

called forth, and would have called forth, the interference of the Clyde Trustees, who were always there, and were able to protect themselves and to assert the right, if they had it, to interfere with such acts of ownership. But, my Lords, we find that no such step was taken by them. Those acts of ownership appear to have gone on—Lord Blantyre or his predecessors taking the sea-ware, pasturing their cattle on the foreshore, and taking the sea sand and removing it—all this was done within the cognisance and the jurisdiction of those who had ample means of interfering if they had thought proper to interfere. Nothing, however, was done in the way of interference, and I say that that is very strongly corroborative of the view that those acts of ownership were done in due pursuance of the authority conferred by the grant and the possession thus acquired on the part of Lord Blantyre or his predecessors.

In all cases where there is such a grant as this, extending for several miles along a river, it is necessary for your Lordships to consider anxiously what the exact nature of the acts of ownership is. Now, it is not merely one corner or one field which is shown to have been used as pastures for the cattle for two or three days owing to some accidental occurrence in connection with their going to a fair, or the like; such casual exercises of the right are not the matter here in question. There seems to have been a regular exercise on the part of Lord Blantyre of the right of pasturing cattle in the manner described in the evidence, just like any other proprietor on his own field; and this was a valuable right. So with the right of taking sea-ware. It appears from the evidence that owing to some alterations which were made in the river Clyde some years ago the stones became nearly bare and the sea-ware ceased to be collected, but, as I understand the evidence, so long as there was any ware worth collecting, it was collected by the tenants of the respondent. In short, as Lord Curriehill says in the judgment which has already been referred to so often, all the rights that possibly could be exercised were exercised by the respondents, either from time immemorial or for more than 40 years, and thereby they fulfilled all the requisites of the *Agnew* case, should that case ultimately be held—and at present I see no reason why it should not be held—to be sound law. The respondents therefore escape from the stringency of that case by complying with the conditions which it imposes, namely, by showing that Lord Blantyre had held possession of, as it appears to me, sufficiently large portions of the shore immediately in front of his lands to justify your Lordships in coming to the conclusion that he is entitled to what he claims. It appears not to have been a partial exercise at one particular spot or at one particular time, but a general exercise, as often as he or his tenants thought fit, of the right to do what they conceived themselves justified in doing by virtue of the title acquired by him.

I confess, my Lords, it appears to me that these acts of ownership justify your Lordships in coming to the conclusion to which the Court below has come. I for one should be very loath and very slow to differ from the learned judges who had an opportunity of hearing and examining the evidence, and whose decision if we interfered at all in this case we should have to reverse, since the case appears to me to depend upon the facts, by reason of our taking a different view of the facts from that

which has been taken by those learned Judges, and taken unanimously, in the Court below. Apart, however, from that consideration, I have come to the same conclusion as to the facts with the most perfect acquiescence in the views which they have presented, and I therefore agree in the motion which has been proposed by my noble and learned friend.

LORD GORDON concurred.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for the Crown (Appellant)—Lord Advocate (Watson)—Martin, Q.C. Agents—Walter Martin, and W. A. Loch.

Counsel for the (Respondents)—Herschel Q.C.—Kinneir. Agents—Grahames, Wardlaw, & Currey.

Friday, June 20.

CREE (LIQUIDATOR OF THE BONNINGTON SUGAR REFINING COMPANY, LIMITED)  
V. SOMERVAIL AND OTHERS (THOMSON'S TRUSTEES).

(Before the Lord Chancellor (Cairns), Lord Hatherley, Lord O'Hagan, Lord Blackburn, and Lord Gordon).

(In Court of Session Oct. 25, 1878, *ante*, p. 33.)

*Public Company—Winding-up—List of Contributory—Purchase by Directors as Trustees on behalf of Company—Trafficking in Shares.*

The memorandum of association of a company limited under the Companies Act of 1862 provided that no transfer of any shares either upon a sale or in consequence of the bankruptcy of any shareholder should be valid or effectual without the consent of a majority of the other shareholders expressed in writing, but that if the other shareholders declined to consent to any such transfer they should be bound to take the shares at the price offered in a case of sale, or at the market price in other cases.

