terms of the contracts the language there used will not avail to change the fact. If these are trains belonging to the Company you cannot alter that fact by calling them traders' trains and charging different rates.

In regard to the third question, it is quite true that the Court are asked to answer that only in the event of its being decided that the Company can relieve itself from the obligation of carrying at rates not exceeding those fixed by Parliament as the rates at which it shall carry. I cannot refrain from saying that on the principle on which we have proceeded I am bound to take a different view of that question from what the Commissioners have taken.

The Court pronounced this judgment:—

"The Lords . . . . . make answer and say—(1) The complaint of the respondents, the Aberdeen Commercial Company, and the Aberdeen Lime Company, against the appellants the Great North of Scotland Railway Company, is in substance that by their recent proceedings they have subjected the particular traffic in which the respondents are interested to an undue or unreasonable prejudice or disadvantage. This, if established, is a direct contravention of the provisions of sec. 2 of the Railway and Canal Traffic Act 1854. The determination of the Commissioners therefore in this Case was, in the opinion of the Court, within their jurisdiction. (2) The Court are of opinion that in the circumstances stated in the case the Great North of Scotland Railway Company, appellants, have since the 1st March 1878 carried the traffic of the respondents as public carriers on their own railway, and are therefore not entitled to charge for such carriage any higher rates than are limited and authorised by the 55th section of the Great North of Scotland Railway Consolidation Act 1859, or by any of the corresponding sections of the Deeside Railway Acts. (3) Having negatived the hypothesis on which the third question proceeds, the Court finds it unnecessary to answer the question. The Court therefore affirm the determination of the Commissioners, and find the appellants liable to the respondents in the expenses of the proceedings, and remit to the Auditor to tax the account of said expenses and to report."

Counsel for Appellants (The Traders)—Asher—Murray. Agents—Tods, Murray, & Jamieson, W.S., and Simson, Wakeford, & Simson.

Counsel for Respondents (The Railway Company)—Kinnear—Balfour—Jameson. Agents—T. J. Gordon, W.S., and Dyson & Co.

Friday, October 25.

SECOND DIVISION.

CREE (LIQUIDATOR OF THE BONNINGTON SUGAR REFINING CO., LIMITED) *v.* SOMERVAIL AND OTHERS (THOMSON'S TRS.)

Public Company—Ultra vires *Act—Power to Directors to Buy Shares—Trafficking in Shares—Reduction of Capital.*

The memorandum of association of a sugar refining company formed under the Companies Act of 1862 provided that no transfer of any shares either upon a sale or in consequence of the bankruptcy of any shareholder should be valid or effectual without the consent of a majority of the other shareholders expressed in writing, but that if the other shareholders declined to consent to any such transfer they should be bound to take the shares at the price offered in a case of sale, or at the market price in other cases. Provision was made for the forfeiture of shares in the event of non-payment of calls.

Objections to a *bona fide* direct purchase of shares by the directors in trust for the company—in respect it was *ultra vires* as being, *inter alia*, unauthorised by the memorandum of association, outside the business of the company, and tending to diminish its capital—(*diss.* Lord Ormidale)—*repelled*; and *held* that in the circumstances of the case the purchase was subsequently ratified by the shareholders.

This was a petition presented by James Cree, voluntary liquidator of the Bonnington Sugar Refining Company (Limited), praying the Court to find that Peter Somervail and others, as trustees of James Thomson deceased, "should be placed on the list of contributories of the said Company in respect of fifty shares," upon which "£1 per share has been paid up," and also for a decerniture against the trustees for £1500, the amount of a call of £30 per share, with interest at the rate of 5 per cent. since April 22, 1878.

The Bonnington Sugar Refining Company was formed in 1864, its capital consisting of £50,000 divided into 500 shares of £100 each, and the whole capital was paid up, Mr Thomson being one of the original shareholders. In 1873 the capital was increased by £50,000 divided in the same manner, but only £1 per share of the new shares thus issued was paid up, each of the then existing members accepting one new share for each of those originally held by him, and being entered on the register as holder thereof. Mr Thomson died in 1875, leaving a trust-disposition and settlement appointing the respondents his trustees, and they were entered as at 7th February 1876 as holders of the shares in question. The Company by special resolution, confirmed on March 27, 1878, agreed to wind up, and appointed Mr Cree their voluntary liquidator. Mr Cree accordingly on 12th April 1878 made a call of £30 on each of the shares not paid up, and after this petition was presented another call was made by him. The respondents refused to pay calls, on the ground that they were not in anyway shareholders or contributories. In the end of 1876 the trustees had become desirous of withdrawing from the company and of realising their shares, and Mr

Callander, who was both a trustee and a director of the company, had opened negotiations for that end. And at a meeting on 17th Nov. 1876 the directors passed a minute whereby they "unanimously approved of the purchase by Messrs Hugh Rose, John Crabbie, and John Weir" (who with Mr Callender were the directors) "from the trustees of the late Mr James Thomson, of Helensburgh, of his 100 shares in this company at the price of 45 per cent. on the original cost—that is to say, the 50 old shares to be bought and paid for at the rate of £45 per share, and the 50 new shares or B stock in the same proportion on paid up price. These shares to be held by them in trust for the Bonnington Sugar Refining Company (Limited). (Signed) HUGH ROSE." The transfer was executed, the price paid, and the transaction approved by the shareholders at their annual general meeting on February 1, 1877, although in the circular calling the meeting no notice was given of any intention to bring up the subject. At next annual meeting on 4th March 1878 an exception was taken to the purchase, and a protest entered on the minutes by certain shareholders.

The present petition was presented under section 138 of the Companies Act 1862, which was as follows—"Where a company is being wound up voluntarily the liquidators or any contributory of the company may apply to the Court . . . to determine any question arising in the matter of such winding-up, or to exercise as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court; and the Court . . . . if satisfied that the determination of such question or the required exercise of power will be just and beneficial, may accede wholly or partially to such application on such terms and subject to such conditions as the Court thinks just," &c.

The respondents in their statement of facts set forth that the company had been throughout of a "*quasi* private character," the number of shareholders varying from fourteen to sixteen. Among the articles of association the respondents quoted the 12th, which, as added to in March 1873, stood as follows:—"No transfer of any shares of the company's stock, either upon a sale or in consequence of the bankruptcy or insolvency of any shareholder, or in consequence of the marriage of any female shareholder, shall be valid or effectual without the consent of a majority of the other shareholders expressed in writing, but in the event of the other shareholders declining to consent to any such proposed transfer of shares in the company they shall be bound to take such shares at the price offered in the case of a proposed sale, and at the market price of the day in the case of a proposed transfer from any other cause." By special resolution, confirmed March 1873, the following words were added—"unless such shares shall not at the time be fully paid up, and the reason for declining to consent be that the directors are not satisfied with the proposed transferee." The directors were the largest shareholders, four of them holding 155 out of 500 shares at the date of the transfer referred to. They had full power of management and control, and were empowered to "exercise all such powers of the company as are not by the Companies Act 1862 or by these articles required to be exercised by the company in general meeting." The respondents further averred entire *bona fides* on both parts as to the transaction, and that the shareholders had in point of fact exercised their undoubted right of pre-emption. On 1st February 1877 Mr Cree, as auditor, certified a gross profit for the preceding year of £13,225, and it was not till after the respondents had left the company and ceased to have any interest in the business that misfortunes overtook it. The 32d section of the articles of association provided, *inter alia*, that the non-receipt of a seven days' notice as to a meeting and its business by any member should not invalidate the proceedings at such meeting. Out of seventeen shareholders then on the register, nine, holding 227 out of 450 shares, were present at the meeting which approved of the transfer.

The next annual general meeting was held on 4th February 1878, when thirteen members out of seventeen were present, and 392 out of 450 shares were represented. This meeting approved unanimously the minutes of the previous meeting, and it was not until after the approval of the minutes of 4th February at an adjourned meeting on March 4th that the objection and protest were taken.

