

Argued for respondent—The appeal was incompetent in both branches. 1. The true test of the value of the cause was to be found in the initial writ setting forth the amount of the creditor's debt. In the present case that writ was the notice given to the debtor under the A. of S. 22nd December 1882, sec. 1, and the sum set forth was only £12, 9s. 2d—*Henderson v. Grant*, March 17, 1896, 23 R. 659; *Dickson v. Bryan*, May 14, 1889, 16 R. 673. Moreover, this petition had not really been disposed of on its merits, for having been refused on a caveat there never had been a process, so there could be no appeal as to the merits—*Adam & Sons v. Kinnes*, February 27, 1883, 10 R. 670. The sole point raised was the question of expenses before the Sheriff, and that formed the true value of the cause as appealed. 2. It was not competent to appeal against an order dealing with caption, which was pronounced after the date of the appealable interlocutor. It was part of the Sheriff Court procedure, with which the Court of Session had no concern, and was not an interlocutor in the cause.

Argued for appellant—1. It was competent to appeal against a sheriff's interlocutor, even though the only point in the appeal was a question of expenses—*Fleming v. North of Scotland Banking Company*, October 20, 1881, 9 R. 11. The true criterion of the value of the cause was not, as the respondent maintained, the amount stated in the statutory notice, for the petition for cessio might involve property of far greater value than £25. 2. Owing to the fact that part of the process was in the pursuer's hands, the defenders were unable to get extract of the interlocutor. Accordingly, the order refusing caption was subject to appeal, even though it was pronounced subsequent to the Sheriff's interlocutor disposing of the merits. It was a judicial step in the process which might be competently reviewed—*Watt v. Thomson*, July 18, 1868, 6 Macph. 1112, at p. 1123. Alternatively if it constituted a separate process in itself, it was equally competent to appeal.

LORD PRESIDENT—I think the appeal is competent because it cannot be brought to the test by pronouncing it to be an action for a money payment, but is an application for an order *ad factum præstandum*.

On the merits I am not aware that the Court is inclined to encourage appeals upon questions of expenses, and in this case I see no reason for interfering with the manner in which the Sheriff has exercised his discretion.

As regards the process caption, it is an order by the Court for recovery of documents belonging to itself, and is not one with which we have anything to do by way of appeal.

I am for refusing the appeal.

LORD ADAM—I am of the same opinion. Mr M'Lennan says that the test of the value of the cause is to be found in the initial writ setting forth the amount of the creditor's debt, but that is not the case,

because under the application for cessio it may have been proposed to sequester estate to the amount of £100, and the intimation would be no criterion of the value of the cause. Accordingly, I think that the appeal is competent, but on the merits I see no reason for interfering with the decision of the Sheriff.

As regards caption, I do not think the Sheriff's order is an interlocutor in the cause. It is applied for by an agent who wishes part of the process which has been borrowed to be returned, and is obtained at the instance of the Sheriff-Clerk. He goes to the Sheriff and gets a warrant to apprehend in respect of the failure to implement the order. That is not an interlocutor, and accordingly we cannot interfere with the procedure of the Sheriff in his own Court.

LORD M'LAREN—I hope it is understood that the Court gives no encouragement to appeals from the inferior courts on a matter of expenses, least of all where the question is of inconsiderable value as here.

On the matter of caption, that is an order of the Sheriff-Substitute, and is not an interlocutor in the *lis* between the parties. Caption is a disciplinary process in the exercise of the authority which every court has over the agents who practise before it to enable the clerk of court to account for the documents entrusted to his charge. It is directed, not against the party but the agent, and therefore I agree with your Lordship that we have nothing whatever to do with it in this case. The parties know very well if it is used in error that there are other remedies open to them than appeal.

LORD KINNEAR concurred.

The Court dismissed the appeal.

Counsel for the Appellant—A. S. D. Thomson—Hunter. Agent—J. B. Lee, S.S.C.

Counsel for the Respondent—M'Lennan. Agent—Robert Broatch, Law-Agent.