Certain of the directors of the company made a direct purchase of shares from the executors of a deceased partner, and paid for them out of the company funds. A transfer was prepared, and the directors' names were subsequently entered in the register of shareholders with a notice of trust. In the winding-up of the company, which occurred upwards of a year afterwards, *held* that, apart from the question of the validity of the transaction, which was a matter for the company or those representing it, and following the decision in *Oakes v. Turquand*, August 15, 1867, L.R., 2 H.L. 325, and *Muir's case*, April 7, 1879, *ante*, p. 483, the directors' names fall to be placed upon the list of contributories in the interests of the creditors, just like any other parties who professed to hold upon trust.

*Opinions* (in disagreement with the judgment of the Court of Session) that the pur-

chase of the shares by the directors of the company was *ultra vires*, as being unauthorised by the memorandum of association.

This was an appeal by James Cree (liquidator of the Bonnington Sugar Refining Company, Limited) against a judgment of the Second Division refusing the prayer of a petition praying the Court to find that Peter Somervail and others, as trustees of James Thomson deceased, "should be placed on the list of contributories of the said Company in respect of fifty shares," upon which "£1 per share has been paid up," and also for a decerniture against the trustees for £1500, the amount of a call of £30 per share, with interest at the rate of 5 per cent. since April 22, 1878. The circumstances of the case will be found fully narrated *ante*, p. 33.

At delivering judgment—

LORD CHANCELLOR—My Lords, I understand from the judgments of the learned Judges of the Court of Session in this case that Lord Gifford and the Lord Justice-Clerk, who formed the majority of the Court, and who decided in favour of the respondents, were of opinion that the Bonnington Sugar Refining Company had, by the operation of the 12th of its articles of association, the power of purchasing its own shares. I am unable to adopt that interpretation of the 12th article. It may be open to doubt by what persons or in what manner shares within the meaning of that article are to be bought in the event of the necessary consent to a transfer being refused; but it is perfectly clear to me that in the case before your Lordships that article was not brought into operation; no person intended to act or supposed he was acting under it, and any sweeping determination by the company or the shareholders to refuse assent to transfers under that article, for the purpose of becoming themselves owners of the shares, would, in my opinion, have been an exercise, not in *bona fide*, of the power given by that article.

The appellant is the liquidator of the company, and he applies to the Court to find that the names of the respondents should be placed on the list of contributories of the company in respect of 50 shares, on which £1 a share has been paid up. He makes this application under the combined operation of the 98th and 35th sections of the Companies Act 1862, and the application becomes, as was admitted at the bar, an application to the Court under the 35th section to rectify the register by removing the names of Rose, Weir, and Crabbie, who now stand upon the register in respect of these shares, and by substituting the names of the respondents, upon the ground that the former have been entered without sufficient cause, and that the names of the respondents have been without sufficient cause omitted from the register.

My Lords, there appears to me to be no doubt as to the circumstances under which the change of names in the register took place. The shares belonged to the late Mr James Thomson, and the respondents are his trustees. The company through its directors were willing to buy, and the respondents were willing to sell, these shares, and an arrangement was made that Rose, Crabbie, and Weir should purchase the shares and hold them for the company. This is made perfectly clear by the minute of the meeting of the directors of

the 17th of November 1876, which is in these words:—"Present—Messrs Rose, Crabbie, Callender, and Weir, *Directors*; C. A. Rose, *Secretary*. The directors unanimously approved of the purchase by Messrs Hugh Rose, John Crabbie, and John Weir, from the trustees of the late Mr James Thomson of Helensburgh, of his 100 shares in this company, at the price of 45 per cent. on the original cost—that is to say, the 50 old shares to be bought and paid for at the rate of £45 per share, and the 50 new shares, or B stock, in the same proportion on paid-up price. These shares to be held by them in trust for the Bonnington Sugar Refining Company (Limited)."

It is not disputed that the purchase money for the shares came out of the funds of the company. A transfer of the shares was made by the respondents, which was in the following terms:—"We, Peter Somervail, Thomas Somervail, Peter Clouston, Matthew Bullock, and John A. Callender, as trustees of the late James Thomson, in consideration of the sum of £2272, 10s. sterling paid to us as trustees foresaid by Hugh Rose, John Crabbie, and John Weir, do hereby transfer to the said Hugh Rose, John Crabbie, and John Weir, in trust for the Bonnington Sugar Refining Company (Limited), Leith, the 50 shares original stock of £100 each, numbered 226 to 275, and also the 50 shares new or B stock, numbered 926 to 975, all standing in our names as trustees foresaid in the books of the Bonnington Sugar Refining Company (Limited), to be held by the said Hugh Rose, John Crabbie, and John Weir in trust as aforesaid, their executors and administrators and assigns, subject to the several conditions on which we held the same at the time of the execution hereof, and we, the said Rose, Crabbie, and Weir, do take the said shares in trust as aforesaid subject to the same conditions."

