some respects the converse of the present. The conception of it was that the heirs were to succeed, and one strong thing against the contention of Robert Grant's children was that nothing was said about his heirs in regard to the Denham Green property. Here it is exactly the reverse.

But there is another ground upon which the same result is arrived at; and that is, that it is impossible to divide the heritage into four parts, of which each child is to receive a share. I think this is as clear an indication of an intention to realise as I have seen. We have more than once held that an heritable subject will not be divided, but that when such an estate is to be divided among children this is an indication of an intention to realise.

On these grounds I answer the question put to us to the effect that the share falls to be conveyed to the whole of the children.

Lord Ormidale—The question in this case is whether the eldest son and heir of the Reverend Charles Melville, who was the grandson of the testator, is entitled exclusively to the property in dispute, or whether all his children are equally entitled to it?

It is assumed by the parties that the *conditio si sine liberis* applies. It is upon this assumption that the case is submitted to the Court for opinion and judgment; and it is on this footing alone that the Court is asked to answer the disputed question. I have not therefore considered the question of the application of the *conditio* at all, but assumed that it does apply, the opposite view being excluded by the terms of the case.

Assuming, then, that the *conditio* applies, the question which remains is whether the whole of the property in dispute must be held to pertain and belong to the eldest son and heir-at-law of the Reverend Mr Melville, or to him and the other children of that gentleman equally among them. Now, in connection with this question it must be kept in view that the testator has himself declared that the property should go, in the first instance, to his own four children equally, and on their decease to their children in four equal portions. He has indicated no predilection in favour of the eldest son and heir. This being so, I cannot avoid the conclusion that the second alternative of the question submitted must be answered in the affirmative. I come to this conclusion, although not without some difficulty, in respect of what I think I am entitled to imply and infer to have been the intention of the testator; and I come to this conclusion without impinging on the authority of the case of *Grant* v. *Grant's Trustees*, July 2, 1862, 24 D. 1211, and without having any desire to do so. In that case there was no such manifestation of the testator's intention as we have in the present case, for there, contrary to what there is here, the testator's predilection was indicated in favour, not of children generally, but of the heir.

The result is that, in my opinion, the second alternative of the question submitted in this Special Case ought to be answered in the affirmative.

Lord Gifford—I am of the same opinion. This case is not parallel to *Grant*, and I have no intention to disturb the decision in *Grant's* case in the least. What are the circumstances here? The estate is entirely heritage, and is disposed of thus—The four children of the testator were the liferenters, and the grandchildren were the beneficiaries. It is assumed that each of the four children might have families, more than one child each, and the provision is that the estate should go to them, not as heritable and moveable, but it is expressly stated "the child of each of my said son and daughters, or in the event of there being more than one the children of each equally among them, receiving one share." Here the governing principle of succession is equal division among children. Nothing is said about great-grandchildren, but the same must apply to them as to grandchildren.

Upon that short ground—the intention of the testator and the ordinary rule of law—I am of opinion that the question must be answered as your Lordships propose; and I must say that I think the case of *Halliday*, November 9, 1869, 8 Macph. 112, quoted by the counsel for the third parties, is much in point.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the Special Case, are of opinion and find that the one-half share of the residue in question falls to be conveyed to the whole children of the Reverend Charles Nairn Barker Melville, equally among them, as at the death of Agnes Nairn; and appoint the expenses connected with the Special Case to be paid out of the estate, and remit to the Auditor to tax the same and to report; and decern."

Counsel for Second Parties—M'Laren. Agents—Watt & Anderson, S.S.C.

Counsel for Third Parties—Black. Agents—Morton, Neilson, & Smart, W.S.

Saturday, November 10.

SECOND DIVISION.

THE CONSOLIDATED COPPER COMPANY OF CANADA (LIMITED) AND LIQUIDATOR *v.* PEDDIE AND OTHERS.

Public Company—Settlement of List of Contributories—Allotment of Shares—Suspensive and Resolutive Condition.

An allotment of shares of a limited company, the prospectus of which had borne that mines were to be purchased for the purposes of the company, was made in the following terms:—"Sir,—I beg to inform you that you have been allotted shares in this company. Undernoted you will find statement showing disposition of the amount of deposit paid by you. . . . After this payment no further call will be made till the deputation of directors shall have reported on the mines. If the board resolve not to purchase the mines, the money will be returned to the shareholders without deduction." The applications for shares had been unqualified by any condition or contingency. The mines were not purchased, and the money was returned to the applicants. In a

petition by the official liquidator of the company to have the allottees put upon the list of contributories under the 38th section of the Companies Act 1862 (25 and 26 Vict. cap. 89).—*Held* (*diss.* Lord Ormidale), that the condition expressed in the allotment letter that the mines should be purchased was a suspensive condition, and that the allotment did not therefore have the effect in law of making each recipient of the above letter an instant member of the company so as to render him liable for its debts.

Opinion (*per* Lord Ormidale) that the condition contained in the allotment letters was a condition-subsequent, and not a condition-precedent, which it required to be if the applicants were not to be held as shareholders immediately on the issue of the allotment letters and the payment of the calls thereby made.