Friday, December 16.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.]

BROWN v. STEWART AND OTHERS.

Company—Directors—Directors' Duty (1) to Applicants for Shares, (2) to Company—Title to Sue—Title of Shareholders to Sue Directors of Company.

The articles of association of a company registered under the Companies Acts empowered the company, notwithstanding that the whole number of shares in the capital might not be subscribed, to commence and carry on busi-

ness "when in the judgment of the directors a sufficient number of shares shall have been subscribed for to justify them in so doing."

A shareholder to whom shares had been allotted by the directors on an application made at a date subsequent to the incorporation of the company, raised an action against the directors to have them ordained to accept from him a transfer of his shares, and to repay to him the price he had paid for them on allotment. The ground of his action was that the directors had committed a breach of their duty as directors in proceeding to allotment and in commencing to carry on the business of the company before a sufficient number of shares had been subscribed for to entitle them to do so.

Held (aff. judgment of Lord Stormonth Darling) that the action was irrelevant, on the ground (1) that the directors in making the allotment were acting as agents, not for the applicant for shares, but for the company, and (2) that the pursuer must seek his remedy, if he had any, through the company, the act complained of being *intra vires*, and capable of being ratified by the shareholders.

Foss v. Harbottle, 2 Hare 461, and *Orr v. Glasgow, Airdrie, and Monklands Railway Company*, April 24, 1860, 3 Macq. 799, followed.

This was an action at the instance of William Stevenson Brown against Sir Mark J. Stewart, Bart., and others, in which the pursuer sought declarator that the defenders were bound jointly or severally to free and relieve the pursuer of the obligations undertaken by him as a member of the Thistle Mechanical Milking Machine Company, Limited, and to accept from him a transfer of the 400 shares in the said company allotted by them to him, and to repay to him the sum of £400 paid by him on application therefor. There was an alternative conclusion that the defenders should be ordained jointly and severally to pay to the pursuer the sum of £400.

The pursuer averred that the Thistle Mechanical Milking Machine Company, Limited, was incorporated by registration under the Companies Acts 1862 to 1890, on 28th March 1898, with a view to carrying out a certain provisional agreement for the purchase of a patent, and that the defenders were the first directors thereof; that the pursuer, relying on the directors acting honestly, carefully, and with reasonable prudence, applied on the 8th April for 400 shares of £1 each in the company, and that these were allotted to him by the defenders on 23rd April 1895.

The pursuer continued—"(Cond. 4) Article 4 of the articles of association of the company provided—"The company, notwithstanding that the whole number of shares in the capital may not be subscribed for or issued, may commence and carry on business when, in the judgment of the directors, a sufficient number of shares shall have been subscribed for to justify them in so

doing.' On said 23rd April 1895, the date of the first allotment of shares in said company, 6126 shares only had been applied for, the sums payable on which could not yield one-half of the minimum cash obligations of the company to the vendors if the said agreement was adopted. . . . In terms of the articles of association aforesaid, the defenders, as directors foresaid, were bound to exercise their judgment for the benefit of the company in allotting shares in said company and in deciding whether it ought to commence and carry on business with the capital which had been subscribed as aforesaid. They were bound to meet together, and to hear and consider one another's views of the probable prospects of the company, and to come to a *bona fide* and honest decision for the best interests of the company, either unanimously or by a majority, as required by the articles. Had they so acted, they could not, as honest, reasonable, and prudent men, have determined that the said subscription justified them in proceeding to allotment and in commencing the business of the company. In the circumstances no allotment should have been made to the pursuer and others on 23rd April 1895 as above mentioned, and the money deposited by them on application should have been returned to them. The said cash obligations of the company under said provisional agreement being, to the extent of at least £11,000, payable within twenty-one days of the first allotment of shares in the company, it was in the interest of the defenders Alexander Shiels and Thomas Cormac Nelson to proceed to allotment at as early a date as possible. The company had not at said 23rd April 1895, and never has had, the means to fulfil, and it had not at said date, and never has had, any prospect of obtaining the means to fulfil, the obligations which said provisional agreement, if adopted, laid upon it, still less to enable it to carry on business. This was well known to the whole defenders, and particularly to the said defenders Shiels and Nelson; nevertheless the defenders recklessly and negligently and in gross breach of their duty, and the defenders Shiels and Nelson corruptly and in their own private interest as aforesaid, proceeded to allotment on said date, and commenced to carry on business. They did not meet together, or discuss or consider the propriety of commencing the business of the company, or of proceeding to allotment of its shares. No vote was taken by them as directors of the company upon these matters. The whole defenders thus acted with gross and culpable neglect of their duty as directors, and indifference to the interests of the company; and the defenders Shiels and Nelson acted not only negligently, but corruptly and fraudulently sacrificed the interest of the subscribers for shares for their own benefit."

