21st of May 1889, subject to this variation, also the said interlocutor of the Lord Ordinary of the 14th of November 1889, and also the said interlocutors of the Second Division of the 30th of May and the 16th of October 1890, be, and the same are hereby affirmed: Further ordered, that the said cause be remitted to the Court of Session in Scotland, to do therein as shall be just and consistent with this variation and this judgment: And it is further ordered, that the appellants do pay to all the said respondents the costs incurred by them in respect of the said appeal to this House.

Counsel for the Appellants—The Lord Advocate (Balfour, Q.C.)—Guthrie. Agents—Loch & Company, for Henderson & Clark, W.S.

Counsel for the Respondents—H. Johnston—C. K. Mackenzie. Agents—Andrew Beveridge, for Mackenzie & Kermack, W.S.

Thursday, June 22.

(Before the Lord Chancellor (Herschell) and Lords Watson, Ashbourne, Morris, and Shand.)

RIXON *v.* EDINBURGH NORTHERN TRAMWAYS COMPANY AND OTHERS.

(*Ante*, vol. xxvi. p. 405, vol. xxviii. p. 209; 16 R. 653, and 18 R. 264.)

Company — Shareholder — Title to Sue — Contract — Fraud — Ultra vires—Reduction.

A company incorporated by a private Act for the construction of a tramway, with a nominal capital, which was never offered to the public, but which was taken up partly by the promoters of the company, and to the extent of the remainder of the shares was acquired by the contractor in payment of the price of the work performed, entered into a contract for the remainder of the work with the same contractor.

A shareholder sought to reduce this contract (1) on the ground of fraud, alleging that the majority of the shareholders who voted in favour thereof were nominees of the contractor, and had obtained their shares gratuitously and for the purpose of voting in his favour; (2) on the ground of *ultra vires*, as the contract had not been offered to competition as required by a clause in a contract which was scheduled to the company's Act.

Held (*aff.* judgment of the First Division) (1) that the contractor's influence in the company had been legitimately acquired; and (2) that the pursuer not being a party to the contract, which provided for competition, he had no title to insist in the plea of *ultra vires*.

This case is reported *ante*, vol. xxviii. p. 209, and 18 R. 264.

Rixon and others appealed.

At delivering judgment—

LORD CHANCELLOR (HERSCHELL) — My Lords, this is an appeal from an interlocutor of the Court of Session affirming an interlocutor of the Lord Ordinary. The ground of the action brought by the appellant, who is a shareholder in the Edinburgh Northern Tramways Company, was that an agreement entered into by that company through its board with a firm named Dick, Kerr, & Company ought to be reduced, inasmuch as it was not honestly entered into by the directors on behalf of the Edinburgh Northern Tramways Company, but was really part of a fraudulent scheme by which, in disregard of the interests of the shareholders whom they professed to represent, the directors should obtain for themselves a benefit as directors of another company.

My Lords, I shall not trouble your Lordships at any length in this case, inasmuch as the learned Judge who tried the case, who heard and saw the witnesses, came to the conclusion that they were witnesses of truth, and that fraud had not been established, and the Inner House have affirmed his decision. Under these circumstances it would be contrary to the precedents upon which your Lordships have acted to overrule the judgment so arrived at by the Inner House unless it is clearly established—conclusively established—that the fraud had been committed, and that the Court below in coming to the contrary determination had erred by overlooking some cardinal fact or disregarding some consideration which manifestly ought to have controlled and determined their judgment.

My Lords, the directors of the Assets Corporation had taken over from the Debenture Corporation, of which they were also directors (the directorates being almost identical), certain securities which had been made over to them by the Cable Corporation in consideration of an advance of about forty thousand pounds. The Debenture Corporation may be dismissed from consideration, because although at law they were the holders of the security in equity the transaction had been transferred to the Assets Corporation, who were in reality the persons entitled to the securities. A large part, or a considerable part at all events, of the securities which the Assets Corporation held consisted of the debentures and shares of the Edinburgh Northern Tramways Company which had been made over by them to the Cable Corporation as part of the consideration for the Cable Corporation constructing a tramway line which under their Act the Tramways Company were empowered to make. The directors of the Assets Corporation being the holders as part of their security of the great bulk of the shares of the Edinburgh Northern Tramway Company, were desirous of obtaining the control of the management of that company. They held 3190 shares out of a total of 4500. They accordingly took steps in the early part of the year 1888 to obtain the control of the direction of that company. They did not

actually remove some of the directors, but they gave such an intimation to them that they resigned, and they replaced them by their own nominees, so that they did in point of fact get the control of that company. But there was nothing illegal in that transaction; it was a step which they were entitled to take; they were the largest shareholders, and as such they were entitled to the control. Of course if they had used the control which they so obtained in improperly serving their own ends in disregard of the interests of the company of which they were the directors or nominated the direction, that no doubt would have vitiated a transaction which was tainted with a proceeding of that description.