The Consolidated Copper Company of Canada (Limited) was incorporated on 6th July 1872 by the registration of a memorandum and articles of association subscribed by seven persons for one share each. By the memorandum and articles of association the objects for which the Company was established were declared to be, *inter alia*, the acquisition of certain lands, mines, plant, and others therein referred to, situated in Canada; the acquisition of any other mines, lands, mining property, and others in Canada, and the working of such mines; the purchasing the goodwill of or any interest in any trade or business of a similar nature or kindred character with any trade or business which the Company is authorised to carry on; also making and carrying into effect arrangements with respect to the amalgamation or union of interests, in whole or in part, with any other companies, partnerships, and persons. The liability of the members was declared to be limited, and the capital of the company was stated to be £400,000 sterling, divided into 40,000 shares of £10 each. After the incorporation of the Company a considerable number of shares were applied for, and were, on or about 22d July 1872, allotted by the directors of the company to the several applicants. The letters of application (leaving out of view the sums and the numbers of shares) were in the following terms:—"To the directors of the Consolidated Copper Company of Canada (Ld.) Gentlemen,—Having paid to the credit of your Company with the Bank of Scotland the sum of pounds, being £1 per share on my application for shares of £10 each in your Company, I request you to allot to me that number of shares, and I hereby agree to accept the same, or any less number that may be allotted to me, and to pay the balance in respect thereof, in terms of the prospectus and articles of association; and I further authorise you to place my name upon the register of shareholders for the shares so allotted."

The letters of allotment sent by the directors to the respective applicants (leaving out of view sums and the numbers of shares) were in the following terms:—"The Consolidated Copper Company of Canada (Limited). Shares £10 each. 146 Buchanan Street, Glasgow, 22d July 1872. Sir,—I beg to inform you that you have been allotted shares in this Company. Undernoted you will find statement showing disposition of the amount of deposit paid by you.

To deposit on shares allotted you, - - - - - - - £
.. amount payable on allotment,

£

By deposit paid on shares applied for by you - - - -

Balance due by you - - - - - £

Which please pay into the Bank of Scotland or branches on or before the 25th instant. After this payment no further call will be made till the deputation of directors shall have reported on the mines. If the board resolve not to purchase the mines, the money will be returned to the shareholders without deduction.—I am, Sir, your obedient servant, J. THOMSON DUNCAN, *Secretary*." Each of the said applicants paid to the bankers of the Company £1 per share on application, and £1 per share on allotment, taking from the bankers a receipt for the second of the said two payments as the 'balance due on allotment' of the specified number of shares allotted to him.

At or about the date of the issuing of the Company's prospectus, and before any allotment of shares was made, the directors resolved that before concluding any agreement with the vendors of the mines which the Company was to work, a deputation of their number should proceed to Canada to visit and report upon the mines; and in consequence of that report the Company never acquired or worked the said mines; and in or about October 1872 the directors, without paying or making any provision for the payment of the debts incurred by the Company, repaid in full to the several applicants for shares the sums which had been paid by them as aforesaid on application and allotment respectively. The sums so repaid were accompanied by the following circular, dated 28th October 1872:—

"The Consolidated Copper Company of Canada (Limited).

"The directors having been further advised by the Company's solicitor that it is unnecessary to appoint an official liquidator, have resolved to return the money to the subscribers.

"I now beg to hand you annexed cheque for the amount of your subscription." . . . .

On 23d December 1872 an extraordinary general meeting of the Company was held, at which it was unanimously resolved that the Company be wound up voluntarily, and a liquidator be appointed. A liquidator was appointed, and the winding-up proceeded voluntarily till the Court, on 28th October 1876, on the petition of certain alleged creditors of the Company, who claimed to be such in respect of certain printing and advertising charges, ordered the Company to be wound up, and appointed the present petitioner to be official liquidator. He was appointed under the provisions of the Companies Acts 1862 and 1867, and with the full powers conferred by those Acts, and this petition was presented by him in order to have a list of contributories settled, the appointment of a law agent, and authorised, &c. The settlement of the list of contributories alone need be referred to here.

The petitioner averred that from the investigation made by him he believed the only assets

petition by the official liquidator of the company to have the allottees put upon the list of contributories under the 38th section of the Companies Act 1862 (25 and 26 Vict. cap. 89).—*Held* (*diss.* Lord Ormidale), that the condition expressed in the allotment letter that the mines should be purchased was a suspensive condition, and that the allotment did not therefore have the effect in law of making each recipient of the above letter an instant member of the company so as to render him liable for its debts.

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Which please pay into the Bank of Scotland or branches on or before the 25th instant. After this payment no further call will be made till the deputation of directors shall have reported on the mines. If the board resolve not to purchase the mines, the money will be returned to the shareholders without deduction.—I am, Sir, your obedient servant, J. THOMSON DUNCAN, *Secretary*." Each of the said applicants paid to the bankers of the Company £1 per share on application, and £1 per share on allotment, taking from the bankers a receipt for the second of the said two payments as the 'balance due on allotment' of the specified number of shares allotted to him.

At or about the date of the issuing of the Company's prospectus, and before any allotment of shares was made, the directors resolved that before concluding any agreement with the vendors of the mines which the Company was to work, a deputation of their number should proceed to Canada to visit and report upon the mines; and in consequence of that report the Company never acquired or worked the said mines; and in or about October 1872 the directors, without paying or making any provision for the payment of the debts incurred by the Company, repaid in full to the several applicants for shares the sums which had been paid by them as aforesaid on application and allotment respectively. The sums so repaid were accompanied by the following circular, dated 28th October 1872:—

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"The directors having been further advised by the Company's solicitor that it is unnecessary to appoint an official liquidator, have resolved to return the money to the subscribers.

"I now beg to hand you annexed cheque for the amount of your subscription." . . . .

