holders of the Northern Tramways Company, of any right which would be competent to other transferees for value. The stipulations of the agreement to which our attention was specially called, by which Dick, Kerr, & Company acquired their shares from the Assets Company and from the Cable Corporation were, as I understood the argument, these—In the first place, a stipulation that they should accept such title as the vendors might be able to give them; and in the second place, it was pointed out that the agreement contained a special reference—I mean the agreement between Dick, Kerr, & Company, and the liquidator of the Cable Corporation, and the Assets Company—to a number of previous agreements, one of which was the agreement now in dispute. Now, it does not appear to me that there is anything in that transaction which can at all affect the right of Dick, Kerr, & Company, having become shareholders of the Northern Tramways Company, to take any objection which might be competent to other shareholders in such a transaction as that now in dispute. They obtained a perfectly good and unqualified title to the shares, and the reference to the agreement now in dispute and the other agreements would appear to me to have no other effect than this, that it would bar them from maintaining as against the vendors, who were the only other parties to their contract, that there was anything in that agreement which would entitle them to set aside the contract. If there were any plea, which I do not at this moment see, which they could have raised against the vendors upon the contract of purchase and sale with them, founded upon the existence of that agreement, if they had not known of it, they are precluded from raising such a plea against the vendors by knowing that such an agreement existed. But I do not see how such knowledge can affect their position as shareholders of the Northern Tramways Company after they have acquired their shares, and I hold that the moneys payable under that agreement by the Cable Corporation to Messrs Beattie and Mann are moneys really belonging to the company, and for which Messrs Beattie and Mann must account.

Now, these were the arguments upon which it was maintained that the grounds of the Lord Ordinary's judgment were displaced, and I am of opinion that they are not well founded, and therefore agree with your Lordship that the interlocutor should be affirmed.

The Court adhered.

Counsel for the Pursuers — Graham Murray — Salvesen. Agents — Graham, Johnston, & Fleming, W.S.

Counsel for the Defenders—H. Johnston —Ure. Agents—A. & J. V. Mann, S.S.C.

Wednesday, July 8.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

MURRAY AND HENDERSON (LIQUIDATORS OF COUSTONHOLM PAPER MILLS COMPANY, LIMITED) *v.* LAW.

Company — Vendor — Agreement to Take Payment in Fully Paid-up Shares—Liability to Pay for Shares in Cash—Liquidation—Companies Act 1867 (30 *and* 31 *Vict. cap.* 131), *sec.* 25.

An owner of paper mills agreed to sell his mills to a company to be formed for the purpose of acquiring and carrying them on, "at the price of £12,000," payable to the extent of £4500 in fully paid-up shares of the company, and the balance to be met by the company relieving the vendor of certain bonds and debts incurred by him in connection with his business. This agreement was subsequently modified, the vendor, "in respect the price of the mills, amounting to £12,000, less amount of bonds, say £3500, will amount to £8500," agreeing to accept the entire sum of £8500 in fully paid-up shares. After the company had been going some years it was ordered to be wound up, and the liquidators applied to the Court to settle a list of contributories, and entered the vendor's name as a contributory in respect of £1300 of shares standing in his name on the register which had been allotted to him as fully paid-up shares in pursuance of the company's agreement with him.

Held (*diss.* Lord Young, and *aff.* Lord Stormonth Darling) that the rights of parties were to be regulated by the later agreement; that under that agreement the vendor had no money claim against the company which could be set off against the cash due upon the shares; and that therefore he was liable to pay the liquidators the full amount of the shares standing in his name, as the agreement had not been filed with the Registrar in terms of section 25 of the Companies Act 1867.

Opinion by Lord Justice-Clerk, that under the original agreement the vendor had no money claim against the company.

Opinion by Lord Young, that the company having originally contracted to relieve the vendor of his debts to the extent of £7500, and having failed to fulfil this contract to the extent of £4000, were debtors in that sum to him, and that this was a money claim against the company which could be set off against the cash due upon the shares.

Opinion by Lord Trayner, that assuming that the vendor had under his original contract a money claim

against the company in respect of their obligation to relieve him of his debts, he could not take any benefit from this fact, as he could not show that the shares standing in his name had been allotted to him in respect of that obligation on the part of the company.

By minute of agreement dated 8th and 11th January 1886, entered into between William Law, papermaker, Coustonholm Paper Mills, Pollockshaws, Glasgow, of the first part, and Thomas Fairweather Weir, S.S.C., of the second part, the first party agreed to sell and convey to the second party his whole right and interest in these paper mills, plant, machinery, "at the price of £12,000 sterling." The date of the second party's entry to the subjects and business was to be at Whitsunday 1886. In the fifth place it was agreed that as it was the intention of Weir in entering into this agreement to form a company under the Limited Liabilities Acts, it was declared that he might resile from it before Whitsunday 1886 without any claim of damages being made against him. In the sixth place it was agreed—"In the event of no notice of withdrawal being given, the purchase price shall be payable as follows—£4500 in fully paid-up shares, certificate of which shall be delivered to the second party within at latest three months from the registration of the company, and the balance of £7500 by the limited company to be formed as aforesaid, freeing and relieving the first party of his liability under and becoming responsible for the bonds, obligations, and securities for which the first party is at present liable in relation to the said business."

This agreement was subsequently modified at a meeting of the directors of the projected company held on 24th March 1886. The minute of meeting bore—"It was further agreed, in respect the price of the mill, amounting to £12,000, less amount of bonds, say £3500, will amount to £8500: Mr Law has consented to accept of the entire sum of £8500 in fully paid-up shares of the company; he has permission to employ *pro tanto* the subscriptions of the following creditors, who have agreed to take stock, in liquidation of Mr Law's debts to them." Mr Law was present at this meeting and signed the minute.

The company was thereafter incorporated, and was registered on 13th April 1886, with a capital of £25,000, divided into 2500 shares of £10 each. It was stated in the memorandum of association, which was dated 7th April 1886, that the objects for which the company were established were to purchase the paper mills, plant, &c., as at present belonging to William Law, and to carry on the business of papermaking there; and "to adopt and carry out an agreement, dated the 8th and 11th days of January 1886, between the said William Law of the first part, and Thomas Fairweather Weir, Solicitor Supreme Courts, Edinburgh, on behalf of the company, of the second part, relative to the purchase by the company of the said Coustonholm Paper Mills, plant, fixed machinery, buildings, and whole pertinents, and stock and plant belonging to the said vendor."

After the company's incorporation a number of shares were allotted to Law in fulfilment of the company's agreement with him.

By interlocutor dated 11th June 1889 the Second Division of the Court of Session ordered that the company should be wound up under the provisions of the Companies Act, and John Maclay Murray, C.A., Glasgow, and Frank Young Henderson, accountant, Glasgow, were appointed liquidators.

Upon 14th May 1890 the liquidators presented a note to the Lord Ordinary to have the list of contributories settled, in conformity with a list produced, in which they had entered the name of William Law as a contributory in respect of 150 shares standing in his name on the register.

