defender. His mother could have conveyed to him the third share of the subjects which she took under the conveyance of 1859. What she would have done had the necessity for some act on her part with the view of excluding her sisters and benefiting her own nominees been before her mind it is not possible to say. She would very probably have preferred her son to her sister, or her sister's representatives; but she might also have preferred her husband to her son. But having done nothing to alter the destination in the deed of 1859 it must now regulate the rights of parties, and in my opinion it excludes the defender."

The defender reclaimed, and argued—The *conditio si sine liberis* should be read into the clause of this deed whether the fee vested at the date of granting or on the expiry of the liferent. The granters here placed themselves *in loco parentis* to their nieces. The conveyance was in the nature of a provision for children, therefore the *conditio si sine liberis* applied. The *conditio* was not excluded because the gift was not in favour of a class, or because the gift was not contained in a settlement of the granter's whole estate—Bell's Principles, secs. 1704 and 1776; Menzies' Conveyancing, p. 462; Bell's Conveyancing (3rd ed.), 922; *Montrose* v. *Robertson*, November 21, 1738, M. 6398; *Rougheads* v. *Rannie*, February 14, 1794, M. 6403; *Grant's Trustees* v. *Grant*, July 2, 1862, 24 D. 1226 (*per* Lord President M'Neill); *Bogie's Trustees* v. *Christie*, January 26, 1872, 9 R. 456-457 (*per* Lord President Inglis and Lord Shand).

Argued for the pursuer—There was no room in this case for the application of the *conditio si sine liberis*. The view of the Lord Ordinary was supported by the authorities. Each fiar had an immediate fee in one-third, and an eventual fee in the whole—Bell's Conveyancing (3rd ed.), 946; *Bisset* v. *Walker*, November 26, 1799, M. App., "Deathbed," No. 2, and Ross' Leading Cases; *Douglas' Executors*, February 5, 1869, 7 Macph. 504; *Blair's Executors* v. *Taylor*, January 18, 1876, 3 R. 362 (*per* Lord Justice-Clerk Moncreiff, p. 365); *M'Call* v. *Dennistoun*, December 22, 1871, 10 Macph. 281; *Gillespie* v. *Mercer*, March 8, 1876, 3 R. 561.

At advising—

LORD JUSTICE-CLERK—In 1859 these two sisters conveyed a certain heritable property to themselves and another sister in liferent, and to three nieces, specially named, and to the survivors or survivor of them in fee. Infeftment followed immediately thereafter. One of the fiars died in 1879 without leaving any settlement. She was survived by a son, and the question which is now before the Court is, whether that son is entitled to succeed to his mother's share, or whether that share goes to his mother's sister under the survivorship clause? It is contended on his behalf that the *conditio si sine liberis* applies, on the ground that the testators acted as *parentes* to the nieces in making this settlement, that it is a family settlement, and that accordingly children of predeceasing fiars are entitled to the share left to their parent.

It is a peculiarity of this case that it does not relate to a *mortis causa* settlement, but to a deed *inter vivos* followed by infeftment. Whether under any circumstances the doctrine of the *conditio si sine liberis* could apply to such a case may be a question, but it is one which does not require to be decided in this case in the view I take of it. The deed here does not present the characteristics of a settlement to which the *conditio* applies. It relates not to the general estate of the donor, but only to a distinct piece of property. It is therefore unlike the case of a general family settlement. It does not give to a class, but only to certain specified persons selected by the donors. This militates against the idea that the donor is taking the parental position in making the gift. There is also a special conditional institution by which the donors destine any share given to one of the donors to pass to the survivors or survivor of the persons named when any of them shall die. This fact is unfavourable to the idea of implied intention conditionally to institute some other class for benefit.

On these grounds, which are substantially those given by my brother Lord Trayner, who decided the case in the Outer House, I am of opinion that the interlocutor should be affirmed.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK—I agree with your Lordship that the judgment of the Lord Ordinary should be affirmed. I think the deed contains a destination to which we must give effect, and it is on that ground I proceed.

