Lord Mure and Lord Shand were absent from illness.

In the case in which Lord Glasgow's trustees were pursuers the Court recalled the Lord Ordinary's interlocutor, repelled the defender's pleas-in-law, and decerned.

In the case in which Mr Clark was pursuer the Court sustained the first plea-in-law for the defenders, and found the pursuers entitled to £57, 12s. 3d., and decerned.

Counsel for Lord Glasgow's Trustees—Low. Agents—J. & F. Anderson, W.S.

Counsel for Clark—Balfour, Q.C.—Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, March 1.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

RIXON *v.* THE EDINBURGH NORTHERN TRAMWAYS COMPANY.

Public Company—Contract—Fraud—Reduction—Action by Single Shareholder.

A shareholder of a public company brought an action of reduction of a contract, alleging that it had been entered into fraudulently and collusively, and that the directors were thereby serving other interests than those of the company. *Held* that as fraud had been relevantly averred, the action could competently be maintained at the instance of a single shareholder, and a plea of no title to sue *repelled.*

The Edinburgh Northern Tramways Company was incorporated in 1884 by Act of Parliament, by which the company were authorised to construct certain tramways mentioned in the Act in the city of Edinburgh and town of Leith.

By agreements between the Town Councils of Edinburgh and Leith and the promoters of the said Act, scheduled to the said Act, and confirmed and made binding upon the company by the 69th and 71st sections thereof, it was provided that all the works to be executed by the company should form the subject of competition and contract.

On 24th October 1884 tenders having been invited by advertisements, a contract was entered into between the Northern Tramways Company and the Patent Cable Tramways Corporation, Limited, for the construction of the proposed tramways. This contract was, in consequence of certain disputes between the parties, subsequently modified by an agreement dated 22nd July 1886, following upon which a portion of the work contracted for was proceeded with.

In July 1886 the contractors made over their whole present and future interest in the concern to the Debenture Corporation, who in turn subsequently assigned it to the Assets Realisation Company, Limited. From time to time during the execution of the works the contractors became entitled to certain payments, and the Tramways Company elected in terms of the contracts to issue to them in satisfaction thereof shares and mortgages of the company to the amount of the engineer's certificates, subject to the retention of a certain percentage provided by the contract. The shares and mortgages were so issued at the request of the contractors to their nominees. It thus happened that at 28th February 1888, out of the 4500 £10 shares and the £10,170 mortgages in and of the Tramways Company, 3190 shares and £6270 mortgages, issued to the contractors' nominees, were held by certain parties, including the present directors of the Tramways Company, for behoof of the said Assets Realisation Company, Limited.

In January 1888 the Patent Cable Tramways Corporation went into liquidation, and Mr John Annan, accountant, London, was appointed official liquidator.

On 15th June 1888 another agreement (supplemental of that of 22nd July 1886 above referred to) was entered into between the Patent Cable Tramways Corporation, Limited, of the first part, the secretary of the Assets Realisation Company of the second part, the Edinburgh Northern Tramways Company of the third part, and Messrs Dick, Kerr, & Company, contractors, 101 Leadenhall Street, London, of the fourth part, with a view to the construction of the remaining portion of the line originally contemplated at a cost of £75,000.

William Augustus Rixon, of 10 Austin Friars, London, raised the present action against the Edinburgh Tramways Company, seeking to have the agreement last above recited reduced.

He averred that he was a debenture and shareholder of the defenders' company, that the works contracted for did not form the subject of competition as provided by the company's Act of incorporation, and were therefore *ultra vires* of the company. He further averred—(Cond. 17) "The said agreement of the 15th June 1888 has been entered into between the said parties wholly irrespective of the interests of the company, and to the prejudice of the pursuer and the other independent holders of shares and debentures. It was entered into by the defenders fraudulently and collusively with the design of obtaining for Messrs Dick, Kerr, & Company a contract on exorbitant terms free from competition, and such contract, should it be carried out, would have the effect of seriously and unjustly depreciating the shares and debentures held by the other independent mortgagees and shareholders of the company. The directors of the defenders were in fact acting in the transaction only as the agents of Messrs Dick, Kerr, & Company, and of the Assets Realisation Company, as mortgagees of the Patent Cable Tramways Corporation, Limited, and not solely, as should have been the case, as the representatives of the defenders' company, which was not independently advised or represented in the preparation or execution of the said agreement. The sum proposed to be paid for the work, even if satisfied by shares and debentures of the company, is wholly disproportionate to the value of the work to be done, that value amounting to no more than the sum of £22,000." He also alleged that the agreement of 15th June 1888 was not a supplemental agreement as stated, but an entirely new contract, and was not submitted to the shareholders of the company in order to prevent them timeously calling it in question.

The defenders admitted the agreement but denied the pursuer's averments.

The pursuer pleaded, *inter alia*—(2) "The said agreement not having been entered into in conformity with the said Act of Parliament, was *ultra vires* of the company, and ought to be reduced, in terms of the conclusions of the summons. (3) The said agreement having been entered into fraudulently and collusively, as condescended on, and being to the prejudice of the pursuer, decree should be pronounced in his favour, as concluded for."