The respondents submitted that the prayer of the petition should be refused, on the following grounds—(1) *Bona fide* purchase and sale for a fair consideration; (2) ratification and approval by the shareholders, and *separatim* acquiescence; (3) *mora* on the part of the shareholders and liquidator.

A minute of admission was adjusted betwen the parties, and a proof was afterwards led, the purport of both of which sufficiently appears from the opinions of the Court.

The petitioner argued—No company could buy its own shares unless there was power to that effect in the articles of association. The transaction was not merely voidable; it was wholly and totally void; and had been said even to be incapable of confirmation by any general meeting. The reason was twofold—(1) The credit of a limited company depended exclusively not on the individual members, like a partnership, but its capital, and any dealing in shares would enable it to diminish, and in fact extinguish, the capital which it was registered as possessing; and (2) in administering its affairs the majority did not bind the minority, but neither the shareholders themselves nor the governing body could validly do any act which was not within the memorandum of association and the articles under which the company was formed. In this case the business was the refining of sugar; transactions in shares were wholly beyond the authority of the directors. No doubt they entered into the contracts with the respondents in good faith, but it was admitted that many of the shareholders had no knowledge of the purchase—some even, it was proved, had refused the shares themselves; and thus, if the contention of the petitioner was not sustained, these parties would be compelled, in consequence of an act of the directors which they never authorised, to take their proportion of the very shares with which they had declined to have anything to do. The remaining question was, Did the articles of association contain any such power as was claimed by the respondents for the directors? The clauses about forfeiture gave no warrant to the proceeding. A forfeiture or cancellation of stock was a remedy given to the directors for non-payment of calls and the like. The shares forfeited

passed into the category of unissued stock, but a power to forfeit did not mean a power to buy. Nor could clause 12 of the articles afford in any just view of it any support to the respondents' proposition, for it only meant, not that the company should buy, nor the directors for behoof of the company, but individual shareholders who choose to withhold their consent from the admission of a proposed transferee buying shares in the market should be bound to take them at the same price, paying for them out of their own pockets, and adding them to their existing holding.

Argued for the respondents—The company had all along been of a *quasi* private character, the shareholders being few in number and connected with each other in business. The directors exercised unusually ample powers, the transaction in question was admittedly carried through perfectly in *bona fide* on both sides, and as matter of fact the prospects of the company improved for some months after the transfer was made. The transfer was within the general powers of the directors, more especially under the 51st section of the articles of copartnery—*Cockburn*, *Snell*, *Thomas*. The case was entirely different from certain others —*Zulueta's* claim—*Hope*. Seeing that this was only a single transaction, not part of a system of trafficking in shares, it was more analogous to a forfeiture of shares. There was sufficient acquiescence on the part of the body of the shareholders —*Phosphate of Lime Company*. More especially under section 12 of the articles there was implied power in the company to purchase its own shares, and the present transaction was merely a shorthand mode of doing that which might have been done in a roundabout manner by availing themselves of the right of pre-emption.

Authorities—*Cross's* case, July 17, 1869, 38 L.J. Ch. 583; *Hope* v. *International Financial Society*, November 9, 1876, L.R. 4 Ch. Div. 327; Companies Act 1867, sec. 9; *Cockburn*, November 4, 1850, 4 De G. and Sm. 177; *Snell*, November 3, 1869, 5 Ch. 22; *Thomas*, March 18, 1872, 13 Eq. Cases 437; *Teasdale*, November 25, 1873, 9 Ch. 54; *Lowe*, March 17, 1852, 1 De G. M. and G. 421; *Zulueta*, May 4, 1870, 5 Ch. 444; *Phosphate of Lime Company* v. *Green*, November 11, 1871, 7 L.R., C.P. 43; *Spachman* v. *Evans*, June 23, 1868, 3 L.R., H.L. 171; *Heiton* v. *Waverley Hydropathic Company*, June 6, 1877, 4 R. 830; *Fyfe*, July 9, 1869, 4 L.R., Ch. 768; *Hill*, referred to in note to *Fyfe's* case; *Lowe*, January 27, 1870, 9 L.R., Eq. 589.

At advising—

Lord Gifford—This is a very important case, and has received from the Court very deliberate consideration. It is important in itself, but it is also very important in reference to the principles which it involves and the consequences which may arise from carrying out these principles in other cases.

I have ultimately come to the conclusion that upon the special terms of the contract of copartnery, and having regard to the special circumstances in which the transaction in question was carried through, the actings and dealings of the company at the time and subsequently thereto the transfer of the shares which had belonged to the late Mr Thomson, and afterwards belonged to his trustees, were validly conveyed by these trustees to the company itself by the transfer which is set out upon record, and which we have now before us, granted in favour of the three individuals to whom that transfer was taken in trust for the company itself.

I have been able to come to the conclusion, though not without very considerable difficulty, that that transfer effectually divested Thomson's trustees of the shares, having been duly entered in the books of the company, and their names having been dropped as shareholders, and therefore that the petition which is now before us to replace Messrs Thomson's trustees as shareholders is not well founded, and the prayer of it cannot be given effect to.

I say I have come to that conclusion, but it is with great difficulty, and it is only in the special circumstances of the case, and having in view the very special terms of the contract of copartnery and its memorandum of association and the special surrounding circumstances of this transaction. I shall explain in a very few words the view which I take of this case. In the first place, it is perfectly apparent from the proof which has been led, and from the documents produced, that all parties interested in the case—Messrs Thomson's trustees and the company, and all the partners thereof who were at all conversant with the circumstances—have acted throughout in the most perfect good faith. On the one hand, the trustees of the late Mr Thomson were desirous in the discharge of their duty as trustees to dispose of the shares which had belonged to their constituent, the late Mr Thomson, in the Bonnington Sugar Refining Company. Mr Thomson's trustees were not only entitled to dispose of these shares forming part of the trust-estate which they were appointed to realise, and thus to terminate all connection between the estate and the Refining Company, but I think they were bound to dispose of them. It is probable, though I am not going into that question—and that is not one of the grounds of judgment, but I think it is probable—and I assume that they were so bound to dispose of them at the earliest possible moment. In the absence of very express powers in the trust-deed, the general rule unquestionably is that trustees holding an estate for beneficiaries are not entitled to invest their estate in mercantile or trading companies. That is trading with the estate in the hope of making gain but with the risk of involving the estate in loss; and the general rule is that trustees may invest the trust-estate on good security but they must not trade with it. Now, to continue to hold shares in, and to remain shareholders in the Bonnington Refining Company was trading with Mr Thomson's trust-funds, and therefore, in this aspect of the case, and going no further at present, the trustees were not only entitled but bound to dispose of these shares. Turning next to the Bonnington Sugar Refining Company, I think I may say that the directors of that company, and all the members who were conversant with the transaction, were also acting in the most perfect good faith. They thought that they had power to buy these shares. Whether they had such power or not is a question which I shall advert to immediately. I am at present pointing out the perfect honesty of the transaction. They really acted in *optima fide* in purchasing these shares for the company. They did so having in view I presume the best interests of the company

itself. The price paid was agreed upon between the parties. It was in point of fact—as appears from the proof—a fair and equitable price at the time. It was the full and true value of the shares so purchased having regard to the then existing circumstances of the company. Everything was done openly and above board—there was no concealment and no hurry or haste to carry through the transaction. The company itself was consulted, and by formal minutes approved of the purchase. The price—£2200 odds—was paid. A formal transfer was prepared and executed in favour of three directors—it is very material to notice that—in trust for the company, and this deed was duly entered into the company's books and in the register of shareholders. The formal transfer is dated in December 1876, and it is entered I think the same month in the register of shareholders. What followed on this was that these shares ceased to be regarded or treated in any way as the shares of Mr Thomson's trustees, but were treated in every respect as shares belonging to the company, and Mr Thomson's trustees took and were entitled to take no further interest or share in the business of the copartnery. They received no notice of any of the meetings of the company. Profits were made, though not divided, and the shares rose in value. The company's affairs were declared to have improved subsequent to the transfer, and the shares might have been resold or reissued at an advanced price. No doubt at a later period the company's affairs retroceded, but it was not till 4th March 1878, about eighteen months after the transaction, that a suggestion was made that the sale and purchase of the shares which had belonged to the late Mr Thomson was illegal, and it was not till after this that the liquidation of the company was resolved upon.