On the 22nd of May 1888 the Assets Corporation agreed with Messrs Dick, Kerr, & Company to sell to them their interest in the securities which the Cable Corporation had made over to them, and at the same time to obtain from Dick, Kerr, & Company the amount of the debt, with interest, which was then owing to them. £43,000 was to be paid by Dick, Kerr, & Company, in consideration of which they were to get those securities. The suggestion is that that agreement so entered into on the 22nd of May 1888 did not represent an isolated and independent transaction, but was part of an arrangement under negotiation between the parties by which not only was that agreement to be arrived at but also an agreement between the Edinburgh Northern Tramways Company (which was no doubt controlled by the same direction as the other at that time) and Dick, Kerr, & Company, by which Dick, Kerr, & Company were to be empowered to construct the portion of the Edinburgh Tramways system which was then uncompleted in consideration of a payment of £60,000 in shares and £15,000 in debentures of the Tramways Company—Dick, Kerr, & Company in addition to completing the line undertaking to pay £3000 worth of debts due by the Tramways Company. The suggestion is that the sum so to be paid to Dick, Kerr, & Company in these "paper payments," as they were called, was far in excess of the real value of the work to be done, and that the consideration for that contract really was that Dick, Kerr, & Company should get an amount in excess of what others would have done the work for in consideration of their taking over the debt due to the Assets Corporation in exchange for the securities held upon it, the suggestion being that the two were so connected that in entering into the agreement of the 15th of June 1888 the interests of the shareholders of the Edinburgh Northern Tramways Company were really disregarded, and the only concern—or the guiding concern—which the directors of the Assets Corporation had in the matter was acting in the guise of the Edinburgh Northern Tramways Company to make sure that they got their own debt paid, and got rid of the securities which they held.

Now, the principal parties to the arrangement—Mr Kerr of Dick, Kerr, & Company on one side, and Mr Harold Brown on the other—were called and gave their evidence. They both of them stated, in terms most distinct and clear, that the two agreements were absolutely unconnected; that at the time when the agreement of the 22nd of May was arrived at, the agreement of the 15th of June was not in contemplation or arranged for or negotiated; and that it was not until a few days after the agreement of the 22nd of May had been absolutely executed by the parties that this other agreement began to be negotiated. My Lords, the Lord Ordinary believed those witnesses. If their evidence is true, there is really an end of the case—or at all events of this part of the case—set up by the appellant. The Inner House has adopted the same view as the Lord Ordinary.

What is said on the other side? First of all, that the price was in fact excessive, and that it must have been known to be so, because it is said that whereas the value of the work could not be put at more than £25,000, the debentures to be paid alone were worth £14,000, leaving a balance of £11,000, and that for this £11,000 they were to get £60,000 nominal worth of shares. But nobody of course pretends that these shares were worth their par or face value. What is there to show that they were worth more than the £11,000? There is a suggestion made at all events that they were only worth £2 a share, which would be £12,000. Nobody of course can suggest that there would be anything excessive or suggestive of fraud if that were all, and I am really unable to see evidence which establishes as a matter of proof that the agreement entered into with Dick, Kerr, & Company was one by which they got that which was worth in money more than is said to be the proper cost of the line.

But even if there were such an excess, it would be necessary to establish that the parties to the transaction, especially the directors of the Edinburgh Northern Tramways Company, were conscious of that excess. If they were conscious of that excess, no doubt that would go some way to show that they were not acting in the interests of the Edinburgh Northern Tramways Company. But to make out the case set up it must be fully shown that that agreement was entered into as part of the same arrangement as the agreement of the 22nd of May. My Lords, how was that said to be proved? It was hardly possible for the learned counsel to contend that it was proved. The utmost that he could say was that there were grounds for suspecting that it must be so. One of the grounds suggested was, that whereas under the agreement of the 15th of June, Dick, Kerr, & Company undertook to pay certain debts due to creditors by the Edinburgh Northern Tramways Company, they had before the 22nd of May begun to buy them up. Well, I will not enter into the question whether that was proved in point of fact, but no such suggestion was made to the witness Mr Kerr in cross-examination, and it would be impossible to act upon any such suggestion now.

