the Court pronounced the following interlocutor:—

"Recal *in hoc statu* the interlocutor of 20th December last in so far as it assoilzies the defender from the conclusions of the action: Allow the pursuer to lodge a minute referring the debt sued for to the defender's oath, reserving meantime all objections to said minute: *Quoad ultra* affirm the interlocutors of 7th June and 20th July 1900, and find in fact and in law in terms of the interlocutor of 6th December 1900.

Counsel for the Pursuer and Appellant—Wilson, K.C.—Lamb. Agent—R. S. Sharpe, Solicitor.

Counsel for the Defender and Respondent—Salvesen, K.C.—Adamson. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, February 27.

SECOND DIVISION.

STEWART *v.* LAMONT.

Company — Winding-up — Voluntarily — Contributory — Rights of Contributories inter se — Fully Paid-up Shares — Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *secs.* 38 *and* 133 (9) *and* (10).

Held, in the voluntary winding-up of a limited company, that after all debts and expenses had been paid, a shareholder who had been allotted fully paid up shares in consideration of his services as promoter of the company was entitled to have the liquidator ordained to make a call upon the holders of shares not fully paid up, so as to equalise the actual payments made on these shares with the amount credited as paid up on the paid-up shares, and thereafter to proceed in terms of the statute with the adjustment of the rights of the contributories among themselves.

Paterson v. *M'Farlane*, March 2, 1875, 2 R. 490, *followed.*

In re Holyford Mining Company (1869), Ir. Law Rep. 3 Eq. 208, *distinguished.*

An agreement, dated 24th, 25th, and 26th January 1898, was entered into between Thomas Law Patterson, late manager to John Walker & Company, sugar refiners in Greenock, William James Stewart, produce broker, Glasgow, John Millar, drysalter in Glasgow, George Coats of Staneley, Paisley, and James Boyd, drysalter in Glasgow, therein termed the First Syndicate, of the first part, the said Thomas Law Patterson of the second part, the said William James Stewart of the third part, the said John Millar of the fourth part, the said George Coats of the fifth part, the said James Boyd of the sixth part, Quinton Hogg, West India merchant in London, of the seventh part, and Andrew Lawrie Macfie of Fairrie & Company, Limited, sugar refiners in Liverpool, of the eighth part, and James Mackenzie, solicitor in Glasgow, as trustee and on behalf of the Syndicate therein termed the Limited Syndicate, of the ninth part. The agreement was filed with the Registrar of Joint-Stock Companies on 28th January 1898.

In the agreement it was narrated that the First Syndicate had incurred an expense amounting to £700 in promoting and developing a scheme for establishing a joint-stock company to be called the Washington State Sugar Company, Limited, for the purpose of acquiring leases of certain areas of land extending in all to 3000 acres or thereby at Waverley, Washington, U.S.A., which the said William James Stewart on behalf of the First Syndicate had obtained the offer of securing at nominal rents upon a sugar factory being established there by the influence of the First Syndicate, and that the said William James Stewart had also obtained promises of subscriptions for capital in the proposed company in Washington State to the amount of £30,000 or thereby, and in the United Kingdom to the amount of £25,000 or thereby, and in order to further develop the said scheme and promote the said company it had been found expedient that a new syndicate with limited liability should be formed on the terms therein specified. The agreement then provided (1) that the parties thereto should take the necessary steps for registering the limited syndicate, under the name of the Scoto-American Sugar Syndicate, Limited, with a capital of £3000 divided into 3000 shares of £1 each; that each of the six parties to the agreement, other than William James Stewart, should subscribe for 400 shares of £1 each, and William James Stewart for one share, and the remaining 599 shares should be issued as fully paid-up to William James Stewart in consideration of his services in maturing and developing the scheme. The sum of 5s. per share was to be payable on each of the said shares on application and 5s. per share on allotment, and the balance was to be subject to such calls as might be resolved upon at general meetings of the syndicate from time to time.

The agreement further provided (3) that the articles of association of the Limited Syndicate should provide (*a*) that the shares held by each member of the syndicate should not be transferable; and (*b*) that all questions at meetings of the Limited Syndicate were to be decided by the votes of the majority of the members present, or represented by proxy at such meetings, each member having one vote whatever number of shares he might hold; (4) that William James Stewart was to be appointed manager and secretary to the Limited Syndicate upon certain terms of remuneration; (5) that when the arrangements were fully matured the Limited Syndicate should take the necessary steps to form a company for the purpose of taking over the concessions and establishing a sugar factory on the basis of the Limited Syndicate receiving a certain number of fully-paid shares in

the company as the consideration for the scheme.