The Court adhered to the interlocutor reclaimed against and found the pursuer entitled to expenses.

Counsel for the Defender and Reclaimer William Howat—Graham Murray—Wilson. Agents—Somerville & Watson, S.S.C.

Counsel for the Pursuer and Respondent—J. A. Reid—A. S. D. Thomson. Agent Marcus J. Brown, S.S.C.

Thursday, December 11.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

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

(*Ante*, March 1, 1889, vol. xxvi. p. 405; 16 R. 653.)

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

A company incorporated by a private Act for the construction of a tramway, with a nominal capital, which was never

offered to the public, but which was taken up partly by the promoters of the company, and, to the extent of the remainder of the shares, was acquired by the contractor in payment of the price of the work performed, entered into a contract for the remainder of the work with the same contractor.

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

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

William Augustus Rixon of London, a shareholder of the Edinburgh Northern Tramways Company, raised the present action of reduction against (1) the said company; (2) the Patent Cable Corporation, Limited, and its liquidator; and (3) Messrs Dick, Kerr, & Company, tramway contractors, London and Kilmarnock, by which he sought to reduce a contract dated 15th June 1888, executed by the said parties above named, whereby, *inter alia*, Dick, Kerr, & Company agreed to construct a cable tramway between Stockbridge and Princes Street in Edinburgh under the statutory powers of the Edinburgh Northern Tramways Company, and also to pay the creditors of the Edinburgh Company to the amount of £3000, and whereby, on the other hand, the Edinburgh Company agreed to pay a contract price of £75,000 (of which £60,000 was to be paid in shares of £10 each, and £15,000 in mortgage debentures).

The circumstances out of which the action arose are fully narrated at an earlier stage of the case (*ante*, March 1, 1889, vol. xxvi. p. 405), as well as in the opinion of Lord Adam, who delivered the judgment in this case.

The pursuer sought to have the said contract reduced upon several grounds, the more important of which were (1) 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; and (2) on the ground of fraud, alleging that the majority of the shareholders who voted in favour of the contract were nominees of the contractors, and had obtained their shares gratuitously, and for the purpose of voting in their favour.

The Lord Ordinary (KINCAIRNEY), after a proof on 25th March 1890, found, *inter alia*, that it had not been proved that the agreement libelled had been entered into fraudulently and collusively to the prejudice of the pursuer; and further, that it was not reducible at the pursuer's instance, in respect that it had been entered into in contravention of the Edinburgh Northern Tramways Act 1884.

"*Opinion.* — [*After stating the facts*] — The first argument was rested on the want of any competition for the contract, and on the clause in the agreement with the Magistrates of Edinburgh and Leith, Schedules C and E of the Act above quoted. The plea has been dealt with by Lord Kinnear. I concur in and refer to his opinion. I think the objection not one which the pursuer has any title to take, and I think that the only persons *in titulo* to take it are the Magistrates of Edinburgh and the Magistrates of Leith. I do not consider that the case of *The Caledonian Railway Company*, March 30, 1874, 1 R. (H. of L.) 8, quoted by the pursuer, supports his contention. It merely shows that such agreements have statutory force, but not that the statute converts them into agreements with the public or with individual shareholders.

"I think the plea that the contract was illegal because the directors were disqualified is also bad, and that the pursuer as an individual shareholder has no title to plead it. I did not understand the pursuer's counsel to plead that the directors had no true qualification, and were disqualified because they were mere nominees of the Assets Company. If such an argument had been stated, I rather think it must have been disallowed on authority—Buckley, p. 53; Lindley, p. 391; *Pulbrook* v. *Richmond Consolidated Mining Company*, 9 Ch. Div. 610. The objection that the directors were disqualified because they were interested in the contract appears to me not well-founded, whether the directors be regarded as representing the interests of the Cable Corporation or of the Assets Company. In either case their interests, supposing they had interests, were the same as those of the Edinburgh company. There was no conflicting duty. They were not contracting with the company but for it. It was argued that this was not so if the contract of 1888 were to be regarded as what it professes to be—supplemental to and a mere modification of the prior contracts of 1884 and 1886; but although there may be subtlety in this view, there is, I think, no substance. The contract of 1888 was really a new contract. The plea pressed by the pursuer is an equitable plea, founded on the assumption of a conflict between the personal interest of a director and his duty as director, and where there is no such conflict the rule has, I think, no place. During the debate I felt a little doubt whether the directors did not fall to be regarded as the nominees of Dick, Kerr, & Company, in which case the argument of the pursuer would have had more force. But I think they cannot be so regarded, and I rather think that even if they were, the objection to the contract which would thence arise would be one which could be, and has been, waived by the majority of the company.