The pursuer then set forth that soon after the allotment a supplementary agreement had been entered into by the syndicate of vendors and the company (who had been of the parties to the original provisional agreement), and that at the date of the adjustment thereof the defenders had, recklessly

and negligently, and in gross breach of their duty as directors, arranged to adopt the provisional agreement. "At the date of adoption of said provisional agreement the defenders knew, as was the fact, that only 7226 shares in the company had been subscribed for, notwithstanding the personal exertions of the syndicate and their friends, and they were well aware that no substantial increase of subscriptions was to be expected, and that the company had not the means, and had no prospect of obtaining the means, to fulfil the obligations undertaken by the adoption of said provisional agreement. It was their duty to the shareholders at said date, instead of adopting the said provisional agreement, to advise the shareholders that the enterprise for which the company was constituted could not be successfully prosecuted, and to take steps for the winding-up of the company, and for the return to the shareholders of the sums paid upon their shares. The said adoption of the provisional agreement was the act of the defenders as aforesaid, without authority from any special or general meeting of the company; and said supplementary agreement, which was executed by the defenders Sir Mark J. Stewart and Andrew Clement, directors, and the said James Walker, secretary, on behalf of the company, was not communicated to the shareholders. The adoption of said provisional agreement, as modified by said supplementary agreement, rendered the company in the knowledge of the defenders hopelessly insolvent, and without the means or the prospect of means to fulfil the obligations thereby undertaken, or to prosecute the business for which it was formed." "(Cond 6) From the first balance-sheet of the company, dated in June 1896, and covering the period from its commencement to 29th February 1896, it would appear that even at the latter date the shares issued, other than vendors' shares, amounted only to 10,570, which, if paid up in full, would have produced £10,570; while not only had that sum been paid away, but the cash liabilities of the company, which there was no capital to meet, amounted to £10,037, 8s. 2d. At the same date the profit and loss account showed a loss of £2274, 10s. 2d., but it is believed and averred that said loss was much greater. In these circumstances the company was never at any time in a position to meet its liabilities, nor was there ever any reasonable prospect of its being able to carry on its business at a profit. In resolving to adopt the said provisional agreement, and to commence and carry on business, the defenders acted in breach of their duty as directors, and in total disregard of the interests of the shareholders of the company, including the pursuer. The majority of the defenders being members of the syndicate were disqualified by their interest as vendors to the company from exercising a fair and unbiassed judgment as to the prospects of the company and its ability to fulfil the obligations resulting from the adoption of the said provisional agreement. The pursuer believes and avers that the subject of the company's ability to