The sixth article of the agreement was as follows:—"As among the members of the limited syndicate the total price received from the company will be applied as follows, namely, each member will receive five fully-paid shares in the company for every one pound share in the syndicate held by him, whether fully or partially paid-up, and the balance of shares received will be applied according to the decision of the meetings of the Limited Syndicate duly called for underwriting premiums and securing capital in the company either in Great Britain or abroad, or otherwise as such meeting may determine. Any balance of shares not required for these purposes will be realised so far as necessary to meet the expenses of forming, carrying on, and winding-up the Limited Syndicate, and any residue of cash or shares will be divided among the shareholders in the Limited Syndicate in proportion to the number of shares held by them respectively."

On 28th January 1898 the Scoto-American Sugar Syndicate, Limited, was incorporated under the Companies Acts with a capital of £3000 divided into 3000 shares of £1 each. Its registered office was in Scotland.

By the memorandum of association the principal objects of the company were directed to be (1) to adopt and carry into effect the agreement, and (2) to promote and develop a scheme for the establishment of a company to construct and work a sugar factory in Washington State or elsewhere in the United States.

In accordance with the agreement the articles of association of the company (which adopted the regulations contained in Table A in the first schedule to the Companies Act 1862, but with certain variations and additions) provided by paragraph 2 that upon the incorporation of the company the directors on behalf of the company should adopt the agreement and carry it into effect; by paragraph 3 that 599 shares should be issued as fully paid-up, and as to the remaining 2401 shares that 5s. per share should be payable on application and 5s. per share on allotment; by paragraph 9 that every member of the company should have one vote whatever number of shares might be registered in his name; by paragraph 25 that articles 72 and 73 of Table A (providing for payment of dividends) were to apply to the company only subject to and in accordance with the agreement; and by paragraph 28 that before payment of any dividend the directors were to make due provision for the fulfilment of the company's obligations under the agreement.

After its incorporation the company adopted the agreement, and in terms thereof allotted to William James Stewart 599 of the £1 shares fully paid-up. The remaining 2401 shares were applied for and allotted to the applicants in terms of the agreement on payment of 10s. per share.

On 28th September 1898, at a general meeting of the company, a resolution was duly passed requiring the company to be wound up voluntarily, and at a subsequent general meeting of the shareholders on 14th October 1898 the said resolution was confirmed, and William Lamont, C.A., Glasgow, was appointed liquidator.

At a general meeting of the company, held on 28th September 1900, in terms of section 139 of the Companies Act 1862, the liquidator reported on the progress of the liquidation and presented his accounts. These accounts showed a surplus of about £27, after payment of the whole debts of the company and the expenses incidental to the winding up.

Thereafter, in December 1900, William James Stewart presented a petition, under the 138th section of the Companies Act 1862, asking the Court to ordain the liquidator to make a call of 10s. per share upon all the shareholders of the company who had not paid more than 10s. per share; and thereafter to proceed in terms of the statute with the adjustment of the rights of the contributories among themselves and the distribution of the surplus assets amongst the parties entitled thereto.

The petitioner stated—"All that now remains to be done in the liquidation is the adjustment of the rights of the contributories amongst themselves, and the distribution of the surplus assets among them according to their rights. The petitioner is one of the said contributories in respect of the 600 shares held by him in the company, and appears as such on the list as settled by the liquidator. According to the said accounts, which only show a surplus of about £27, the liquidator does not propose to make a call upon the holders of the 2401 shares upon which 10s. per share only has been paid. He ignores the fact that the petitioner is the holder of 599 fully paid-up shares, and has accordingly contributed 20s. per share, while the holders of the said 2401 shares have only contributed 10s. for each share, notwithstanding that they are liable to pay 20s. per share. A call of 10s. per share would produce £1200, 10s., and adding to this the amount of the free assets appearing in the liquidator's accounts, viz., £27, there would be available for division among the shareholders the sum of £1227, 10s. (subject to any further expenses of liquidation), being about 8s. 2d. per share. If such a call were made the petitioner's share of the surplus assets would amount to £244, 11s. 10d. The petitioner maintains that the liquidator, in the adjustment of the rights of the contributories of the company amongst themselves, is bound to make a call upon the holders of shares, which have not been fully paid up, of an amount sufficient to equalise the contributions and losses of all the shareholders and thereafter to divide the sum received in respect of said call, together with the funds at present in his hands, among the contributories in proportion to their shareholdings. The present application is made under the Companies Acts, and the petitioner refers in particular