"The plea founded on fraud raises more difficulty, because it involves the consideration of intricate and complicated negotiations and arrangements, in which it may be that fraud may lurk. Although it may generally be the case that a contract which is a fraud on a company is not void but only voidable, and may be accepted and validated by the company, and that where that is the case the title of a single shareholder to reduce it cannot be sustained, yet it does not seem doubtful that the rule admits of this exception, that where a contract amounts to a fraud by a majority of shareholders on the minority, such a contract may be reduced at the instance of any shareholder who has been so defrauded—*Atwool* v. *Merryweather*, L.R., 5 Eq. 464; *Meaver* v. *Hooper's Telegraph Works*, 1874, 9 Ch. App. 350; *Mason* v. *Harris*, 1879, 11 Ch. Div. 97. The previous decision of the Court in this case amounts to a judgment to that effect.

"The present is clearly a case to which that principle is applicable. If there has been any fraud, it has been a fraud practised by the majority of the shareholders on the minority, and against which the minority could have no remedy except through the Court. If such a fraud has been proved in this case the contract ought to be reduced. Now, whether there has been such a fraud or not is just a jury question, as to which impressions and opinions may differ, but my own impression was when the proof was being led, and remains after consideration and examination of the documents, that no fraud has been proved. I think that the evidence of Mr Harold Brown is substantially true, and while it shows that he was looking keenly and acutely after the interests of his own clients, it does not show that he disregarded or acted adversely to the interests of the Edinburgh Northern Tramways Company.

"The pursuer's conjecture is intelligible enough, and it cannot be said that his suspicion is altogether unreasonable. The idea seems to be that Mr Brown, in order to secure payment of the £43,314, 19s. due to the Assets Company, agreed with Dick, Kerr, & Company to secure to them through the influence of the Assets Company the contract for the Stockbridge section on too favourable terms, if they in return would pay the debt due to the Assets Company by the Cable Corporation, which must in that view be held to have exceeded the value of the Cable Corporation assets. All the witnesses concerned deny most absolutely that there was any such agreement, and there certainly was none unless these witnesses are all to be disbelieved. There is no direct proof whatever of such an agreement. There may, however, have been a fraud without any such express agreement, and indeed it was in no view to be expected that such an express agreement would be proved. The device of filling the directorate of the Edinburgh Northern Tramway Company with nominees of the Assets Company may excite suspicion and challenge inquiry, but such suspicion cannot, I think, supply the proof of a direct fraud.

"It might be shown that the conditions of the contract are so unfair as of themselves to prove fraud, and they would prove fraud if the pursuer's contention were established that the contract price is three times what it ought to have been, but I think there is nothing of the kind established. Parties are not much at variance as to the probable cost of making the Stockbridge section. Both sides put it at £25,000 or thereby. The question is not about that at all, but about the value at the time of the shares of the company. £60,000 to be paid in shares, having regard to the financial condition of the company, was a very different thing from £60,000 to be paid in money. Evidence has been led on both sides on this point. It would serve no good purpose to examine it, but after considering it I am not prepared to say that the contract price was excessive, or so excessive as to warrant the conclusion that it must have been agreed to in fraud of the company. There was evidence led by engineers and contractors that contractors might have been got at more reasonable terms, and it is said that the contract should have been put up for competition. *Ex post facto* evidence of this kind must be considered with caution, and I do not see in it sufficient reason to disbelieve the evidence of Mr Brown and the other witnesses, who are satisfied that it would have been useless to attempt to get outside contractors. It was submitted for the pursuers that the proceedings adopted by the Assets Company, the removal of the Edinburgh directors, and in particular the appointment of a judicial factor, were taken with the deliberate intent of discrediting the Edinburgh company and reducing the nominal value of the shares, so as to enable them the more readily to deter competitors and to favour Dick, Kerr, & Company. I cannot find that such a design has been proved, and I find no sufficient ground for inferring it.