The defender pleaded, *inter alia*—"(1) No title to sue; and (2) all parties not called."

On 10th January 1889 the Lord Ordinary (KINNEAR) sustained the defenders' first plea in law and dismissed the action.

"*Opinion.*—The pursuer is a shareholder of the Edinburgh Northern Tramways Company, incorporated by Act of Parliament, and he brings this action for the purpose of reducing an agreement between the company and certain contractors for the construction and maintenance of a line of tramway. It is not disputed that the line which it is proposed to construct is within the limits of the company's undertaking, but it is said to be *ultra vires* in other respects.

"It is well settled law that a single shareholder can have no title to sue such an action, except on the ground that the contract which he challenges is *ultra vires*, not of the directors only, but of the company as such, or on the ground of fraud upon himself. But the only ground on which it is alleged that the contract in question is *ultra vires* is that it is inconsistent with the terms of two previous contracts between the promoters and the Town Councils of Edinburgh and Leith, which have been confirmed by the incorporating Act, so as to make them binding upon the company. By these contracts it was agreed, *inter alia*, that the works to be executed by the company should 'form the subject of competition and contract;' and the pursuers' ground of reduction is that the works which are contemplated by the contract which he challenges have not been made the subject of a previous competition. I do not think it necessary or proper to inquire whether in the circumstances set forth on record this would be a valid objection at the instance of the Town Council, because it is an objection which the parties to the contracts confirmed by the Act of Parliament are clearly entitled to waive if they think fit. If the parties to these contracts should be of opinion that the stipulation in question has been substantially observed, or that in certain circumstances it would be prejudicial to the interests with which they are charged to enforce it, or that it is undesirable or unnecessary to litigate on the subject, they are at liberty to sanction or acquiesce in an agreement to which they might otherwise have objected. It follows that a failure to comply with the stipulation involves no inherent invalidity in the agreement, and therefore that if it is open to any objection on the ground alleged, it is an objection which no one can have a title to enforce excepting the persons who are entitled to sue upon the contracts which are alleged to have been violated.

"A second ground of reduction is that the terms of the agreement are prejudicial to the company, and that the directors have acted in breach of their duty, against the interests of their shareholders, and in the interest of the other contracting parties. If this be so, it is a wrong done to the company, and not to the pursuer as an individual. If the pursuer thinks the agreement objectionable on the ground alleged, his proper course is to bring the matter before his fellow-shareholders. He cannot appeal to the Court to set it aside until the views of the shareholders have been ascertained, because if it is not in itself illegal it may be supported by the majority. The case of *Orr* v. *The Glasgow and Monklands Railway Company*, 3 Macq. 799, is directly in point. The ground of action in that case was that the directors were also directors of a rival company, and that they had acted in the interests of this latter company to the prejudice of the shareholders of the first. The action was dismissd on the ground that although the transaction complained of was beyond the powers of the directors, it was competent for the shareholders to sanction it, and therefore that a single shareholder, or a minority, had no title to sue. Again, it is said that the agreement has not been submitted to the shareholders, and that certain of the directors are disqualified. Neither of these grounds will support an action of reduction. They are not objections to the legality of the agreement in itself, but to the manner in which it has been concluded. I do not inquire whether the directors ought to have laid the agreement before the company, or whether it was not in their power to make contracts for the execution of works without consulting the shareholders, because I think it clear that the company may sanction and adopt what has been done, assuming that they would not be bound by the action of the managing body alone. The rule is fixed that the Court will not interfere in such circumstances at the instance of a single shareholder. The principle is stated by Lord Justice Mellish in *M'Dougall* v. *Gairdner*, L.R., 1 C. D. 13—'If something has been done irregularly which the majority could do regularly, or if something has been done illegally which the majority could do legally, the majority are the only persons who can complain.' There are many cases to the same effect. I am of opinion therefore that the plea to title must be sustained, and that renders it unnecessary to consider the other pleas stated in defence. But I must add that even if the pursuer had had a good title to sue, the action could not have been entertained in the absence of the contractors. They have a material interest in the agreement challenged, and it is manifestly impossible to set aside a contract made by the directors on behalf of the company without calling into Court the persons with whom they have contracted."

The pursuer reclaimed, and argued—The contract sought to be reduced was (1) *ultra vires* of the company, (2) fraudulent. A reduction was the pursuer's only remedy. The contract had been privately arranged by the directors, and its existence had been kept concealed from the shareholders. All contracts were by the terms of the defenders' Act to be open to competition, and this one not having been thrown open to competition, that circumstance alone made it reducible by any one interested. The pursuer had an interest, as he should have obtained this contract; he had fraudulently been deprived of it. The sum con-

tracted for was exorbitant and ruinous to the interests of the company, and of the pursuer as one of the shareholders. It was an attempt by a majority of the company personally to benefit themselves at the expense of a minority—*Menier* v. *Hooper's Telegraph Works*, 1874, L.R., 9 Ch. App. 350; *Mason* v. *Harris*, 1879, L.R., 11 Ch. Div. 97; *Athoel* v. *Merryweather*, L.R., 5 Eq. 464, note.

