themselves participating members. While the contributions of the beneficiaries no doubt bring them directly within the sphere of the society, it appears to the reporter that the benefits paid are paid as contributions from a charitable fund, and are not of the nature of contractual claims by contributing members as in a friendly society proper—*Smith* v. *Lord Advocate, cit. sup.*; *Spiller* v. *Maude*, 32 Ch. D. 158, note; *in re Buck*, 1896, 2 Ch. 727. . . .

"The two schemes tabled by the petitioners have this in common, that they are designed to throw the benefit of the fund open to all domestic servants in Aberdeen while in sickness and in want, and to abolish the existing basis of membership as a condition of participation. They differ in this, that the scheme proposed *primo loco* involves the handing over of the whole fund and administration presently in the hands of the petitioners to a body called The Aberdeen Association for Improving the Condition of the Poor; the scheme proposed *secundo loco* does not involve denuding by the present directors of the management, but contains a clause empowering the directors to entrust the duty of investigating the circumstances and qualifications of applicants for assistance to any individual or corporation they may choose.'

"The Court will grant authority to charitable trustees to denude if the expediency of doing so is obviously manifest—*M'Grouther's Trs.*, 1911 S.C. 315, 48 S.L.R. 220. In *M'Grouther's* case the Court authorised two private trustees acting on a charitable and educational trust to denude in favour of the General Trustees of the United Free Church. Such a course had the effect of substituting a permanent body to act as trustees *ex officio* in place of private individuals whose tenure of office could only be limited. The proposal here is that a body of permanent *ex officio* trustees should denude in favour of a charitable institution possessing no particular attribute of permanence. The reason alleged for the proposal is that the existing trustees, who with one exception are municipal dignitaries, are an unsuitable body to distribute benefits designed in the interests of a class of beneficiaries with whom the said trustees are not in contact. The petitioners think the Aberdeen Association for Improving the Condition of the Poor would if they were in control come in contact with many possible beneficiaries outwith their own ken, and would be in a better position to examine the surrounding circumstances of any applicant. In this view the reporter agrees, but it does not appear to him to be necessary in order to invoke the aid of a society like the Aberdeen Association for Improving the Condition of the Poor to replace the existing trustees. In point of fact the alternative scheme, which does not involve denuding, by clause 6 thereof proposes to confer upon the directors the power of entrusting the duty of inquiring into the circumstances of applicants to any individual or corporation; such power would appear to the reporter to enable the directors to obtain the maximum amount of assistance which the Aberdeen Association for Improving the Condition of the Poor could give them in the administration of their fund.

"The reporter is humbly of opinion that it is impossible usefully to carry on the society in its existing form, and that the Court may sanction the proposed alternative scheme.

"There remains the question of the rights of the sole surviving member Miss Amelia Crombie. The petitioners propose to give Miss Crombie £20 in full of all her claims as a member of the society. This sum is just a rough and ready sum, but taking into consideration that under the existing rules Miss Crombie could claim no benefit unless sick and in want, it seems quite a liberal discharge of her contingent rights as a member. The reporter is satisfied that Miss Crombie has had the position fairly put before her, and has had full opportunity for consideration of the offer of the trustees, which she is prepared to accept."

The petition was heard in the Summar Roll of 16th October before a Court consisting of Lords Kinnear, Johnston, and Mackenzie.

Argued for petitioners—This was clearly a charitable fund, and that being so the Court had a discretionary power to approve of the proposed scheme, and to authorise the petitioners to denude where, as here, the expediency of doing so was obviously manifest—*M'Grouther's Trustees*, 1911 S.C. 315, 48 S.L.R. 220, *distinguishing M'Lean* v. *Alloa School Board*, November 4, 1898, 1 F. 48, 36 S.L.R. 46.

The Court, without delivering opinions, approved of the proposed scheme, and authorised the petitioners to make payment to Miss Crombie of the sum of £20 in full of her claim upon the fund as a contributor thereto.

Counsel for Petitioners—J. H. Millar. Agents—Mackenzie & Kermack, W.S.

Friday, January 31.

OUTER HOUSE.

[Lord Cullen.

PENANG FOUNDRY COMPANY, LIMITED (IN LIQUIDATION) AND OTHERS *v.* GARDINER.

Company—Liquidation—Call on Shareholder—Liability of Allottee of Unpaid Shares which were ex facie Fully Paid—Representation by Company on Share Certificate—Personal Bar.

