with it; indeed, I see that I was counsel in it. I think that was clearly a case in which the agreement in restraint was incidental to a contract of employment.

The Court pronounced this interlocutor:—

"Sustain the appeal, and recal the interlocutors appealed against: Find in fact (1) that the pursuer is a photographer, and carries on business as such at High Street, Elgin: (2) That the defender, a brother of the pursuer, also carries on the business of a photographer at present at Institution Road, Elgin; (3) that the pursuer in 1886 purchased from his father Robert Stewart senior, photographer, Elgin, the photographic business carried on by him at High Street, aforesaid; (4) that the defender has failed to prove that the pursuer so purchased the business for the benefit of his brothers, the defender and the witness Charles Stewart, as well as for the benefit of himself; (5) that on or about 8th July 1897 the defender was imprisoned in the Elgin prison for an alimentary debt which he was then unable to pay; (6) that on 9th July aforesaid, the defender, in the said prison, signed the minute of agreement; (7) that by said agreement the pursuer bound himself to advance the sum of £5 sterling, and that on said 9th July (after the agreement was signed and completed) the pursuer advanced the said sum to the defender, and so enabled him to pay his alimentary debt and get out of prison; (8) that by said agreement the defender, *inter alia*, bound himself that he would not thereafter start or carry on the business of a photographer in Elgin, or within twenty miles thereof, and that it was thereby stipulated that if the defender should infringe said stipulation the pursuer should be entitled forthwith to interdict him; (9) that notwithstanding thereof the defender, more than a year after said date, started the business of a photographer in Elgin, and has since continued to carry on the same; and (10) that the defender has failed to prove that the said agreement was signed by him in error, or was impetrated from him by misrepresentation and in circumstances amounting to fraud, force, and fear: Find in law that the restraint in question, being limited to a particular district, and reasonably necessary for the protection of the pursuer, with whom the contract was made, and the pursuer having given a legal consideration therefor, was valid and binding on the defender: Therefore repel the defences: Grant interdict in terms of the prayer of the petition: Find the pursuer entitled to expenses in this and in the Inferior Court, and remit," &c.

Counsel for the Pursuer — Shaw, Q.C. —C. D. Murray. Agent—William Geddes, Solicitor.

Counsel for the Defender—Dundas, Q.C. —Clyde. Agent—Charles George, S.S.C.

Friday, June 30.

FIRST DIVISION.

[Lord Pearson, Ordinary.

GUNN *v.* MUIRHEAD.

Company—Companies Act 1867 (30 *and* 31 *Vict. c.* 131), *sec.* 25—*Fully Paid-up Shares —Payment in Cash.*

The Companies' Act 1867 provides by section 25 that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

Aitchison & Sons, Limited, purchased the heritable and moveable property belonging to the West End Cafe Company, Limited, for a certain sum payable at entry, on the understanding that such shareholders in that company as desired to reinvest their shares in the company of Aitchison & Sons should be offered an opportunity of doing so, and that for that purpose the amounts of their shares should be deducted from the price payable by the new company to the old company, and upon the winding up of the old company the shareholders in question should grant discharges of their shares and receive shares in the new company for the amount thus discharged. Gunn, a shareholder in the West End Cafe Company, applied for shares in Aitchison & Sons, authorising the directors thereof to intimate to the liquidator of the former company that the amount to be realised from his shares therein would be reinvested in the shares in Aitchison & Sons applied for by him.

Gunn also entered into an agreement with Muirhead, one of the promoters of Aitchison & Sons, Limited, by which, after setting forth the transactions between the selling and the buying company, he agreed to accept shares in Aitchison & Sons in lieu of the shares held by him in the West End Cafe Company, while Muirhead agreed, if called upon, to relieve Gunn of the £1 shares allotted to him in Aitchison & Sons, paying therefor the sum of £1 each. Gunn subsequently called upon Muirhead to fulfil his part of the agreement, tendering the shares allotted to him in Aitchison & Sons in terms of his application. Muirhead declined to do so, on the ground that the shares tendered to him were not fully paid up.

In an action raised by Gunn against Muirhead for implement of the agreement, *held* (1) that under sec. 25 of the Companies Act 1867 the shares must be deemed to be held subject to the payment of the whole amount thereof in cash, and (2) that it lay upon the pursuer, as he sought to enforce the contract to take

them, to have adopted the procedure provided by that section to prevent this liability attaching, and that having failed to do so, he could not insist on the defender taking them as in implement of the contract.

