or the freight being profits of trade. According to the statements in the case, as I read them, this cargo-carrying trade was not transferred from the former owners to the present owners, but what was transferred was the *corpus* of the ship, and in my opinion that does not entitle the appellants to say that they were the successors in business of the persons from whom they purchased the "Craigerne."

LORD KINNEAR—I agree with your Lordships, and I think it is a very clear case. The only semblance of argument maintained by the appellants was founded on a misconception of the decision arrived at in the case of the *Ryehope Coal Company*. In that case it was decided that a company which had been formed for the purpose of continuing to work and carry on a going colliery were the successors in business of the persons who had carried it on previously for many years. But they had taken over what one of the learned Judges describes as "a mining concern," and had not merely acquired a piece of machinery.

The Court affirmed the decision of the Commissioners.

Counsel for the Appellants—Ure, K.C.—Constable. Agents — J. B. Douglas & Mitchell, W.S.

Counsel for the Respondents—Campbell, K.C.—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor for Inland Revenue.

Wednesday, May 14.

FIRST DIVISION.

BRAID HILLS HOTEL COMPANY, LIMITED, PETITIONERS.

Company—Shares Issued as Fully Paid up—Authority to File Contract or Memorandum—Contract as to Shares Never Reduced to Writing—Companies Act 1867 (30 *and* 31 *Vict. c.* 131), *sec.* 25—*Companies Act* 1898 (61 *and* 62 *Vict. c.* 26), *sec.* 1—*Companies Act* 1900 (63 *and* 64 *Vict. c.* 48), *sec.* 33.

Held that notwithstanding the repeal of section 25 of the Companies Act 1867 by section 33 of the Companies Act 1900, it was competent for the Court, under the provisions of section 1 of the Companies Act 1898, to authorise the filing of a contract, or memorandum in lieu of a contract, in cases where shares in a company had been issued as fully paid up, and authority *granted* to file such a memorandum in a case where shares had been issued as fully paid up for a consideration other than cash, but the transaction had not been embodied in any written contract.

The Companies Act 1867 enacts (sec. 25)—"Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares."

The Companies Act 1898 enacts (sec. 1)—"(1) Whenever before or after the commencement of this Act any shares in the capital of any company under the Companies Acts 1862 and 1890, credited as fully or partly paid up, shall have been or may be issued for a consideration other than cash, and at or before the issue of such shares no contract, or no sufficient contract, is filed by the Registrar of Joint-Stock Companies, in compliance with section 25 of the Companies Act 1867, the company, or any person interested in such shares, or any of them, may apply to the Court for relief, and the Court, if satisfied that the omission to file a contract or sufficient contract was accidental or due to inadvertence, or that for any reason it is just and equitable to grant relief, may make an order for the filing with the Registrar of a sufficient contract in writing, and directing that on such contract being filed within a specified period it shall in relation to such shares operate as if it had been duly filed with the Registrar aforesaid before the issue of such shares. (2) Any such application may be made in the manner in which an application to rectify the register of members may be made under section 35 of the Companies Act 1862. . . . (4) Where the Court in any such case is satisfied that the filing of the requisite contract would cause delay or inconvenience, or is impracticable, it may in lieu thereof direct the filing of a memorandum in writing, in a form approved by the Court, specifying the consideration for which the shares were issued, and may direct that on such memorandum being filed within a specified period, it shall, in relation to such shares, operate as if it were a sufficient contract in writing within the meaning of section 25 of the Companies Act 1867, and had been duly filed with the Registrar aforesaid before the issue of such shares."

The Companies Act 1900 enacts (sec. 33)—"(1) Section 25 of the Companies Act 1867, and the other enactments mentioned in the schedule to this Act, to the extent specified in the third column of that schedule, are hereby repealed. (2) No proceedings under section 25 of the Companies Act 1867 shall be commenced after the commencement of this Act."

The Braid Hills Hotel Company, Limited, presented a petition under section 1 of the Companies Act 1898, quoted *supra*, with regard to 95 ordinary shares, Nos. 8 to 102 inclusive, issued to William Ritchie Rodger.