In the register of shareholders an entry was made of the transfer, and Rose, Weir, and Crabbie were entered as transferees in these words—"Hugh Rose, John Weir, and John Crabbie, in trust for the Bonnington Sugar Refining Company (Limited)."

All this took place on the 11th of December 1876, more than 15 months before the winding-up of the company.

In the argument at your Lordships' bar it was strongly urged that the effect of the transaction was the same as if the company had obliterated these shares from their capital, or had taken a transfer of them into their own name. It was said that the transaction, and every part of it, was absolutely void; that the respondents were to be looked upon as they stood on the register before the 11th of December 1876; and that no attention was to be paid to the transfer into the names of Rose, Weir, and Crabbie.

I cannot take this view of the case. I do not express any opinion as to what rights there may be, or as to whether there are any rights on the part of the company, or those who represent them, to recal the money paid to Mr Thomson's trustees, nor is it necessary that I should express any opinion as to what the rights of the shareholders of the company *inter se* might be if there were no creditors to be considered. But the rights of creditors have intervened, and those rights the liquidator represents as well as the rights of the company. Rose, Weir, and Crabbie

have been on the register as the persons responsible for these shares during a period of upwards of a year. There is no doubt that they came into that position expecting to be indemnified by the company for anything they might be called upon to pay, and that indemnity they may not be able to enforce; but with that matter it appears to me the creditors have nothing to do. To outside creditors they stand upon the list just as any other persons professing to hold shares upon trust, and creditors are not concerned to inquire into the rights existing between them and those for whom they profess to be trustees. It appears to me to be clear, according to the principles laid down by this house in *Oakes v. Turquand* (cited above), that Rose, Weir, and Crabbie could not, as against the creditors, come forward and claim to have their own names taken off the register, and so, in my opinion, neither can the appellant do this in order that he may place upon it the names of the respondents.

It was contended in the argument at the bar that the principle on which *Muir's* case was decided in the Glasgow Bank litigation ought to tell in favour of the appellant. I look upon that decision as opposed to the appellant's argument. The directors of the company in purchasing these shares felt that it was requisite that the shares should be held out to the world upon the register as owned by individuals, and to this the individuals assented. Beyond this creditors had no occasion to look, and they would be entitled to assume, according to the decision in *Muir's* case, that whatever amount of liability attached to the shares, was assumed by the individuals in whose name they stood, and that this liability was not in any way diminished or derogated from by the reference to the trust upon which they were held.

I therefore move your Lordships that the appeal be dismissed with costs.

**LORD HATHERLEY**—My Lords, I take entirely the same view as that which has been expressed by my noble and learned friend on the woolsack, and after that explanation of the exact circumstances of the case, there really is very little to be added—indeed the argument might have been confined within a very limited compass.

The question whether or not this company has power to reduce its own capital, and whether or not it can do so by virtue of the operation of the 12th clause of the articles of agreement, appears to me, as it has appeared to my noble and learned friend, to be wholly beside the question we have now to consider. In the transaction which took place there was no attempt to absorb or merge the capital of the company; on the contrary, the company seems to have thought it right that it should be carefully preserved from such merger—that these shares should be carefully kept distinct and separate from the general body of the capital of the company, which might be considered to be (if there be any) unappropriated, by taking care that the shares themselves should be vested in the persons named (and whom it is now sought to remove from the register) as actually owning those shares,—as keeping those shares on foot for the benefit of the company, it is true, but as owning them distinct from the rest. As to any question of diminishing the

capital, or of merging the capital by what was done, I see no trace of it.