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The petitioner averred that from the investigation made by him he believed the only assets

of the Company consisted of unpaid capital. The 8th article of his condescendence was as follows:—"The list of contributories prepared and submitted by the official liquidator as the list of contributories of the Company correctly sets forth the persons who were shareholders or members of the Company, and the number of shares held by them respectively at the commencement of the winding-up. The several persons named in the said list were at the commencement of the winding-up, and now are, members of the Company in respect of the numbers of shares therein specified, and are liable to contribute to the assets of the Company to an amount sufficient for payment of its debts and liabilities, 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 among themselves." Answers were lodged to the petition by two sets of respondents—(1) John Dick Peddie and others, (2) Thomas Allan junior and others.

In the answers for John Dick Peddie and others it was averred, *inter alia*, that from the date of the circular of 28th October 1872 the provisional allotment of shares to the respondents was to all intents and purposes cancelled, and that from that date none of the respondents other than those who subscribed the memorandum of association had been in any respect recognised as shareholders of the Company. Notice of the meeting of 23d December, at which the resolution to wind-up was taken, was sent to no one, it was said, but to the seven subscribers of the articles of association. Several of these respondents who had signed the articles of association lodged a minute expressing their willingness to be ranked for one share.

For the respondents Thomas Allan junior and others it was, *inter alia*, averred that the prospectus of the Company contained false and fraudulent statements as to the value of the mines and other material points; that the provisional allottees ceased to have any connection with the Company more than a year before the present winding-up proceedings, that, even apart from the expressly provisional nature of the allotment, applicants for shares were entitled to demand back their deposits on account of the altered arrangements and the misleading statements of the prospectus. Further, that it was part of the agreement that the vendors should pay the preliminary expenses.

The pleas-in-law for the parties were, *inter alia*, as follows:—

For the petitioners—"(3) The respondents, who applied for and received allotments of shares, having thereby become members of the Company, and having remained so ever since, in respect of the shares so allotted to them, ought to be settled on the list of contributories for these shares respectively, in terms of the list made up by the liquidator. (4) *Esto*, that the contracts on the part of allottees to take shares were conditional, the conditions were not suspensive but resolutive, and could not affect the liability of the allottees for debts incurred prior to the resolution of the contracts."

For Peddie and others—"The respondents (other than the subscribers to the memorandum of association) are not liable as contributories of the said Company—(1) Because they never were, and never agreed to become, shareholders in the Company. (2) Because the allotment of shares founded on by the petitioner was conditional upon the purchase of the mines, and the said condition failed. (3) Because, in any view, the said allotment was validly cancelled by or with the consent or acquiescence of the Company. (4) Because the applications for shares made by said respondents were made on the faith of the prospectus, and in view of the capital therein mentioned being subscribed; and the said capital not having been subscribed, the directors had no right to make any allotment to said respondents. (5) The respondents who signed the memorandum of association are only liable as contributories in respect of one share each, and they having always been willing to pay up the amount due on their respective shares, the present petition, so far as directed against them, was unnecessary."

Argued *inter alia* for the respondents John Dick Peddie and others, who led—The respondents never agreed to take shares except under a condition which was never fulfilled. This condition was really part of the bargain between the parties; it was suspensive, and therefore there can be no liability. But suppose the condition was not suspensive but resolutive, even then the result was the same, for so long as the condition was a part of the bargain, the effect of holding it resolutive and not suspensive would be that the bargain was *ultra vires* of the directors, and therefore not binding on any of the parties. If the condition was in the power of the directors, it took effect as a suspensive condition *et cadit questio* on that ground. If it was *ultra vires* of the directors it was not binding on them, and therefore from mutuality not binding on the contributories. Even supposing the respondents did become members, they ceased to be such more than a year before the winding-up, and therefore were not liable.

Authorities—Lindley on Partnership, 1409; *Wood*, L.R. 15 Equity 236; *Pellatt's* case, L.R. 2 Chanc. App. 527; *Elkington's* case, L.R. 2 Chanc. App. 522; *Dixon and Evans*, L.R. 5 Eng. and Irish App. 618; *Lord Belhaven*, 3 Dejex, Jones, & Smith, 41; Lindley 759-761, and cases there referred to; *Anglo Californian Gold Company* v. *Lewis*, 6 Huddleston & N. 174; *Waterhouse* v. *Jamieson*, 20th May 1870, L.R. 2 Scotch App. 29; *Brown's* case, 19th Nov. 1873, L.R. 9 Chanc. 102; Thring's Law and Practice of Joint-Stock Companies 43; *M. of Abercorn* 1862, 4 Dejex, Fisher, & Jones, 78.

Argued for Allan and others, respondents—in addition to above argument—Besides, unless the full amount was subscribed, which it was not, no allotment existed at all—*i.e.*, if it was clear from the prospectus that no work could be done until the full amount was subscribed.

Authorities—*Sharpley*, 26th Jan. 1876, 2 Law Rep., Chanc. Div. 663. *North Stafford Iron and Steel Company*, 3 Law Rep., Exch. 172; *Pierce* v. *Jersey Water-works Company*, 5 Law Rep., Exch. 209; *Elder* v. *New Zealand Company*, 20th April 1874, 30 Law Times, 285 (the respondents here were never in the register of shareholders); *Central Railway Company of Venezuela* v. *Kisch*, 2 Law Rep., Eng. and Irish App. 113.