By joint-minute for the parties it was admitted that in all there had been allotted to Mr Law 619 shares, on which no cash had been paid, and that he still stood on the register as a holder of 130 of these shares, the others having been transferred by him at various times to different parties; that 20 other shares on which no cash had been paid stood in Mr Law's name, and that these had been transferred to him by the allottee without any price being paid therefor. It was further admitted that the contract between Law and the company had not been filed with the Registrar of Joint-Stock Companies.

By the 25th section of the Companies Act 1867 it was provided—"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 liquidators pleaded—"(1) The said William Law having become a shareholder of said company to the extent of 150 shares, and the amount of said 150 shares not having been paid in cash, all as condescended on, the said William Law ought to be put on the list of contributories in respect thereof."

The respondent pleaded—"(1) The shares held by the respondent must, in the circumstances condescended on, be held as paid in cash, and no further liability in respect thereof attaches. (2) The shares standing in the respondent's name having been accepted by him in lieu of the company's obligation to relieve the respondent of his debts and liabilities in connection with said business, were in reality paid for in cash."

Upon 27th February 1891 the Lord Ordinary (STORMONTH DARLING) pronounced this interlocutor:—"Repels the plea-in-law for the respondent William Law: Finds that the said respondent is rightly entered by the liquidators in the list of contributories appended to the note, No. 24 of pro-

cess, as holder of 150 shares: Finds that the said shares must be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, and decerns, &c.

"*Opinion.*—The question here is, whether Mr William Law, the respondent, has been properly entered in the list of contributories for 150 shares, and whether these shares must be 'deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash,' in terms of section 25 of the Companies Act 1867, the purport of which is that there can be no contract for the issuing of shares to be paid for otherwise than in cash unless the contract be registered.

"As regards the whole of the shares, it is admitted that there was no registered contract, and as regards 20 of them it was conceded at the bar that no cash had been paid, and that Mr Law knew this when they were transferred to him, but as regards the remaining 130 shares, it was maintained on his behalf that although no cash was paid for them the company were bound to relieve him of certain obligations to his creditors, including a debt of £2500 to the Clydesdale Bank, that the company failed to fulfil this obligation, that he was compelled to take the shares in lieu thereof, and therefore that the shares must be held to have been paid in cash. Reliance was placed on a series of English cases which relax the strict words of the statute to this extent, that where money is due by the company to the intending shareholder on the one hand, and by the intending shareholder to the company on the other, and the parties agree to set the one demand of money against the other, that shall be held to be a good payment in cash. The cases are *Spargo*, L.R., 8 Ch. 407; *Ferrao's*, L.R., 9 Ch. 355; *Barrow-in-Furness*, L.R., 14 Ch. Div. 400; *James Lloyd & Company*, L.R., 41 Ch. Div. 159.

"Though I am not bound by these decisions, I should think it right to follow them on a question affecting the construction of a British statute, and not turning on any peculiarity of Scots law, if the facts were such as to warrant their application. But I think the facts are the other way. These facts, so far as not admitted on record, are set out in the minute of admissions. It appears that Mr Law was the vendor and one of the promoters of the company, and by an agreement dated 8th and 11th January 1886 between him and Mr Weir, as representing the company (then about to be formed), he agreed to sell the paper-mills, plant, machinery, and buildings at the price of £12,000, payable to the extent of £4500 in the fully paid-up shares, and as regards the balance of £7500 by the company freeing and relieving him of his liability under the 'bonds, obligations, and securities' for which he was liable in relation to the business. Had the matter rested there it would have been pretty plain that as regards the £4500 to be taken in shares there never was an agreement to pay cash for these shares within the meaning of the English cases. On the other hand, as regards the £7500 of liabilities, if one of Law's creditors had applied for shares, and had agreed with the company that instead of going through the idle ceremony of his handing them money for the share, and their handing him the amount of Law's debt, the one payment should be set against the other, the transaction would have been very similar to some of those recognised in England as equivalent to a payment in cash. But the matter did not rest on the agreement of January 1886. At a meeting of the directors of the company held on 24th March 1886 (Mr Law being present and acquiescing as an individual in the arrangement there made) it was minuted that 'in respect the price of the mill amounting to £12,000, less amount of bond, say £3500, will amount to £8500, Mr Law has consented to accept of the entire sum of £8500 in fully paid-up shares of the company.' Now, this was the arrangement which was actually carried out, and it seems to me to have constituted an entire novation of the agreement of January 1886.

"As regards the mode of payment of the price of the concern, the company were no longer bound to pay Mr Law's business debts in money except to the extent of the bonds for £3500, but these were heritable bonds, amounting with interest to £3456, 5s. 10d., and they were paid by the company.

"When that was done there remained no obligations on the part of the company to pay money to creditors of Mr Law, but only to issue fully paid-up shares to the value of £8500. The foundation in fact for his argument that the company were bound to relieve him of his liabilities, including his liability to pay £2500 to the Clydesdale Bank, thus disappears, and the result is to place the £4000 for which he agreed to accept fully paid-up shares (including the shares now in question) in exactly the same position as the £4500 which he agreed to take in the form of shares by the original agreement of January 1886. In neither case, at the time when he bound himself to take the shares, was there any money due to him by the company, their sole obligation towards him being to issue the shares in his favour as fully paid-up.

"The vital importance of this decision is pretty well brought out in *White's* case, L.R., 12 Ch. Div. 511.

"There must often be hardship in the enforcement of the statutory rule, and I do not doubt there is hardship here, but the statute must receive effect."

The respondent reclaimed, and argued—It was admitted that the number of shares which the respondent had received as part price of the mills and business must be paid for in cash. The case, however, of the other shares which he held was different, and it was not necessary, so far as they were concerned, that the reclaimer's agreement with the company should have been registered as they had been virtually paid for in cash. In article 3 of the company's memorandum of association it was stated that one of the objects of the company was

to carry out the agreement entered into by the reclaimer and Mr Weir in January 1886, one of the conditions of which agreement was that the company should relieve the reclaimer of the debts and liabilities incurred by him in the course of trade. Now, that meant a payment to the creditors in cash. Afterwards it was found not to be convenient for the company to pay the creditors in cash, and the reclaimer then consented to accept fully paid-up shares from the company and settle with his creditors himself. That, however, was not a novation of the original agreement with the company, but was merely a variation of the mode of payment. It still remained the obligation of the company to pay cash to the reclaimer's creditors, and it was by the company's obligation that the matter must be tested. It was not necessary that money should actually pass between the parties to make it a "payment in cash"—*Spargo's* case, L.R., 8 Chan. 407; *White's* case, L.R., 12 Ch. Div. 511.