In 1894 John Gunn was proprietor of 3114 fully paid-up shares of £1 each in the West End Cafe Company, Limited, which carried on business in Princes Street, Edinburgh. Of these shares 700 stood on the register in his own name, the remainder having been transferred to other persons, of whom one was James Muirhead, in security of advances made by them to Gunn, or of cautionary obligations undertaken by them on his behalf. In the same year a new company was promoted to take over the business of the West End Cafe Company and the business of Aitchison & Sons, purveyors. Muirhead was a promoter of the new company, which was styled Aitchison & Sons, Limited.

On 10th May 1894 an agreement was entered into between Aitchison & Sons, James Douglas Jameson, sole partner of that firm, and James Muirhead, first parties, and Mr Gunn, second party, to the following effect:—"Whereas it has been arranged that the West End Cafe Company shall shortly be wound up and the shareholders therein repaid the capital pertaining to them, and that such shareholders in the said West End Cafe Company as desire to reinvest their shares in the said proposed company of Aitchison & Sons, Limited, shall be afforded an opportunity of doing so, and for this purpose, upon their signifying their intention so to do, the amounts of their shares shall be deducted from the price payable by the said Aitchison & Sons, Limited, to the said West End Cafe Company, and upon the winding up of the said West End Cafe Company being completed the said shareholders shall thereupon grant discharges of their shares, and the money to be paid in respect of such discharges shall meet the part payment of the aforesaid price payable by the said company of Aitchison & Sons, Limited, deducted as aforesaid, and scrip in the said company of Aitchison & Sons, Limited, shall be issued for the amount thus discharged; and further, considering that upwards of 3000 A shares of £1 each in the West End Cafe Company belong to the said John Gunn, including 2000 of such shares registered in the name of the said James Muirhead and Henry Waters, Queensferry Street, Edinburgh, the said 2000 shares being held by the said James Muirhead and Henry Waters in security to them in respect of their having signed a cautionary obligation to the extent of £2000 for the said John Gunn, and under which cautionary obligation £1700 of principal is at present due; further, considering that the parties have agreed that the whole amount invested in the said shares of the West End Cafe Company shall be reinvested in the proposed company of Aitchison & Sons, Limited: Therefore it is hereby agreed as follows:— (1) The said John Gunn hereby agrees to accept shares in the said company of Aitchison & Sons, Limited, in lieu of the shares possessed by him in the West End Cafe Company, Limited, and authorises his said shares to be deducted from the price payable by the said Aitchison & Sons, Limited, to the West End Cafe Company, Limited, and undertakes to grant all necessary discharges in connection therewith; (2) Seventeen hundred shares of one pound each in the said company of Aitchison & Sons, Limited, shall be allotted in names of the said James Muirhead and Henry Waters in order to cover the balance of principal still due upon the said cautionary obligation, and the balance of the shares of one pound each in the said company of Aitchison & Sons, Limited, shall be allotted in the name or names of the said John Gunn or of his nominees; (3) The said Aitchison & Sons, James Douglas Jameson, and James Muirhead agree to relieve the said John Gunn or his nominees of the said shares in Aitchison & Sons, Limited, or of any part thereof, at any time, upon his giving them three months' notice in writing of his desire to be so relieved, and they shall either themselves pay to him the sum of one pound sterling for each of the said shares of one pound each or procure a purchaser to take over the said shares at par, and they further agree to take over the shares invested in names of the said James Muirhead and Henry Waters at par in order to repay the said cautionary obligation above mentioned."

On 14th May the following agreement was entered into between the West End Cafe Company and Aitchison & Sons, Limited:—"The parties hereto, considering that an offer was made on behalf of the second parties by letter addressed to the chairman of the first parties, dated fourth April last, of the sum of Twenty-two thousand pounds for the property, furnishings, and fittings belonging to the first parties, . . . and it being understood that the purchasers were to take over the bonds at present over the property amounting to Twelve thousand nine hundred and seventy-six pounds, and relieve the sellers of all responsibility in connection therewith, any discharges, however, of the personal obligations of the first parties being at the expense of the first parties, the purchasers to take over all contracts between the company and the employees who might be in office at the date of transfer, and any other current contracts, it being also a condition of the said offer that entry should be given at fifteenth May next or within six weeks from the acceptance of the offer, it being understood that the price would be payable at entry, but that payment of part of the price should be deferred so far as representing the amount of shares held by those in the first parties who might signify their desire that the amounts repayable to them should be reinvested in shares of the second parties; considering further that the said offer has now been submitted to two meetings of the shareholders of the first parties who have approved of the same being accepted, and have authorised the directors to accept it accordingly, and the directors