Argued *inter alia* for the petitioner — The respondents were really shareholders, and must

be put upon the list of contributories; for here there was a regularly registered company before even the prospectus was issued; the allotment of shares was made to applicants with an obligation by the directors to return the money on certain conditions. The allotment was unconditional—the obligation to return the money on a certain condition was a separate and collateral agreement. This condition took effect, the money was returned, but the allotment stood good, and the parties continued shareholders. The question here was—Did the parties agree to take shares? If they did, they were members of the Company, and it was not essential to the statutory definition of a shareholder that he be upon the register. They must be held to have been members—for (1) they paid a deposit; (2) there was an allotment, and the allotment money was paid. It would have made the condition a suspensive one if it entitled the parties to refuse to pay their allotment money; but they had to pay it, and it belonged to the Company, for a time at all events. The directors were not entitled to cancel the allotment—at all events such cancellation was of no avail against creditors.

Authorities—Lindley on Partnership 1404–11, 482; *Elkington's* case, L.R., 2 Chanc. 511; *Bridger's* case, Feb. 10, 1870, L.R., 5 Chanc. App. 305, L. R.; *Reese Silver Mining Coy.* v. *Smith*, L. R. 4 H. of L. 64 (Lords Cairns and Westbury, pp. 77, 80); *Evans*, L. R. 2 Chanc. App. 427 (Lord Cairns, p. 430); *Adams*, L. R. 13 Equity 474; *Overend, Gurney, & Coy.*, L. R. 2 H. of L. App. 325 (Lord Chelmsford, 353); *Harward*, L. R. 13 Equity 30; *Fowler*, 14 Equity 316; *Forbes'* case, L. R. 8 Chanc. Apps. 768; *Vining's* case, 6 Law Rep., Chanc. App. 96.

At advising—

Lord Gifford—In this petition, at the instance of the Consolidated Copper Company of Canada (Limited) for settlement of the list of contributories, a very large number of questions have been raised and argued at your Lordships' bar. To some of these questions we have given very anxious consideration, but there is one question which stands so prominently out and separate from the others that I suggest for your Lordships' consideration whether that question should not be disposed of first, leaving the others over in the meantime, because I think upon some of them we require additional and more precise information.

The question, then, which I suggest as the only one that we should dispose of now is the question regarding the effect of the allotment letters which were issued in terms of the minute of 22d July 1872, and which allotment letters contain a notandum or condition in respect of its being doubtful at that date whether the mines, which were the subject-matter of the Company, were to be purchased or not. That question may be said to turn upon this, whether the allotment letters issued by the Company made the allottees who were therein addressed partners of the Company to every effect from the time those letters were received, or at least from the time the money thereby demanded was paid, or whether they were of the nature of suspensive allotments, only to take effect if the report of the committee who had been appointed to inspect the mines was favourable, and if the mines were ultimately purchased by the Company. Upon this depends the question whether a very large number of persons are to be placed upon the list of contributories or not, and the question was argued at your Lordships' bar very much upon this footing, whether those allotment letters were of the nature of a present allotment constituting present membership of the Company, with a condition that in certain events the membership should be rescinded, or whether they were suspensive allotments which were not to take effect unless the mines were purchased upon a favourable report being returned by the committee.

Now, I am free to admit that that is a very difficult and delicate question, especially when we look at the special terms of the letters of allotment, to which I shall immediately refer. A prospectus had been issued originally in the view of purchasing those mines, and it seems to have been taken for granted, as originally issued, that the directors of the Company were satisfied, and the mines were to be purchased, and the Company was to be formed for the acquisition of those mines. I may notice in passing from this part of the prospectus that though there is a general clause about acquiring other mining property, I take it that that is a mere provision for extending the Company when it is actually instituted, for the particular purpose of the Company was to acquire, not mines anywhere, or situated in *any* locality, or of *any* description, but certain specific mines. Accordingly, in the first clause of the prospectus it is said—"This Company has been formed for the purpose of acquiring and working (1) The copper mine of Harveyhill, and the adjoining lands containing the same lodes and deposits, situated in the township of Leeds, county of Megantic, and province of Quebec; and (2) The Ives copper mine, situated in lots 2, 3, and 4 of the 8th and 9th ranges of the township of Bolton and province of Quebec"—and there the prospectus stops; and though in the memorandum of agreement somewhat more extended powers are taken, still the very first object of the memorandum of agreement is expressed thus:—"The objects for which the Company is established are (1) to adopt and carry out a contract, dated the 1st day of July 1872, between John Watson," and so on (naming the parties), "and to acquire the lands, mines, plant and others therein referred to," which are just those referred to in the prospectus. No doubt the memorandum goes on to say—"(2) To purchase, lease, or otherwise acquire any other mines, lands, or mining property," &c., in Canada. But I cannot regard that second head of the agreement as a separate purpose of the Company. The true purpose of the Company was to acquire the mines specified, and the addition as to acquiring "other mines" implies that the two mines mentioned were to be acquired; and therefore if through anything that occurred it was found impossible or inexpedient to acquire the first two mines, I think the whole purpose of this Company failed. Well, after the allotments had been applied for by the different parties to whose cases I am now referring, additional investigations proved to be necessary. The question was reopened whether the two mines should or should not be purchased,

and a Committee was appointed to go to Canada to inquire and report whether the purchase should go on or not, and it is upon the effect of this state of matters that the question principally turns.