fulfil its obligations was never discussed at any meeting of the directors, nor was any vote taken upon it by them before adopting the said provisional agreement. The defenders, other than the defenders Shiels, Nelson, and Clement, acted negligently and recklessly in adopting the agreement; and in so doing the defenders Shiels, Nelson, and Clement, as vendors, acted not only negligently but fraudulently and for their own personal gain. It is believed and averred that the vendors have received in cash from the company over £6000, in addition to the 17,700 and 8408 fully-paid shares allotted to them under said supplementary contract. The vendors as a body have thus a preponderating holding in the shares of the company, the major part of which belongs to the defenders Shiels and Nelson, and their partner Elliot. The defenders as a body have also a preponderating holding in the shares of the company. The defenders therefore, either by themselves or in conjunction with those of the vendors who are not defenders, are able to outvote the independent shareholders and to control the company. (Cond. 7) The company is now hopelessly insolvent, and if it were wound up the creditors would not receive 20s. in the £. The shares in the company are believed to be worthless. In consequence of the negligent and reckless, corrupt, and fraudulent actings of the defenders condescended on, the pursuer has suffered loss to the extent of not less than the sum of £400 paid by him in respect of said shares. On payment thereof by the defenders he is willing, and hereby offers if desired, to transfer said shares to the defenders, or as they may direct."

The defenders, in answer to cond. 4, admitted that 6126 shares had been applied for on 23rd April 1895. "(Ans. 5) *Quoad ultra* denied. Explained that in resolving at their meeting on 23rd April 1895 to proceed to allotment, and to adopt the said provisional agreement, the board of directors acted *bona fide*, and with due consideration to the prospects of the company, which they had good reason at the time to believe, and did believe, to be of a favourable kind and in the interests of the company. The agreement mentioned is referred to. Explained that the said agreement had, after due deliberation, been adopted by the directors at their meeting of 23rd April 1895. Admitted at 30th May 1895 7226 shares had been applied for." "(Ans. 6) The amount of capital actually subscribed when allotment was made, and when the directors resolved to adopt the said provisional agreement and to commence and carry on business, was the subject of consideration by the directors."

The defenders denied the averments contained in condescendence 7.

The pursuer pleaded—"(1) The defenders having, in breach of their duty as directors aforesaid, allotted the shares libelled to the pursuer, and accepted from him the sums payable thereon, are bound to free him of all liability therefor, as concluded for. (2) The defenders having, in breach of the trust

reposed in them, and in total disregard of their duty as directors foresaid, adopted the agreement referred to and commenced to carry on the business of the company in the circumstances set forth, are bound to free and relieve the pursuer of all liability for his said shares, in exchange for a transfer thereof."

The defenders pleaded—" (1) The action is incompetent as laid. (2) The pursuer's averments being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (4) The defenders having acted *bona fide*, and in the reasonable and proper discharge of their duty as directors, should be assoilzied from the conclusions of the summons."

Article 2 of the articles of association was in these terms:—"The company, by the directors, shall, notwithstanding any interest they may have as vendors or otherwise, which interest they shall have right to retain for their own benefit, adopt the agreement mentioned in the company's memorandum of association, and the company shall agree to carry the said agreement into effect, with full power to the directors, notwithstanding any interest they may have in the subject-matter of said agreement, from time to time to agree to any modification of the terms thereof."

On 18th December 1897 the Lord Ordinary (STORMONTH DARLING) sustained the second plea-in-law for the defenders and dismissed the action.

Opinion.—"Two pleas were discussed in the procedure roll—one that the action is incompetent on the principle of *Barr v. Neilson*, 6 Macph. 651, in respect that five directors of a limited company are sued on different grounds of liability, and the other that the action is irrelevant, in respect that the wrong, if any, was one of which only the company itself, and not an individual shareholder, could complain.

"I cannot sustain the plea of incompetency. *Barr v. Neilson* was an action of damages against a husband and wife concluding for a lump sum, the grounds of action being two acts of slander by the wife, for which the husband was held not responsible, and one act of malicious information by the husband, for which, of course, the wife was not responsible. It was held that the alleged wrongs were unconnected, and that it was impossible to apportion the lump sum claimed between the two defenders. Here the wrongs complained of are the same as against all the defenders, *i.e.*, (1) the allotment of shares to the pursuer, and (2) the commencement of the business of the company before a sufficient number of shares had been applied for. All the defenders are charged with negligence or breach of duty in these respects, but three of them are also charged with fraud, because they are said to have had a personal interest in the adoption of a certain agreement whereby business was commenced. Up to a certain point, therefore, the case against all of them is exactly the same, because they all joined in doing the things complained of, and beyond that point the only difference is that some are

said to have acted from a corrupt motive, which did not influence the others. The acts which are alleged to have constituted a wrong being acts for which all are responsible, the sum concluded for against all is a single sum. I see no resemblance between such a case and one where the wrongs were different, and the damages required to be separately assessed.