Argued for the liquidators—The shares must be paid in cash in terms of the Act of 1867, section 25, for here no agreement had been registered as required by the statute, and all the shares received by Law were therefore to be treated as unpaid shares upon which there was a liability to their full nominal amount. It was conceded that this was so in regard to the £4500 part of the price stipulated in the original agreement to be paid in shares. The other shares were in the same position for they were given in substitution for the company's obligation to relieve Mr Law of his liabilities in relation to the business. Even, therefore, if the original agreement had been carried out, all the shares were in the same position and were subject to a liability to their full nominal amount. It was, moreover, impossible to say whether the shares in question belonged to the former or the latter number of shares, as there was no special division or earmarking of them—*Fothergill's* case, 8 Ch. 270. In any event, however, the original agreement was never adopted by the company, and was altered by the minute of 24th March 1886 before it became binding on the company — *Northumberland Avenue Hotel Company*, L.R., 33 Ch. Div. 16. There never therefore was any contract binding the company to pay money to the reclaimer, and hence there was no foundation for the set-off pleaded by him. *Spargo's* case decided that many debts due *hinc inde* need not be actually paid, but might be set off against each other without the actual transference of cash or cheques—*Pagin & Gill's* case, L.R., 6 Ch. Div. 681; *Andress'* case, L.R., 8 Ch. Div. 126. It had been held that if a person held shares, that was *prima facie* evidence he had to pay for them in cash, and the *onus* of proving that he had not so to pay was thrown upon the holder of the shares—*Burkinshaw* v. *Nicolls*, L.R., 3 App. Cas. 1004 (Lord Blackburn, 1027). Any claim to be regarded as a money claim must be for money presently due. There was no such case here, as all that the company agreed to do even by the first agreement was to "free and relieve" the reclaimer of his trade debts, which could not have enabled him to call upon the company to pay him a sum of money—*Barrow's* case, L.R., 14 Ch. Div. 432; *Kent's* case, L.R., 39 Ch. Div. 259; *Jones, Lloyd, & Company, Limited*, L.R., 41 Ch. Div. 159; *Johannesburg Hotel Company*, 1891, L.R., 1 Ch. 119.

At advising—

LORD JUSTICE-CLERK—This case is one of considerable importance to the law, and of very great importance to one of the parties, relating as it does to the question of the liability of a holder of shares in a limited company to pay the amount of them in cash, in a case in which he has *bona fide* accepted them as being fully paid-up shares, under an agreement by which he contracted to convey property to the company, and to take shares in payment of the price of the property handed over.

The case has been repeatedly and anxiously considered by the Court since the debate upon it was heard, and in now stating the opinion at which I have ultimately arrived I desire to express my feeling that no more time has been spent upon it than its importance demanded, whether from a general point of view or in view of the party's interest to which I have already alluded.

The affairs of the Coustonholm Paper Mills Company, Limited, are in course of being wound up under an order of this Court pronounced on 11th June 1889. The present proceedings relate to certain shares of the company held by William Law, on which the liquidators demand that Mr Law shall pay the whole amount, it not being disputed that he holds these shares, and that he has not directly paid for them in cash. Mr Law, on the other hand, maintains that although he has not directly paid in cash he has done so indirectly, in respect that by agreement he made over certain property to the Coustonholm Paper Company, and took payment of the price in fully paid-up shares.

The history of the transaction is clear, and is not in dispute. Mr Law was formerly proprietor of the Coustonholm Paper Mills, and entered into negotiations for its sale with Mr Weir, S.S.C., who was acting for an intended company, the result of which was that he agreed to sell and Weir agreed to buy at a price of £12,000, the buyers stipulating that £4500 of the amount should be payable in fully paid-up shares of the new company, and that the balance of £7500 was to be met by the company relieving Mr Law of his liability under certain bonds, obligations, and securities in which he was debtor. It was also part of the agreement that with the exception of shares to the value of £800 all the other shares were to be subscribed for and paid in cash in the usual way. The shares included in the 800 pounds' worth were to be issued as fully paid up to a firm of engineers for work to be done at the mill.

Mr Law was an active promoter of the company, and was appointed its managing

director. At the first meeting of directors on 24th March 1886 he was present as a director, and at that meeting an important change was made upon the agreement as it had been adjusted between Mr Weir and Mr Law. The company was freed from the obligation to take over Mr Law's liabilities except in so far as these were upon heritable bonds, which amounted to about £3500, and agreed to pay Mr Law the whole balance of the price, namely, £8500, in fully paid-up shares. The result of this arrangement was that the debt which was upon the property was transferred to the company and became their liability, and that Mr Law took, as representing the balance of the price, shares fully paid-up to the amount of £8500, remaining liable for the other debts.

Mr Law having received the shares, negotiated himself with his creditors, and induced them to accept transfers of shares from him in satisfaction of their claims, and no question arises in this case in regard to shares so transferred by him to others. But when the paper company went into liquidation, he held 150 shares, and it is upon these that the liquidators now insist that he shall pay. As regards 20 of these shares there is no question. They were originally allotted to a Mr Wilson to qualify him for the directorate. No cash was paid for them, and they were transferred to Mr Law without value. The question truly relates therefore to the 130 shares, which were issued to Mr Law as part of the consideration for which he conveyed his property to the company.

The claim of the liquidators is under the 25th section of the Companies Act of 1867, by which it is enacted that "Every share of 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."

This enactment is most explicit and clear in its terms. To exempt a holder of shares from liability to payment of their amount in cash, three things are requisite—first, a contract duly made in writing; second, a filing of the contract with the registrar; and third, that the filing be "at or before" the issue of such shares.

In this case there was a contract duly made in writing. It is true that the agreement and subsequent minute of directors and the disposition as regards the heritable property, bear that the company agreed to give, and Mr Law to accept, fully paid-up shares, and I shall assume that the contract was sufficient to meet the requirement of the statute. But it is admitted that the further statutory requirements in regard to the contract were never fulfilled. There was no timeous filing of the contract with the registrar. Mr Law is therefore debarred from saying that the shares he holds are not subject to the condition of the payment of their whole amount in cash. If they have not been already paid in cash, he has no plea on which he can escape from the liquidators' claim.

He maintains, however, that in the circumstances he must be held to have paid for his shares in cash, and that therefore although it be the law that they must be deemed to be held subject to the payment of their amount in cash, the liquidators are not entitled to place him upon the list of contributories, he being in the position of having paid cash. This he maintains on the ground that he sold for a price, that the price being due to him, and he having taken shares, the case is the same as if he had been actually paid in cash for his property, and had then paid the cash back to the company for his shares. He thus seeks to bring his case under certain English cases, and notably the case of *Spargo*, in which it has been held that if an individual has a money claim against a company, and takes shares of the company, discharging his money claim to the extent of the price of the shares, he cannot be called upon to pay liquidators' calls on the shares, as he has a good defence on the ground that he paid for them in cash. These decisions appear to me to amount to this, and to nothing more, that where there is a money claim on the one side for property or services, and a money claim on the other side for shares subscribed for, it is not necessary in order to the shares being held to be paid for in cash that money should actually pass from hand to hand, either in specie or by notes or cheque. A ceremonial payment in cash is not necessary, if the truth of the transaction be that money claims have been satisfied on both sides, the price of the property or services being satisfied by the delivery of the shares as paid-up shares, to the extent of the money payable for the property or services. If that be the position of the transaction in this case, then undoubtedly Mr Law has paid cash for his shares, and cannot be called upon to make any further payment in the liquidation.