Now, the letter of application, which is the first thing with which we have to do, is in these terms—the form is printed here, and I assume that all the parties that applied for shares applied in that form, and that what we have here is really the contract applicable to each party—[*reads letter of application*]. Now, that is an application in the usual terms to have a certain number of shares allotted, the number varying with the number which each applicant asked and proposed to take, and, as a usual condition of making an application for shares, there is along with the application paid into the Bank of Scotland the sum of £1 for each share applied for. Now, if in answer to that application the Company, or its directors acting for it, as constituted by the signatures of the seven gentlemen who signed the memorandum, had allotted so many shares up to or within the number applied for, that would undoubtedly make the applicant to whom such allotment was assigned a member of the Company. But that is not the state of matters which arises in this particular case. The directors, between the date of receiving the applications for shares and the allotment which ultimately took place, seem to have had considerable deliberation as to whether—for I put it in this way—the Company was to go on at all. We have a meeting of directors held on 22d July 1872, at which, as appears from the minute, "The directors revised the proof and corrected the allotment paper, having at same time resolved that no allotment whatever should be made until the new arrangement with the vendors should be agreed upon and formally executed. The allotment of shares agreed upon on Friday last has in consequence been postponed." I think that at that date therefore the directors are doubtful whether they shall allot at all in terms of the applications which were in their hands. Then a further meeting takes place two days afterwards, on the 24th of July, at which this is resolved:—"The directors had under consideration the question of the deputation to proceed to Canada to investigate the mines, and nominated and appointed Messrs Dickson and Miller to be that deputation, and, if possible, that Mr Robert Shaw Stewart also accompany them." Then there is a provision as to the probable expense of the investigation and they go on to say—"In the event of the Company being established, it is understood and agreed that the entire expenses of deputation and mining engineer be refunded to Messrs Taylor, Cameron, & Company." That deliberation went on for some time and there are also deliberations as to an interim allocation—I pass over a good deal of the proceedings—till the vendors seem to have required that an interim allocation be made, not with the view of constituting the Company, but to show who the Company would be if the mines were ultimately to be acquired. That is assented to, and then comes the letter of allotment upon which this question turns, and which is addressed to each of the applicants who have made application for shares in the terms I have referred to—[*reads letter of allotment*].

It is upon the notandum at the end that the whole question turns—"After this payment no further call will be made till the deputation of directors shall have reported on the mines. If the board resolve not to purchase the mines, the money will be returned to the shareholders without deduction." A letter in these terms was received by each of the parties whose cases are now under consideration, and the question is whether the receipt of that letter and the payment of the allotment money made those parties instant members of the Company, or whether it was not a conditional allotment which merely would have the effect of constituting them members if the mines were purchased and the Company went on.

Now, without disguising the difficulty of that question, I have come to be of opinion that it was only a conditional allotment, and that it did not have the effect in law of making each recipient of those allotment letters an instant member of the Company to the effect of being liable for all the debts contracted or which might be contracted by the Company. I am quite aware of the difficulty which arises if you look technically to the exact expression of this letter; and if the question were to be determined upon the mere turn of expression which the letters contains, I should have very great difficulty indeed in holding that this did not constitute the recipients members of the Company. But I think it right and proper in cases such as this not to determine the matter upon a minute criticism of the turn of expression in the letters, but upon the real substance and meaning of what was done.

The question is, What was meant to be carried out by the directors when they issued those letters? Upon that view, and looking rather to the substance of the letter than to its mere accidental form, I think it was not intended that the gentlemen to whom those letters were addressed should be to every intent and purpose present members of the Company, but that it had in view a contingent event, upon the occurrence of which alone their membership should take place. Undoubtedly it would have been easy to express the letter so. It would have been quite competent to make a suspensive allotment and to have by as many words declared that there should be no membership unless the mines were purchased. Suppose the letter, instead of being in the terms which I have read, were varied in expression, and had borne something of this kind—"We are doubtful whether the Company will go on at all or not. It depends upon the report of persons who are now making certain investigations, and it depends upon the ultimate purchase of those mines. You who have applied for shares shall be shareholders if the mines are purchased, and your tenure of shares shall be upon that condition." Suppose that had been said, I think it could not have been regarded otherwise than as a suspensive condition. "You shall be shareholders if the mines are purchased; if the mines are not purchased you shall not become shareholders"—but, according to my reading of the letter, that is exactly what is done. "We are doubtful about this Company going on at all. For certain reasons connected with the vendors' satisfaction, who want to know that there will be a Company, and that it will go on if the mines are purchased, we tell you what your allotment

will be; but we tell you also that no further call will be made—nothing further will be done upon this unless the report is favourable and the mines are purchased; and if that does not happen the money which you are to deposit with us will be returned to the shareholders." It seems to me that "to the shareholders,"—whatever may be said upon a critical reading of the words—really means "to those who may be shareholders if there is a Company," and not "to those who are shareholders, or whose shares may be rescinded or cut off." And therefore, looking to the substance of this, rather than determining a question so important upon a critical consideration of the words, I have come, though not without difficulty, to think that this is a proper suspensive condition, meaning that the parties to whom the shares are allotted will become shareholders to that amount, and will be called upon to pay in reference thereto if the mines are purchased, and not otherwise. I think I get confirmation for that by looking to the after history of the case. What was done? The report was unfavourable; the mines were never purchased; and the money which these different applicants had deposited and had paid to the promoters was repaid without deduction; and they heard no more about the matter till this question arose.

On the whole, I am of opinion that they were not shareholders; that, looking both to the carrying out of the bargain and to the terms of the bargain itself, they were never in truth members of this Company; and therefore, that in reference to all the parties who are now proposed to be put upon the list of contributories in respect of those letters of allotment—I do not say anything about the other matters, because there are other matters behind, particularly about the directors, and what their holding shall be considered to be, and how far their actings are involved—but in respect merely of those letters of allotment—no instant membership was constituted in favour of the parties to whom those letters were directed, and that, if that is the only ground for putting them on the list of contributories, they should not be put upon it.