of the first parties having again had the said offer before them, and having met with representatives of the second parties, have agreed to accept of the said offer, and hereby accept of the same subject to the following conditions which have been and are hereby agreed upon between the parties, viz., 1. As the second parties will not be in a position to pay the said price of Twenty-two thousand pounds at the term of Whitsunday eighteen hundred and ninety-four, the second parties shall get nominal entry to the Cafe premises at said fifteenth May on paying a sum of Two thousand pounds to the first parties, and on payment to the first parties of the value of the stock-in-trade which may be in hand on the evening of the fourteenth May as the same shall be ascertained by parties mutually appointed by the first and second parties. 2. The balance of the price (subject to the postponement of payment of an amount equivalent to the shares held by those shareholders who agree to continue their holding in the first parties in shares in the second parties; the second parties and their directors, however, granting in favour of the first parties an obligation for payment thereof on the first parties' company being wound up) shall be payable on or before the fifteenth day of June next, and shall bear interest at 5 per centum from fifteenth May till payment; it being understood and agreed that on payment of said price and interest as aforesaid a disposition of the property shall be delivered to the second parties."

On 23rd June Aitchisons & Sons, Limited, and the directors thereof, granted the following obligation to the West End Cafe Company:—"Considering that by agreement entered into between the West End Cafe Company, Limited, Edinburgh, and us the said Aitchison & Sons, Limited, dated fourteenth May Eighteen hundred and ninety-four, it was agreed that as we, the said Aitchison & Sons, Limited, would not be in a position to pay to the said West End Cafe Company, Limited, the price of Twenty-two thousand pounds for the West End Cafe premises and other assets therein mentioned at the term of Whitsunday Eighteen hundred and ninety-four, on paying a sum of Two thousand ponnds to the West End Cafe Company, Limited, and on payment to them of the value of the stock-in-trade in hand on the evening of the fourteenth May, as the same should be ascertained by parties mutually appointed; that the said sum of Two thousand pounds was duly paid, and the value of the stock-in-trade was also ascertained and duly paid; considering further that by said agreement it was provided that the balance of the price should be payable on or before the fifteenth day of June Eighteen hundred and ninety-four, and should bear interest at five per cent. from fifteenth May till payment, but subject always to the postponement of an amount equivalent to the shares held by these shareholders who agree to continue their holding in the West End Cafe Company, Limited, in shares in us the said Aitchison & Sons, Limited, we and our directors, however, granting in favour of the West End Cafe Company, Limited, an obligation for payment thereof on the said West End Cafe Company, Limited, being wound up, and now seeing that in addition to the said sum of Two thousand pounds paid on fifteenth May last on account of the price of the property and others, we have of this date paid to the West End Cafe Company, Limited, a further sum of Two thousand eight hundred and eighty pounds to account of said price, with interest thereon from fifteenth May last to date of payment, and that we have taken over and become responsible, as at fifteenth May last for the bonds and dispositions in security affecting the heritable property, amounting to Twelve thousand nine hundred and seventy-six pounds—amounting said three sums in all to the sum of Seventeen thousand nine hundred and seventy-six pounds, leaving a balance of said price still due and owing by us to the said West End Cafe Company, Limited, amounting to Four thousand one hundred and forty-four pounds, with interest thereon at five per cent. per annum from said fifteenth May last till payment, that it is understood and agreed that said balance is to be paid out of monies to be received by shareholders of the West End Cafe Company, Limited, who are to become shareholders in our company, conform to a list thereof annexed and signed as relative hereto, and that said shareholders have signed transfer and application forms in respect of their shares in said West End Cafe Company, Limited, in terms similar to the form annexed and signed as relative hereto, which have been intimated to and lodged with the said West End Cafe, Company, Limited, and it has been arranged that on the West End Cafe Company, Limited, being put into liquidation and wound up, which is to be done with all convenient speed, the sums repayable to the said shareholders in respect of their shares up to the said sum of Four thousand one hundred and forty-four pounds, with interest thereon as aforesaid, shall be received by and paid to the West End Cafe Company, Limited, or to the liquidator to be appointed by them, so that out of the same they or he may secure payment of the balance of the said price, but in the event of the same or any part thereof from any cause not being paid to the West End Cafe Company, Limited, or to the liquidator appointed by them, or of said shareholders or any of them refusing or delaying to sign a discharge of said shares within twenty-one days after being called upon by the said company or the liquidator to do so, we the said Aitchison & Sons, Limited, and we the said" A, B, C, and D, "as directors of said Aitchison & Sons, Limited, and as individuals, and we all, conjunctly, and severally, agree and bind and oblige ourselves and our respective heirs, executors, or successors to pay to the said West End Cafe Company Limited, or to the liquidator to be appointed by them as aforesaid, the said sum of Four thousand one hundred and forty-four pounds, being the balance of said price or such part thereof as may remain unpaid out of the sums to be received on behalf of the said

shareholders as aforesaid, with interest thereon from the said fifteenth May Eighteen hundred and nine-four till payment thereof."