The other suggestion was that there were some conflicts in minute details between Mr Brown and Mr Kerr as to the circumstances. My Lords, allowing the fullest weight to all that, it is impossible to say that there is anything in this case which would justify your Lordships in finding that the judgment of the Courts below, which absolved these parties from fraud, was, as is suggested, clearly and demonstrably wrong.

My Lords, two other points were raised in the Court below. It was said that inasmuch as this contract had not been put up to competition it was thereby rendered invalid. That point was not pressed at the bar, but was abandoned by the learned counsel for the appellant, and may therefore be put aside. The other point taken was this (it appears not to have been taken before the Lord Ordinary, but to have been argued in the Inner House)—that the shares were in fact issued to Dick, Kerr, & Company at a discount, inasmuch as whilst their nominal value was £60,000 the work in respect of which they were to be made over was of very much less cash value, and that under the Companies Acts, which are incorporated with the Edinburgh Northern Tramways Act, there is no power to issue shares at a discount, and that therefore the transaction is void. My Lords, that point was not, as I have said, taken in the Court below before the Lord Ordinary, but it was taken in the Inner House. It appears to me, I confess, not to be raised upon the pleadings; there is nothing in them to point to such a ground as a reason for reducing the contract of the 15th of June. After it had been argued in the Inner House the Lord President invited the pursuer if he pleased to amend his pleadings. He declined to do so, and he not having done so, the Court below pronounced no judgment upon the point. Under these circumstances, my Lords, it seems to me to be impossible for your Lordships to entertain the question, or to pronounce any judgment upon it.

For these reasons I move your Lordships that the interlocutor appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON—My Lords, I concur in the judgment which has been proposed by my noble and learned friend the Lord Chancellor. I do not desire to express any opinion of my own upon these transactions, which are somewhat peculiar in their character. They have been held, first by the Lord Ordinary, and secondly by the learned Judges of the First Division, not to have been fraudulent. I can only say that there has, in my opinion, been no good cause shown for treating this appeal as an exception from the rule which your Lordships observe with regard to concurrent judgments of fact by the Courts below.

I agree in the observations which the Lord Chancellor has made with respect to the other points raised in this appeal. It appears to me that the second and more important of them, namely, the plea which the appellant endeavoured to raise with regard to the issue of shares at a discount, was one upon which he declined to take the judgment of the First Division by refusing to add it to his record, and that therefore it is quite impossible, as his Lordship has observed, that it can be brought under our notice in reviewing the judgment of the First Division.

LORD ASHBOURNE—My Lords, I entirely concur in the conclusion arrived at by the Lord Chancellor.

LORD MORRIS—My Lords, I concur.

LORD SHAND—My Lords, concurring as I do in what has fallen from the Lord Chancellor and from the rest of your Lordships, I have only to add that it is worthy of note that within the last few days this is the second case which has been appealed from the Court of Session in which we have had two concurrent findings of fact. I mean by the Court of First and by the Court of Second Instance, by the Lord Ordinary and by the Inner House, and I think it would be well that it should be realised that where the case is to depend upon facts, as this case unquestionably did, there is a very serious onus cast upon the appellant who asks that the judgment shall be reversed. He must, I think, bring the case up to this, that there has been an obvious miscarriage of justice, that there has been a clear omission to take into view evidence which has been before the Court. Neither in this case nor in the one to which I have referred have we had any argument except what was substantially asking for a review of the judgment upon questions of credibility in the course of the evidence. My Lords, I entirely agree with your Lordships that this case raises a question of that kind only, and the Judges below, both the Lord Ordinary and the learned Judges in the Inner House, having intimated that they held the same view upon that subject, I do not think that it would be in accordance with the rule which your Lordships have laid down that any result could follow but an affirmance of their decision.

The House affirmed the decision of the Court of Session, and dismissed the appeal with costs.

Counsel for the Appellant—Haldane, Q.C.—Methold. Agents—A. W. Rixon, for A. & G. V. Mann, S.S.C.

Counsel for the Respondents—Graham Murray, Q.C.—Mackenzie. Agents—Linklater & Company, for Graham, Johnston, & Fleming, W.S.