"The question is, not whether the directors made a bad bargain, but whether they made the bad bargain knowingly, or in disregard of the interests of the company, with the intent to sacrifice the interests of the company and the minority in order to save and protect the interests of the predominating shareholder, whose nominees they were? I am of opinion that that has not been proved, and that the reasons of reduction ought to be repelled."

The pursuer reclaimed, and argued—That he was entitled to prevail, as the contract was extravagant in its terms, and *ultra vires* of the majority of the company. The directors of the company had virtually entered into a contract with themselves, and any such agreement was therefore void. Besides, the statute of incorporation precluded the directors from issuing shares except for a cash payment of at least one-third of their nominal value, and this they had not done. By these means the stock of the minority of the shareholders, who were represented by the pursuer, had been watered down, and the dividend earned by

the company was spread over a much larger share list. Such a transaction could not have been legitimated by the consent of the whole body of shareholders, much less by a mere majority. In such circumstances any single shareholder who thought himself aggrieved was entitled to object. It being practically admitted that the true money value of the Stockbridge contract was about £22,000, what the directors did was to give this work to the contractors at three times its value. Such a transaction was just an illegal issue of stock, or the issuing of shares at a discount, and the actings of the majority being seriously to the prejudice of the minority, the minority were entitled to come to the Court for redress—*Macdougall* v. *Gardiner*, November 1875, L.R., 1 Chan. Div. 13; *Meaver* v. *Hooper's Telegraph Works*, February 1874, L.R., 9 Chan. App. 350; *Mason* v. *Harris*, January 1879, L.R., 9 Ch. Div. 97; *North-West Transportation Company* v. *Beatty*, June 1887, L.R., 12 App. Cas. 589; *East Pant Company, Limited* v. *Merryweather*, 1864, 2 Hemming & Miller, 254; *Leckie's* case, December 1870, L.R., 11 Eq. 100 and 107; *Jones*, November 1870, L.R., 6 Chan. App. 49.

Argued for respondents—The shares held by the pursuer were in the same position as those held by Dick, Kerr, & Company. If theirs were vitiated, so were his, and he had no title to sue. The pursuer was not entitled to argue that the agreement in question was *ultra vires* of the directors, as he had no averment or plea to that effect, but even if such an argument was well-founded, it would not in the circumstances nullify the contract. It was not fair to judge this contract in the light of the present day; it had to be looked at as at the time when it was entered into. The directors got no personal benefit by it, and in such circumstances fraud was most improbable. Suppose it admitted that the true cash value of the contract was £25,000, the question to be determined was, what was to be considered a fair price when payment was to be made only in shares? The contract was one which was concluded under great difficulties, and the shares were at the time only worth £2 each, and not the £10 of nominal value. The result of the decisions upon the question of the issuing of shares at a discount was that when money's worth and not money was given in payment of work done, the Court would not inquire into the exact value of the shares—Lindley on Companies (5th ed.), 395; *Pell's* case, November 1869, L.R., 5 Chan. App. 11; *Oakbank Oil Company* v. *Crum*, December 2, 1881, 9 R. 198, and L.R., 8 App. Cas. 65.

At advising—

LORD ADAM—This is an action of reduction of an agreement dated 15th June 1888, entered into between the Cable Corporation, John Annan, the liquidator of that company, the Tramways Company, and Messrs Kerr, Dick, & Company.