The disposition of their premises by the West End Cafe Company in favour of Aitchison & Sons, Limited, proceeded upon a narrative setting forth the stipulations as to the payment of the price embodied in the documents above quoted.

Mr Gunn signed the memorandum of association of Aitchison & Sons, Limited, and agreed to take 1000 shares therein. On the 31st May he applied for 700 shares in that company by filling up a form of application issued for the use of shareholders in the West End Cafe Company.

At a meeting of directors of Aitchison & Son Limited held on 16th April 1895 it was resolved that no further shares than those already allotted should be issued to Mr Gunn, and that the shares presently allotted to him should be marked on the register as having been accepted in full of his signature to the memorandum of association for the shares opposite his name. This was done.

Two thousand shares in Aitchison & Sons, Limited, were allotted to Mr Muirhead, who subsequently transferred them to the joint names of himself and Mr Waters. These were in reality Gunn's, but, as above mentioned, were held by Muirhead and Waters in security of a cautionary obligation undertaken by them on his behalf.

On 21st March 1896 Mr Gunn gave notice to Mr Muirhead that he desired to be relieved of the whole of the shares held by him in Aitchison & Sons, Limited, but Mr Muirhead declined to take them over.

In these circumstances Gunn raised an action against Muirhead to have it declared that the latter was bound to implement the obligations undertaken by him in the agreement dated 10th May 1894, that in reliance thereon the pursuer had "accepted and paid the sum of £1 each for the following shares of the nominal value of £1 each, fully paid up, presently standing registered" in the share register of Aitchison & Sons, Limited [the pursuer here set forth the shares held by him and his nominees], and that on the lapse of three months from 21st March 1896 the pursuer became entitled to insist upon the fulfilment by the defender of his obligations under the minute of agreement. There was also a conclusion to have the defender ordained to implement the said obligations by relieving the pursuer of the shares and paying the sum of £1 each therefor.

After condescending on the minute of agreement, the pursuer averred—"Upon the sum of £3114 due to him as repayment of the said shares held by him and for him in said West End Cafe Company, Limited, becoming payable, the pursuer invested the whole of said sum in acquiring 3114 fully paid-up shares of the value of £1 each in the said company of Aitchison & Sons, Limited. . . . The whole of said shares in the new company were paid for in cash by applying the sum of £3114 due to the pursuer as aforesaid." This averment the defenders denied.

The pursuer pleaded—"(1) The defender having by the minute of agreement founded on entered into the obligations set forth in the summons, is bound to implement the said obligations as concluded for in the conclusions of the summons for declarator and implement."

The defender pleaded, *inter alia*—"(3) None of the pursuer's shares being fully paid up the defender should be assoilzied, with expenses. (4) The pursuer being unable to implement his obligations in the document founded upon in the summons by transferring the shares referred to therein free from any liability from calls thereon the defender is entitled to absolvitor, with expenses."

The Companies Act 1867 (30 and 31 Vict. cap. 131), sec. 25, enacts that "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Register of Joint Stock Companies at or before the issue of such shares."

After a proof the Lord Ordinary (PEARSON) on the 14th July 1898 pronounced the following interlocutor:—"Finds that to the extent of 1114 shares standing partly in the name of the pursuer and partly in the name of F. C. Auld (the pursuer's nominee), the pursuer has failed to prove that the shares tendered by him as in implement of the agreement libelled are fully paid-up shares, on which there is no further liability; therefore dismisses the action, and decerns."

Opinion.—"This is an action for implement of an agreement, dated 10th May 1894. . . .

"The defender reserves his right to challenge the agreement on extrinsic grounds.

"But, subject to that, he is willing to implement it, provided the pursuer is able and willing to fulfil his part of it.

"Now, the defender thereby agreed to relieve the pursuer or his nominees of his shares in a new company of Aitchison & Sons, Limited, paying him the sum of £1 for each share of £1, or procuring a purchaser to take over the shares at par; and he further agreed to take over at par a certain further lot of shares standing in name of the defender and a Mr Waters.

"I take it that the shares tendered by the pursuer in implement of his part of this agreement must be fully-paid shares; and, further, as no contract to the contrary was filed, in pursuance of sec. 25 of the Act of 1867, they must be shares which have been paid for in cash. And it lies upon the pursuer to make out that the shares which he tenders answer this description.