It is now said, however, by the liquidator in the voluntary winding-up that the sale and transfer by Mr Thomson's trustees was *ultra vires*, in respect it was made in trust for the company itself, and that accordingly Mr Thomson's trustees are still to be treated as shareholders in the company, and must now be placed upon the list of contributories in the liquidation in the same way as if no sale had taken place, and as if no transfer had ever been executed and recorded. The liquidator's plea is founded upon the alleged principle that in all joint-stock companies the joint-stock company itself or its directors have no power to buy the company's own shares unless express power to do so is in so many words (as I understand the argument) conferred upon the directors by the memorandum of association. Now, in the view which I take of this case I think it is not necessary to question the entire soundness of the general proposition that a joint-stock company cannot without express power or without the express or unanimous consent of all its partners, and probably of all its creditors, purchase its own shares. I think that is the general rule, for unless in very exceptional circumstances the purchase of its own shares is not the purpose for which any joint-stock company is instituted. It is not part of the business of the company, and the general principle therefore seems clear enough. But it seems also to be decided by a variety of very authoritative decisions that this principle will in general be rigidly applied. To purchase its own shares might in certain circumstances be destructive of the company itself, for every such purchase is practically, and when fairly wrought out, a diminution of the company's capital, and an alteration of the basis upon which it is constituted, and I think it may be therefore laid down that, apart from very express and explicit powers, anything like trading or dealing, buying and selling, and speculating in the company's own shares must be illegal. I am not sure, however, whether the principle was not pressed too far by the counsel for the liquidator, and I am not prepared to say that there may not be exceptional cases in which a company quite legitimately, and perhaps even necessarily, may acquire lawfully its own shares. Cases of forfeiture of shares are really equivalent to the acquisition of these shares, and when there is a power of forfeiture I do not see very well what practical distinction there is between forfeiting shares and acquiring them. Then, again, in cases of bankruptcy where the shares will not sell, but are held by the company in security of advances or loans to the shareholder or for debts due by him to the company, in such cases practically the company holds the shares for itself. I merely notice these cases to show that it cannot be said to be an absolute nullity for a company to buy or to acquire for onerous causes its own shares in every case. A partner of a company may quite fairly and reasonably become indebted to the company itself, and then the property of the shares, if they are worth anything, is held in security for the debt due by the individual partner, and this may practically be making the company itself the proprietor of its own shares. There may therefore be exceptions to the general principle. It is not necessary, however, to consider, much less in my view to decide, any of these points, for I have come to be of opinion in this particular case that the sale and transfer by Mr Thomson's trustees to the three gentlemen Mr Rose, Mr Crabbie, and Mr Weir, is a valid and effectual transfer upon the construction of the contract of copartnery or articles of association in this particular case, and having regard to all the circumstances in which the sale and the transfer took place.

Now, in the first place, I think that this case really turns upon the fair meaning and effect of the articles of association. I am sorry to say that in this case, as in many other cases, the articles of association in reference to the point now in question are very ill-expressed, and the whole difficulty of the case arises from the necessity of gathering from what I think I may not unfairly describe as somewhat ambiguous and doubtful expressions in the articles the real meaning of the parties to the contract under which this company was constituted. The clause in the articles upon which the principal question in my view chiefly turns is the 12th, which is in these terms—"No transfer of any shares of the company's stock, either upon a sale or in consequence of the bankruptcy or insolvency of any shareholder, or in consequence of the marriage of any female shareholder, shall be valid or effectual without the consent of a majority of the other shareholders expressed in writing, but in the event of the other shareholders declining to consent to any such proposed transfer of shares of the company they shall be bound to take such shares at the

price offered in the case of a proposed sale, and at the market price of the day in the case of a proposed transfer for any other cause." There is an alteration made upon this article by a special resolution, which is dated 24th March 1873, and the following are the words of this special resolution, which now, I suppose, forms part of the 12th article—"unless such shares shall not at the time be fully paid up, and the reason for declining to consent be that the directors are not satisfied with the proposed transferee." Now, I may say in passing that I do not think that this addition or alteration affects the decision of the case. I do not see the precise meaning of this addition, which appears to me to be neither expressed grammatically nor intelligibly, but I think nothing turns upon it in the present case. Now, before considering the effect of section 12 of the articles, it is proper to remark that in all joint-stock companies under the statutes the right of a shareholder to sell and transfer his shares is an inherent quality of membership. The statute expressly says that the shares shall be transferable, and I think this could not be altered by any special contract whatever, so as to make the shares untransferable. No joint-stock company, so far as I know, or so far as I can almost conceive, has a right to insist that the shares in the company shall be inalienable, or that members or the heirs, executors, and representatives of members shall *nolentes volentes* be compelled to continue shareholders for ever without the power of disposing of their property. I think such a stipulation, even if it were made—perhaps even though it were expressly made in so many words—would be illegal and void. If a member of a joint-stock company wishes to dispose of his shares, I think the company must either allow him to do so or take the shares themselves, or (and this seems to be the only other possible alternative) the company must be wound up and dissolved. I cannot be compelled to trade with other ten people who are dissipating my means and property; I will dispose of my shares; I may have to pay somebody to take them even, but even this is a right which I must have unless the company will take the shares themselves, or unless I can wind-up. I think there are no other alternatives, and I can even fancy—I think I may almost say that my present opinion is that if there were a stipulation in a contract of copartnery or joint-stock company to the effect that members should be members for ever—they and their heirs—that would be a bad clause, and void, as against public policy. It is very important to keep this in view—I mean the inherent transferability of the shares—because we are in a question here—and that is the reason why I referred to the *bona fides* of the parties—where trustees were in the exercise of their duty desirous of disposing of the shares of which their constituent had died possessed. I am speaking just now of course only of companies under the statute, but it is quite possible that the principle has a wider application, at least in cases where there is no *delectus personæ*, and no fixed period of endurance. Now, it follows from this that wherever in joint-stock companies restrictions or limitations are imposed upon partners, restraining them from disposing of their shares at pleasure either in the public market or by private bargain, then a duty and by consequence a right accrues to the company itself of acquiring the shares the disposal of which they prohibit and restrain. Thus, if the consent of the company or of the directors is required in order to the validity or efficacy of a particular transfer—that is, if the company or its directors may without cause say we cannot receive your transferee, we will have nothing to do with him, and not give any reason or any cause for that, and there is no appeal against their judgment—then I say in such a case, wherever they have such a veto, such an absolute veto against a proposed transfer, and wherever the consent to a proposed transfer is refused by the company, I think it follows that the directors or the company who have the power of such an unqualified *veto* must necessarily have the power to take the shares themselves, even although this is not said in the contract in so many words; for if this were not so, the result would be that a company or its directors might compel a member or members, or their executors or representatives, however numerous—for it might be that there was a succession to a great many equal next-of-kin—that they could compel all these to remain members, traders, and speculators in the company against their will and without their consent, and that for an indefinite period, and it may be with indefinite and incalculable risk. At all events—and this is enough for the present case—when the consent of the company is made essential to the efficacy of the transfer, this implies (at least where nothing is said to the contrary), that the company may take the transfer to itself. Any other reading of the contract would be unfair and inequitable to the shareholders and no such reading is to be presumed. Of course it would have been better if all this had been expressed in the contract instead of leaving us to spell it out, but I am doing no more in my view than bringing out what the necessary result of an article expressed as article 12 in this case is. Now, confining the application of clause 12 to the case of a sale of shares, and leaving out of view just now the other cases put, of marriage and so on, I think it is plain that if Mr Thomson's trustees had found honestly in the public market a purchaser for these shares, who was willing and desirous to buy them and to accept the transfer, and if they had offered the transferee to the company, and then if the company or a majority of the other shareholders refused to consent to such transfer, then the company itself, or the majority dissenting—and in the view I take of this case the result is the same whichever of these alternatives had happened—would have been bound to accept of the shares at the price offered by the proposed honest purchaser. I take it that this is the necessary reading of clause 12 of the contract. Of course in all the observations which I am now making I am assuming that there is no fault or fraud, no collusion or mere pretended or counterfeit sales or transfers. All that is out of the question, and it is for this reason that I began by explaining that in the present case perfect *bona fides* characterises the transaction. Wherever there is fraud or mere pretended sales—getting up a pretended transfer in order to get out of the company—a different set of rules and principles would be applicable, and these must no doubt be fairly applied in each individual case of fraud or collusion.