"But the plea of irrelevancy is, in my opinion, well founded. The first thing complained of is the act of allotment. Now, on 8th April 1895, when the pursuer applied for shares under express reference to the memorandum and articles of association, the company was already incorporated, and in the language of sec. 18 of the Companies Act of 1862 was 'capable forthwith of exercising all the functions of an incorporated company.' The pursuer must be taken to have known that the articles gave power to the directors to commence and carry on business when in their judgment a sufficient number of shares had been subscribed for to justify them in so doing. He did not qualify his application by stipulating that it should be held as conditional on a certain amount of capital being subscribed. When therefore the directors on 23rd April allotted to him the number of shares for which he had applied, they accepted his offer precisely in its terms. It is said that looking to the number of shares (6126) at that time applied for, they ought not to have proceeded to allotment, but ought to have returned to the pursuer and the other applicants the money deposited on application. It seems to me that they were under no such obligation, because they had no trust duty to any applicant before he became a shareholder. Their duty was to the body corporate, of which they were directors.

"This consideration cuts very deeply into the whole case for the pursuer, because it is only by combining the defenders' alleged duty to him as an individual with their subsequent duty to the company not to commence business until sufficient capital had been subscribed, that he is able, even plausibly, to contend that he as an individual shareholder has a good ground of action. I quite agree that the defenders were under this latter duty to the company. I also agree that it was a duty involving deliberation and the exercise of judgment, and I note that the pursuer alleges that the defenders acted recklessly and without deliberation in commencing business when the number of shares applied for had advanced to no more than 7226. That is the second thing of which he complains. But then, if the defenders so acted, not only was the company itself the proper *persona* to call them to account, but their act was of a kind which the company might quite well condone and confirm. In other words, although the adoption of the provisional agreement and the consequent commencement of business had been recklessly and inconsiderately gone about by the defenders, the company might quite well have taken the view that for all that it was the best thing to do.

“Now, the pursuer has not adopted any means of taking the sense of the company, which is a going company, on that matter. He is therefore not in a position to allege either that a majority of the other shareholders agree with him, or that he has been outvoted by interested parties. He makes, it is true, an averment that the defenders as a body have a preponderating holding in the shares of the company, and that, either by themselves or in conjunction with those of the vendors who are not defenders, they are liable to outvote the independent shareholders and to control the company. But he is not in a position to say that he has tried to obtain redress within the company and has failed. He is not even able to say what is the view of those ‘independent shareholders’ whose existence he admits.

“The rule applicable to such a case both in England and Scotland—a rule associated in England chiefly with the case of *Foss v. Harbottle*, 2 Hare 461—is thus expressed by Lord Cranworth in the Scottish case of *Orr v. The Glasgow, Airdrie, and Monklands Railway Company*, 3 Macq. 799 (I quote from Paterson’s App. 963)—‘When there are shareholders in any incorporated body who have, or say they have, a right to complain of the conduct of those who are managing the affairs of that body, their remedy is not strictly against the managers, but through the company against the managers, and through the company only. And upon very obvious principles; the managers are the servants, not of the individual shareholders, but of the company, and the course therefore that any shareholder must take if he is aggrieved is to call upon the employers of these managers to bring them to account, and then, that being done, to get redress from the company itself. If, indeed, there be any collusion that can be suggested, or any specialty to show that the ordinary course being pursued would lead to injustice that would give rise to different considerations, but nothing of that kind occurs here.’