"The company of Aitchison & Sons, Limited, had its inception in a syndicate, of which the defender Mr Muirhead was a prominent member. This syndicate agreed in April 1894 to acquire the property, fur-

'nishings, and fittings belonging to the West End Cafe Company at the price of £22,000, of which a sum of £12,976 was represented by bonds on the property which were to be taken over.

"On 11th May 1894 the memorandum of association of the new company was signed, the pursuer subscribing for 1000 shares of £1 each, and the defender Muirhead for 2000 shares.

"On 31st May the pursuer applied for an allotment of 700 shares in the new company. The application letter was addressed to the directors of Aitchison & Sons, Limited, and it contained no reference to the obligation incurred by signing the memorandum of association. It was in a special form which had been settled as appropriate to the case of a shareholder of the West End Cafe Company taking shares in the new company.

"The 700 shares were thereafter allotted to the pursuer, and on 16th August 1894 he was entered on the register of the new company as the holder of 700 allotment shares. The share certificate was dated on 10th October 1894, and issued then or shortly afterwards, describing the 700 shares by their numbers, and as 'fully paid up.'

"Matters so remained until April 1895. The settlement of the price between the West End Cafe Company and the new company, which had come in place of the syndicate, was practically completed in December. And in conformity with an arrangement, of which all concerned were cognisant, the sums payable to the new company by the individual allottees of shares were (so far as those allottees had been shareholders in the Cafe Company) crossed or set off against their respective shares of the price payable by the new company for the heritable property, fittings, and furniture of the West End Cafe Company. It is true that the new company was not directly indebted to the old shareholders in their shares of the price. It was indebted in the whole price to the liquidator of the old company, whose duty it was to pay it over or account for it to the members of the old company, in proportion to their holdings in that company, and who, on their request, reinvested so much of the price in shares of the new company.

"In my judgment that was, according to the authorities, payment in cash within the meaning of sec. 25 of the Act of 1867. But in the view I take of the case it is not necessary to decide this point." . . .

The defender reclaimed, and argued—The obligation on the defender, if any, was to take over from the pursuer shares fully paid up. The defender could not be held to take shares on which there was an outstanding liability, and the pursuer being *in petitorio* must, as an indispensable condition of succeeding in an action to enforce the obligation, do whatever was necessary to convert the shares into fully paid-up shares—*Baranagh Oil Refining Co.* (*Arnot's* case), 1887, 36 Ch. D. 702; *Howard & Wyndham* v. *Richmond's Trustees*, June 20, 1890, 17 R. 990. The main question therefore was, were the shares in question fully paid-up or shares which inferred liability? In other words, did sec. 25 of the Act of 1867 apply? The Lord Ordinary's view was unsound. On the face of the various agreements it was manifest that, except as regards a very small part, the shares in the new company were never to be paid for by the handing over or the cross-entry of money. The transaction was an exchange of scrip against scrip. It was never contemplated that there should be a cash payment to the old company. What was given for the shares at the date of their issue was not money but shares of the old company, It was necessarily implied in such an arrangement that the fortunes of these shares must be followed for good or evil. If the old company had continued to exist, the new company must have gone on its register of shareholders, and the fact that the old company went into liquidation did not alter the situation. It could not be held that shares had been paid for in cash unless there was a liquid obligation prestable in money, and that obligation had been fulfilled by a money payment. In the contract here between the new company and the old there was no kind of obligation prestable in money. The whole transaction was carried through on the footing that only a very limited amount of cash should pass. The rest of the purchase price was to be made up by taking over a bond and by taking over shares. What the new company got was the property of the old company less the shareholders' claims upon it. The case was ruled by the decisions in *Johannesburg Hotel Co.* L.R. [1891], 1 Ch. 119, *per* Lord Chancellor at p. 126; and *Liquidators of Coustonholm Paper Mills Company, Limited* v. *Law*, July 8, 1891, 18 R. 1076; *Spargo's* case, L.R., 7 Ch. 407; and *Larocque* v. *Beauchemin*, L.R. [1897], A.C. 359, were easily distinguishable from the present. In those cases there were genuiue cross-entries of cash transactions. There was nothing of the sort here. The law on the matter had been well summarised by Lord Stormonth Darling in *Liquidator of Scottish Heritages Company*, 5 S.L.T. 419, p. 336.