I next go a step further, and I say that if a company who refuse to accept a proposed purchaser tendered in *bona fide* as a transferee, would be bound themselves to accept the shares at the price offered by the proposed purchaser, then it is not necessary to go through this form of tendering a proposed purchaser and having him rejected, but that the trustees may at once agree with the company itself to sell the shares directly to the company. Suppose the market price of the shares to be, or the fair value of the shares to be, as it was in point of fact in the present case, 45 per cent. on the original cost, and suppose the company resolve not to accept of any transferee at this price, whoever he may be—and I see nothing to prevent them from coming to such a resolution—then surely it was not necessary for the validity of any purchase by the company that the idle form should be gone through of presenting a third party as the proposed transferee, when it was perfectly well known and understood and perfectly certain that whoever might be presented at that price would be rejected, and the company itself would take the shares. That was not at all essential to the validity of a purchase. The company itself, who had power to refuse to accept any tendered purchaser, and thereupon to take the shares to themselves, had, I think, power, with the consent and concurrence of Mr Thomson's trustees, to take the shares directly. I think it would have been a useless formality to go through the form, it being perfectly well known and understood and perfectly certain that whoever might be presented at that price would be rejected and the company itself take the shares. Now, I think it is not possible to contend for that necessity in such a case, where it would be a mere idle and empty form.

Now, turning to the history of this case, I think it plain that the company themselves virtually announced that it was unnecessary for Mr Thomson's trustees to find a purchaser at 45 per cent., but they themselves declared their option to take the shares at that price. It was of no moment whatever to Thomson's trustees, who got the shares, provided they realised what was held to be their then just value, and accordingly Mr Callander, who carried through the transaction, and who was one of the trustees, said that he would have taken the money from anybody else who would have given it. He had no wish to sell to the company themselves. It was their doing, and not his. In the next place, see how deliberately the transaction was gone into and carried through. Mr Thomson's trustees in the discharge of their duty resolved to dispose of and realise the shares. In 1875 and 1876 they made full inquiry into the affairs of the company; some of them personally visited and examined the works, and procured all necessary information from the officials; and on 25th October 1876, as the minutes of Thomson's trustees bear, they resolved after mature deliberation that if an offer of not less than 40 per cent. on the amount paid upon the shares were received, they should be disposed of, and Mr Callander was authorised to accept such an offer on behalf of the trustees. Negotiations were then opened with the company, and these culminated on 14th November 1876 in Mr Hugh Rose, one of the directors of the company, telegraphing to Mr Callander that he accepted Mr Thomson's shares as offered at £45 per share. Now the telegram does not say that the company accepted. It just says Mr Rose accepted. It may be that he was acting for the company, or it might not, and the legal effect of his accepting it is a totally different question, with which I do not meddle just now. I do not think it is raised in this petition, and what the effect of the transfer to Mr Rose would have been if he had been the only transferee, and what the effect of the present transfer to three gentlemen may be, I do not think it is necessary to decide under the present petition. It is enough if there has been a valid transfer accepted and registered by the company. Then by a subsequent letter it was explained that £45 per share meant £45 per cent. on the amount paid. Now, this proposed bargain was brought before the directors of the company on the 17th November, when there were present Mr Rose, Mr Crabbie, Mr Callander, Mr Weir, and Mr C. A. Rose. It is very important to notice that these gentlemen held 420 or nearly one-half of the whole shares (1000) of the company. This meeting of the directors unanimously approved of the purchase, and this minute was confirmed at the next meeting on 11th December 1876. But the case does not stop here. A general meeting of the shareholders was called, and it was held on 1st February 1877, and at this general meeting there were actually present nine shareholders, being a majority both in number and in value of the whole shareholders of the company. Now this general meeting of the company proceeded to deal with the proposed transaction, and they unanimously approved of the purchase made by the directors for the company of the stock of the late Mr James Thomson at the price of 45 per cent.

Now, I am of opinion that this general minute of the whole shareholders of the company concluded the transaction. The consent of all these gentlemen would have been enough, whether at a meeting of the company or not. They were the absolute majority both in number and in value of the whole shareholders, and as such they had an undoubted right either to accept any transferee who had been tendered, or, if they refused to accept him, to take shares for the company themselves, either for the company or for the majority of its members. I think they effectually did so, and that this act of the majority in number and value of the shareholders completed the transaction and bars all subsequent challenge. As already mentioned, the transfer was actually executed on several dates in December 1876, the price was then paid, and Messrs Rose, Weir, and Crabbie were entered upon the register of shareholders in room and place of Mr Thomson's trustees. It was said that there was no notice given in the circular calling the general meeting of shareholders of 1st February 1877 that the proposed sale and purchase was to be one of the matters considered at the meeting, and that consequently they could not take it up as it was not on the billet. Now the billet is in quite general terms, and does not mention any business at all. But it appears to me that this is not of much consequence in the present case, for as there was an actual majority both in number and value present at the meeting, and as they confirmed the purchase, that majority had a good right to do so even though they had

only met accidentally, and although there had been no general meeting at all. The contract does not say it is to be a majority of the parties present at the meeting, and I see that in previous cases they had consented to transfers upon what I may call private meetings which did not come before any meeting at all.

Now, what follows after this? The business of the company goes on; and it is not immaterial to notice that its prospects brightened, and the value of the property was said to have increased. If Mr Thomson's trustees had retained the shares, they might have realised a larger price in the open market. That is at all events possible; but they parted with them, and the transaction was at an end. They were no longer treated as members, and their shares were held as belonging to Messrs Rose, Weir, and Crabbie in trust for the company, and everything went on as it had been before, there being at that time apparently no apprehension that the company would become insolvent. The next general meeting of shareholders was held on 4th February 1877, and at this meeting the minutes of the previous general meeting of 1st February 1877 were read and approved of. So that here again, by the reading of the previous minutes this transfer then carried through in favour of these three gentlemen in trust for the company from Thomson's trustees was again brought under their notice and again approved of. And so the company went on afterwards till it ultimately found itself in difficulties from sustaining losses, and liquidation was resolved upon.