“Be it observed that the averments of the pursuer in that case covered not merely mismanagement but malversation of funds. The mere use of the word ‘fraud,’ therefore, or the ascribing to the directors of a bad motive for doing what they did, is not enough to oust the rule. The nature of the alleged fraud requires to be examined. And the only cases of fraud which let in an action at the instance of an individual shareholder are cases where either the fraud has induced him to become a shareholder, or has been of such a kind that no body of shareholders could sanction or adopt it. This distinction is very well brought out in the contemporary case of *Davidson v. Tulloch*, 3 Macq. 783. Again I quote the same noble and learned Lord, as his opinion is given in 1 Paterson’s App. 937. After dealing with the allegations of fraud which were said to have induced the shareholder to buy his shares, Lord Cranworth says—‘The doubt I have has been upon the point whether Dr Tulloch as an individual shareholder was entitled to maintain the

action with respect to frauds that were perpetrated during the time he was a shareholder. On that subject I do not believe there can be any difference in principle between the law of Scotland and the law of England, and I take that principle to be extremely clearly and well enunciated, by stating that in respect to any transaction which the body of shareholders could not sanction there might be a right of action, but in respect to any transaction which they could sanction, although the directors might not have been justified in what they were doing, there can be no right of action. The remedy must be of a different nature. The question, therefore, really is this—whether the acts alleged to have been perpetrated by Davidson and the other directors come within the one class or the other? If there had been nothing alleged against the directors but that they had advanced money (even putting in the “fraudulently”) for the benefit of persons with whom they, or some of them, were associated, and whom they wished to assist, I should have been very reluctant indeed to hold that that was not an act which the body at large might not have sanctioned, for in truth it amounts to no more than this, an improvident and improper advance of funds.’ Then his Lordship goes on to point out that the fraudulent acts alleged against the directors were acts which no body of shareholders could have authorised, such as issuing false accounts, paying dividends out of capital, and the like. This distinction explains the judgment in *Leslie v. Lumsden*, 14 D. 213, which was a case arising out of the affairs of the same Aberdeen Bank.

“It seems to me that Lord Cranworth’s test affords a complete solution of the present case. In the first place, there is here no allegation of fraudulent misrepresentation inducing the pursuer to take shares. He applied for shares, as I have already pointed out, knowing who the directors were; knowing that by article 2 of the articles of association they might, notwithstanding any interest they might have as vendors or otherwise, adopt the agreement mentioned in the memorandum of association; knowing also that by article 4 they might commence and carry on business so soon as in their judgment a sufficient number of shares had been subscribed for. It is vain in these circumstances to found a case of fraudulent inducement merely on the obvious and acknowledged fact that certain of the directors had an interest in getting the company started. Then as to the fraud alleged against those same directors after the pursuer became a shareholder, if, as Lord Cranworth puts it, the general body of shareholders could have sanctioned what he calls ‘an improvident and improper advance of funds’ to friends of the directors, how much more could they have sanctioned an improvident and premature commencement of business, the policy of which was entirely a matter of discretion.

“I therefore hold, without any hesitation, that the pursuer’s averments as to the acceptance of his application for shares are wholly irrelevant, and that his averments

as to the commencement of business are irrelevant also, so long as he cannot allege that he has had recourse to the proper means of obtaining redress within the company itself."

The pursuer reclaimed, and argued—(1) The Lord Ordinary was wrong in holding that the defenders had no fiduciary relationship as regards allotment to the pursuer. They did owe the pursuer a duty. His application for shares amounted to a mandate from him, in view of article 4 of the articles of association, to consider whether they should allot him shares. (2) The present case fell within the exception indicated by Lord Cranworth in *Davidson v. Tulloch*, February 23, 1860, 3 Macq. 783, and therefore the pursuer was entitled to seek reparation directly from the defenders, and not merely through the medium of the company. The company could not have sanctioned the action of the directors in beginning business.—*Leslie's Representatives v. Lumsden*, December 17, 1851, 14 D. 213; June 19, 1856, 18 D. 1046; *Rixon v. Edinburgh Northern Tramways Co.*, March 20, 1889, 16 R. 653; *North Stafford Steel Company v. Ward*, L.R., 3 Ex. 172; *Menier v. Hooper's Telegraph Works*, L.R., 9 Ch. 350; *Mason v. Harris*, L.R., 11 Ch. Div. 97; *Atwood v. Merryweather*, L.R., 5 Eq. 464 n; *Fox v. Clifton*, 6 Bing. 776; *Ornamental Pyrographic Company v. Brown*, 2 H. & C. 63, 32 L.J. (Ex.) 190; *M'Dougall v. Jersey Hotel Company*, 2 H. & M. 528; *Elder v. New Zealand Land Company*, 30 L.T. 285.