Lord Ormidale—Upon the view which I take of the only question we have now to decide, I think I can avoid, and ought to avoid, entering into most of the details into which in reference to some of the other points it might be necessary to enter. My view therefore upon the only question we have now to decide may be expressed very shortly.

The discussion in this case has arisen under an application to the Court by the official liquidator of the Consolidated Copper Company of Canada to settle a list of contributories, and to pronounce certain other orders usual and proper in the winding-up of such companies.

The respondents resist being included in the list of contributories, in respect, as alleged by them, that the Company in question never had any legal existence, that the liquidator has not a sufficient title to sue, and on other grounds—into an explanation of which it is at present unnecessary to enter, except to say that they, so far as relevant at all, will probably require some proof or investigation of facts before they can be disposed of.

As, however, there is one of the objections by the respondents to being treated as shareholders or dealt with as contributories which requires no proof or investigation beyond the writings on which it is founded, and about which there is no dispute, and which, if determined, as they maintain it ought to be, is sufficient of itself to exonerate them from being dealt with as contributories, it has been thought right that it should be at once, and before entering on the other objections, taken up and disposed of.

The respondents say that the alleged allotment of shares upon which the liquidator relies was merely contingent or conditional on an event which, as it turned out, prevented them ever becoming holders of the shares. That the respondents applied for shares, and that the application was itself free from any contingency or condition, is not disputed. It is in the allotment letter or answer to their application by the secretary of the Company that, according to their contention, the contingency or condition upon which they found occurs. But is this so?

It will be observed that by the secretary of the Company's answer to the respondents' application for shares, set out in the third article of the petitioner's condescendence, he states in unqualified terms that he had allotted shares to them in the Company; and he subjoins a state shewing the result in figures of the sum which had been already deposited by the applicants for shares, and the amount payable on allotment which he called on them to pay, on the 25th of July 1872, that is three days after the date of the intimation, into the Bank of Scotland. That payment was accordingly made by each of the respondents, who thereafter received a receipt from the bankers for the payment "As the balance due on allotment." So far there is no dispute, and could be none. The allotment necessary to constitute the respondents shareholders of the Company was thus, as it appears to me, made and completed in the usual terms, without any qualification or reservation whatever. But then there is added to the secretary's letter of allotment an intimation to the effect (1st) 'that after this intimation no further call will be made till the deputation of directors shall have reported on the mines;" and to the effect (2dly) "that if the board resolve not to purchase the mines the money will be returned to the shareholders without deduction." Founding upon the terms of this intimation, the respondents have contended that the allotment to them was contingent and conditional, and that till the contingency or condition came to be purified by the retention in place of the return of their money, they could not be said to be shareholders, and that as their money was returned after the lapse of about three months, on the directors reporting against the purchase of the mines, the Company came practically to an end, and they (the respondents) never were shareholders.

I have been unable to satisfy myself that this contention on the part of the respondents is sound. On the contrary, it appears to me that the respondents did become holders of the shares for which they paid the deposit money and the first call as I have explained. They may afterwards, when they got back their money, have ceased to be shareholders—and whether they did so or not is a question I shall afterwards attend to—but the primary and more important question is, Whether they ever became shareholders at all? I

can very well understand that they might if they had pleased have made it an express condition precedent to their becoming shareholders that the board of directors should have resolved to purchase the mines in Canada, and if they had attached such a condition to their application for shares the Company, by their secretary or others acting for them, might or might not have acceded to it; but no such condition was hinted at by the respondents in their applications, nor is there any such condition in the allotment letters issued by the secretary of the Company as I read them. There was merely an intimation annexed to the allotment to the effect that no further call would be made, and that the money would be returned in the event of the directors resolving not to purchase the mines in Canada—a different thing altogether, as I view it, from saying that in the intervening period of time betwixt the issue of the allotment letters and the resolution of the directors to purchase or not to purchase the mines the respondents should not be shareholders. If they were not shareholders during that intermediate period, what were they? They had paid the requisite deposit money and the first call applicable to the number of shares they had applied for, and the money so paid by them had been received and retained by the Company. Whose money did it then become? Could it have been attached by creditors of the Company or creditors of the respondents? For myself, I can entertain little or no doubt that it could have been attached by creditors of the former who held it, and not by the creditors of the respondents who had parted with it.

If I am right in the views I have now expressed, it follows that the condition in the allotment letters, if there was any proper condition in them at all, was of the nature of a condition-subsequent, and not a condition-precedent, which it required to be in order to prevent the respondents becoming shareholders of the Company immediately on the issue of the allotment letters and payment of the call thereby made. Accordingly, the notification in the allotment letters, that in the event of the directors resolving not to purchase the mines in Canada—is not that the money shall be returned to the allottees—but to "the shareholders" without exception, thereby necessarily including the original subscribers to the memorandum of association, who beyond all doubt were, and had long previously been, shareholders of the Company. This was just a notification that as the Company was to come to an end in the event suggested, the money of all parties would be returned, a result which would have followed and could have been enforced although there had been no intimation at all to that effect in the allotment letters.