Argued for the pursuer—The Lord Ordinary was right. The shares in question had been paid for in cash, interpreting that expression in the sense put upon it by *Spargo's* case and *Larocque*, *ut sup.* These decisions made it plain that "payment of cash" could not be limited to payment in actual coin. A cheque if honoured was payment in cash. The whole nature of the transaction must be looked at—*Larocque*, *ut sup.*, *per* Lord Macnaghten, at p. 364, and what had happened here was that the pursuer gave an order to the liquidator of the old company to pay to the new company a sum due to him by the old company. It was a simple case of cross-entry designed to save the trouble of the liquidator paying the money to Gunn in the first instance, and Gunn paying the money to the new company in the second. The Court had been much influenced in the *Johannesburg* case by the fact that there the company was a bogus company. Payment of some sort was un-

doubtedly necessary—*Ooregum Gold Mining Company* v. *Roper*, L.R. [1892], A.C. 125, and there had been payment here. The pursuer also referred to *Ferrar's* case, 1874, L.R., 9 Ch. 355; and *Barrow-in-Furness* v. *Northern Counties Land and Investment Company*, 1880, 14 Ch. D. 400.

At advising—

LORD KINNEAR—This action is brought to enforce the obligations of an agreement, dated 10th May 1894, by which the defender became bound to relieve the pursuer of certain shares in a limited company called Aitchison & Sons. The agreement arose out of certain arrangements which were made in the course of forming that company for purchasing the property of another company, the West End Cafe Company, and the goodwill of its business. The defender was one of the promoters of Aitchison & Sons, and the agreement narrates the promotion of the company for the purpose of purchasing the West End Cafe, and certain other property, heritable and moveable, the intention to wind up the West End Cafe Company and to repay the shareholders their capital; and an arrangement that such shareholders in that company as desired to reinvest their shares in the proposed company of Aitchison & Sons should be afforded an opportunity of doing so, and that for that purpose the amounts of their shares should be deducted from the price payable by the proposed new company to the company about to be wound up, and upon the winding-up being completed the shareholders in question should grant discharges of their shares, and the money payable in respect of such discharges should meet the part payment of the price payable by Aitchison & Sons, so deducted, and scrip in the company of Aitchison & Sons should be issued for the amount thus charged. On this narrative, and on the further statement that the pursuer Gunn was a holder of 3000 shares in the West End Cafe Company, the agreement proceeds, that Gunn shall oblige himself to accept shares in Aitchison & Sons in lieu of his shares in the West End Cafe Company, and authorises his shares to be deducted from the price; and that 1700 of these shares shall be allotted in the names of James Muirhead, the objector, and Henry Waters to cover the balance due upon a certain cautionary obligation which they had undertaken for Gunn; and upon the other hand, that the defenders shall relieve Gunn of his shares and pay the sum of £1 for each, and take over the shares invested in the names of Muirhead and Waters at par, in order to repay the cautionary obligation. It is on this agreement that the action is based; and the material conclusions are for declarator that in implement of his part of the agreement the pursuer accepted and paid the sum of £1 each for specified shares of the nominal value of £1 each fully paid up, which presently stand registered in his name, and for decree that the defender should forthwith relieve the pursuer by accepting valid transfers of a parcel of 1414 shares and by paying £1414, or £1 sterling for each, and by taking over at par another parcel of 1700 shares for the purpose of extinguishing the cautionary obligation. The condition, therefore, of the claim as set forth in the conclusions of the summons is that the shares which the defender is required to take over are fully paid up, the pursuer having paid the sum of £1 sterling for each. The main ground of defence is that the shares are not in truth fully paid up and that the defender is not bound to take shares to which a liability for calls may attach. The point of the objection, however, is not that the shares were issued without a consideration equivalent to their nominal value, but that they have not been paid for in cash or by a consideration set forth in a written contract duly filed with the Registrar of Joint Stock Companies, so as to satisfy the requirements of the 25th section of the Act of 1867.

I am unable to agree with the Lord Ordinary that the pursuer has paid for his shares in cash, within the meaning of this enactment. The argument was somewhat confused by an endeavour to represent the transaction as an exchange of shares for shares, or as an attempt to set off shares against shares. There is perhaps some foundation for this view to be found in the narrative, but it was part of the transaction that the West End Cafe Company should be voluntarily wound up, and its shareholders repaid their capital; the right of each shareholder was reduced to a claim for a share of the assets when realised and converted into money, or in other words, to a claim against the liquidator for a money payment; and if there had been funds in the hands of the liquidator, a draft upon him for the amount of the pursuer's share of the assets might have been in effect as good a payment in money as a cheque upon a bank. But then the liquidator never had funds in his hands to account of the pursuer's share of the assets, and it was not the intention of the transaction that he should have such funds. The agreement between the two companies was, that Aitchison & Sons should purchase certain houses in Princes Street, and certain moveable property belonging to the West End Cafe Company for £22,000, on condition that the price should be payable at entry, but that payment of part of the price should be deferred so far as representing the amount of shares held by members of the West End Cafe Company who might signify their desire that the amounts repayable to them should be reinvested in shares of Aitchison & Sons, and in carrying out this agreement the pursuer and other shareholders of the selling company who desired to join the buying company applied for shares in the latter company according to a form by which they authorised the directors to intimate to the liquidator of the West End Cafe Company that the shares presently held by them in that company would be discharged, and that the amount to be realised from these shares would be held in