The defenders' argument sufficiently appears from the opinions of the Lord Ordinary and Lord Kinnear.

At advising—

LORD KINNEAR—This action is based upon two entirely distinct and separate grounds. These are mixed up in the condescence in such a way as to have created some confusion in the argument which was addressed to us for the pursuer. But the Lord Ordinary has distinguished them very clearly and has dealt separately with each, and I think upon right grounds.

The first ground of complaint is, that the defenders as directors ought not to have completed a contract between the company and the pursuer by allotting to him shares for which he had applied. If this were otherwise well founded, I should think the competency of the remedy asked for very doubtful indeed. The pursuer does not seek to set aside the contract which he says was wrongfully completed, and so to restore both parties to their original position, but without cancelling the allotment he demands that the defenders should repay to him the whole sums which he has paid for the shares. In other words he holds by the contract, and claims damages on the ground that it was wrongfully made. It is true that he proposes upon repayment to transfer the shares to the defenders, that is, to the individual directors, not as representing the company at all, but in their own personal capacity; but that is a very different thing from a reduction of the contract with a consequent cancellation of the shares. No

ground was suggested in argument upon which the defenders, not for the company but as individuals, could be compelled to accept the transfer, but if they were willing to do so, the transfer by the pursuer would be an exercise of his right as a shareholder under the very contract of which he complains. I think it very doubtful whether that is a competent remedy.

But the objection stated by the Lord Ordinary goes more directly to the merits of the claim, and is, in my opinion, conclusive. The averment is that the directors who had a discretion to commence and carry on the business when in their judgment a sufficient number of shares should have been subscribed for, notwithstanding that the whole number of shares had not been subscribed, did not in the exercise of their discretion attempt to exercise their judgment as they were bound to do for the benefit of the company in allotting the shares, and in deciding whether they ought to commence and carry on the business with the capital subscribed. And then the pursuer goes on to say that, in the circumstances which he sets out more specifically, no allotment should have been made to the pursuer, and the money deposited on application should have been returned. Now, the allotment of shares to the pursuer on his application, and the commencement of business are two entirely separate things. The directors may have been quite wrong in doing the one, and perfectly justified in doing the other. But the material point is that in making the allotment the defenders were not acting as trustees for the pursuer. They were acting for the company already constituted, and making a bargain with the pursuer at arm's length. As the Lord Ordinary has pointed out, they had no duty to him till he became a shareholder. He made an application for shares in full knowledge of all the conditions which he required to know, and the directors acting for the company accepted his offer. They thus completed a contract which in my opinion he cannot set aside except upon such grounds of fraud, misrepresentation, or mutual error as would enable him to set aside any other mutual contract. But there is no allegation whatever of fraud or mistake; all that is said is that the directors who acted for the company in transacting with the pursuer failed to have due regard to the interest of the company. But that is the company's affair. If they are satisfied, the pursuer cannot challenge the allotment on the ground that the interests of the other party to the contract were not sufficiently considered by their agent; and therefore he is equally precluded from claiming damages on the footing that the transaction had been wrongfully completed.