Then, my Lords, it is said—that was part of the argument, but I see no facts to support it—that the transaction was such that it must have been known to all parties concerned—I mean to strangers as well as to proprietors in the company—how the transaction had been brought about. Now, all they would see upon the register would be this—in place of those gentlemen who had held the shares as the trustees of Mr Thomson (the respondents), they would see as owners of these shares the names of Mr Rose, Mr Crabbie, and Mr Weir (the names now sought to be removed), and they would see as a fact that they had come in by assignment from the trustees of Mr Thomson. They would see further that they held these shares in trust for the company, but there would be no impossibility of their having come in in a perfectly legitimate way. I am not pronouncing any opinion upon the other view of the case, namely, supposing this had been an attempt to merge the shares; but I say merely there was nothing, as the matter now stood, before the eyes of any stranger, considering whether he should become a shareholder in this company or not, to call for further investigation on his part. He would see that certain shares had been taken by persons who had accepted the position of shareholders in the full sense, and were entitled to a share of all profits and liable in respect of all losses sustained by the company, but still as trustees for the company.

The question arising from their being trustees (I do not now say trustees for the company) was disposed of in *Muir's* case (cited above). The mere fact of their being trustees would not be a thing that would require a purchaser to investigate the matter further. As to their being trustees for the company, that might be perfectly legitimate and lawful, whatever view be taken of this case. I am not, as I have said, pronouncing any opinion as to what would have happened if the nature of the transaction had been different—if it had been for the purpose of merging the shares. But those shares might have become vested in a variety of ways in trustees for the company without their being necessarily the purchasers of them. For instance, Mr Thomson by his own will might, if he had thought fit, or if he thought such a course was desirable for his own purposes, have made a bequest of these very shares to certain persons as trustees for the company, or he might have made a bequest of them to the company itself, and the company might have found trustees to hold the shares as trustees for them, and to be answerable to third parties in respect of them.

That being so, my Lords, I apprehend that there is nothing to induce us to say now, after these shares have been registered, as they have been, and after they have been open to all the world as so registered for more than a year—for some fourteen months—that the course can be taken of removing these names from the register for the purpose of putting in the names of the original parties who held the shares. I think that would be entirely in the face of the decision in *Oakes v. Turquand* (cited above). The parties are met on the one hand by the decision in *Oakes v. Turquand* when they seek to remove from the register the names which creditors may have seen there for

fourteen months, and, on the other hand, if they seek to remove these names from the register in consequence of their being entered as trustees on the register, then they are met by the case of *Muir* in the City of Glasgow Bank Liquidation. Therefore they are met either way, and unless there is some third ground of acting which has not yet come in controversy with reference to matters of this description the application must fail. I do not say whether there might be any other ground on which a controversy might be raised, but unless he could make out that these shares had been actually merged, if the question had arisen before us as to whether there was a power of merging capital, or some question such as that, which was attempted to be argued, but not very successfully—except upon some new ground such as that—I do not see why that which is sought by the liquidator should be conceded to him.

I think the proper course was taken by the learned Judges in the Court of Session, namely, to refuse to make any order removing these names from the register, and I think that your Lordships' House should sanction that course; and the consequence follows that this appeal should be dismissed.

**LORD O'HAGAN**—My Lords, concurring as I do in the conclusion at which my noble and learned friend on the woolsack has arrived, and the reasons which he has very succinctly given to your Lordships, I do not think it necessary to repeat those reasons, or to re-state the very short facts on which they have been founded. I shall merely say a few words in sustinment of the view which has been expressed.

The real purpose of the appellant is to obtain a rectification of the register by substituting the names of the respondents, as former holders of the shares, for those of the persons in whom they are at present vested. I do not think that we are warranted in doing this upon any of the grounds presented at the bar.

No doubt the whole transaction was *bona fide*. No doubt Messrs Rose, Crabbie, and Weir openly and honestly purchased the shares in trust for the Bonnington Company; and no doubt the money which paid for them was supplied from the funds of that company. On these points the transfer from the trustees and the resolution of approval of the 17th November 1876 furnish conclusive evidence, and there is no real controversy as to the facts.

Neither has there been any as to the legal incapacity of the company to become the purchaser of its own shares, unless the purchase was authorised by the memorandum and articles of association; and on the construction of the 12th of the latter I am not prepared to say that my opinion concurs with that of the majority of the Scottish Judges, which, notwithstanding, in the result, and for other reasons, I approve. If I were driven to sustain their judgment merely on that section, I should more than hesitate. There is much obscurity in the wording of it; but it seems to me to have been framed *diverso intuitu*, to regard a state of things such as we have not to deal with, and never to have been contemplated as warranting the impeached act of purchase at the time when that act was done. It points to a transaction by individual shareholders and not by the company; and the chairman Mr

Rose states expressly that the right of pre-emption set forth in the 12th article "was never exercised." So far I am disposed to go with the very able judgment of Lord Ormisdale.