The main ground of reduction is that the agreement was entered into by the parties fraudulently, and to the prejudice of a minority of the shareholders of the Tramways Company, of whom the pursuer Mr Rixon is one.

In order to understand the fraud alleged it is necessary to explain the situation in which the several parties to the agreement stood to each other at its date.

The Tramways Company was incorporated by the Edinburgh Northern Tramways Act 1884, which authorised the construction of certain tramways, and, *inter alia*, one called the Golden Acre section, and another called the Stockbridge section.

It may be premised that the shares of the Tramways Company have never been offered or issued to the public, so that that company had no cash with which to pay for the construction of the tramways, their only means of doing so being by the issue of shares or debentures of the company.

On the 24th October 1884 the Tramways Company entered into a contract with the Cable Corporation, by which the latter undertook the construction of the two sections of the tramways before mentioned.

By this contract the Cable Corporation undertook, at their own cost, to provide the land, and to erect buildings thereon for the company's works, and to pay the cost of and incident to obtaining the company's Act.

The price or consideration to be paid by the company was £93,000, but as the cost of the lands and buildings to be erected thereon had not been fixed, but only estimated at £7250, it was agreed that should the actual cost exceed or fall short of that sum the contract price should be correspondingly increased or diminished.

The price was to be paid, as to £5000 thereof, by the allotment and issue to the Cable Corporation, or to persons to be nominated by them in writing, of 500 fully paid-up shares of the company, and the balance by monthly instalments on the certificates of the engineers. In the event of the company not paying in cash, the Cable Corporation agreed to accept payment in Lloyds' bonds, in fully paid-up £10 shares of the company, to be issued either to the corporation themselves, or in their option to their nominees, or in mortgage debentures; and the company undertook not to issue, without the previous sanction of the corporation, any shares beyond 150 shares necessary for the directors' qualifications except in payment to the corporation.

On the 25th October 1884 an agreement was entered into between the Cable Corporation and Messrs Beattie and Mann, who had been promoters of the Tramways Company, by which it was agreed that Messrs Beattie and Mann should relieve the corporation of their obligation to pay the costs of and incident to obtaining the Tramway Company's Act, and in respect of that undertaking that the corporation should pay them a sum of £17,000 to cover

such costs. This sum was to be paid as follows—£5000 in cash on the execution of the agreement; £8500 in debentures of the Cable Corporation on the opening of any part of the Tramway Company's line; and £3550 by the transference of Tramway Company's shares to that amount by the Cable Corporation to Messrs Beattie and Mann.

It appears that £5000 was paid on the 25th October 1884 in cash by the Cable Corporation to Messrs Beattie and Mann, and that they also paid, under the agreement of 24th October, £2000 as the price of the ground required for the tramway works, and that the company issued 150 shares for the qualification of the directors. Neither of the agreements, however, appear to have been further implemented at this time. The construction of the tramway lines was not proceeded with in consequence of disputes and litigations having taken place between the parties. These, however, were ultimately compromised, and the result of the compromise was embodied in a supplementary agreement of 22nd July 1886. By this agreement the Cable Corporation granted to the Tramways Company licence to use certain patents, and agreed to pay the costs of obtaining an Act for extending the time for constructing the tramways, and in respect thereof the contract price was increased from £93,000 to £98,000.

It was further agreed that the Cable Corporation should be at liberty to proceed with the execution of both the Golden Acre and Stockbridge sections of the tramways, or either of them, and that should they elect to proceed with only one of such sections, it should not be compulsory on them to carry out the other save and except that they should execute and supply the necessary buildings, boilers, &c., for the whole tramways embraced in the contract. In the event of the Cable Corporation only carrying out one section a deduction was to be made from the contract price, the amount, in case of difference, to be settled by arbitration.

The Cable Corporation proceeded with the execution of the Golden Acre section only, which was completed and opened for public traffic on 28th January 1888.