Supposing, however, that the alleged condition and consequent return of their money, on which the respondents rely, operated a rescission and I do not see how in the most favourable view for them that can be taken of the matter it could do more—of the contract by which they had become shareholders, I do not at present understand how that can be any reason why they should not now be added to the list of contributories; for by section 38 of the Companies Act 1862 it is provided that in the event of a company formed under the Act, as the present one was, "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 for payment of such sums as may be required for the adjustment of the rights of contributories amongst themselves," with certain qualifications which are there enumerated, and among others the qualification that "No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to commencement of the winding-up." But it was not, and could not, I think, well be disputed that the respondents, assuming that the alleged condition on which they found was at best a resolutive and not a suspensive one, or, in other words, a condition-subquent and not precedent, had not ceased to be members of the Company for the period of a year and upwards before the commencement of the voluntary winding-up referred to in the papers. I do not overlook the objection which was taken by the respondents to the voluntary winding-up being taken into consideration at all in the present official winding-up. But I think that, in place of now determining that point, it may be better left over until it is ascertained whether there are any existing creditors at all of the Company, as well as till the other matters about which the parties differ in regard to facts are cleared up. This is clearly the expedient course, considering that the majority of the Court are, as I understand, prepared to decide that the respondents, with the exception of the persons who subscribed the memorandum of association, are not and never were shareholders of the Company.

In the meantime I have merely to add, that for the reasons I have stated, the respondents ought, in my opinion, to be held to have become members of the Company in question in 1872, when they received their allotment letters and paid the call then made upon them. In forming this opinion I have held myself bound by the express terms of the respondents' application for shares and the allotment letters sent to them in answer to that application. I do not think that I am entitled, from a desire to relieve the respondents—were I at liberty to entertain any such desire, which I am not—to proceed on the assumption that the terms of the letters of application and allotment can for any reason whatever be varied or altered. I have formed the opinion which I have now expressed without going beyond or attempting to change—which I do not think I was entitled to do—the phraseology or terms of the application for shares or the answer to that application which was made by the secretary of the Company. However anxious I might be to relieve the respondents, I am not entitled, I think, to change the phraseology in any way whatever on the ground of doing substantial justice, or any other ground. It is upon the phraseology of the writings alone that we have to decide this question.

Lord Justice-Clerk—On the question whether there was a concluded contract of copartnery between the respondents, that is to say, the allottees and the persons who signed the memorandum of agreement, I agree with Lord Gifford; and that is the only point we propose to decide at this time. My opinion on that matter is, that while on the one hand there was an unconditional offer

by the allottees to become partners of the Company by the application for shares and the payment of deposit money, that offer never was unconditionally accepted, and that until it was the contract was not and could not be complete.

The question turns upon the effect substantially of the allotment letter, which is dated 22d July 1872, combined with the provision attached to it. I shall content myself with a very few remarks in addition to what has fallen from your Lordships. The partnership or society of which it is said those respondents became members was constituted by the memorandum of association, and the only partners of that Company, until others were accepted and admitted into the partnership, were those seven signatories, and it is with them the contract was made if contract there was. Without going into the previous documents, the result is substantially this, that there is an advertisement of the Company, there is a prospectus, and certain details are given, and there is an invitation to apply for shares. The respondents did apply for shares, and requested that those shares might be allotted to them, they having paid the necessary deposit. Some time elapsed between the application and the letter of allotment, and at last a letter of allotment is signed, with the proviso that after this payment no further call will be made until a deputation of the directors shall have reported on the mines, and that if the board resolve not to purchase the mines the money will be returned to the shareholders without deduction. And, in the first instance, I take the case, as Lord Ormidale has taken it, upon the precise words of this provision and on what followed in consequence. Now, what followed in consequence was this, that the mines were not purchased and the money was returned; and the question is whether those persons ever were accepted as partners of the association constituted by the memorandum of association. I am very clear that they never were. The proviso of returning the money on that condition could have no meaning whatever excepting that it was on that condition alone that they were about to be partners. They say—"If we purchase the mines we assume you as partners; if we do not purchase the mines, we return you your money;" and the meaning of returning the money without deduction could only be this, that there is no transaction if we do not purchase, if we purchase you will become partners. That seems to me to be the common sense of the thing, because there is no obvious meaning in returning the money without deduction unless the whole transaction, in popular language, is "off."

But there are two suggestions made. The first is, that notwithstanding the return of the money those persons continued to be partners. The second is, that they became partners when the money was paid, and ceased to be partners when the money was returned. Now, as to the first, it is quite clear that is not so, because every man who received back his money lost all right he could possibly have to claim to be a partner, and if he could not claim to be a partner he was not a partner; because, if he was a partner he had all the rights of one, but there is certainly no provision in this contract of copartnery that a man shall both not pay the amount due upon his shares and yet be and remain a partner of the Company That is out of the question. The second suggestion—and it has more plausibility—is, that this was not a contingent acceptance of those persons as partners, but an absolute acceptance of them as partners, with a provision that if the mines were not obtained then they should cease to be partners. But that is not the meaning of the notandum. That is neither the wording nor the intention of it. There is not the slightest intimation given there that they are received as partners—quite the contrary. There is a condition attached to the acceptance of those persons as partners, and if that condition is not fulfilled, the whole thing is radically torn up by the roots—the money is to be returned without deduction. It means this—'We do not hold you liable for anything; we do not hold you ever to have been partners."