A accepted an allotment of shares in a limited company, for which he paid no cash consideration. The certificates issued to him in respect of the shares bore that they were fully paid up, and the evidence established that A believed, and was justified in believing, that the shares were fully paid, although in fact

they were not. The company having gone into liquidation, the liquidators put A on the list of contributories for an amount equal to the value of the shares held by him, and brought an action for recovery of the same.

Held (*per* Lord Cullen) that the company were barred from insisting in their claim by reason of their representation in the certificates that the shares were fully paid, and that A was entitled to absolvitor.

This was an action brought by the Penang Foundry Company, Limited, registered in Penang under the Companies Ordinance, 1889, of the Straits Settlements, now in liquidation, and the liquidators thereof, and William Donaldson Robertson, solicitor, Glasgow, their mandatory, against A. H. Gardiner, Campbeltown. The summons concluded for payment by the defender of £560, being the sterling value of fifty-six shares in the company, of 100 dollars each, held by him, and for payment of which sum the liquidators held a decree or order of the Supreme Court of the Straits Settlements.

The pursuers averred that no consideration had been received by the company in respect of these shares.

The defender averred that the shares were fully paid up, and that he was not liable in the sum sued for.

On 8th July 1911 the Lord Ordinary allowed a proof.

The *facts* of the case as brought out at the proof sufficiently appear from the opinion of the Lord Ordinary, *infra*.

LORD CULLEN—[*After referring to a question of relevancy discussed at an earlier stage of the case*]—The Penang Foundry Company, Limited, acquired the business of a private firm called the Penang Foundry Company, the three partners of which were named Wemyss, Baldwin, and Lawrence. In 1902 Wemyss came to Glasgow and set about the formation of a syndicate to acquire the business of the firm. He enlisted the assistance of his correspondent in Glasgow, Mr MacLaverty of the firm of Graeme & Company. A number of persons, including the defender, were induced to entrust sums of money to Wemyss and his firm. The arrangement about these moneys was that they were to be used in taking up shares in the syndicate if and when it was formed, and that the firm should in the meantime pay five per cent. interest on them and be liable to repay them in the event of the syndicate not being formed. These parties I shall call the depositors. It was a condition of the arrangements made with the depositors that no syndicate should be formed unless there was raised in all £20,000. This amount was not raised, and the syndicate never came into existence. The depositors remained an unorganised series of individuals who had entrusted varying sums of money to the Penang firm on the footing above explained. For these sums they held receipts granted by Wemyss on behalf of the firm. They had no collective activities, but were simply so many investors who were separately induced to deposit moneys with the firm with the view of their possibly being bound together in a syndicate.

The project of forming a syndicate was finally abandoned by Wemyss on 11th April 1903. He then resolved to essay the flotation of a limited company in Penang and returned to Penang. At this point the firm stood liable to repay to the depositors the moneys which they had advanced. Mr Wemyss, however, acting for the firm, put before the depositors the proposal that their deposited moneys should be applied in taking shares in the limited company. As an inducement he offered that depositors who agreed to this course should receive for each £100 deposited fourteen shares of the new company of 100 dollars each. This offer was intimated to the depositors by a circular letter in terms of No. 210 of process. Thereafter there was sent out, to some of them at least, a letter asking them to sign an authority for the allotment of shares to them in the form shown in No. 71 of process. The defender received the letter in the form of No. 210. He took no notice of it. He says he did not receive the letter transmitting the form of authority shown in No. 71, and that he signed no such authority. I believe him. Mr MacLaverty, to whom such letters of authority would in ordinary course have been sent, says that he never saw such an authority signed by the defender. No such authority by the defender has been found. It would appear, however, that the defender, who was an old friend of Mr MacLaverty and in touch with him, had indicated that he was favourable to Wemyss' proposal. He did nothing, however, that I can see, actually binding himself to take shares at this stage. Mr MacLaverty sent out to Wemyss in Penang the book No. 15 of process containing the names, &c., of the depositors with remarks as to what he understood each depositor was inclined to do as to taking shares.

The limited company was incorporated in Penang on 14th December 1903. On 18th March 1904 the directors (Wemyss and his partners) met and resolved to allot. Next day they did allot. Thereafter share certificates were sent to this country, including certificates in favour of the defender for 56 shares of 100 dollars each. The certificates were sent to Mr MacLaverty's firm. On 28th July 1903 they wrote to the defender sending him the said certificates of 56 shares and asking him to return in exchange the receipts which had been given to him for his various deposits, amounting in all to £400. On 1st August 1903 the defender acknowledged the certificates, which he retained, and returned the said receipts.

The certificates so sent to the defender and accepted by him bore that the shares were fully paid up.

