee*, July 14, 1882, 9 R. 1115. The same principle applied equally to actions for restitution. Even in the case of *Russell*, relied upon by the defender, it was laid down that a single shareholder might sometimes be allowed to bring such an action. The pursuer should be allowed to do so here.

Argued for the defender and respondent—Actions for replacing money were only competent at the instance of a single shareholder in exceptional circumstances. There were none such here. The pursuer had never tried to get the company, the proper pursuers in such an action, to sue. There was no explanation given why this particular director had been singled out. If such actions were allowed every shareholder might bring an action against each of the directors individually—*Orr, &c. v. Glasgow Railway Company*, December 18, 1857, 20 D. 327, *aff.* April 24, 1860, 3 Macq. 799; *Russell* v. *Wakefield Waterworks Company*, May 28, 1875, L.R., 20 Eq. 474 (Jessel, M.R.)

At advising—

LORD YOUNG—This company was constituted as set forth in the condescendence for the following purposes—"to receive money by way of loan, deposit, or otherwise; to lend money on security of land, houses, or other heritable subjects; to make advances for improving, building, buying, or disburdening dwelling-houses, or other real or leasehold estate in Scotland, to be heritably secured thereon, and to be repaid within such a period, not exceeding twenty-five years, as may be arranged; and the doing all such other things as are incidental or conducive to the attainment of the above objects." It was a kind of banking or money lending company. Its affairs were conducted by directors, one of whom was styled the managing director, I suppose because he took the chief management of its business.

The pursuer, then about 19 or 20 years old, bought 200 shares of the company when they were at the very low price of 2s. 9d. per share. His averments substantially are that the directors of the company, of whom the defender was one, made advances to the managing director at various times and to various amounts. He acknowledges that all those were repaid except a sum some-

what exceeding £700, which when this action was raised was still due by the managing director. He also avers that there was advanced in like manner to Deans, the secretary of the company, a sum, the balance unpaid of which somewhat exceeds £2000. He brings the action in 1889, four years after the purchase of the shares, against Mr Crawford one of the directors, and he concludes that the defender shall repay to the company those two balances due by the managing director and the secretary. The Lord Ordinary dismissed the conclusion to that effect as not well founded. Now, I am not disposed to decide any more than is required for the circumstances of the particular case. I have regard, first, to the character of the company; secondly, to the fact that the pursuer is the only shareholder who complains; and thirdly, to the fact that Crawford is the only director called. Having regard to these facts I have to consider this action in which the pursuer alone seeks as against Crawford alone to have an inquiry into the propriety of the advances to the managing director and the secretary. I do not mean to decide any question as to whether the directors of such a company may permit advances to be made with or without heritable security to the managing director. The action is not well suited for determining that. I am far from indicating any opinion that they cannot do so.

As to whether such a question can be tried in an action by one shareholder against one of the directors alone, the general rule is that stated by Sir G. Jessel in the case of *Russell*, that an action to have money replaced in the company's coffers must as a general rule be at the instance of the company itself, and be laid against the directors as a body. The Master of the Rolls says, "The rule is a general one, but it does not apply to a case where the interests of justice require the rule to be dispensed with." I cannot find in the circumstances of this case any case of necessity in the "interests of justice" which ought to introduce an exception to the rule, and allow this pursuer to sue Mr Crawford (or indeed all the directors) to restore this alleged balance due by the managing director. I can understand a case in which the circumstances are such that the Court will not refuse to an individual shareholder the remedy of suing alone such an action. But they do not exist here.

As to the advance of £2000 to the secretary, I think that in such a case there might be special circumstances which would induce the Court, in order to do justice, to allow an individual shareholder to sue alone. But, again, there are none here, and I cannot countenance the statement of a general rule of law that a company for lending money can in no case advance money to its law agent. Therefore as to the first question of the action I am of opinion that the Lord Ordinary's judgment should be adhered to.

As to the other part of the case, the Lord Ordinary seems to think that it does not look a hopeful one, and I share that opinion, but he has allowed a proof holding that the statements are irrelevant, and I agree in that judgment also.

LORD RUTHERFURD CLARK concurred.

LORD LEE—I am of the same opinion. As to the demand for repayment by the defender to the company I think there is a clear distinction between this case and that of *Leslie* v. *Lumsden*. There the pursuer asked that money which he paid for his shares should be restored. Such an action could only be raised by an individual shareholder. Here the pursuer demands that the defender shall pay money into the coffers of the company. Now, the pursuer did not attend the meeting of the company, and object to what was done. He is not in the position of a protesting minority. Nor is he a beneficiary under a trust like the pursuer in *Perston* v. *Perston's Trustees*, 1 Macph. 245.

LORD JUSTICE-CLERK—I am of the same opinion.

The Court refused the reclaiming note.

Counsel for the Pursuer and Reclaimer—Lorimer. Agent—J. B. W. Lee, S.S.C.

Counsel for the Defender and Respondent—H. Johnston—Guthrie. Agents—Morton, Stuart, & Macdonald, W.S.

Wednesday, July 9.

FIRST DIVISION.

AVERY & COMPANY, PETITIONERS.

Company — Regulations — Reduction of Capital—Companies Act 1867 (30 *and* 31 *Vict. c.* 631), *sec.* 9.

Section 9 of the Companies Act 1867 provided that "any company limited by shares may by special resolution so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed or as allowed by special resolution, as to reduce its capital."

By the 5th article of a company's memorandum of association the capital of the company was fixed at £15,000, "with power to the company to increase or reduce the capital as provided by the articles of association."

By section 110 of the articles of association it was provided that "the company might by special resolution modify the conditions contained in the memorandum of association to the extent authorised by the Companies Acts 1862 to 1883." The company having passed a special resolution reducing the amount of its capital, petitioned the Court under section 11 of the Companies Act 1867 for a confirmation order. The reporter to whom the case was remitted was of opinion that