But however irregular may have been the proceeding by which the present registered shareholders acquired possession of the shares—whatever may be ultimately the legal ascertainment of their relations with the company for which they bought in trust, and from which they were reasonably justified in expecting indemnity, and whether or no the shareholders could be successful in seeking a return of the money advanced to the trustees—I do not see that we can now obliterate from the register the names of the purchasers and put others in their place. I agree with the Lord Chancellor that such a rectification could not be effected at the instance of the registered transferees, and no sufficient reason has been given for making it at the instance of the liquidator.

Messrs Rose, Crabbie, and Weir thought proper, at the desire of the company, to buy the shares. They paid the price—they took the transfer—they allowed themselves to be registered and incurred all the responsibilities, and acquired all the rights attendant on registration—they held themselves out to the world as the owners of the shares, and pledged their credit to those who had dealings with the company—and having regard to the principles on which this house has acted very recently in a series of most painful cases, I cannot see that they could be exonerated in a proceeding against them by creditors whilst their names remain on the register, or that they would be able to procure exoneration by any attempt to alter the entries there. And if such an alteration could not be made, affecting their position and the relations and liabilities of those connected with them, by any effort of their own, it seems to me impossible to hold that the liquidator can prevail when he asks substantially to substitute one set of names for another and diminishes, it may be, in a most serious way the value of the security on which creditors may have relied.

The disclosure of the fiduciary character of the registered transferees could not, this House has held, diminish their personal liability. It might afford, as Lord Gifford observes in the case before us, a very good proof of trust as in a question between them and the beneficiaries for whom they are trustees. But the statement was dictated by themselves, and was not that of the persons assigning to them. But it did not concern those to whom their voluntary acceptance of the position of registered shareholders made them responsible. Whatever may have been the original taint of the transaction or the effect of the subsequent ratification by which it is said to have been validated, and whether as between the company and their trustees it was valid or not, I do not think that we can now alter the condition of the register with such consequences as I have indicated, and I therefore support the proposal made by my noble and learned friend on the woolsack.

**LORD BLACKBURN**—My Lords, this is an appeal from the Second Division of the Court of Session. The interlocutor appealed against was made on a petition by the appellant as liquidator in the

voluntary winding-up of the Bonnington Sugar Refining Company (Limited), and by it the Lords refused the prayer of the petition with expenses.

The only question raised and brought before your Lordships' House is whether that prayer should have been granted. The facts which are material for the decision of that one question seem not to be now in dispute. The Bonnington Sugar Refining Company (Limited) was formed in 1864 under the provisions of the Companies Act 1862. The memorandum of association was as follows:—“(1) The name of the company is ‘The Bonnington Sugar Refining Company (Limited);’ (2) the registered office of the company is to be established in Scotland; (3) the object for which the company is established is ‘the buying and selling of sugar, and carrying on the business of sugar refining and all processes connected therewith;’ (4) the liability of the shareholders is ‘limited;’ (5) the nominal capital of the company is £50,000, divided into 500 shares of £100 each.” I do not think it necessary to read the articles of association, as I agree with the opinion expressed by the noble and learned Lords who have already spoken, that whatever be the true construction of the 12th article, the parties in this case were not acting under it.

The original 500 shares of £100 each were fully paid up. By special resolution passed on the 24th February, and confirmed 24th March 1873, it was agreed to increase the capital of the company by £50,000, divided into 500 shares of £100 each, to be offered to the then members in proportion to the number of shares held by them respectively. On the new shares thus issued £1 only was paid up; and each of the then members accepted one new share for each original share held by him, and was so entered on the register.

The company appears to have been a *bona fide* commercial company. The shares were in very few hands, and seem never to have been dealt with speculatively. In 1875 the whole shares, as appears by the register, were held by 18 shareholders; one was James Thomson, who was then a holder of 100 shares, 50 being old fully paid up shares and 50 being new shares on which £1 a share had been paid up and £99 a share remained as yet uncalled up. He died in 1875, and it is in respect of the liability to pay the £99 a share on the 50 shares which formed part of his estate that the question is raised in the petition. The other 17 shareholders continued to be on the register till March 1878, when the resolution to wind up the company was passed.