There is no dispute that the defender, by accepting the share certificates sent to him, agreed to become a member of the company in respect of the 56 shares in question.

And I have no doubt on the evidence that the defender, in accepting the certificates, believed in the truth of the company's statement on the certificates that the shares were fully paid up.

It is now necessary to give some explanations as to the formation of the limited company. It was preceded by an agreement between (1) the firm of the Penang Foundry Company, and (2) Mr Samuel Warnock of Glasgow, as trustee for the prospective limited company. Mr Warnock is a partner in Mr MacLaverty's business in Glasgow. The agreement provided, *inter alia*, (1) that the nominal capital of the prospective company was to be 600,000 dollars in 6000 shares of 100 dollars each; (2) that the vendors should sell, and that the company should purchase, the business of the Penang Foundry Company and assets thereof; (3) that the price should be 200,000 dollars, at 2s. per dollar, payable as follows, viz., "The directors may satisfy any portion of the said consideration not exceeding 100,000 dollars by the allotment to the vendors of shares in the capital of the company to an equal nominal amount, the said shares being credited as fully paid up, and the balance of the said consideration shall be payable in cash"; (4) that the purchase should be completed on 30th June 1903, and the company shall then declare what portion of the said consideration it proposes to satisfy by the allotment of shares, and shall pay the balance of the said consideration in cash to the vendors or as they shall direct. The shares which are to be allotted in lieu of cash are to be allotted to the vendors or their nominees on or before the 14th day of July next (1903), and before such allotment the company shall cause this agreement to be filed with the Registrar of Joint Stock Companies.

This last-mentioned provision was not fulfilled and the agreement has not yet been filed. The company was not incorporated until 14th December 1903. The option given to the company by the agreement to satisfy part of the price by shares could not thus operate in terms of the agreement, and no new agreement on this subject was made. The defender had nothing to do with this agreement.

On record the pursuers aver that the real vendors under this agreement were (1) the ostensible vendors, the Penang Foundry Company, and (2) the alleged syndicate of whom the defender was said by them to be a member. They further aver that as a member of the syndicate the defender had allotted to him directly his 56 shares as part of the earmarked vendors' shares under the agreement. The defender was thus on record represented as having knowingly accepted his 56 shares for a consideration other than cash under a contract which has not been filed. This ground of action, however, is now exploded, as there never was a syndicate, and the sole vendor to the company was the firm of the Penang Foundry Company.

Although the case made on averment by the pursuers has for the most part disappeared, there remains their averment that no cash was paid by the defender to the company therefor. As to the fact, the evidence in my opinion is to the effect that cash was not paid. The question then arises, what is the effect of the company having, in the circumstances of the case, issued the share certificates to the defender bearing that the shares were fully paid? On this question it is common ground that the law prevailing in Penang is the same as in this country. Accordingly if the defender had acquired the shares in question by transfer from an allottee without notice of the fact that, contrary to the company's representation on the certificates, cash had not been paid for them, it is conceded that the company would have been barred from denying the truth of their representation. The pursuers, however, contend that this principle cannot apply in the case of an allottee of shares. I confess I do not see why, if the conditions necessary to raise the bar exist. The principle of bar or estoppel is a general one of the common law, and in this connection cannot be limited to transferees of shares unless the conditions of its application are only possible in the case of transferees. But this, in my opinion, is not sound. It is true that an allottee will not often be in the position of not knowing the footing on which shares which he accepts have been allotted to him. But he may be, and in such circumstances he accepts shares in reliance on the company's representation that they are fully paid up, and without notice to the contrary he is, I think, as much entitled to hold the company to that representation as a transferee acquiring right from him without notice would be. Mr Buckley (9th ed. p. 63) says—"Nevertheless a *bona fide* purchaser and transferee or even allottee of shares which the company by the share certificate state to be paid, who has no notice that the shares are not what they are certified to be, is not liable although the shares have not in fact been paid." For the application of this rule to allottees he cites *Parbury's* case, [1896] 1 Ch. 100, and *Bloomenthal* v. *Ford*, [1897] A.C. 156. *Parbury's* case was expressly approved by L. J. Lindley in *Bloomenthal* (1896, 2 Ch. 532). I quote his statement of it. "In that case Parbury was an allottee from the company. He had paid a person the full amount of those shares in order that that person might pay the same to the company and procure for Parbury a proper certificate. The person (Wright) who received the money, and who was connected with the company, misapplied the money, but the company gave Mr Parbury a certificate that they had received his money and that his shares were paid up in full, although in truth that was not the case. The doctrine sanctioned by the House of Lords in *Waterhouse* v. *Jamieson* (1870, 2 H.L. Sc. 29) and in *Burkinshaw* v. *Nicolls* (1878, 3 A.C. 1004) was properly applied in *Parbury's* case although he was an allottee and not a transferee." In the case of *Bloomenthal* v. *Ford*, from which I have quoted, the decision of the Court of Appeal was against the allottee, on the ground that, as they held, he had not