Now, I am of opinion in these circumstances, although I have already explained the reasons of my doubts, that this is an effectual transfer to the company itself, and that in virtue of the necessary implication of the 12th article of the articles of association. There are alternative views in this case which have occurred to me, and which I merely mention, though I do not intend to give any definite or final opinion upon them. Even supposing that the transfer as a transfer to the company were not valid, it does not follow that this is not a valid transfer to Messrs Rose, Weir, and Crabbie as individuals, and that these gentlemen are not validly entered as partners. The deed is a transfer which bears to be to three trustees, and I think there is room for maintaining—this point was not argued, and I am therefore giving no final and absolute opinion upon it, but certainly there is room for maintaining—that if the transfer is not a good transfer to the company, it still remains a valid transfer to three gentlemen who undertook the office of trustees. It was they who paid the price. It is material to notice the terms of the transfer. The price is not said to have been paid by the company. The price, £2272, 10s., is "paid to us," that is, Thomson's trustees, by Hugh Rose, John Crabbie, and John Weir, all of Edinburgh; and there it stops. That is the consideration which they give for it, and that consideration may have come from the company's funds, or may not. It does not state so. The transfer is to these three persons, and no doubt they are designed as trustees; and that may be a very good proof of trust as in a question between them and the beneficiaries for whom they are trustees; but that is dictated by them, and it is no part of the statement of the assigners. What these three gentlemen were to do with the shares they had purchased from Thomson's trustees was not a matter in which Thomson's trustees had much concern; and I am merely stating the difficulty here because I think it has not been argued, and I shall not give any opinion upon it. But it shows that the points are very important and very difficult, especially in prospect of the general principle in regard to trustees who hold shares. I think it may be said with great force that the trustees might have designed themselves in any way they liked—as proprietors for themselves jointly, or proprietors in certain proportions, or proprietors for behoof of somebody else. Thomson's trustees are not the makers of the deed. They get the money, and in consideration thereof they give the shares to those three individuals. Now, if it was held that these three individuals were the sole parties who had any interest in a trust, it is their business to see that the trust is good, and the alternative would be that they as individuals were the transferees; and there are plenty of cases in the books where, in a question even with the company itself, there is such a transfer recorded the trustees are held individually liable; they may have relief against the trust, but that is not a question with which the company or its creditors have any concern. If that view were taken here, the result would be that Mr Hugh Rose, Mr John Crabbie, and Mr Weir are the transferees; and an application may possibly be made—it is not made yet, and therefore I can give no opinion upon it—to put their names on the list as individual contributories. We may hear of that yet, but on that point I give no opinion. But even in that view, Thomson's trustees are well out, because the transfer by them has been recorded and approved of by the company in terms of the articles of association—by an absolute majority of the whole partners. That would be enough also for this case, for they can never replace Thomson's trustees on the list of contributories if the company themselves have approved of the transfer, which either was to the company itself or to certain trustees as transferees of Thomson's trustees. I do not go into these questions, because it is not necessary here to decide them. They are difficult in themselves, and they may possibly not arise; but my opinion is that we must refuse the application of the liquidator to replace Thomson's trustees on the list of contributories.

Lord Ormidale—There can be no doubt that this is a case of great importance, and that it raises considerations of general application. I have therefore given it all the attention in my power, and all the more as I had reason to know that my views were not in accordance with the rest of the Court.

The question to be determined is, Whether the purchase by the Bonnington Sugar Refining Company (Limited) of the shares — 50 original and 50 new—which were held by the deceased Mr Thomson, is or is not valid, to the effect of relieving the respondents, Mr Thomson's testamentary trustees, by whom the shares were held after his death, from liability in respect of these shares in the present liquidation or winding-up of the company. The respondents maintain the affirmative of this question, and the liquidator Mr Cree, who is the petitioner, the negative.

The facts of the case are now, in all substantial respects, indisputable—any difference which had existed regarding them having been cleared up and removed by the proof. And I think it also appears from the proof that, apart from the legal results, the respondents acted throughout in good faith.

In law, however, it has been argued on the part of the liquidator that any purchase of their own capital or shares by the company was and is null and void, being *ultra vires* and in violation of the constitution of the company, while, on the other hand, it was argued for the respondents —first, that according to the true construction of the memorandum and articles of association of the company, and in particular the 12th article, such a purchase as that in dispute was not *ultra vires*, but permissible; and secondly, that at any-rate it is enough that the purchase has been ratified and acquiesced in by the shareholders of the company.

As a general rule or principle, I think it must be taken as clear on the authorities and precedents, many of which were cited at the debate for the liquidator, that such a company as the present is not entitled to purchase its own shares unless plainly and clearly authorised or empowered to do so by its constitution, that is to say, by its memorandum and articles of association and the Companies Acts of 1862 and 1867.

The memorandum of association in the present case sets out the essential conditions upon which the company was established, and among them, there is one to the effect that "The nominal capital of the company is £50,000, divided into 500 shares of £100 each;" and there is another, to the effect that the object for which the company was established is "the buying and selling of sugar, and carrying on the business of sugar refining." Nowhere can I find, either in the memorandum and articles of association or in the Companies Acts of 1862 and 1867, under and subject to the enactments of which the company has been incorporated, that any power is given to it to diminish its capital or to purchase its own shares. On the contrary, I find that by section 8 of the Act of 1862 there is a provision to the effect that in the case of limited companies such as the present the memorandum of association shall contain among other things—"(3) The objects for which the proposed company is to be established," and "(5) The amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount;" and that by section 12 the company may, by observing certain steps of procedure, so far alter its constitution "as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock; but, save as aforesaid, and save as hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association." It is true that by the subsequent Companies Amendment Act of 1867 power is given under section 9 to a limited company "by special resolution so far to modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed or as altered by special resolution, to reduce its capital, but no such resolution for reducing the capital of any company shall come into operation until an order of the Court is registered by the Registrar of Joint-Stock Companies as is hereinafter mentioned;" And that by next section (10) it is enacted—"That the company shall after the date of the passing of any special resolution for reducing its capital add to its name, until such date as the Court may fix, the words, 'and reduced.'" There then follows, in sections 11, 12, 13 and 14, various other particulars which must be attended to to entitle a company to reduce its capital. But none of these particulars have been attended to in the present instance; and it has not been said or argued by the respondents that they can take any benefit from the Companies Amendment Act of 1867.

Nothing, therefore, can be plainer than that the present company, while it might increase its capital, and to that effect alter its constitution, could not make any alteration to the effect of diminishing its capital. And that the transaction which the respondents found upon as entitling them to resist the present petition is of the nature of a purchase of the shares which belonged to the late Mr Thomson admits of no question. Neither can it be doubted that the purchase was made for the company and paid for out of its capital. This, besides being clearly established by the proof, is matter of express admission in the record by the respondents. Thus, while the liquidator in article 9 of his statement refers to the negotiations which had been opened through Mr Callander "for the company acquiring the shares, and which ended in the transaction mentioned in next article," he goes on in next article (the 10th) to say that the shares were bought by certain individuals, viz., Messrs Rose, Crabbie, and Weir, and that they were to be held by them "in trust for the Bonnington Sugar Refinery Company (Limited);" and this article 10 is admitted in the answers for the respondents. There is also the deed of transfer itself, which expressly bears that the shares in question which stood in the names of the respondents as Thomson's Trustees were transferred to Messrs Rose, Crabbie, and Weir, in trust for the Bonnington Sugar Refinery Company (Limited). Accordingly the sum of £2272, 10s., which was the price paid for the shares, is entered in the company's books as having been paid by them. Finally, as to the matter of the purchase, and for whom it was made, I have to refer to the testimony of Mr Rose, the chairman of the company, who was examined as a witness for the liquidator, and whose account of the matter is characterised by a fairness and candour very creditable to him. He says that "In the autumn of 1876 Mr Callander at one of the directors' meetings mentioned that Mr Thomson's trustees were anxious to dispose of his shares in the company, and asked us to find buyers for them if possible. Some conversation took place at the board in reference to what should be done with the stock, and in the course of our communings it was suggested that we might take it for the company. . . . . We thought we were doing a good thing for the company in making such a purchase. It was distinctly understood on both sides that the purchase was made for the company, and not by the directors for themselves individually. That was quite well known all round." And Mr Callander, who is one of the

respondents, and in whose testimony Messrs Clouston and Bullock, two of the other respondents, concur, says, "It was quite understood that it was the company who were to buy the shares, and not the directors personally."

In these circumstances, I must own my inability to find any ground for holding that the purchase in question can be upheld, or for disputing that from the beginning and throughout it was null and void as being *ultra vires* of the company and incapable of ratification. The numerous precedents and other authorities cited at the debate appear to me to be quite conclusive on the subject, and I think it only necessary now to refer in particular to three of the more recently decided cases. In the case of the *London, Hamburgh, and Continental Exchange Bank — Zulueta's* claim — May 1870, L.R. 5 Chan. 444, it was held, on appeal by Lord Justice Giffard that unless the memorandum and articles of association of a company contain in plain terms an express power enabling the company to purchase their own shares, such purchase is *ultra vires*, even although the company may be empowered to deal in shares of joint-stock companies generally. That was obviously a more favourable case for relaxing the general principle or rule of law than the present, for there, although the company had no special power to purchase their own shares, they were empowered to deal in shares of joint-stock companies generally; but here the company had neither a special power to purchase their own shares nor a general power to deal in the shares of other companies. In disposing of the case referred to the Lord Justice remarked (p. 450 of report)—"Unless there is in plain terms a direct authority to purchase their own shares, it is clear in point of law, and I have no hesitation in saying it is clearly understood among all men of business who give their minds to the subject, that they cannot do so." And again, in regard to the ratification of such a purchase by the shareholders, his Lordship says (p. 451 of report)—"I am clearly of opinion that this transaction is *ultra vires*, and if it is *ultra vires* it is not a mere voidable transaction, but it is wholly and totally void; it is a transaction which no general meeting could confirm, because it was altogether beyond the power of the company in every sense."