lien for payment of the shares applied for in Aitchison & Sons, and further that they agree that payment of an amount of the price payable by Aitchison & Sons to the West End Cafe Company equivalent to the shares in the latter company held by them should be postponed until the date of settlement.

The effect of this transaction seems to be perfectly clear. The one company purchased the property of the other and paid for it partly in cash and partly in shares, and in carrying out that transaction, so far as the pursuer's interest in it was concerned, he received payment of his share of the property of the West End Cafe Company in shares of Aitchison & Sons, Limited.

The consideration, therefore, which Aitchison & Sons received for the issue of the shares now in question was neither a transfer of shares in another company nor was it a payment of money, but a conveyance of certain heritable property and a transfer of certain moveable property. Their shares, therefore, were paid for not in money but in money's worth.

I think it must be assumed that this was a perfectly genuine transaction, and that we are not to assume that the consideration received by Aitchison & Sons for their shares was less than a fair equivalent for full payment of the shares in money. The rule as it is stated by Lord Herschel in the *Ooregum Gold Mining Company* v. *Roper* is that not only may shares be allotted as fully paid-up in respect of property or goods received by the company, but that the Courts will not inquire into the adequacy of the consideration, and will not require it to be proved that the consideration given was equivalent in cash value to the nominal amount of the shares, We must take it for granted that a fair price and no more was given for the property of the West End Cafe Company. But then I think it clear that although this may have been a perfectly lawful and valid transaction in itself, it is just one of those agreements to which the 25th section of the Act of 1867 was intended to apply, because the meaning of that enactment is that contracts by which a company may lawfully agree to accept considerations other than cash must be duly filed with the Registrar of Joint Stock Companies, and that if they are not so filed they shall be of no effect, and the shareholder shall remain liable for the value of his shares in money just as if no valuable consideration had been given for them.

The result is, that although the pursuer has given valuable consideration for his shares he has not paid for them in cash, and therefore that because the contract under which he obtained them has not been filed they are still held subject to the payment of the whole amount in cash. It does not follow that this claim could be enforced at present by Aitchison & Sons as a solvent and a going company. It would be very unjust to enforce it, because they have obtained the pursuer's property in return for fully paid-up shares, and they cannot be entitled to have the value of their shares in heritable property and in money too. We cannot decide any question of that kind in the absence of the company, and without knowing whether rights have been created in third parties which might prevent matters from being set right in the same way as if no interests were involved except those of the company itself and its shareholder. But I observe that it is no part of the argument that the pursuer's position is irretrievable or that he may not still be enabled to obtain the benefit of his contract by procuring a rectification of the register and a subsequent revisal of the shares, or otherwise. In the meantime, however, the shares are held "subject to the payment of the whole amount thereof in cash," and if the company were wound up the shareholders would be liable to contribute on that footing. The question, then, comes to be, whether the defender is bound by his agreement to take shares to which this liability attaches.

Now, if the objection were that shares issued for the consideration set forth in the agreement between the two companies could not in law be fully paid-up shares, that would, in my opinion, have been an untenable ground of defence, because the defenders' own agreement sets forth in the clearest possible terms the whole history of the transaction between the companies, the circumstances under which shares of Aitchison & Sons were to be issued to the pursuer, and the consideration he was to give for them by allowing his share of the price to be deducted from the sum payable to the West End Cafe Company; and all this having been fully narrated, the defender agrees to relieve the pursuer of "the said shares." That means that in performance of his obligation the defender is to relieve the pursuer of the specific shares issued for the specific consideration set forth in the agreement, and it is of no consequence whether shares so issued are in law fully paid-up shares or not, because whatever their legal quality may have been, they are the very shares which the defender has in express terms bound himself to take over. But the true ground of objection is not that the pursuer did not in fact give value for his shares, but that the statutory procedure which is indispensable in order to give legal effect to the contract under which they were issued has been omitted, and therefore that an unforeseen liability attaches to them, which is altogether contrary to the true intention of the contract.