adequate ground for believing the shares to be fully paid although he did so believe. The allottee Bloomenthal had been induced to lend money to a company on the faith of a security to be given him in the form of fully paid-up shares in it. The shares were allotted to him as fully paid up, but in fact they were not. The decision of the Court of Appeal was against Bloomenthal, on the ground that while he believed the shares were fully paid up he was not justified in this belief. The decision was reversed by the House of Lords, where the plea of estoppel against the company was sustained and Bloomenthal was held not liable to pay anything on the shares.

In the present case the defender did not make an application to the company for an allotment of shares. Nor is there evidence that he authorised Mr Wemyss to apply for shares in his name. There is no evidence that Wemyss did so. The position was that Wemyss had offered to procure to any of the depositors who consented to put the amount of their deposits in the company 14 shares of 100 dollars each for each £100 of deposit. The defender had indicated to Mr MacLaverty that he favoured this proposal, but he had not bound himself. He did not sign the letter of authority asked by Wemyss. When the share certificates were sent to him by Mr MacLaverty on 28th May July 1904 he might, I think, have rejected them. He accepted them, however; in accepting them I have no doubt that he believed in the truth of the company's statement that they were fully paid up. He acted in perfect good faith. And I am of opinion in these circumstances that he is entitled to plead the company's said representation against their present demand. The pursuers maintained the special point that even if the defender was justified in believing that the shares had been paid up to the extent of his deposit (£400) he was not justified in believing that the balance of the share value in dollars (total value was 5600 dollars) had been paid up. Now it is true that the defender's deposit of £400 was not of the value of 5600 dollars, although it is left uncertain what the exact amount of shortage was. Let it be stated at 1600 dollars. But the defender's position was that Wemyss had offered, if he agreed to put his deposit of £400 in the company, to procure him 14 shares of the value of 100 dollars each. And he had no information as to how Wemyss was to procure him these shares, so far as their nominal value exceeded his deposit, which might have been by Wemyss paying the amount of the excess in each, or, what is the same thing, setting off the cash price of the business under the agreement *pro tanto* against the value of the shares. The defender simply accepted the shares when offered to him by the company, and he accepted them on the footing on which the company tendered them to him, namely, that they were fully paid up, and fully believing in the truth of the company's representation to that effect.

I am accordingly of opinion that the defender is entitled to absolvitor. . . .

Counsel for the Pursuer—Sandeman, K.C.—Smith Clark. Agents—W. & F. Haldane, W.S.

Counsel for the Defender—C. D. Murray, K.C.—J. R. Christie. Agents—Simpson & Marwick, W.S.

Friday, June 6.

OUTER HOUSE.

[Lord Hunter.

HUTCHISON *v.* GRANT'S TRUSTEES.

Succession — Accumulations — Thellusson Act (39 and 40 Geo. III, cap. 98), secs. 1 and 2—Accumulations Continued beyond Twenty-one Years in order to Effect Equitable Compensation for Legitim Taken by Liferentrix of Trust Estate.

The Thellusson Act (39 and 40 Geo. III, cap. 98), sec. 1, provides that no one shall thereafter settle any real or personal property by will or otherwise in such a manner that the interest thereof shall be "accumulated for any longer term than the life . . . of any such . . . settler . . ., or the term of twenty-one years from the death of such . . . settler . . ., and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void. . . ."

By trust-disposition and settlement A directed his trustees to hold the residue of his estate for B, his only daughter in liferent, and for her children in fee. On A's death B elected to take her legal rights, and the income of the estate was thereafter accumulated by the trustees in order to compensate the trust estate for the sum paid to B as legitim. At the termination of twenty-one years from A's death, equitable compensation to the trust estate having not yet been fully effected, the trustees continued to accumulate the income for that purpose. *Held* (*per* Lord Hunter) that the accumulations of income subsequent to the expiry of twenty-one years from A's death were illegal under the Thellusson Act, and fell to be paid to B as heir *ab intestato* of A.

The Thellusson Act (39 and 40 Geo. III, cap. 98) enacts—Section 1—". . . No person or persons shall after the passing of this Act by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such