But is that the position of the transaction? I cannot hold it to be so. I find no trace in the agreement made between Law and Weir, or between Law and the company, of any contract under which the company became liable to pay any money to Mr Law. On the contrary, as I read the agreement, it is stipulated by the company that they shall not be liable in any money payment whatever. They are under no obligation to Mr Law which would entitle him to demand any money from them, if his demand was for implement of the agreement. Standing the agreement, his sole right as against the company is to have a certain quantity of shares made over to him as fully paid-up shares. If in fulfilment of the agreement the company tender to him shares the nominal value of which amounts to the price set forth in the agreement, they have fulfilled their part of the agreement, and it matters not whether the true market value of the shares in money is a much less amount. On the other hand, if the shares were at a

premium, so that on obtaining them a much larger sum could be realised than the money value of the property on which the agreement is based, the company could not refuse to deliver to him the same number of shares as if they were at par value. Thus it is not a money price to which he is entitled under the agreement, but shares the nominal value of which corresponds to the money price. Mr Law took all the prospects, good or bad, of the transaction. He had under his bargain no right to money from the company. He had a right to shares and nothing else.

It is said that Mr Law by his agreement with Mr Weir agreed to sell his property "at the price of £12,000 sterling," and that this is inconsistent with the case for the liquidators. I do not think so. It was necessary to fix a price for the property as a basis for determining what number of shares should be handed over under the other head of the agreement. At least that was the natural way of ascertaining it. The two heads of the agreement cannot be taken separately. They must be read together, with reference to their bearing the one upon the other. I hold the effect of the agreement to be the same as if it had expressed the agreed-on value and the agreed-on principle of settlement in one article—as if it had said at the end of article 1 of the agreement, after the words "£12,000 sterling," "which price it is hereby agreed shall not be payable in cash, but the said first party agrees that the said price shall be payable as follows," and so on.

It may test the question to consider what would have been the state of matters had Mr Law after entering into the agreement demanded payment of the price in cash. Would it not have been a conclusive answer on the part of the company to say "We have no agreement with you to pay cash; we have only undertaken to deliver to you certain shares; these we tender?" Can it be doubted that their position would have been unassailable? But if the company could resist a demand for cash, how can it be said that Mr Law paid for his shares in cash? His bargain was for shares, on the distinct footing that they were to be handed over to him without his paying cash for them, not as a substitute for cash which he had a right to, but in fulfilment of the stipulation in which his claim against the company was to be met by an issue of shares. The question whether he would get what really represented in value the £12,000, or what would be of less value or of more value, was a speculative question, and the transaction was on Mr Law's part essentially speculative. He had no right to £12,000 or any other sum. He had only a right to shares of that nominal value. Had the company failed to fulfil their part of the agreement by issuing the shares to him, I cannot think that his remedy would have been to maintain that he had sold the property to the company for £12,000, and to sue them for that sum. If he maintained the contract, he could only maintain his right to receive certain shares. If he desired to state an alternative, it appears to me that the only alternative he could state would be one of damages. And the measure of his damage would be the loss he sustained by not getting the shares issued to him.

I come therefore, after the best care I have been able to give to the consideration of the case, but in the end without doubt or hesitation, to the conclusion that Mr Law's shares, being under the 25th clause of the Companies Acts shares which must be deemed to have been issued and to be held subject to the payment of the whole amount thereof in cash, they have not been paid in cash, and that as "the same have not been determined otherwise by a contract duly made in writing and filed with the Registrar of Joint-Stock Companies" in terms of that Act, the liquidators' plea must prevail.

But it is said that this view of the matter is contrary to decisions which have been pronounced in England. Although we would not necessarily be bound by decisions of the English Courts, I agree with the Lord Ordinary in thinking, that where there are English decisions giving distinct opinions upon the interpretation to be given to a British statute, we ought to follow them unless there seems to be very strong ground for doubting their soundness. But it is necessary before considering that matter to ascertain whether the English decisions do result in a different view of the law from that which commends itself to us, looking at the question from our own standpoint. Now, in this particular case, after examining the English cases, I am satisfied that they in no way conflict with the opinion which I have expressed, and that, as I said before, they only decide that payment of shares may be made without an actual passing of money or cheques in cases where there is on each side of the transaction an obligation to pay cash, and the claim for cash on each side is held to be paid by the discharge of the other.

The leading case in which this was held was the case of *Spargo*. If that case be examined, it will be found to be essentially different from the present, although resembling it in some of its external features. Spargo sold a mine to a company. The sale was for cash, and the company could have had no defence against a demand for an actual cash payment in settlement of the price. He also applied for and had allotted to him in the ordinary way a quantity of shares of the new company. What then occurred was this, that instead of the company paying him a cheque for the whole price of the mine, and he paying them a cheque for the whole price of the shares, he was credited with the one sum and debited with the other, and a balance having been brought out against him, he paid that balance in cash. In short, instead of handing money backwards and forwards unnecessarily, the contracts of both parties were implemented by ascertaining a balance of money liability, and by the person who on making up the account

was due the balance, paying it. In short, it was a more convenient mode of settlement, but in no way affected the rights of parties. Spargo actually paid for his shares. They were not delivered to him as being fully paid-up shares. He took them under the agreed-on obligation of an ordinary applicant for an allotment, that he should pay for them, and he did pay for them. The company, on the other hand, did not pay the price of the mine in shares. They paid according to their agreement in cash. All that was decided by the Court in that case was this, that although each party had a right to be paid in money for what he was selling, it was not indispensable to its being held that the money was paid, that the actual cash or equivalents of cash should be *in forma specifica* handed back and forward. The case is, in my judgment, entirely different from this case.

The present case seems to me to have much more resemblance to a subsequent case—that of *White*—in which the decision was to the same effect as that which I hold should be pronounced here. In that case a company agreed with a newspaper proprietor that if he inserted certain advertisements he should be paid the amount chargeable for the advertisements in fully paid-up shares. The advertisements were inserted, and the proprietor made out an account and delivered it to the company, upon which the company allotted him shares to that amount as fully paid up. The contract was not registered in terms of section 25 of the Companies Acts, and the company afterwards went into liquidation. In that case Lord Justice James, who was one of the Judges who decided *Spargo's* case, held without hesitation that the liquidators' demand under the 25th section of the Act must receive effect. He held that the company never came under any obligation to pay any money, which is just the case here. He held that the bargain was that White should "accept payment in shares, and must not look for cash," which is just the case here. Therefore he says, "There never was that money demand, which was capable of being, I do not say set off in the ordinary legal sense, but set off by the parties meeting and agreeing to put debt against debt. That being so, it seems to me utterly impossible to bring the case within *Spargo's* case, and consequently the case must fail." I can see no distinction whatever between this case and *White's* case, and, on the contrary, find the grounds of Lord Justice James' judgment, in which his brethren concurred, to be entirely consistent with the views I have already expressed in the case we are dealing with.