It appears from the register that after the death of James Thomson the 100 shares which had been his were transferred into the names of the respondents as trustees of James Thomson. In December 1876 a deed of transfer, which has been already read, was executed by each of the respondents, and also by Hugh Rose, John Crabbie, and John Weir. The register of the company was made out in six columns, headed respectively—(1) Names of shareholders; (2) Address; (3) Occupation; (4) No. of shares held, original and new; (5) Date of transfer; (6) To whom transferred. The register for 1876 is printed in the papers before the House. The two entries which relate to the 100 shares in question are as follows:—“The late James Thomson, Millview, Helensburgh, merchant, 100, Feb. 16, 1876—Peter Somer-

vail, Thomas Somervail, Peter Clouston, Matthew Bullock, and John A. Callender; trustees of James Thomson. Peter Somervail, Thomas Somervail, Peter Clouston, Matthew Bullock, and John A. Callender, as trustees for the late James Thomson, Esquire, Helensburgh, 100, Dec. 11, 1876—Hugh Rose, John Weir, and John Crabbie, in trust for the Bonnington Sugar Refining Company (Limited).”

The register for 1877, though in process, has not been printed, but I think we must assume that in it the names of the respondents were not inserted, and that Hugh Rose, John Weir, and John Crabbie, in trust for the Bonnington Sugar Refining Company (Limited), were inserted as the shareholders. This last register for 1877 remained unaltered at the time when the resolution to wind up the company was come to in March 1878, more than a year after the 11th December 1876, when the names of Hugh Rose, John Weir, and John Crabbie were entered as being the persons who were the holders of the 100 shares which had been held by James Thomson in his lifetime.

By section 23 of the Companies Act 1862 every person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company; and by section 37 the register of members shall be *prima facie* evidence of any matters by this Act directed or authorised to be inserted therein; but independently of section 37 what was entered on the register was true; the transferees had agreed to become members of the company.

If this had been an English or Irish company no notice of any trust could have been entered on the register. But as this was a Scotch company it was lawful to enter a notice of trust on the register, and accordingly it is entered that the transferees held the shares “in trust for the Bonnington Sugar Refining Company (Limited),” and so much the creditors ought to have known. On this much of the appellant's argument was founded. I will notice it presently.

In the meantime I will proceed to state those matters which are not stated on the register, and which being unknown to those who during those 15 months trusted the company, cannot diminish the rights of the creditors. If the creditors (or the liquidator acting for them) had made a case that the transferees were men of straw, whilst the original transferors were solvent, or any other case showing that the keeping of the register as it is was prejudicial to the creditors, and on that ground had sought to have the register rectified, different considerations would arise; but no such case is set up. The transferees are, as far as appears, quite as capable of paying the calls as the transferors, and, in truth, this seems really to be an application in the interest of Messrs Rose, Weir, and Crabbie, who if they have any ground for removing their names, should make the application themselves, and not in the name of the liquidator.

The testator Thomson had by his will directed that his trust property should be realised; and his trustees on 25th October 1876, “after mature deliberation, resolved that if an offer of not less than 40 per cent. on the amount paid upon the shares were received, they should be disposed of,” and Mr Callender was authorised to accept such an offer on behalf of the trustees.

Mr Callender, besides being one of the trustees of Thomson, was one of the directors of this company. After some negotiation between Mr Callender and Mr Rose, who was also a director, it was arranged that the shares of the testator should be purchased by the directors for the Bonnington Sugar Refining Company. There was no disguise about the matter. A minute was made which has been already read. The transfer was then prepared, and the price was paid out of the funds of the company, and Mr Callender at least knew that that price was paid out of the funds of the company—which I think ought not to have been done, though it is probably not necessary for your Lordships to decide this.

It has been argued that this transaction was illegal, as being an attempt to reduce the amount of the share capital, and in effect extinguish the 100 shares. It certainly was not intended to have any such effect; and though, if the shares had been conveyed direct to the company, and the company been entered on the register as holders of these shares, it might have been argued that (whatever was intended) the legal effect was to extinguish the shares, no such consequence follows from conveying the shares to three men *sui juris*, fully competent to agree to be members of the company, and able to fulfil all the conditions attending on being members, and entering their names with their assent as the persons holding the shares, though at the same time declaring on the register that the shares were to be held by them in trust for the company.