At this date 4500 fully paid-up shares of the company had been issued in payment of the contract price and otherwise, with the result that of these shares about 3190 were held by the Cable Corporation or their nominees, and the remainder—1310—apparently almost wholly by the nominees of Messrs Beattie and Mann. It is unnecessary, however, for the purposes of this case to go into detail in this matter, because it is obvious that the Cable Corporation, through their nominees, had the means of acquiring the entire control of the Tramways Company.

In July 1886 the Cable Corporation borrowed from the Debenture Company £40,000, in respect of which the Cable Corporation issued to the Debenture Company £40,000 in first mortgage debentures of £100 each. These constituted a first charge on the capital and whole assets of the Cable Corporation.

In November 1887 the Assets Company purchased from the debenture Corporation £39,600 of these debentures, and to that extent became first mortgagees on the assets of the Cable Corporation.

In December following the Cable Corporation became insolvent, and the Assets Company resolved to realise the assets of the corporation in order to secure payment of their debt. The Assets Company appear to have left it in the hands of their agent Mr Harold Brown to take such proceedings as might appear to him to be necessary or desirable for this purpose.

As has been stated, part of the Cable Corporation assets consisted, besides debentures, of 3190 shares of the Tramways Company. Mr Brown was dissatisfied with the management of that company, and in December 1887 he intimates to the directors that the Assets Company were determined to have the control of the company, and in February 1888 he procured or compelled the resignation of the then directors and the appointment of new directors, who were nominees of the Assets Company. After this Mr Brown became agent for the Tramways Company as well as of the Assets Company.

On 13th December 1887 the Assets Company, in virtue of powers contained in the debentures acquired by them as aforesaid, appointed the defender Mr Annan to be the receiver of all the property charged by the debentures, and on 17th February 1888 they obtained an order from the Court of Chancery duly appointing Mr Annan receiver and manager on behalf of themselves and the other debenture-holders of the company. On 14th January 1888 an order was made at the instance of a creditor for winding-up the Cable Corporation, and on 15th February 1888 Mr Annan was appointed by the Court official liquidator. So far as I can see, there was nothing irregular or improper in these proceedings.

While these proceedings were being taken Mr Brown was endeavouring to obtain a purchaser for the assets of the Cable Corporation, and among others he applied to the defenders Messrs Kerr, Dick, & Company.

Kerr, Dick, & Company were in this position. They had, as sub-contractors under the Cable Corporation, constructed the Golden Acre section of the tramways. They were creditors of the corporation to a large amount, holding mortgages postponed to those of the Assets Company. They were thus deeply interested in the successful realisation of the assets of the Cable Corporation, as any surplus after payment of the Assets Company's debts would go to them.

The Assets Company, however, refused to sell the assets at a sum which would not be sufficient to pay their debt in full. That debt amounted with interest to £43,314, 19s., and Kerr, Dick, & Company ultimately agreed to purchase at this price. The terms of the purchase are set forth in an agreement dated 22nd May 1888, to which Mr Annan, as liquidator of the Cable Corporation, the Assets Company, and Dick,

Kerr, & Company are parties. By this agreement £3714, 19s. of the purchase money was payable to the Assets Company on the execution of the agreement, £10,000 on the 22nd November 1888, and £29,000 on the 22nd May 1889. It was further agreed that if the said sums of £10,000 and £29,000 should not be paid, the said sum of £3714, 19s. should be forfeited, and the assets re-sold as the Court might direct. It was further stipulated that the liquidator and the Assets Company should forthwith apply for the sanction of the Court to the agreement, and that if such sanction should not be obtained within three months from the date of the agreement the agreement should be void, and the Assets Company should repay the said sum of £3714, 19s. The sanction of the Court was subsequently obtained, but not until August 1888.