But *White's* case further disposes of the very plausible argument that the naming of a definite sum or price makes the transaction for the sale of the article or property to the company practically a sale for cash, notwithstanding that there is an agreement to take shares. In *White's* case it was argued—and the Vice-Chancellor had given effect to the argument—that the services were rendered, and White's account for them was handed in, before the issue of the shares, and the company in their letter had put their stipulation thus—"provided you are willing to accept payment of your account in fully paid-up shares." It was argued that this was a money account due by the company. But, as Lord Justice Cotton pointed out, the rendering of the account was necessary for the fulfilment of the contract, in order to ascertain what quantity of shares should be allotted. It was, as he expresses it, "merely for the purpose of ascertaining the *quantum*, as a measure of the number of shares that were to be allotted." In this case the ascertainment and fixing of a price by the agreement was necessary for the ascertainment of what number of shares the company would require to allot to Mr Law in order to fulfil their contract. There was no intention to contract on any other footing than that the company should allot and Law should accept fully paid-up shares. The agreement on a price had no other purpose than to give a basis for ascertaining the number of shares to be allotted.

I have only further to point out, that while this case is undoubtedly a very hard one for Mr Law, there would be hardship of a different kind if he escaped from the legal net in which unfortunately for him his feet are set. He could not be in his present position had his contract been registered. Such registration is no mere formality. It tends to the protection of the creditors of limited liability companies. It is the creditors of the company of which Mr Law was a shareholder who through the liquidators are insisting that he shall not be allowed now to found upon a special contract with the company, he having failed to take the steps required by statute as preliminary to his being allowed to found upon his contract in a question with creditors. Persons transacting with such companies have a right to be protected against the risk of finding in a liquidation, that although ostensibly there is a large security in the shape of unpaid capital, much of this security is taken away by large quantities of the shares issued having been allotted as fully paid-up shares. Therefore the prescription that such allotments shall be registered, otherwise the shares will be deemed to be payable in cash, is one which has a most practical purpose, and however hard the case may be of one who has failed to see that the statutory requirement has been fulfilled, he has really only himself to blame.

The view I take of the case, and which has been already expressed, makes it unnecessary to notice a subsidiary point which was raised in regard to the identification of the particular 130 shares in question. The point seems not to have been raised before the Lord Ordinary, and as I am at one with his Lordship in disposing of the case upon the broad grounds which I have indicated, I refrain from saying anything upon it.

LORD YOUNG—The questions which we

have to decide arise in a liquidation process, and regard only 130 out of a much larger number of shares in the insolvent company which were issued to the respondent. These 130 shares now stand in the register in the respondent's name as the holder, which he is admittedly, and the questions about them result in this one—whether or not the liquidator has rightly entered him in the register of contributories in respect thereof as being wholly unpaid. But as these questions are of a very general character, so that our opinion upon them will in its scope extend to many more shares which were issued to the respondent, the Lord Ordinary has very properly, if I may presume to say so, considered them with reference to the legal validity and effect of the contract between the respondent and the company, and all that passed between them in pursuance of it.

The respondent was the owner of certain paper mills, plant, machinery, and buildings which the company desired to acquire for the purposes of their business. Accordingly in January 1886 a contract was made between them whereby the former sold and the latter purchased the property "at the price of £12,000 sterling." By a term of the contract it was agreed that "the purchase price" to the extent of £4500 (which was subsequently increased to £8500) should be payable "in fully paid-up shares" in the company. The details of the contract beyond what I have stated are immaterial. This contract, the honesty of which is not questioned, and we have no reason to doubt, was completely executed in the sense of being implemented. The company got the property with a good title, entered into possession, and paid the price as agreed—ostensibly at least, and really as both parties believed.

Of the shares that were issued to the respondent all certified as fully paid, we are, as I have already stated, directly and immediately concerned with only 130, the remainder having been transferred by him to others on contracts of which we have no knowledge. With respect to these 130 shares the liquidator maintains that the "amount thereof," viz., £1300 not having been paid in cash as required by section 25 of the Companies Act 1867, the respondent as the holder must be entered as a contributory. Whether or not the amount of these shares has been paid in cash is the question to be decided, and it turns and depends exclusively on legal considerations and argument, the facts not being in controversy. These facts I have stated fully and exhaustively so far as necessary to raise the legal question, which I propose in the first instance, and indeed principally to consider, deferring meanwhile the statement of a detail on which what I regard as a subsidiary question has been raised.

It may conduce to clearness and brevity in explaining my views to regard "the whole amount" of the shares in question, viz., £1300, as the whole contract price of the property sold by the respondent to the company, and doing so cannot possibly affect the argument one way or other. And the proposition which I propose to consider is this—that if the owner of property (land or goods), being money's worth, contracts to sell it to a company at the price of £1300 sterling, agreeing by the same contract to take payment of that price in fully paid-up shares in the company, and the company takes over the property and makes payment therefor with shares, certified as fully paid to that amount, "the whole amount" of the shares is paid in cash.

The proposition involves the consideration of two questions, viz., 1st, what is "payment in cash,' and 2nd, what is "a fully paid-up share;" and I shall try to consider them distinctly and separately, observing in the outset that in the consideration of them we have no aid from section 25 of the Companies Act or from anything except the general rules of the common law, resting, I hope and believe, on reason and good sense.

And, 1st, what is meant by the word "cash" when used as in sec. 25 of the statute. Speaking negatively, its meaning is not confined to "currency"—that is to say, minted gold and silver, and such bank-notes as are by statute legal tender. But if not so limited, what possible guide can we have except the rules of the common law, *i.e.*, the rules of reason and good sense, applicable to the particular case in which the question as to the meaning of the word may arise? But these rules are not confined to questions under section 25 of the Companies Act. And this suggests an observation which I regard as one of much general practical significance, that every statute is to be construed and applied with a due reference to the rules of the common law, which it is undesirable, and indeed (fortunately) impossible that every statute should keep on repeating in case we should forget or neglect them in the particular case. My conclusion therefore is, that the amount of any shares is to be held or not to have been paid in cash by reference to the rules of the common law applicable to the facts of the individual case in which the question arises.

2nd. What is a "fully paid-up share"? It is, I think, clearly a share "the whole amount" whereof has been paid in cash. It is also, in my opinion, clear that a certificate by the proper officers of a company that certain shares are fully paid up is an acknowledgment, which is *prima facie* binding on the company and available to the holder, that "the whole amount thereof" has been paid in cash. By the expression *prima facie* I mean to imply that such certificate may in any particular case be impeached on the ground that the company's officers were not warranted in issuing it.

It follows from what I have said that by the contract I am dealing with the purchasing company obliged themselves to deliver to the seller shares in the company, the "whole amount" of which was a certain specified sum of money sterling, and certified in the usual binding manner to have

been paid, and as I assume and think, paid in cash. I so assume and think, because by section 25 of the Companies Act 1867, presumably known to both the contracting parties, the amount of the shares could not be effectually paid, *i.e.*, paid at all, otherwise than in cash. But beyond this, section 25 cannot affect the construction of the contract, or the meaning and intention imputable to the contracting parties.