to the following sections of the Companies Acts 1862 (25 and 26 Vict. cap. 89), viz., Section 38—'In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves.' . . . Section 133—'The following consequences shall ensue upon the voluntary winding up of a company—"(9) The liquidators may at any time after the passing of the resolution for winding up the company, and before they have ascertained the sufficiency of the assets of the company, call on all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, to pay all or any sums they deem necessary to satisfy the debts and liabilities of the company, and the the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves . . . (10) The liquidators shall pay the debts of the company, and adjust the rights of the contributories amongst themselves."'"

Answers were lodged for the liquidator and for John Millar, James Boyd, and Thomas Law Patterson, in which they stated—"The said agreement was entered into by the parties other than the petitioner on the faith of representations made to them by the petitioner that he could succeed in overcoming the law of Washington State prohibiting aliens and alien corporations from holding lands on lease or otherwise, or carrying on business in that state, and that he had obtained subscriptions in the United States for capital in the proposed company which the syndicate was intended to promote to the extent of £30,000, and in the United Kingdom to the extent of £25,000; and on the faith of these representations they agreed that the petitioner should have an equal but no greater *pro rata* share with them in the profits to be derived from the promotion of the company. It was also clearly understood and agreed among all the parties to the said agreement that no other capital should be paid up than the 10s. per share on the 2401 shares, except with the consent of the majority of the parties, and hence the provision in the articles of the association that each party should have one vote at meetings of the syndicate whatever number of shares he might hold. The only object in giving to the petitioner paid-up shares was to prevent his being made liable for calls by the votes of a majority of the members. If the scheme failed, it was never intended that he should receive any payment of money on account of his shares being treated as paid up, while the other shares were only partly paid up, and this was well known to the petitioner. It was clearly understood and agreed among all the parties, including the petitioner, that if the objects of the syndicate failed, and the intended company was not formed, all the parties were to be on the same footing upon the winding up of the syndicate, whether their shares were treated as wholly or partially paid up, that if any balance of cash remained after the expenses of winding up were provided for, it was to be divisible among the shareholders in proportion to the number of shares held by them, whether wholly or partially paid up, and that no calls should be exigible upon any unpaid shares to equalise the right of the petitioner as nominally holding fully-paid shares with those of the other members of the syndicate. Said understanding and agreement is expressed or clearly implied in the articles of association of the syndicate. The petitioner did not succeed in overcoming the difficulty regarding the alien law, and consequently he did not obtain the subscriptions for capital in the proposed company, which formed the basis of the said agreement, and it therefore became impossible to form the company or to carry out the objects of the syndicate. In consequence thereof it was resolved to wind up the syndicate, and a special resolution to this effect was duly passed on the 28th September 1898 and confirmed on the 14th October 1898, and the respondent William Lamont was appointed liquidator of the syndicate. His appointment, however, was subject to the following conditions—'that the liquidator is to advise and consult with a committee of shareholders (consisting of the respondents Millar, Boyd, and Patterson, and the petitioner) who will fix his remuneration, but that the liquidator is not empowered to make any arrangement without the sanction of a majority of said committee.' The liquidator has paid off all the debts of the syndicate, and has on hand a balance of about £27, which in accordance with the said agreement he is prepared to divide among the shareholders in proportion to the respective number of shares held by them, whether fully or partially paid up. When the present petition was served upon him he consulted the advising committee of shareholders, and was instructed by a majority of them to resist this application. The members of the said committee other than the petitioner concur in these answers. . . . In these circumstances the respondents maintain (1) that the petitioner is not entitled to insist upon the liquidator making any further call upon the holders of shares upon which 10s. per share only has been paid, and that in any event the petitioner is only entitled to a share of any surplus of the assets rateably with the other shareholders in the syndicate in proportion to the number of shares held by each, whether bearing to be fully or partially paid-up; and (2) that the 599 shares issued to the petitioner as fully paid-up were in the circumstances stated issued by the syndicate without value or consideration, and they are subject to calls to the extent of 20s. per share."