The petition set forth that by feu-charter dated 17th and recorded in the Division of the General Register of Sasines applicable to the county of Edinburgh the 23rd, both days of October 1893, and re-recorded in said Register on 14th September 1894, granted by Peter Mowat, builder, Edinburgh, William Ritchie Rodger, S.S.C.,

100 George Street, Edinburgh, acquired a piece of building ground at Greenbank, Morningside. After incorporation of the company an agreement was made between the company and the said William Ritchie Rodger, by which the company acquired right to the said piece of ground. By the terms of said arrangement the price to be paid for said piece of ground was fixed at £1350, payable £400 in cash and £950 in fully paid shares of the company. The company paid said sum of £400 in cash to the said William Ritchie Rodger, and allotted to him 95 shares, being numbers 8 to 102 inclusive, in the company, and in consideration thereof the said William Ritchie Rodger executed and delivered a back-letter by which he acknowledged that the said piece of ground was held by him in trust and on behalf of the said company, and bound and obliged himself to convey the said piece of ground to the company at any time if required. The company thereafter entered into possession of the said piece of ground, and erected hotel buildings thereon, and have since carried on and still carry on business in the said buildings. The said 95 shares were issued by the company as fully paid shares, but no contract relating to said 95 shares was filed with the Registrar of Joint-Stock Companies, under and in compliance with section 25 of the Companies Act 1867.

The prayer of the petition was in the following terms—"To order the filing with the Registrar of Joint-Stock Companies of such contract in writing relative to ninety-five shares of petitioners' company, number 8 to 102, as shall be deemed by your Lordships to be sufficient under and in terms of sub-section 1 of section 1 of the Companies Act 1898, and that within such specified period as to your Lordships shall seem proper, and to direct that on the filing of such contract as aforesaid it shall operate in relation to such shares as if it had been duly filed with the Registrar of Joint-Stock Companies before the issue of such shares; or, alternatively, to order the filing with the Registrar of Joint-Stock Companies of such memorandum in writing as to your Lordships shall seem proper, the same having been previously duly stamped, relating to said shares, and specifying the consideration for which the said shares were issued, and that within such specified time as to your Lordships shall seem proper; to direct that on the filing of such memorandum as aforesaid within such specified period relating to the said shares numbered as aforesaid, the said memorandum so filed shall, in relation to such shares, operate as if it were a sufficient contract in writing within the meaning of section 25 of the Companies Act 1867, and had been duly filed with the Registrar of Joint-Stock Companies before the issue of said shares, all in terms of sub-section (4), section, 1 of the Companies Act 1898."

The petition was unopposed.

It appeared that not only had no contract relating to the purchase by the company from Mr Rodger of the said piece of ground, or to the allotment to him of 95 shares of the company in part payment of the price, ever been filed with the Registrar of Joint-Stock Companies, but the contract had never been reduced to writing, and the terms of the arrangement could only be deduced from the minute of meeting of the directors of the company, held on 5th December 1893, at which the arrangement seemed to have been entered into.

On 18th March 1902 the Court remitted to Sir C. B. Logan, W.S., to inquire and report as to the regularity of the procedure, and the facts and circumstances set forth in the petition.

Sir C. B. Logan lodged a report, in which, after narrating the facts and the provisions of the Companies Acts, he proceeded as follows:—"Notwithstanding the repeal of section 25 of the Companies Act 1867, and the provisions of section 33, sub-section (2), of the Companies Act 1900, doubts have arisen as to whether section 25 of the Act of 1867 has been repealed retrospectively, and it has been suggested in the recent English case of *Brutton* v. *Burney, Limited* [1901], 1 Ch. 637, that the holders of shares, which by reason of the Companies Act 1867, section 25, have to be treated as unpaid shares, may find in the event of the company being wound up that they could not claim to share in any surplus assets available for distribution among the shareholders without first paying up the amount which has to be treated as unpaid on their shares. The Court, in the case of *Brutton*, were of opinion that, as it might be years before such a question arose, and as meanwhile the shareholders would be placed in a difficult position, and the value of their shares seriously imperilled, an order might be pronounced for the filing of a memorandum in terms of the Companies Act 1898. The object of the present petition is to obtain the authority of your Lordships for the filing with the registrar of a sufficient contract or memorandum in writing relative to the 95 shares issued to the said William Ritchie Rodger as fully paid-up, as part of the price or consideration for the sale to the company of the piece of ground on which its hotel is built, in order that all doubts may be removed as to the position of these shares. In inquiring into the averments of the petitioners as to the omission to file the necessary contract at or before the issue to the said William Ritchie Rodger of the 95 shares above referred to, I have followed the course adopted in similar cases, and have obtained through the agent for the petitioners two affidavits — one by Mr Rodger and the other by Mr M'Donald, the only remaining directors of the company who were present at the meeting of directors on 5th December 1893, when the arrangement in regard to the sale to the company of the piece of ground at Greenbank was made, Mr Robert Inches junior, the only other director who was then present, having died some time ago. These affidavits, which are lodged in process, are to the effect that the omission to file a contract before the issue of the shares