I think that is the reasonable meaning of the transaction. But when we come to the real substance of it the thing becomes more clear. This was one of those numerous projects got up to work certain mines in Canada—to work those mines, not to work any others, because though some power is given to the directors to purchase other mines, that is not the real meaning of the Company, and the proof of that is that while there are statistics given as to the expected return from those individual mines, there are no statistics given and no means afforded to the public for judging what any other mines are worth. Well, those seven persons undertake to get up this Company, but they have made a bargain with the sellers of the mine and the person who represented them, and that bargain goes deep into the substance of this question. It is this, that no payment is to be made till the mines have been inspected and approved of, that the vendor is to bear the whole of those preliminary expenses, and until the mines are purchased there is to be no responsibility of any kind otherwise. Of course, the signatories to the memorandum of association must be liable to the persons whom they employ; but that shows that the real intention was that there should be no company formed and no liability otherwise except in view of the mines being purchased and the thing started, and if the mines were not purchased the vendors were to bear the whole expense. Accordingly, on 22d July 1872, the day on which the letters of allotment were issued, the directors resolved that no allotment should be made until a new agreement with the vendors should be agreed to. In the course of the day the vendors do agree to a new agreement, and thereupon the directors authorise the issue of the allotment papers as initialed by the chairman. The substance of that is quite obvious. The vendors say "We must have the security of your allottees for the price if we agree," and the directors accordingly issue the letters of allotment conditionally on this, that they shall only take effect in the event of the mines being purchased in terms of the bargain. That that is the substance of it I have no doubt whatever—the letters of allotment had no operation in constituting a copartnery unless the purchase went on—and the proof of it is that nothing passed and the money was returned, and there was an end of the whole thing.

That is quite enough for this case, because if there was no partnership with those seven persons, there was no partnership at all. There was

no partnership with the creditors, and the creditors understood with whom they were dealing, for, if I mistake not, the whole of the money that was accepted was spent, not even in suing the seven signatories to the memorandum of association, but in endeavouring to recover from the vendors and their agents in London the amounts that had been expended, and it was only when they found those parties were not good for those expenses, and failed to recover them in that way, that they turned round and insisted on what they had not insisted on before, that the respondents here were members of the association. That is the opinion I have formed, and therefore on that point I hold the liquidator has failed to make out that those persons should be placed on the list of contributories.

There is a question about persons who appear in the list of directors, and persons who acted as directors, that may give rise to a separate question, and in that we are ready to hear any observations that may be made.

The following interlocutor was pronounced:—

"The Lords having resumed consideration of the cause, with the record made up in terms of the interlocutor of 20th July last, and heard counsel, Find that the respondents who are proceeded against solely in respect of the letter of allotment of 22d July 1872, and the consequent payment of the allotment money, are not contributories, and ought not to be put upon such list, in respect they never were partners of the Consolidated Copper Company of Canada (Limited); and decern: And before further answer appoint the said respondents to lodge their account of expenses in process, reserving consideration of the same: *Quoad ultra* continue the cause."

Counsel for Petitioner — Balfour — Alison. Agent—T. F. Weir, S.S.C.

Counsel for Respondents John D. Peddie and Others — Asher — Mackintosh. Agents — Drummond & Reid, W.S., and J. & A. Peddie & Ivory, W.S.

Counsel for Respondents John Allan jun. and Others—R. V. Campbell—Pearson. Agents—Mitchell & Baxter, W.S.

Wednesday, November 14.

SECOND DIVISION.

SPECIAL CASE—PRINGLE AND OTHERS.

Succession—Mortis causa *Conveyance—Conveyance of House under Bequest of "Moveable and Personal Estate."*

A bequest of "all the moveable and personal estate which shall belong to me at the time of my death," taken in conjunction with the terms of a holograph letter of instructions by the testatrix, in which the amount of the estate as detailed included the value put upon certain house property belonging to her—*held* (upon the principle of *Hardy's Trustees*, May 13, 1871, 9 Macph. 736; and *M'Leod's Trustees* v. *M'Leod*, Feb. 28, 1875, 2 R. 481) to be sufficient to carry that heritage.

Counsel for First Party—Jameson. Agents—Scott-Moncrieff & Wood, W.S.

Counsel for Second Party—Fraser—Darling. Agents—Mylne & Campbell, W.S.

Thursday, November 15.

SECOND DIVISION.

[Lord Young, Ordinary.

SCHOOL BOARD OF THE BURGH *v.* SCHOOL BOARD OF THE PARISH OF RENFREW.

School—Education Act 1872, *sec.* 9—*Disputed Areas of Parish or Burgh.*

A question having arisen between the School Boards of the burgh and of the parish of Renfrew as to the respective areas of the two — *held* (following the case of *Lochgilphead School Board* v. *Knapdale School Board*, January 30, 1877, 4 R. 389) that under section 9 of the Education (Scotland) Act 1872, such a dispute was matter for the Board of Education or the Sheriff, whose decision was final, and action brought to have the matter determined in the Court of Session dismissed accordingly.

Counsel for Pursuers (Reclaimers)—Asher—R. V. Campbell. Agent—A. Kirk Mackie, S.S.C.

Counsel for Defenders (Respondents)—Balfour. Agents—Frasers, Stodart & Mackenzie, W.S.

Thursday, November 15.

FIRST DIVISION.

[Sheriff of Forfarshire.

NICOLL *v.* REID.

Title to Sue—Use of Firm Name—Where a sole Surviving Partner sued in his own Name for Debts due to Firm.

A firm of two partners was dissolved by mutual agreement, which provided for winding up the concern, and for the payment to and discharge by either party of debts due to or by the firm. One of the partners died shortly afterwards and before the winding-up was completed. *Held* that the surviving partner was then in the same position as if the death had operated the dissolution, and that in suing for a debt due to the firm neither law nor usage obliged him to do so in the company name.

The firm of Nicoll & Reid carried on business at Kirremuir as cabinetmakers and joiners. It was mutually agreed between the partners that the firm should be dissolved on December 31, 1875, and a minute of agreement was drawn up to that effect. The third article of the agreement was as follows:—"*Thirdly*, The books of the concern