I think this is a valid objection. There can be no question that the contract intended fully paid-up shares, because they are to be given and accepted as the price of property bought and sold, and accordingly it is stipulated that when they are taken over by the defender he is to pay the full value of £1 per share, and the conclusions of the summons are entirely in accordance with this intention, because the shares are tendered by the pursuer as fully paid-up.

But then they are not in law effectually paid, because the contract under which

they were allotted has not been filed, and therefore, after the defender has paid £1 for each to the pursuer on the assumption that they are fully paid, he may still be liable to pay the same sum to the company or a liquidator on the contrary assumption. I think that in these circumstances the doctrine laid down in *Arnot's* case ought to govern our decision. It is pointed out in that case that the statute does not throw upon any particular party to the contract under which shares are to be issued the obligation of filing it with the registrar, but that is for those who seek to enforce a contract to take shares to put themselves in a position to complete that contract. Now, there is a contract between the parties to this action that the pursuer shall acquire, and that the defender when called upon shall take over, shares that in fact and law are to be considered as fully paid, and it is for the pursuer who seeks to enforce that contract to show that everything has been done effectually to make the shares fully paid-up. But that has not been done. The fact is, as Lord Justice Bowen puts it in *Arnot's* case, that the matter has been left in an inchoate form, that the steps have not been taken which are necessary to complete the contract to give fully paid-up shares, and therefore I think the pursuer cannot have decree for specific performance. It is clear enough that the pursuer might himself have refused on the same ground to take the shares when they were allotted to him by the company, and if he had done so at the time of allotment there would probably have been no difficulty in rectifying the omission to register which left them subject to liability. But he did not stand on his right to insist that the contract should be registered before the shares were issued, and he has thus put himself in the position of holding shares which he cannot deal with as being paid in law, although he has in fact given value for them. There can, I think, be no question that if he were to tender them in execution of a contract to sell and transfer fully paid shares, the buyer would not be bound to take them; and the defender is in exactly the same position, unless it can be said either that the contract was for particular shares which he was bound to take whether fully paid or not, or that he is himself responsible for the failure to make them fully paid-up shares. I do not think either of these propositions can be successfully maintained. The contract, as I read it, was that the pursuer should acquire shares to which no liability should attach, and that the defender should take them over at par value. But the pursuer has not put himself in a position to tender shares answering to the contract, and the defender cannot be required to accept shares which will not give him the benefit for which he stipulated, but will involve him in a liability which the contract shows that he was not intended to incur.

Lord Adam, Lord M'Laren, and the Lord President concurred.

The Court recalled the interlocutor of the Lord Ordinary, in so far as regards the finding quoted above, "and in place thereof find that under and by virtue of section 25 of the Companies Act 1867 the shares tendered by the pursuer as in implement of the agreement libelled must be deemed to be held subject to the payment of the whole amount thereof in cash: *Quoad ultra* adhere."

Counsel for the Pursuer—Guthrie, Q.C.—M'Lennan—T. B. Morison. Agents—Auld, Stewart, & Anderson, W.S.

Counsel for the Defender—Balfour, Q.C.—Wilton. Agent—W. Marshall Henderson, S.S.C.

Friday, June 23.

SECOND DIVISION.

[Sheriff of Forfar.

ALEXANDER *v.* PHILLIP.

Reparation—Negligence—Duty to Public—Driving Accident—Running Over Child Playing in Street.

In an action of damages for the death of a child who had been run over while playing in the street, the onus is upon the pursuer to prove that the driver was in fault, and not upon the driver to prove that the occurrence was due to inevitable accident, or some cause which he could not reasonably be expected to anticipate.

Circumstances in which *held* (*dub.* Lord Justice-Clerk) that the driver of a dog-cart who ran over a child of six who was playing in the street was in fault and was consequently liable in damages.

This was an action brought in the Sheriff Court at Dundee by James Symers Alexander, labourer, Dundee, against David Phillip, farmer, Balcalk, Tealing, near Dundee, in which the pursuer craved decree for £500 as damages for the death of his son aged six years.

The pursuer averred—"(Cond. 3) On or about 26th April 1898 the pursuer's said son James Symers Alexander junior was playing along with a number of other boys in Princes Street, Dundee. The defender was in charge of a horse and dog-cart or other carriage in said Princes Street, Dundee, on or about said 26th April 1898, and the defender in driving said horse and dog-cart or other carriage north-east-wards along said street, culpably, carelessly, and recklessly knocked down and ran over the pursuer's said son, who in consequence thereof sustained injuries from which he died on the following day. The defender knocked down and ran over the pursuer's said child in consequence of (1) his culpably, carelessly, and recklessly driving said horse and dog-cart or other carriage along said