was not intentional, but was due to inadvertence, and that there was nothing in the position of the company or in connection with the issue of the shares which would have made it inexpedient or prejudicial for the company to file a contract before the issue of said shares. I have referred to the fact that not only has there been failure timeously to file a contract with reference to the 95 shares issued as fully paid-up to Mr Rodger, but also that there has never been a formal contract in writing in regard to the arrangement which was apparently come to at the meeting of directors on 5th December 1893. The two requisites prescribed by the 25th section of the Companies Act 1867 are — (1) a contract duly made in writing, and (2) that that contract be filed with the registrar at or before the issue of shares deemed to be fully paid-up in respect of a consideration other than cash. The Companies Act 1898 empowers the Court to grant relief in cases of non-compliance with section 25 of the Companies Act 1867, in so far as there has been failure timeously to file a contract, but it may be open to question whether the Act affords or was intended to afford relief in cases where there has not only been failure to file a contract but also failure, as in the present case, to reduce a contract to writing. The petitioners have referred me to the petition of *John Pollock and Another*, presented 27th October 1899, in which in very similar circumstances the prayer of the petition was granted by your Lordships on the statement of counsel at the bar, and without any further inquiry. I have been unable to find any decisions on the point by the courts either in England or in Scotland, and in the circumstances your Lordships may perhaps be disposed to follow the precedent to which I have referred."

The Court (without giving opinions) granted the prayer of the petition.

Counsel for the Petitioners—J. A. Christie. Agent—Forbes T. Wallace, S.S.C.

Tuesday, August 13, 1901.

OUTER HOUSE.

MORRICE *v.* CRAIG.

Process—Set and Sale—Public Roup of Ship—Pursuers Bidding at Roup without Leave, and without Notice to Co-Owner—Fiduciary Relation of Pursuers in Set and Sale to Co-Owner—Reduction of Sale—Trust.

A and five other persons were owners of a ship in equal shares. The five co-owners brought an action of set and sale in the Sheriff Court against A, who did not enter appearance. The Sheriff-Substitute remitted to a man of skill to fix the upset price of the ship, and subsequently granted decree for the sale of the ship by public roup at the upset price so fixed. The sale was advertised in the local newspapers and by handbills. The date of sale and upset price were intimated to A, and the articles of roup were prepared at the sight of the Sheriff-Clerk-Depute. Neither the interlocutor ordering the sale nor the articles of roup contained power to the sellers to bid, and no notice was given to A that the pursuers in the set and sale intended to bid. At the sale the ship was purchased by the pursuers in the set and sale at the upset price, they being the only bidders.

In an action brought by A against the pursuers in the set and sale, for reduction of the sale, *held* (1) that the pursuers in the set and sale had in material particulars the conduct and management of the sale; (2) that therefore they were in a fiduciary position towards A, and were disqualified from purchasing at the sale without notice to A and without leave to bid; (3) that even if this disqualification were not absolute, the proceedings with a view to sale were in fact conducted by the pursuers in the set and sale without due regard to the interests of A—and sale *reduced*.

This was an action at the instance of James Morrice, South Esplanade, East Torry, Aberdeen, against Robert Craig, 23 Wood Street, William Walker, 21 Wood Street, George Craig, 17 Baxter Street, George Main, 21 Wood Street, George Main junior, 21 Wood Street, and George Craig, Abbey Place, all in Torry, Aberdeen, and William Meff junior, ship-owner in Aberdeen.

The pursuer and the defenders had been owners of a certain steam-fishing vessel called the "East Neuk," and the defenders had purchased this vessel at a public roup carried through under an action of set and sale brought at the instance of the defenders against the pursuer. The question in this case was whether the pursuer was entitled to have this sale reduced.

The pursuer concluded for reduction of (*first*) minute of preference and enactment, dated the 27th day of June 1900, executed by the said William Meff junior, on behalf of the other said defenders, whereby he was alleged to have purchased on their behalf, at the price of £1950 sterling, the steam line-fishing vessel "East Neuk" of Aberdeen, her boats, apparelling, and appurtenances, and also by James Conner, Sheriff-Clerk-Depute of Aberdeen, at Aberdeen, judge of the roup; (*second*) the interlocutors, dated respectively 29th June, 6th July, and 11th July, all in the year 1900, and bearing to be signed by the Sheriffs-Substitute at Aberdeen, and pronounced in an action of set and sale at the instance of the defenders Robert Craig, George Craig, William Walker, George Main, and George Main junior, against this pursuer, and which interlocutors are in the following terms:—"Aberdeen, 29th June 1900.—Having considered the minute for the pursuers, grants the crave thereof—DUN. ROBERTSON." "Aberdeen, 6th July 1900. — Remits the pursuer's account of