That case relating to *Zulueta's* claim occurred in 1870, and in 1876 occurred the case of *Hope* v. *The International Society*, 4 L.R. Chan. Div. 327, where it was held by the Lord Justices James, Bagallay, and Brett, affirming a judgment of Vice-Chancellor Bacon, that a scheme sanctioned by resolution passed by a company to the effect that the directors should purchase from any shareholders willing to sell any shares not exceeding 100,000, and that such shares should not be re-issued by the directors without the authority of a general meeting, was *ultra vires* and invalid, as being an attempt to reduce the capital of the company without complying with the provisions of the Companies Act 1867, secs. 9–13, or else a trafficking in the shares of the company. All the Judges were unanimous in this opinion, and each took occasion to remark that it was unlawful for a company to do anything not authorised by the Companies Acts and their memorandum and articles of association. Lord Justice Bagallay said (p. 337 of report)—"It appears to me that the resolutions which were passed on the 24th of August, and which were confirmed on the 21st of September, were in substance resolutions for the reduction of the capital of the company. No doubt it might have been done with a view to the winding-up of the company in preference to the ordinary process of winding-up, but they were in substance resolutions to reduce the capital of the company, which then consisted of £1,500,000, to an extent not exceeding £1,000,000. Now, I am of opinion that at the time when these resolutions were passed there was no power to reduce the capital of the company except by pursuing the course pointed out by the Act of 1867. The Act which until the Act of 1867 was passed was in force was that of 1862, and this expressly provided that no alteration should be made by the company in the conditions contained in the memorandum of association except those which were previously mentioned, which included the increase of the capital of the company but did not include its diminution."

That case is very important in its bearing on the present, as well in reference to the illegality of departing from the provisions of the Companies Acts of 1862 and 1867 and the conditions on which the company has been established as contained in its memorandum and articles of association, but also in reference to any attempt, direct or indirect, on the part of a company to diminish its capital. There it was held, apparently without hesitation or difficulty, that the purchase by a company of its own shares must necessarily have the effect of diminishing its capital, and this I should have thought was so obvious as not to admit of any doubt or question. Take, for example, as an illustration of the matter, the present case. The sum of £2272, 10s. was paid by the company for Thomson's shares, as shown by the deed of transfer, and of course to the extent of that sum the capital of the company is unmistakeably diminished. And it necessarily follows that if the purchase by a company of its own shares or stock to the extent of £2272, 10s. was lawful, purchases of the remaining shares or stock must also be lawful, so that ultimately no capital and no partners would be left to carry on the business of the company or to meet the demands of its creditors—a state of things which in no view that can be taken of the constitution of the present or any similar company could, so far as I can see, be justified.

The only other case which I think it necessary to notice is that of the directors of the *Ashbury Railway Carriage and Iron Co. (Limited)*, decided in the House of Lords in 1875 (L.R. 7 Eng. and Ir. Appeal Cases, 653), and where, as I read the opinions of the noble and learned Lords who took part in the judgment, viz., the present Lord Chancellor (Cairns), and Lords Chelmsford, Hatherley, O'Hagan, and Selborne, the principles to which I have already adverted as those which must govern the present case are fully and distinctly recognised. Thus, the Lord Chancellor, after entering very fully into an examination of the principles which govern all such companies as the present, established and incorporated under memorandum and articles of association and the Companies Acts of 1862 and 1867, goes on to observe (p. 667)—"The provisions under which that system of limiting liability was inaugurated were provisions not merely, perhaps I might say not

mainly, for the benefit of the shareholders for the time being in the company, but were enactments intended also to provide for the interests of two other very important bodies; in the first place, those who might become shareholders in succession to the persons who were shareholders for the time being; and secondly the outside public, and more particularly those who might be creditors of companies of this kind." And again he says—"I find Mr Justice Blackburn, whose judgment in the Court of Exchequer Chamber was concurred in by two other judges who took the same view, expressing himself thus—'I do not entertain any doubt that if on the true construction of a statute creating a corporation it appears to be the intention of the Legislature, expressed or implied, that the corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void, and to hold that a contract wholly void cannot be ratified." "My Lords" the Lord Chancellor added, "that sums up and exhausts the whole case." And Lord Selborne in the course of his opinion says (p. 693 of report)—"I only repeat what Lord Cranworth in *Hawkes* v. *Eastern Counties Railway Company*, L.R. 5 H. of L. 331 (when moving the judgment of this House), stated to be settled law, when I say that a statutory corporation created by Act of Parliament for a particular purpose, is limited as to all its powers by the purposes of its incorporation as defined in that Act. The present and all other companies incorporated by virtue of the Companies Act of 1862 appear to me to be statutory corporations within this principle. The memorandum of association is under that Act their fundamental and (except in certain specified particulars) their unalterable law, and they are incorporated only for the objects and purposes expressed in that memorandum. The object and policy of those provisions of the statute which prescribe the conditions to be expressed in the memorandum, and make these conditions (except in certain points) unalterable, would be liable to be defeated if a contract under the common seal, which on the face of it trangresses the fundamental law, were not held to be void and *ultra vires* of the company, as well as beyond the powers delegated to its directors or administrators. It was so held in the case of the *East Anglian Railway Company* (iii. 21 L. J., C. P. 23) and in the other cases upon Railway Acts, which cases were approved by this House in *Hawkes'* case, and I am unable to see any distinction for this purpose between statutory corporations under Railway Acts and statutory corporations under the Joint-Stock Companies Act of 1862."

I am aware that departures in some instances from the strict letter of the regulations of a company may unavoidably and incidentally occur in the management of its affairs by the directors, without invalidating what they do, or at least without precluding the operation of acquiescence or ratification of their proceedings by the shareholders. Some examples of these are referred to in various passages of Mr Lindley's work on Partnership and Companies; but it is not unworthy of notice that he at the same time states (3d edition, p. 626)—and he accompanies his statement by a reference to precedents—that the directors cannot apply the capital of the company in paying dividends or in the purchase of shares of retiring shareholders, or—unless they are authorised to do so by the company's Act, charter, deed of settlement, or regulations—forfeit shares or reduce the capital of the company.

Such, then, being the principles or rules of law recognised and acted on in previous cases of the highest authority, and by which, as it appears to me, the present case must be governed, I have now very briefly to notice the grounds relied upon by the respondents. As I understood their argument, it was maintained that the transaction in question, whereby the shares formerly belonging to Mr Thomson, and afterwards held by his testamentary trustees, were purchased for the company, was and is valid, in respect, 1st, that it was warranted by the 12th article of the company's articles of association; and 2dly, that at anyrate it was afterwards ratified and acquiesced in by the shareholders. Now, in regard to the first of these grounds, I think it is enough to observe that article 12 of the company's articles of association requires only to be read to show clearly and unmistakeably that in no reasonable sense that can be taken of it does it authorise the purchase by such a company as the present, constituted as it has been, of its own shares or stock. The 12th article relates to a different matter altogether. It relates not to the purchase by the company of shares or stock, but to the purchase of shares or stock by the shareholders. It bears that no transfer of shares of the company's stock, either on a sale or in consequence of the bankruptcy or insolvency of any shareholder, or in consequence of the marriage of any female shareholder, shall be valid without the consent of a majority of the other shareholders, expressed in writing, but in the event of the other shareholders declining to consent, they—not the company—shall be bound to take the shares at the price offered in the case of a proposed sale, and at the market price of the day in the case of a proposed transfer for any other cause. Clearly, therefore, this article has no application to the present case. Mr Rose, the chairman of the company, to whose evidence I have already referred, distinctly states that "the right of pre-emption set forth in the 12th article of the articles of association was never exercised." It seems to me, therefore, to be in vain for the respondents to rely on the 12th article of the articles of association. Nor can it be said that the respondents could not be relieved of the burden of their shares in any other way, and therefore that a result would happen which it cannot be supposed any set of regulations, statutory or otherwise, could have contemplated, for the respondents might have obtained all the relief they were entitled to by selling their shares, as they might have done, to parties other than the company. And failing that or some other remedy, the respondents had it in their power to make the necessary application for having the company put into liquidation and wound up, and thereby effectually relieving themselves from all further responsibility in connection with the company or its shares. A winding-up is always competent in terms of subdivision (5) of section 79 of the Act of 1862, whenever the Court considers such a cause "just and equitable."