Argued for the petitioner—The liquidator should be ordained to make a call on the holders of partly paid-up shares for the

purpose of adjusting the rights between them and the petitioner—*Paterson* v. *Macfarlane*, March 2, 1875, 2 R. 490; *in re Anglesea Colliery Company*, 1866, L.R., 2 Eq. 379, *aff.* 1866, L.R., 1 Ch. App. 555. The case of *Paterson* ruled the present; the only difference between them being, that in *Paterson* a patent was given in exchange for paid-up shares, while in the present case the shares were given for services rendered. The present case was indeed *a fortiori* to that of *Paterson*, because the present respondents were not third parties who had become shareholders by purchasing shares, but were parties to the original agreement.

Argued for the respondents—The prayer of the petition should be refused. The Court was entitled to look behind the terms of the share certificate and see what was the true bargain between the parties. From the agreement it was quite clear that the bargain between the parties was that no calls were to be made upon the shares, and that all the shares were to be treated as on an equal footing. If the public company contemplated had been formed, each shareholder, in terms of article 6 of the agreement, would have been entitled to five fully paid-up shares in the new company, whether or not his shares in the present company were fully or partially paid up. Having regard to the plain agreement between the parties, the petitioner was not entitled to have a call made on the respondents—*in re The Holyford Mining Company*, 1869, Ir. Law Rep. 3 Eq. 208. Their view of the case was supported by considerations of equity. The petitioner's services had resulted in nothing, and he ought not therefore to be paid for them.

At advising—

LORD TRAYNER—We concur in the decision which was pronounced in the case of *Paterson* v. *Macfarlane*, and are of opinion that it governs the present case, which is not distinguishable from it. The case of the *Holyford Company* cited by the respondent (regarding the decision in which we express no opinion) proceeded upon a specialty which is here wanting. Our interlocutor will be practically the same as that pronounced in the case of *Paterson*.

LORD JUSTICE-CLERK—I concur; and LORD YOUNG, who was present at the hearing but is not able to be here to-day, desires me to say that he also concurs.

LORD MONCREIFF was absent.

LORD KINCAIRNEY was present at the advising in order to make a quorum, but not having been present at the hearing gave no opinion.

The Court pronounced this interlocutor:—

"Ordain the respondent William Lamont to make a call of as much per share upon all the shareholders of the company who have not paid more than 10s. per share, as will with the funds in his hands be sufficient to equalise the contributions of the shareholders, and thereafter to proceed in terms of the statute with the adjustment of the rights of the contributories among themselves, and decern: Find the expenses of the petitioner and of the said William Lamont payable out of the first of the funds, and remit," &c.

Counsel for the Petitioner—Salvesen, K.C.—J. D. Robertson. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—H. Johnston, K.C.—Aitken. Agents—Webster, Will, & Co., W.S.

Wednesday February 20.

FIRST DIVISION.

MATTHEWS DUNCAN'S TRUSTEES.

Succession—Faculties and Powers—Power of Appointment—Exercise of Power Partially ultra vires—Gift to Parties Not Objects of Power—Marriage-Contract—Election.

By antenuptial contract of marriage funds were conveyed to trustees to form a provision for "the children to be procreated of the marriage," to be "paid in such proportions as" the spouses "by any joint writing under their hands, failing which as the survivor by any writing under his or her hand, may direct and appoint." By his trust-disposition and settlement the husband, with the consent and concurrence of the wife, directed that the funds falling to the children under the marriage-contract should be apportioned "amongst our children equally, share and share alike, the issue of any of them predeceasing taking their parent's share, the share of any such child or his or her issue being held, managed, and dealt with as hereafter provided for my children's shares of my estate." The provisions with regard to the children's shares of the husband's estate were such as in the case of sons might, and in the case of daughters necessarily must, restrict the child's share to a liferent, with a fee to his or her children. The marriage was dissolved by the death of the husband, leaving five sons and four daughters. None of the children had predeceased him.

In a special case after the husband's death, *held* (1) That the provision in the clause of apportionment, whereby it was declared that the issue of a predeceasing child should take their parent's share, did not invalidate the apportionment, as being a gift to persons not objects of the power in respect that the circumstances thereby contemplated had not arisen, as none of the children had predeceased their father;