The contract price of the property is specified in sterling money, a fixed sum in no respect uncertain or variable. Then it is agreed that this "price" shall be paid by delivering shares of the same amount in sterling money—neither uncertain nor variable—with a formal and of course true and valid certificate that this amount has been paid. It is obviously immaterial to the argument whether the agreement was that the whole or only a certain fixed part of the contract price should be thus paid. I have, for simplicity, assumed that the whole was, and that the whole exactly corresponded with the amount of the 130 shares in question, viz., £1300, "the amount" of them being that exact sum, and incapable of variation. Now, the parties manifestly thought and assumed that the amount of the price might be set off against the amount of the shares, which being thus (by set-off) paid in cash might legitimately be certified as paid accordingly. Whether or not this was a legitimate assumption is, I think, the question in the case. The statute only declares that the amount of the shares must be paid in cash. Whether a payment in cash has been operated by "set off" is a question at the common law, as I have already pointed out. That it is capable of being so is not doubtful. Whether or not it has in any particular case depends on the facts of it—and is I think very plainly a question at the common law.

Now, it was conceded, as I understood, by the counsel for the liquidator that the price of property sold to a company may be set off against the amount of shares so as to operate payment of the latter in cash under section 25 of the Companies Act, provided the contract for the sale of the property at a cash price is followed (at any interval however short) by an agreement to take payment thereof in paid-up shares, but not if such contract of sale, and such agreement as to the mode of payment, are in the same instrument—or of course merely simultaneous in the case of moveables—the sale of which requires no instrument. I must confess that I am unable to appreciate the logic or sense of the distinction. That the thing cannot be done in any way is an intelligible proposition, but that it cannot in the one way but may in the other, which does not appreciably differ from it—both being in the power and option of the parties who want to do it—is I own unintelligible to me. At the common law (which in my opinion governs) we should I think characterise such a proposition as absurd; and if appeal is made to section 25 of the Companies Act, it does, I think, at least approach the ridiculous to suggest that the evil which that clause was intended to avoid exists when the thing is done by one instrument but not when it is done by two—the thing itself being such as the parties were entitled to bargain for and accomplish without impediment from the statute.

It was argued on the part of the liquidator, that when the agreement to take payment of the price otherwise than in money occurs in the contract of sale, a money debt, or obligation to pay money, never exists, and that there is thus no debt (in money) due to the seller which can be set off against the money debt due by him to the buyers (the company.) But is this so? I think it clear, on the contrary, that a contract of sale of land (or any commodity) at a fixed price in sterling money does of itself constitute a money debt and obligation, notwithstanding an agreement for the payment of it in a particular way. Such agreement is in its nature subsidiary. Suppose (the property being delivered and the period for paying the price arrived) that payment is not made in the manner agreed on—what is the seller's right under the contract? or has he none? I should think it clear at the common law that he has a right of action for the money price, although it may well be that he may elect if he pleases to sue for payment in the particular manner agreed on. Put the case that the mode of payment agreed on is that the buyer shall convey to the seller a certain house or piece of land of equal value, and fails to do so, having discovered that he cannot, or for any reason or for none does not. Is it doubtful that the seller may demand and sue for the price in money? The assumption on which this argument against the set-off rests is therefore unfounded, if the rules of the common law are to govern, and I know of no others which can be appealed to.

It was further urged that when the seller got the shares certified as fully paid-up, although unwarrantably, they not being so in fact, he got all the price that he bargained for. But this is certainly untrue in fact, and the suggestion if made by a private party would be dishonest. The bargain was that the price should be paid by the delivery of shares "fully paid-up" in fact, and not of shares untruly and unwarrantably certified to be so, and it cannot be reasonably or honestly represented that this was not the meaning and intention of both parties.

It was contended for the liquidator that the true import and meaning of the contract was that the respondent should convey to the company his property, of the covenanted value of so many thousands of pounds, as a premium to induce them to give him shares, the amount of which he was to pay over and above, and it was pressed upon us that this was a quite fair and familiar sort of bargain and might have proved profitable by a rise in the value of the shares. If this view is true in fact, that is, if such is the true import and meaning of the contract, any reference to section 25 of the Companies Act is idle, and

we have been wearied and are wearying ourselves in vain with arguments about it. For in this view there is not and never was a contract that the amount of the shares should be paid otherwise than in cash. The registration, before the shares were issued, of the only contract regarding them would have been useless—for it does not relate to the payment of the amount of the shares, but only to a premium or bribe to induce the company to let the respondent have them. It would be a waste of time to dwell on a view so fanciful and untrue. Clause 25 of the Act may or not defeat the intention of the parties as expressed in their written contract, but it cannot warrant a misrepresentation of it, that is to say, the defeasance of it through the medium of misrepresentation.

It is perhaps superfluous to observe that the circumstance of the company being in liquidation does not affect the points I have been considering, which must be dealt with and decided exactly as they would have been, had the company, as a solvent and going company, been demanding and seeking to enforce payment of calls on the shares in question. For the Companies Act 1867, section 25, is applicable to the case of a solvent and going company exactly as it is to a company in liquidation.

I desire to point out the materiality, in my opinion, of the fact that the contract in question is a completely executed (in the sense of fulfilled), as distinguished from a current contract which is still wholly or partially unexecuted. When shares have been issued and registered on a contract between the shareholder and the company that the amount, necessarily a fixed sum of money, shall be paid with—say goods such as the company deals in, it may be that the company is at liberty to repudiate the contract as to the mode of payment, and founding on section 25 of the Act, require payment in cash. But then they shall not have the goods. They are entitled to have payment for the shares in cash, but not in both cash and goods—that is to say, twice over. If, however, the contract has been completely executed—the goods having been received and consumed or sold by the company, and the sellers' account stated and closed in the company's books, he being debited on the one side with the money amount of the shares, and credited on the other with the same sum as the admitted contract price of the goods—the two entries thus balancing each other—I have to state it as my clear opinion that the matter cannot be gone back upon, and that it would be to prostitute section 25 of the Act from its legitimate purpose to permit it to be founded on to the effect that the shares are to be paid for over again in money, and that the goods are not to be paid for at all. But this is the very case we are dealing with. The company got the property which they bought from the respondent years (not many, but still years) before they went into liquidation, and in the respondent's account in their books credited him on the one side with the price (the amount not being disputable or disputed), and on the other debited him with the price or amount of the shares which had been delivered to him. Is it doubtful that according to the rules and principles of the common law this is a clear case of legitimate set-off (not merely pleaded, but allowed and acted on), and payment thereby of admitted mutual debts?

To avoid any risk of misapprehension, I desire to say that the opinion which I have formed and expressed involves no questioning of the proposition that a shareholder of a bankrupt company in liquidation is not entitled to have his name struck out of the list of contributories by reason of a debt (of whatever amount) due to him by the company, or to set-off such debt against the liquidator's claim for calls. What I dissent from, as in my opinion unsound, is the very different proposition, that supervening bankruptcy and liquidation will destroy or affect in any way the validity of a payment by set-off to the solvent company which was good and effectual prior to the liquidation.