This agreement being contingent on the sanction of the Court, it is obvious that in the event of such sanction not being obtained, the assets, including the Tramway Company's shares, would be left on the Assets Company's hands. Mr Brown says—and I believe quite truly—that seeing this, and believing that it was very doubtful whether the Court would sanction the sale, and also that it was possible that Messrs Dick, Kerr, & Company might not be able to implement their part of it, he resolved to do what he could to increase the value of these shares, that he thought that the success of the company depended on the Stockbridge section of the tramway being constructed, as buildings and machinery had been erected to work both sections, and that entertaining these views he induced Dick, Kerr, & Company to undertake the construction of that section of the tramways, and accordingly the agreement of 15th June 1888 sought to be reduced was entered into.

The parties to this agreement are the Cable Corporation and Mr Annan, the liquidator, the Tramways Company, and Dick, Kerr, & Company. By it Dick, Kerr, & Company undertook to construct the Stockbridge section of the tramways, and to provide from time to time such sum, not exceeding £3000, as might satisfy the present creditors of the company, except the claims of Messrs Beattie and Mann. The price to be paid by the company was £75,000, whereof £60,000 was to be paid in fully paid-up shares of the company, and £15,000 on mortgage debentures, to be satisfied by monthly instalments of shares, and debentures upon monthly certificates by the engineers of the line. It was further agreed that the Cable Corporation and the liquidator should release the company, and that the company should release the Cable Corporation and the liquidators of all claims *hinc inde*. The liquidator undertook forthwith to apply for the sanction of the Court to the agreement, and if such sanction was not obtained within six months the agreement was to be void, and in the event of the company being at any time wound up by the Court, Dick, Kerr & Company to be at liberty to determine the agreement.

The sanction of the Court was applied for and obtained on 16th June 1888, so that the agreement became a binding agreement. It is this agreement which is sought to be set aside on the ground of fraud, and the fraud alleged is set forth in the 13th article of the condescendence.

Shortly stated, the fraud alleged is that Dick, Kerr, & Company agreed to purchase from the Assets Company the assets of the Cable Corporation at a much larger sum than the assets were worth, and that the Assets Company, in order to reimburse Dick, Kerr, & Company, agreed to obtain for them, by means of the control they had of the Tramways Company, a contract for the construction of the Stockbridge section at a price sufficient not only to pay for the construction of the line, but also to repay them for their over-payment to the Assets Company in respect of their purchase of the assets of the Cable Corporation. No doubt, if this were true, the contract would be a fraud on the Tramways Company, and to their prejudice to the extent of such overpayment, and it will further be observed that the loss would fall, *ex hypothesi*, on the shareholders of that company other than the Assets Company, because that company would be reimbursed for their loss as shareholders by their gain as sellers of the assets of the Cable Corporation.

I agree with the Lord Ordinary that there is no direct proof whatever of any such fraudulent scheme. All the persons concerned are examined as witnesses, and they deny most emphatically that there was any such agreement or any such scheme as that alleged.

It appears to me that the pursuer can have no possible case unless he can show in the face of these denials that fraud is nevertheless necessarily to be presumed from the facts and circumstances of the case.

The Lord Ordinary remarks that there may have been a fraud without any such express agreement. It might be shown, he says, that the conditions of the contract are so unfair as in themselves to prove fraud, and they would prove fraud if the pursuer's contention were established, that the price was three times what it ought to have been; but there is, he says, nothing of the kind established, and this seems to be the main ground on which the Court presumes the existence of fraud.

I agree with the Lord Ordinary that there is nothing of the kind established. The actual cost of the construction of the Stockbridge section would appear to be about £25,000. The price in the contract was £75,000, but this included £3000 which Dick, Kerr, & Company were to advance in payment of the company's debts. This price, however, was merely nominal, as £60,000 was to be paid in shares of the company and £15,000 in debentures. The company had no cash, and could only pay in shares and debentures. The real price, therefore, depended on the value of these shares and debentures at the time. The shares in particular were of very little value, and in my opinion it is not shown that the price was excessive. The price was

a speculative one; whether it has turned out a good or a bad bargain for Dick, Kerr, & Company there is no evidence to show.