And if I am right so far, it also follows on the authorities that the purchase or transaction in question could not be validated by the subsequent

ratification or acquiescence of the shareholders. In reference to this the Lord Chancellor remarked, in the case of *The Ashbury Railway Carriage and Iron Company* v. *Riche*, that a contract void at its beginning as having been beyond the powers of the company could not be subsequently validated by the shareholders, for they would thereby be "attempting to do the very thing which by the Act of Parliament they were prohibited from doing." Besides, were it necessary to enter into the inquiry whether there has been any approval of the transaction by all the shareholders, I would have little or no hesitation in saying, on the evidence, written and parole, that there was not. The evidence of Mr Rose of itself makes this I think sufficiently clear. He says—"No notice on the subject was issued to the shareholders. It was brought up as part of the ordinary business at the annual meeting in February 1877, when all who were present approved of what we had done. The absent shareholders had no notice whatever of the transaction, and no means of knowing that such a transaction had taken place. No formal intimation of it was sent to the shareholders after the meeting in February 1877."

But then something was also said, as I understand, that whether the purchase or transaction in question was invalid or not it is incompetent for the Court under the present application, keeping in view that the respondents are no longer on the register of shareholders, to find that they should be placed on the list of contributories, and ordained to pay the call of £30 per share which has been made on all the shareholders. For my own part, I must own that I have been unable to understand upon what foundation such a plea has or can be raised. It rather appears to me that, if I am right in holding that the purchase or transaction whereby the shares in question, which were formerly held by the deceased Mr Thomson and afterwards by his trustees, was *ab initio* and is now absolutely null and void, it follows that matters must and ought to be restored as asked by the liquidator in order that the rights and liabilities of all parties may be judged of and determined, just as if no such purchase or transaction had ever taken place. And that this may be quite competently done is, I think, clear from sections 98, 102, and 138 of the Companies Act 1862. By the first of those sections it is enacted that—"As soon as may be after making an order for winding-up the company the Court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required, in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities." By the second of the sections referred to power is conferred on the Court to make calls, and "order payment thereof by all or any of the contributories for the time being settled on the list of contributories to the extent of their liability." And by the third of the sections referred to it is enacted that where a company is being wound up voluntarily, as the present company is, the liquidator may apply to the Court "to determine any question arising in the matter of such winding-up . . . on such terms and subject to such conditions as the Court thinks fit, or it may make such other order, interlocutor, or decree on such application as the Court thinks just." Again, therefore, I must say that I am unable to see any reason for holding that it is not within the power of the Court to give effect to the prayer of the present petition, either in whole or in part, as may be thought right.

In the whole circumstances, and for the reasons I have now stated, the liquidator is, in my opinion, entitled to have the prayer of his petition granted. And I have only to add that I think it would be unfortunate, and calculated to lead to disastrous consequences, were the judgment to be pronounced in this case such as to give any countenance to the notion that a company like the present is entitled to depart from or violate either the provisions of its own memorandum and articles of association under which it has been established, or the provisions of the Companies Acts of 1862 and 1867, under which it has been incorporated, and by which it must be governed. I may add that while this is the result at which I have arrived on the questions and in the circumstances which here present themselves, I am not to be understood as expressing any opinion on questions of a different character or arising in other and different circumstances. In particular, I offer no opinion on the question whether Messrs Rose, Crabbie, and Weir may not in some form or other, or in some other proceeding than the present, be made answerable in respect of the shares in question. No such question was argued at the bar or ever referred to, and it would, besides, be highly improper for us to deal with such a question, seeing that Messrs Rose, Crabbie, and Weir are not parties at all to the present litigation, and of course have not been heard for their interests.

Lord Justice-Clerk—I am not surprised that there should be difference of opinion in this case. I have found it to be very perplexing, nor can I say that the conclusion I have come to has been formed without difficulty. But I agree with Lord Gifford, and think that the trustees of Mr Thomson ought not to be placed on the list of contributories at the suit of the voluntary liquidator.

The ground on which the liability of these respondents is supposed to rest is, that the transaction by which their names were removed from the register of shareholders falls under the principles applied by the Courts in England and by the House of Lords in the cases referred to by Lord Ormidale; and that it was not only an informal and unauthorised proceeding, but one which was wholly illegal, and as such incapable of being validated by the consent or acquiescence of all the shareholders. If this be a sound answer, it would seem to follow that if this company had turned out prosperous Thomson's trustees could at any time have repudiated the sale and demanded to be restored to the register and admitted to share in the realised profits.

I shall shortly consider, first, whether this transaction falls within the category of acts which are in themselves wholly illegal; secondly, whether it was concluded in terms of the articles of association; and thirdly, if it were not so concluded, then whether it has been ratified by the shareholders in whose interest this demand is made.

I must be understood, in the remarks I have to make, to adopt without reserve the very valuable principles asserted in these authoritative judgments. I think them not less sound than salutary, and I should be sorry to say a word which should seem to imply the slightest doubt of the

grounds on which they proceeded. But whether the present case can be brought by logical inference under the same category or not, it is quite clear that it arises in circumstances standing in sharp contrast to those which were the subject of these decisions, and that it belongs to a class not obscurely indicated even in the weighty opinions of the Judges and in the House of Lords in the cases referred to.

I take, as fair examples of the facts to which the doctrine in question clearly applies, the leading cases of *The London and Hamburg Bank* (*Zulueta's* case) in 1870 (L.R. 5 Ch. App. 444); *Riche* v. *The Ashbury Railway Carriage Co.*, L. R. 7 H. of L. 653; and the most recent of all, *Hope's* Case, in 1876 (4 Ch. Div. 327). The nature of these cases was the following: — In the first, the directors of the bank had authorised Henry, their broker, to buy shares of the bank for the purpose of raising their value in the market. In the second, the directors of the Railway Carriage Company had undertaken for the company the construction of a line of railway, which was entirely and admittedly beyond the object for which the company was formed, which was only to provide carriages and plant for railways. In the third, the directors of the International Financial Society authorised the purchase of 100,000 shares for behoof of the company, being two-thirds of the whole capital, with a view, substantially, to their cancellation or re-allotment. In all three it was held that the transaction was illegal, because it was contrary to the memorandum of association to engage the company in any branch of trade other than that for which it was incorporated, or to enter into any arrangement for the purpose of reducing the capital set out in the memorandum.

Now, these cases all disclosed, not a violation of the letter, but a fraud on the substance of the company contract. They were transactions plainly illegitimate, and entirely beyond the objects of the association. It is, I think, manifest that the facts in the present case are widely dissimilar. The directors here did not desire to engage the company in any traffic in its own shares as a commercial speculation, but to relieve the trustees of a deceased shareholder of shares which they had the power to sell, and which the body of shareholders had the power to purchase. It might be that the effect of the purchase was in the meantime to a slight degree to diminish the capital of the company, but that was in no degree the object or intention of the proceeding. In the first of these cases Lord Justice Giffard said—"Of course, if this had been a transaction in any shape within the ordinary course of the business of the company, which an ordinary person going to the company would have supposed to be within the ordinary course of their business, I should be the last to say it was a transaction which could not be supported." In *Hope's* case Lord Justice James is reported to have said—"When the company deals with an individual shareholder, and does what appears to be right under the circumstances, namely, to accept the surrender from the shareholder who cannot pay, and to release him from further liability, that might be good, although incidentally and to a small extent it may be said to diminish the capital." These remarks indicate forcibly the line to be drawn in such cases. The present is a strong example of their application.