Had the company here remained a solvent and going company, it is according to the opinion which I have expressed that they could not have gone back on the implemented contract between them and the respondent, and the account stated in their books, not inaccurately, but in all respects truly, on the footing of set-off allowed and acted on. I am further of opinion that if the solvent company could not have gone back on it, neither can the liquidator. The matter was settled and terminated before the bankruptcy. It will, I should think, be conceded as a generally true proposition that settlements of accounts by set-off, which are of familiar and daily occurrence in the business of companies, are not opened up by subsequent bankruptcy and liquidation. If so, the challenge of the settlement here must be on the specialty that it related to the payment of shares. But here there is no other specialty than such as section 25 of the Companies Act may introduce, and this enactment applies, as I have pointed out, equally to solvent and going companies, so that supervening bankrupty, after any interval long or short, would not affect its operation.

The question therefore comes back to this, could the company, had it continued solvent, have gone back on the settlement by set off?

The views which I have expressed extend to the whole shares delivered to the respondent, and the amount of which is entered against him in the company's books, and credited as paid by the cross entry of the contract price of the property which they got from him, and I am of opinion that the case ought to be decided accordingly, although in terms and in form the order or decree must be limited to the 130 shares now standing in the respondent's name.

But it is my duty to notice and express my opinion on another view which was argued to us, and indeed chiefly or solely

relied on by the respondent's counsel—very reasonably, if they thought it clearly the strongest—for it is sufficient to avoid the demand made in respect of the 130 shares in question. It is founded on the fact, which I have not hitherto stated, that by the contract in question the company obliged themselves to pay the contract price of £12,000 to the extent of £7500 by freeing and relieving him of debts to that amount due by him to certain creditors of his, and that by subsequent agreement the respondent agreed to relieve the company of this obligation to the extent of £4000, and instead to take that amount of paid-up shares, which were accordingly delivered to him, or rather shares to that amount unwarrantably (as the liquidator contends) certified as paid up. The amount of the whole shares delivered to him was £8500, including those to the amount of £4000 just referred to. Now the question is this, whether a distinction can be made between shares to the amount of £4000, as being given for discharging the company of their obligation to pay the respondent's debts to that amount, and the remainder (to the amount of £4500) as being given directly in part payment of the price of the property sold. It is a nice distinction certainly, and it is a pity that there should be occasion to resort to it. But the respondent's counsel sought thereby to avoid the nice, and even subtle and captious, argument against them, that unless an agreement to take payment of the price of property in paid-up shares was made subsequent (however brief the interval) to the contract to sell at that price, there could be no money debt on which to found the plea of set-off. Their contention accordingly was, that to the amount of £4000 there was certainly a money debt due by the company to the respondent, inasmuch as they had bound themselves to pay that amount to creditors of his, and having failed to do so (which they did), and so left him to pay the amount himself, they were his debtors and he their creditor to that amount in cash, and so to that amount a debt due by the company to him which might be set off against any debt due by him to the company.

The liquidator answered, (1) that the company did not undertake to pay the respondent's debts to his creditors to the amount stated, but only to relieve him of these debts; and (2) that it was impossible to say which of the shares delivered to the respondent were in direct payment of the price of the property under the original contract, and which of them were in lieu of their obligation to pay and relieve him of his debts.

I am of opinion that if an individual (or a company) undertakes for an onerous consideration to relieve a man of debts of his to a specified amount, and fails to do so, leaving him to pay them himself, the defaulting party is debtor for the amount, and that a valid plea of set-off may be based on the debt so incurred. I am further of opinion that this company thus became the debtors of the respondent to the amount, strictly in money, of £4000. It was certainly intended that it should be paid by so many of the shares (certified as paid up) delivered to him in 1886 as would amount to £4000, and why this intention should be frustrated I fail to see. Of course this involves the assumption that a money debt of £4000 may be set off against a money debt of the like amount due for shares, although to be paid in cash. But the assumption is, I think, clearly sound.

Now, what has the distinguishing and identification of shares to do with the question of set-off? Take any number of shares you please—the amount of the whole of them was a certain fixed sum payable in cash to the company by the holder, and if he was the company's creditor in a debt of £4000, he might, I should think, clearly on his part set it off, and the company on theirs take it as set off accordingly against his liability on any of the shares not exceeding that amount, and if the shares are undistinguishable, which the liquidator here says they are, what can it signify to which of them, within the amount of the debt, the set-off shall apply? The respondent requires that it shall be applied to the 130 shares now standing in his name. Upon these shares he stands debited in the books of the solvent company with £1300 as money due by him in respect of them, while *per contra* he is credited with the debt of £4000 due to him by the company. I mean, of course, that this is the result of an intelligent reading of the entries. There were other entries, but it was manifestly immaterial to the company which of the cross-entries should be set off against each other. Has the liquidator on behalf of the creditors any ligitimate interest to oppose the respondent's choice? None that I can see—unless indeed he can reasonably say that he is apprehensive of the benefit of the whole or part of this set-off being claimed by the present holders of other shares assigned to them by the respondent. No suggestion to that effect has been or can, I think, reasonably be made, and I should be greatly indisposed to listen to a mere fanciful suggestion in order to do what I should regard as injustice.

I am of opinion with respect to all the shares here in question registered in the respondent's name, that they are fully paid up, and therefore that the respondent ought not to be entered in the list of contributories in respect of them.

LORD RUTHERFURD CLARK—I agree with the Lord Ordinary, and think his interlocutor ought to be affirmed.

LORD TRAYNER—The liquidators of this company propose to place Mr Law's name on the list of contributories as the holder of 150 shares. Mr Law objects to this on the ground that his shares are all fully paid up, and that he is under no liability for calls or otherwise in respect thereof. Of the 150 shares 20 are held by him under transfer, the remainder under original allotment; but this difference in the title under which the shares are held makes no difference in the

question of liability, having regard to the admitted facts of this case.

The company now in liquidation was formed for the purpose of taking over the Coustonholm Paper Mills, then belonging to Mr Law, and of carrying on the business then and there carried on by him. By agreement dated 8th and 11th January 1886, entered into between Mr Law and one of the promoters of the company, Mr Law sold the mills with the plant, machinery, and whole pertinents for the price of £12,000, which was to be payable as follows—£4500 in fully paid-up shares, and the balance of £7500 by the company freeing and relieving him of his liability for the bonds, obligations, and securities for which he was then liable "in relation to said business." In consequence, as was explained at the bar, of the shares of the company not being taken up by the public as had been expected, the agreement above referred to was modified at a meeting of the directors of the company (so called although the company was not yet registered) held on 24th March 1886, at which Mr Law was present. The minute of that meeting bears that "it was further agreed, in respect the price of the mills amounting to £12,000, less amount of bonds, say £3500 will amount to £8500, Mr Law has consented to accept of the entire sum of £8500 in fully paid-up shares of the company. Mr Law admits that he acquiesced in the arrangement thus made, and signed the minute of the meeting in token of his acquiescence. It is made a question now whether Mr Law's contract with the company is that expressed in the minute of 24th March, or that expressed in the formal agreement of January. It does not appear to me to affect the result whether the contract is to be taken as set forth in the one document or the other. Both agreements are the same in character, for by both and each of them Mr Law agreed to convey his property to the company in return for a certain number of shares, and for relief from certain obligations; the number of shares and the amount of obligation from which relief is to be given differ, but that is not material to the question before us. I am of opinion with the Lord Ordinary that the agreement made in March "constituted an entire novation of the agreement of January," and therefore that the agreement of March is that which must be taken as regulating the rights and regulations of the parties. In that view, and having regard to the admitted facts of this case, and the law applicable thereto, I cannot see how Mr Law can successfully maintain that his name should not be placed on the list of contributories.