Argued for the defenders—The pursuer had no title to call in question the actings of the defenders in the absence of the other parties to the contract. The defenders could in their discretion set aside the stipulation regarding the throwing open of contracts to competition, and that did not of itself necessarily invalidate the agreement, but only left it open to those whose interests were affected to sue upon the contract. The pursuer's interest was identical with the other shareholders, and could not be dissociated from theirs—*Orr* v. *The Glasgow and Monklands Railway Company*, 3 Macq. 799—and no one shareholder or a minority had any title to sue.

At advising—

Lord President—There are two preliminary defences to this action, "no title to sue" and "all parties not called." The Lord Ordinary has sustained the first of these, and to that course I am not prepared to assent. There is a distinct and intelligible ground of reduction stated here, namely, fraud, in respect of which it cannot be said "that one or more of the shareholders cannot sue though the company can do so." I think, therefore, that the Lord Ordinary is wrong. It is probably the fact that the pursuer relied too much on the ground of *ultra vires* in the discussion before the Lord Ordinary, and did not sufficiently attend to the question of fraud.

But, on the other hand, there are other parties to the agreement under reduction who must be called. The pursuer is prepared to call these persons, and the best form of order for us to pronounce would be to repel the first preliminary defence, reserving its effect on the merits, and in respect that the pursuer undertakes to call the other parties to the agreement, to repel the second preliminary defence. I think it premature to go into any examination in detail of the averments, or as to what their effect will be when the case comes to be tried on the merits, particularly if the pursuer amends his record as he says he intends doing.

Lord Adam and Lord Lee concurred.

Lord Mure and Lord Shand were absent from illness.

The Court pronounced the following interlocutor:—

> "Recal *in hoc statu* the interlocutor reclaimed against, and sist process till the 12th of March current to enable the pursuer to call as defenders the other parties to the agreement of 15th June 1888 sought to be reduced, viz., The Patent Cable Corporation and the liquidator of that company, and Messrs Dick, Kerr, & Company."

Counsel for the Pursuer—H. Johnston—G. W. Burnet. Agent—A. & G. V. Mann, S.S.C.

Counsel for the Defenders—Graham Murray—Sir L. Grant. Agents—Graham, Johnston, & Fleming, W.S.

Saturday, March 2.

SECOND DIVISION.

[Sheriff of Lanarkshire.

JAMES EAGLESHAM & COMPANY *v.* DICKSON AND OTHERS.

Process—Action—Delivery of Stolen Goods.

The owner of stolen goods which have been lodged in the hands of the official custodier for the public interest, may present a petition in the Sheriff Court to have the custodier ordained to deliver them.

James Eaglesham & Company were manufacturers at 128 Ingram Street, Glasgow. Between 5th March and 11th October 1888 a person in their employment named James Patrick stole from their premises a quantity of goods, and on 22nd October he pled guilty under an indictment charging him with the theft thereof. The stolen goods were given into the charge of Adam Dickson, custodier, Central Police Office, Glasgow.

Eaglesham & Company brought an action in the Sheriff Court of Glasgow for delivery to them of the stolen goods as being their property. They called as defenders the said Adam Dickson, and a number of pawnbrokers with whom the goods had been pledged. Upon 1st December 1888 the Sheriff granted warrant to cite the defenders, and ordained them, "if they intend to show cause why the prayer of the petition should not be granted, to lodge in the hands of the Clerk of Court at Glasgow a notice of appearance within the *inducie* of citation hereon, under certification of being held as confessed." No appearance was made for any of the defenders.

Upon 20th December the Sheriff-Substitute (Lees) dismissed the petition, and in respect no appearance had been entered by any person called as defender, found no expenses due.

"*Note.*—So far as my experience goes, cases of this kind are always raised in the form of a multiplepoinding, and there is good ground for such form of action being adopted. The main defender Mr Dickson is custodier under the Glasgow Police Act of property taken possession of in the public interest in criminal cases; therefore the property which he holds in such circumstances comes into his possession in no casual way or under any wish or act of his own, but under the duty imposed on him by a public statute. That being so, it would be an improper addition to his duties to cast on him the *onus* of seeing that the proper defenders have been called into the field, and that he is free from any risk of subsequent question at any party's instance. Now, the form of action adopted here will not give him the necessary protection. It is an action for delivery. But I apprehend it is not for Mr Dickson to decide who is entitled to the goods. It is for the Court to do so, and more than that, I have the very gravest doubts as to the competency of a claim by the pursuer against Mr Dickson for delivery of the goods. The proper form of action is a multiplepoinding. Such an action amounts to an application to the Court to distribute the goods which are the subject of it amongst the parties who may have right thereto, whether they are called to the action or not. In such a form of action the