This Bonnington Company, although registered under the Acts of 1862 and 1867, was in some sense a private company. It consisted originally of thirteen partners, who were personal friends or acquaintances. Its stock never could be the subject of traffic, because it never was on the market or quoted in share lists, as the shareholders had a right of acquiring any shares which might be for sale, and no sale could take effect without their consent. Thus the element of power to purchase shares by the body of the shareholders for their joint behoof was part of the fundamental constitution of this association, and was essential to its administration. Whether therefore the form adopted in the present case, of taking the right in the name of the company instead of in that of the individual shareholders, was regular or not, it is clear that the transaction did not involve in any degree the engaging of the concern in a trade or traffic foreign to the object set out in the memorandum of association. It was in its substance and intention an act of ordinary administration, and all that can be said is that it was not carried out in precise conformity with the articles of association.

As to the element of the diminution of capital, the case appears to be identical with that which is put by Lord Justice James. It is as remote from *Hope's* case as it can well be. There was no intention to diminish the capital, and if it were so diminished by the arrangement, that was an incident, and an inconsiderable one, and not beyond the reach of reasonable adjustment. The provisions in sections 14 to 19 of the articles in reference to the forfeiture of shares for non-payment of calls, show that it was contemplated that in some circumstances share capital might be extinguished, and the forfeited shares were to be disposed of "as the company at a general meeting should direct"—a provision, in my opinion, which was fair matter of administration, and not inconsistent in any way with the memorandum of association.

I think therefore that this case stands outside the category of the cases referred to. The transaction was not of a nature in itself illegal, or one which not even all the shareholders could legally have completed. It was in itself reasonable—completely within the spirit of the 12th article of the association.

It is, however, said that the special provisions of this 12th article were not followed; that no call to a third party had been attempted; that the sale was to the company and not to the shareholders; and that no notice was given to the shareholders when the bargain was completed.

It is here, and here alone, that I have felt any serious difficulty; but I am inclined to look more to the substance and good faith of the thing done than to scan too critically the mode of doing it. As far as the result to the shareholders is concerned, it would seem to be precisely the same as would have followed the adoption of the course pointed out in the 12th section. In either case the remaining shareholders became entitled to the profits, and liable to any loss which might accrue on these shares. They were entitled to share among them the £13,000 of profit which was the result of the trade of 1876, and in like manner they are liable in the losses of the subsequent year. I think the 12th section implies a power to deal directly with the shareholder voluntarily,

and if the directors had re-allotted the shares to the remaining shareholders, and this had been confirmed at general meetings, I think the transaction could not have been challenged on either side. The objection in this way becomes, *inter socios*, one as to procedure merely, not to substance, and is therefore one which acquiescence or ratification may cure.

The question whether it has been ratified is very narrow, but if it were capable of ratification I think it was ratified. The sellers were removed from the register in 1876, and this in so limited a partnership must be held to have been notorious. The sale was duly reported to the general meeting of 1877, and was again formally approved of in 1878, at a meeting where all the shareholders excepting three were represented. In the meantime the sellers, who are trustees under a *mortis causa* settlement, have made their arrangements on the faith of this unchallenged bargain, and the shareholders took the chance and the risk of the rise or fall of the value of the shares. I think they cannot now repudiate it, and as this company is solvent that is the only question we have to consider.

I think the substance of this article, although ambiguous both in expression and in its practical effect, has a most material bearing on this branch of the law as applied to this case. It gives the company a right to prohibit transfers outside the company, and gives the shareholders in substance a right of pre-emption. Now, the Companies Act of 1862 expressly provides in section 22 that the shares of such companies shall be transferable subject to the articles of association. But to my mind this power necessarily implies a power on the part of the company to purchase and hold its own shares, and although the words are misty enough, the inclination of my opinion is that the obligation to purchase is not laid on the individual shareholders who vote against the transferee, but on the company. Some one, a body of men, must become the transferee. It would be a strong provision to compel an unwilling shareholder to take more shares than he ever undertook to take, and therefore I conclude that the company itself were to hold them.

The Court refused the prayer of the petition, with expenses.

Counsel for Petitioner—Guthrie Smith—Pearson. Agents—Boyd, Macdonald, & Co., S.S.C.

Counsel for Respondents—Balfour—Rankine. Agents—Maclachlan & Rodger, W.S.

Saturday, October 26.

SECOND DIVISION.

[Sheriff of Perthshire.

WEBSTER *v.* SHIRESS (WEBSTER'S EXECUTOR).

Process—Sheriff—Competition for Office of Executor.

Held that in a petition for decerniture of an executor any one may come forward with a competing petition before confirmation, and that neither reduction of nor reponing against a decree is necessary.

Executor—Nomination and Confirmation—Next-of-Kin—Moveable Succession Act 1855 (18 *Vict. c.* 23)—*Act* 4 *Geo. IV. cap.* 98.

W died intestate and unmarried; her father thereupon was decerned executor-dative *qua* next-of-kin, but was not confirmed. Subsequently he died leaving an executor, who in his turn was decerned executor-dative to W *qua* executor-nominate of her father. In a petition for recall of that decree-dative, at the instance of W's brother as one of her "next-of-kin," *held* that as both parties were equally entitled to the succession they must both be conjoined in the administration.

Observed (*per curiam*) that the term "next-of-kin" does not denote any special degree of propinuqity, but merely that which is next in the order of succession.

This was an appeal from the Sheriff Court of Perthshire in a petition presented by Edward Webster, residing at Dollerie, near Crieff, against William Shiress, solicitor, Brechin, executor-nominate of the late Lieutenant-Colonel J. C. Webster, lately residing at Portobello. The pursuer prayed the Court to recall a decree-dative granted by it in favour of the defender as executor-dative of Sophia Webster, sometime residing at Dollerie, near Crieff, *qua* executor-nominate of the said James Carnegy Webster, dated the 31st day of August 1877; and to decern the pursuer executor-dative *qua* one of the next-of-kin to the said Sophia Webster. In his condescendence he set forth that his sister Sophia died at Dollerie on 17th September 1876, intestate, and that he was her eldest surviving brother and one of her "next-of-kin." She had been survived by her father Lieutenant-Colonel Murray, and by several brothers. Her father had been decerned executor-dative *qua* next-of-kin to her on 27th April 1877, but it appeared that by a clerical error Sophia had been named Euphemia in the petition for appointment. Colonel Webster died on 19th July 1877, and by will, dated June 1, 1877, had appointed Mr Shiress, the defender, his executor. He had died without obtaining confirmation as his daughter's executor, and on 31st August following Mr Shiress had been decerned her executor-nominate in the terms mentioned above.

The pursuer pleaded, *inter alia*—"(1) The said James Carnegy Webster not being one of the next-of-kin of the said Sophia Webster, the defender was not entitled to be appointed executor-dative *qua* next-of-kin of the said deceased Sophia Webster. (3) The pursuer, as one of the next-of-kin of the said Sophia Webster, ought to be decerned *qua* such. (6) The said Colonel Webster being father of Sophia, was not among her next-of-kin while collaterals were alive. (13) A petition for recall of an improper decerniture having been always competent in the Commissary Court in similar circumstances to the present, and the Sheriff Court (Scotland) Act 1876 having transferred the powers of commissaries to the Sheriffs, your Lordship is now entitled to exercise said power of recall."

The defender pleaded, *inter alia*—"(1) The action is incompetent in so far as it prays for the recall of the decree-dative pronounced in favour of the defender on 31st August 1877, and subsequently extracted. This Court cannot recall its own extracted decree or any of its decrees after seven days from their date, except under the provisions