By the 25th section of the Companies Act of 1867 it is provided that 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 at or before the issue of such shares. Now, under this statutory provision there are only two modes in which a person holding shares in a company can escape from the position of a contributory in its liquidation. Either he must have paid for his shares in cash, or have registered "at or before the time when such shares were issued a contract duly made in writing," which determines that the shares are not to be paid for in cash. Mr Law cannot plead the latter of these grounds, for, assuming that the minute of 24th March may be regarded as such a contract as would fulfil the statutory description (whether it would or not I do not say), it was never filed with the registrar. Nor can Mr Law plead the other ground of exemption from liability, because he has not paid in cash for his shares. It is said, however, that he must be dealt with as if he had paid cash because he gave property in return for the shares. But this argument fails, I think, on the authority of the cases decided in England to which we have been referred and in which decisions I concur. The effect of these decisions is this—if the person to whom shares are issued has a money claim against the company, that money claim may be set off as cash paid against the shares, it not being necessary in order to satisfy the provisions of the statute that the money claim should be paid in cash to the shareholder and handed back by him in cash as payment of the shares. The mere paying of money from hand to hand is not necessary; but it must be a money claim exigible from the company which is set off against the cash due for the shares. Now, Mr Law had and has no money claim against the company. He sold or rather he bartered his property for a certain number of shares and relief from a certain obligation. I leave the latter element out of view because the relief stipulated for has been given. That he had no claim against the company for money may be shown in this way. If he was here in an action for enforcing his right against the company, what could he claim? Not money, because the company offering him shares to the amount specified would fulfil its obligation. And, on the other hand, if the company had been successful and the shares had risen in value Mr Law could have declined payment of £8500 in money if offered to him and have insisted on delivery of 850 shares. Shares, therefore, and not money, was what Mr Law was entitled, and alone entitled, to demand—shares, and shares only, the company was bound to give. It follows that if Mr Law had no money claim against the company, he had no claim which he could set off against his liability for "the whole amount" of the shares allotted to him, and if he could not plead set off and has not paid cash "to the whole amount" of his shares his liability therefor continues.

It is said, however, that what Mr Law stipulated for was "fully paid-up shares;" that if his shares are fully paid up no liability attaches to them; if they are not, then Mr Law is now entitled to demand the price of his property, and set off that price

against liability as a contributory. It is not open to doubt, I think, that the shares held by Mr Law are not fully paid up—free from all further liability. Whatever these shares might be held to be in a question with the company if it was solvent, they cannot be regarded as fully paid up in the liquidation. The amount of the shares has not been paid in cash, and Mr Law has failed to take that step pointed out by statute whereby he could have given these shares the character and privileges of paid-up shares. If—not being paid-up shares—Mr Law is still a creditor for the price of his property, he may have a claim against the company's estate, but to hold him entitled now to set off that claim against his liability as a shareholder would be to give him a preference over the other creditors of the company. Further, compensation or set-off against liability as a contributory cannot be pleaded in a liquidation.

I have said that in my opinion the agreement made in March 1886 is that which must be taken as regulating the rights of parties. Would the result in this case be different if that agreement was set aside and the agreement of January substituted? I think not. Under it there was no obligation on the company to pay Mr Law any money. The company did, however, thereby undertake to relieve him of certain money obligations. It is pleaded that part of the shares allotted to Mr Law were allotted that he might fulfil the company's obligation of relief, and that being so allotted against an existing money obligation, no claim can now be made in respect of these shares on the principle of the decided cases I have already referred to. Without either expressing assent to or dissent from this view, I am of opinion that Mr Law cannot take any benefit from it. He has not shown—and cannot show—that the shares now held by him are shares which were issued by the company under their obligation to relieve rather than under their obligation to deliver shares.

I agree with the Lord Ordinary in thinking this a hard case for Mr Law. He has parted with his property for no valuable consideration, and the consideration which he did get has only, as it turns out, imposed upon him an additional liability. The shares allotted to him might have proved very valuable, and he doubtless thought they would. But it would be incorrect, in my view, to say that Mr Law got nothing for his property. He got exactly what he bargained for, and all that can be said is that, as matters have turned out, he made a bad bargain. He could have protected himself by a simple enough measure pointed out by the statute, and having failed to do so, must now contribute to the payment of those creditors whose debts might never have been incurred had they known that the greater part—or at all events a great part—of the capital of the company was represented by paid-up shares held by one of the shareholders.

The Court adhered.

Counsel for Liquidators—D.-F. Balfour, Q.C.—Burnet. Agents—Carmichael & Millar, W.S.

Counsel for Respondent—Asher, Q.C.—Strachan. Agents—Campbell & Smith, S.S.C.

Friday, July 10.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

COCHRANE *v.* STEVENSON.

Heritable and Moveable—Seller and Purchaser—Fixtures—Pictures Attached to the Wall.

In a dining-room in a mansion-house whose general design was wainscot panelling, there were three pictures all painted upon canvas on stretcher frames, and fastened to the wall by means of small plates and screw-nails concealed by dust mouldings. Two of the pictures were in ordinary gilders' frames, and behind them the wall was apparently roughly panelled. The third picture was in a mirror frame, which formed part of the architectural decorations of the room, but out of which it could be taken without injury to itself or the frame. Behind this picture there was a bare stone and lime wall.

Held that none of the pictures were fixtures, and that they did not pass to the purchaser of the mansion-house.

In December 1886 William Stevenson, Esq. of Househill, purchased the mansion-house of Hawkhead, in the county of Renfrew, from the trustees of the late Earl of Glasgow. In 1888 the Hon. Lady Gertrude Julia Georgina Boyle or Cochrane, daughter of Lord Glasgow, purchased the furniture in Hawkhead, and took possession of the same after Lord Glasgow's death, on 23d April 1890, had brought a lease of Hawkhead furnished to an end. Lady Gertrude requested Mr Stevenson to deliver up three pictures in the dining-room of Hawkhead as being part of the furniture of the house. Two of the pictures were portraits of Lord and Lady Wharton respectively, and the third was a portrait of Charles II. This Mr Stevenson declined to do on the ground that the pictures were fixtures, and had passed to him as part of the heritage. Thereupon Lady Gertrude and her husband, the Hon. Thomas Horatio Arthur Ernest Cochrane, brought an action against Mr Stevenson for delivery of the pictures, in which they pleaded, *inter alia*—"(1) The defender never having purchased the said pictures, has no right to retain possession of them. (3) The pictures are moveable, and are therefore the property of the pursuers."

The defender pleaded, *inter alia*—"(3) The defender should be assoilzied in respect—1st, The pictures in question form part of the structure of the house; 2nd, They are heritable; 3rd, They were conveyed to the defender by the disposition in his favour."