Further, in considering the probability or improbability of any such fraudulent scheme having been entered into, it appears to me that it would have been a very improvident arrangement for the Assets Company to have entered into on the assumption that the contract price was an extravagant one. The agreement for the purchase of the assets of the Cable Corporation by Dick, Kerr, & Company was contingent on a very doubtful event—that the sanction of the Court should be obtained to it, and this sanction had not been obtained on the 15th June, when the agreement sought to be reduced was entered into. But this agreement was not contingent on sanction being obtained to the agreement of 22ndMay, so that it was very probable that the Assets Company might have been left with the Cable Corporation assets in their hands, and have still been bound to pay the contract price under the agreement of 15th June, to their own loss as shareholders of the Tramways Company.

It does not appear to me to be probable that so acute an agent as Mr Brown would bave advised the Assets Company to embark in a scheme likely to lead to such a result. I can see no evidence of fraud with reference to the agreement of 15th June.

But it is further maintained by the pursuer that the agreement of 15th June was entered into by directors who held their qualification in trust for and were under the control of the majority of the shareholders of the company, with said holders for their benefit, and to the prejudice of the company, and that therefore the agreement is null and void, or at least voidable. It is true in point of fact that the directors were the nominees of the Assets Company and were under their control, and that the agreement was entered into for their benefit; but it was for their benefit only because they were shareholders of the company, and because it was believed to be a contract for the benefit of the company. It is clear that the interest of the Assets Company and the Tramways Company in this matter was identical. Whatever was for the benefit of the shareholders of the company was for the benefit of the company.

The directors were in no way under the control of Dick, Kerr, & Company, and were not contracting in their interest.

Moreover, the agreement has since been confirmed by the company at a general meeting, and if, as I think, there is no fraud in the matter, that is conclusive.

The only other matter that requires to be referred to is the plea that the contract is *ultra vires* of the company because it did not form the subject of competition. This plea is founded on a clause in a contract between the Lord Provost, Magistrates, and Town Council of Edinburgh and the promoters, and which is confirmed by the incorporating Act, to the effect that all the works to be executed should form the subject of competition and contract. I concur with Lord Kinnear and the Lord Ordinary in thinking that this is a stipulation which can only be enforced by the parties to that contract, and that the pursuer has no title to insist in it.

On the whole matter, I am of opinion that the Lord Ordinary's interlocutor ought to be affirmed.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

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

Counsel for the Defenders — Graham Murray—C. K. Mackenzie. Agents — Graham, Johnston, & Fleming, W.S.

Wednesday, December 17.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

FLORENCE *v.* MANN.

Process—Jury Trial—Verdict—Ambiguity in Verdict—Reparation—Contributory Negligence.

In an action of damages for personal injury a jury returned as their verdict, "Find for the pursuer, but in respect of there being contributory negligence on the part of the pursuer, assess the damages at £300." Thereafter each of the parties moved in the Inner House to have the verdict set aside and a new trial granted, and also moved before the Lord Ordinary, who had presided at the trial, to have the verdict applied, the pursuer claiming decree for the damages found due, and the defender decree of absolvitor. The Lord Ordinary reported these motions to the Inner House, in respect of the motions for a new trial there pending. *Held* that the verdict, being either ambiguous or contrary to law, could not be applied as a verdict in favour of either party, and that it must therefore be set aside and a new trial granted.

This was an action of damages against the lessee of a hotel at the instance of a person who alleged that while in the hotel on business he was injured by falling into a hoist therein through the defender's fault.

Upon 20th June 1890 the First Division of the Court approved of this issue—"Whether, on or about the 29th day of July 1889, in the Palace Hotel, Aberdeen, the pursuer was injured in his person by falling down the space through which the lift is propelled in said hotel, through the fault of the defender, to the loss, injury, and damage of the pursuer? Damages laid at £2000."

The case was tried upon the issue as thus approved before Lord Ordinary (KYLLACHY) and a jury upon 16th and 17th October 1890, and upon the latter day a verdict was returned, the material part of which was in the following terms—"Find for the pursuer, but in respect of there being contributory