But the case of *Ashbury v. Riche* in your Lordships' House, L.R., 7 English and Irish Appeals, 653, determines that the true construction of the Companies Act 1862 is that companies incorporated under it are authorised to trade in the manner authorised by the memorandum of association, and in no other; and that it is not only beyond the authority of the managing body to enter into any contract beyond its scope, but also *ultra vires* of the company itself. And this certainly goes a great way to establish that the application of the funds of the company to the purchase of those shares was an application of their funds to an illegitimate purpose, and that it could have been prohibited whilst still executory even if every existing shareholder had assented to it. If the case made here by the appellant had been one of repetition, claiming to get back this money from the respondents, they would have had to refund it or to defend themselves from that claim as they best might; but no such case is made.

It appears here that a large majority of the shareholders knew of this purchase, and approved of it. Even if they had unanimously approved of it, that would not have affected the question whether the company was bound by this improper application of its funds. But if those approving shareholders, or if the four directors, who certainly were parties to the application of the funds, had, on being told that the application of the company's funds to such a purpose was wrong, subscribed and replaced the sum so misapplied, it would have completely rectified the mischief arising from the collateral illegality. It would seem that the appellant's argument requires him to maintain that even in that case

the transfer would still be entirely illegal, and that it could after any lapse of time be set aside. This, I think, is a question quite collateral to that raised by the petition, and it is unnecessary to express any opinion on it.

The same case of *Ashbury v. Riche* goes a great way to say that when the directors requested Messrs Rose, Crabbie, and Weir to hold these shares as trustees for the company, and thereby impliedly though not expressly engaged to indemnify them against the consequences of their so doing, they made an engagement which, so far as it professed to bind the company, was not merely beyond their authority as mandatories for the company, but also an engagement beyond the competency of the company itself, and consequently that these gentlemen if called on to pay calls can only have recourse against those individuals, if any, who requested them to incur this liability. This is a question to be raised by Messrs Rose, Crabbie, and Weir, who being not parties to this litigation, at least in form, may perhaps in some other process show that the facts here were misapprehended. But, as it seems to me, this question also is quite collateral to that raised by the petition in this case. The prayer of the petition is that the respondents should be placed on the list of contributories—a prayer which necessarily involves that the register of shareholders should be rectified by taking off the names of Messrs Rose, Crabbie, and Weir. The argument is that this should be done, because to hold shares in trust for such a company is in itself a legal impossibility or rather illegality. The argument must, I think, be pushed to this extent, that even if the transferees had at the time of the transfer believed that they could have no legal claim for indemnity against the company, and had in express terms said that they would make no such claim, relying for indemnity entirely on the moral obligation of those who being shareholders approved of their conduct, the trust would be illegal.

This is a position which seems rather startling. No authority exists for it, and if the point arises here—and which I doubt—I think your Lordships should hold that it is not correct. I therefore entirely agree in the motion proposed.

LORD GORDON—My Lords, I concur in the opinion which has been expressed by my noble and learned friend on the woolsack.

I think the transaction in question does not fall under the 12th section of the articles of association; and I am also of opinion that that section does not confer on the company the power of purchasing its own shares.

But while I am of that opinion, I also think that the appellant is not entitled to have the names of the respondents placed on the list of contributories of the company. The names of the respondents were removed from the register of shareholders more than fifteen months before the commencement of the winding-up of the company; and on the removal of the names of the respondents the names of Messrs Rose, Weir, and Crabbie were substituted in their place. I think it is not necessary for the disposal of this case to express any opinion as to the liabilities of these gentlemen, who are not represented in the present proceedings. But as their names were put on the register, and were on the register at

the time of the winding-up of the company, I think that *prima facie* they must be held to be rightly on the register, and while their names remain on the register I think the appellant has neither right nor title to apply to have the names of the respondents restored to it.

I think the circumstance that the names of Messrs Rose, Weir, and Crabbie appeared on the register as holding the shares "in trust" for the company does not affect the question involved in the present application. These words may or may not affect the personal liability of these gentlemen, but that is a point which your Lordships are not now called on to decide.

I am therefore of opinion that the result arrived at by the Court of Session was right, and that the appeal should be dismissed.

Interlocutor appealed from affirmed, though on different grounds, and appeal dismissed with costs.

Counsel for Appellant—Benjamin, Q.C.—Davey, Q.C. Agent—William Robertson.