The second ground is that after the pursuer had become a member of the company the defenders acted recklessly and negligently, or, as regards certain of their number, fraudulently and dishonestly and from an indirect motive, in commencing business, and also in adopting a certain supplementary agreement. By the articles of association it is provided that the directors are to

have a discretion in commencing business according to their judgment. I agree that this is a discretion which imposed a duty, and if, instead of exercising an honest judgment upon the question submitted to them, they began business, as the pursuer alleges, with insufficient capital, in circumstances in which no reasonably prudent and honest man would have done so, I do not doubt that they may be made responsible for consequent loss to the company, whether they acted from indirect motives or from mere negligence. But whether an individual shareholder can recover damages as for a separate wrong to himself while the company is still a going concern is a very different question. I agree with the Lord Ordinary that the principle upon which that question must be solved is that established by the cases of *Foss v. Harbottle*, and *Orr v. The Monkland Railway Company*, and others of the same class. There can be no question that the commencement of business, whether prudent or not, might have been sanctioned and confirmed by the company. If the company are satisfied to carry on the business, as it would appear that they are, the Court cannot interfere in the management of their private affairs. Nor can it take upon itself to determine the question of expediency of the conduct of the business which might have been determined, and if it arises ought to have been determined, by a general meeting of shareholders. It is said that the defenders have a preponderating holding in the shares, and are able to outvote independent shareholders. But the averment on this head is vague and general. There is no specific statement to support it; and the pursuer has made no attempt to ascertain the views of the other shareholders, and is therefore not in a position to allege that he has been outvoted, or that any minority of independent shareholders has been outvoted by the influence of the defenders. The case of the *Eastern Telegraph Company* appears to me to have no application, because the majority there were alleged to be using their powers illegally, and contrary to the constitution of the company, by seeking to divide assets among themselves to the exclusion of other shareholders. Nothing of the kind is alleged in the present case, nor is it said that anything has been done to defraud a minority or the defender as an individual shareholder for the benefit of the majority outvoting them. Everything complained of is a wrong to the company as such, nor does the pursuer seek to protect the interests either of a majority or a minority, or to restrain proceedings which he avers to be illegal. It is an entirely different case, therefore, from those in which it has been held that when an apparent majority has used its influence to pass a vote against an injured minority, the Court will interfere upon the application of the minority to restrain something that is *ultra vires*. In the first place, the thing complained of is not in itself illegal; in the second place, we are not asked to interpose and restrain anything from being done. This is a mere action of damages brought by the pursuer for a

wrong done to himself, first in beginning and then in carrying on the business of a company of which he is still a member. He brings that action without making any attempt, either by means of a general meeting or even by means of this process, to bring the business, which he says ought not to be carried on, to an end. He simply claims damages, and the medium by which the conclusion for damages is to be reached is a finding that the company is hopelessly insolvent. Now, that judgment is asked in a case to which the company is not made a party and in which it is not represented; because the directors are not called as directors to represent the company, but are convened as alleged wrongdoers, answerable to the company for the wrong they have committed. Their judgment is asked by a member of the company who does not allege that he has either taken the means which are open to him for winding up the affairs of the company, or taken any means for calling the attention of the shareholders as a body to the state of their affairs. The principle explained by Lord Cranworth in the case of *Orr* seems to me to be directly applicable. The directors were not acting as the servants of the pursuer in beginning business, but as the servants of the company. It is for the company to call them to account; and if the pursuer as a shareholder has suffered damage with the other shareholders, he may claim redress through the company. But we cannot entertain an inquiry of the kind at the instance of a single shareholder, and in the absence of the company. For this reason, therefore, I agree with the Lord Ordinary. I think that this is not an action in which either the first or second ground of complaint can be entertained, and that the action should be dismissed.

A separate ground of action is averred on record against the defender Mr Neilson. But Mr Johnston stated that he withdrew the case on this point, having discovered, as he explained, that the document on which it is founded is not duly stamped.

LORD ADAM, LORD M'LAREN, and the LORD PRESIDENT concurred.

The Court adhered.

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Counsel for Defenders Stewart and Others—Sol.-Gen. Dickson, Q.C.—Cullen. Agents—Tods, Murray, & Jamieson, WS.

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