Counsel for Respondent—Herschell, Q.C.—Gifford. Agents—Phelps, Sidgwick, and Biddle.

## COURT OF SESSION.

Saturday, June 28.

### SECOND DIVISION.

SPECIAL CASE—TENER'S TRUSTEES *v.*  
TICKLE AND OTHERS.

*Writ—Stat. 37 and 38 Vict. c. 94 (Conveyancing (Scotland) Act 1874), secs. 38 and 39—Informalities of Execution—Subscribing ex intervallo and after Granter's Death by a Party not Called as an Instrumentary Witness.*

A lady handed over certain heritable property for religious purposes to a body of five trustees by a deed prepared by her husband (who was not a lawyer), which was bilateral in form though unilateral in substance, and in return stipulated for payment of "a yearly rent or sum of 10s." to herself and her heirs and assignees. The deed when signed by the granter was attested only by one witness, her husband being however present at the signing. It was thereafter delivered and signed by two out of five of the trustees, also only before one witness. The granter then died, and after her death her husband added his subscription as a second witness to her signature. A second witness also attested the signature of the trustees who had already signed, and the other three trustees also executed the deed. *Held*, in a question as to the validity of the deed, it being admitted that it was subscribed by the granter and maker in presence of two witnesses—(1) That it must receive effect in terms of the 38th and 39th section of the Conveyancing (Scotland) Act 1874; (2) That the fact that it was bilateral in form did not affect its validity, although it was not signed by all the parties before the death of the actual granter, the deed being in its substance unilateral.

*Observed* that instrumentary witnesses do not need to be "called" as such, and it is

enough that they are legitimately present, and stand by and see what is done.

The first parties to this Special Case were the trustees under the last will and settlement and relative codicil, both dated 20th October 1876, duly executed by the late Mrs Mary Ann Grant or Tener, who resided in Dundee. It was a general settlement of all Mrs Tener's estate, heritable and moveable. Mrs Tener had previously been desirous to benefit the Church of Christian Disciples at Dundee, of which she was a member, and she had erected at her own cost a building named Salem Chapel, in which religious worship was conducted. The title of this chapel remained at first in herself, but afterwards she became desirous of giving a permanent right to the chapel to the religious sect just mentioned, and she got the aid of her husband Mr Tener in putting her wishes and intentions into writing, without seeking or obtaining any advice or assistance from a professional conveyancer. The result was the framing and engrossing by Mr Tener, in accordance with Mrs Tener's instructions, and the subsequent execution by her, of a document, upon paper bearing a 15s. stamp, which was styled at its outset—An indenture, made the 24th day of October 1876, between Mrs Tener of the one part, and Gilbert Young Tickle, James Marsden, John Aitken, William Linn, and John Selbie, as trustees for the purposes therein set forth, of the second part. These trustees were the second parties to this Special Case. The indenture contained an obligation that a certain amount of yearly feu-duty should be paid on behalf of the chapel. This duty was described "as a yearly rent or sum of 10s. sterling," payable by the trustees to Mrs Tener and her heirs and assignees.

The following statement is taken from the case:—"Mrs Tener died at Dundee on 3d November 1876. At the time of Mrs Tener's death her signature to the said indenture bore to be attested by only one subscribing witness, thus—'Signed, sealed, and delivered by the above-named Mary Ann Grant Tener, in presence of' (Signed) 'James Allan, T.C., Dundee'—this witness being James Allan, one of the members of the Town Council of the royal burgh of Dundee, and one of the first parties hereto, and the capital letters appended to his subscription were the initial letters of the words 'Town Councillor.' Although Mr Allan alone subscribed as a witness to Mrs Tener's signature, Mr Tener, her husband, was also present when she signed the said indenture or deed of trust, and saw her subscribe it; but he, not thinking that more than one attesting witness was necessary, did not then subscribe as a witness. Before the document was signed by Mrs Tener it was read over to her by Mr Tener in the presence and hearing of the said James Allan, and it was thereafter taken by her into her own hands, and again read over by herself, and after she had expressed her approval it was signed by her as above mentioned. As her intention was that it should receive effect in her own lifetime, she, after it was signed and attested by Mr Allan as before stated, committed it in Mr Allan's presence to the care of Mr Tener, with instructions to get it forwarded to the trustees therein appointed. Accordingly, Mr Tener, on the following day—25th October 1876—wrote with it to Mr Tickle, who thereafter subscribed