This they do in respect of the terms of the memorandum and articles of the Association, where the fact that £100,000 of the nominal capital of the company was paid up from the first is set forth, and also in respect of the terms of the register of shareholders. I cannot hold that on either of these grounds, or on both, they can exclude investigation.

On this point I agree with what has been now stated by Lord Deas; and I also agree in the observations of Lord Cowan and others in regard to the statutory import and effect of the memorandum and articles. I do not think that the statement of the amount paid up on each share, or of the aggregate amount of such payment of shares, is within the statutory requisites, or meets the statutory purposes of the memorandum and articles. It is a statement inappropriately introduced where it was not required by statute, and where it is not attended with any statutory effects. If so, it is not from the enactments of the Statute that the statement can derive any absolute presumption of its truth, or any protection against inquiry. The liquidator alleges and offers to prove that the statement is absolutely false, and that the payment of capital said to have been made was never made. Now, when I consider that this statement of falsehood and fraud is offered to be proved by the official liquidator, whom we have appointed to assist us in doing justice and ascertaining truth, I cannot arrive at the conclusion, that we should refuse inquiry—should deliberately shut out the light—and should administer this estate in darkness and ignorance, when light and truth are within our reach.

The same observations apply to the statement in the register. That statement is not conclusive, and, in my opinion, is certainly not beyond the reach of inquiry. But I need not again repeat what has been already so well explained. I am not moved much by the suggestion, that if the facts alleged by the liquidator are proved, this would be a company with unlimited, not limited, liability, and thus not within the Winding-up Act. I do not think this is the case. The limit to £105 per share makes this a limited company. The further limitation to £5 per share, said to be effected by the statement that £100 per share was paid, is what is complained of. I think that the company is within the Winding-up Act on either view, the question being as to the amount of limitation.

In regard to the position of the respondents as being transferees, and not original shareholders, I have nothing to add to what has been so well stated by Lord Deas. We have as yet no materials for forming an opinion in regard to the nature of the transactions by which these respondents acquired their shares. The liquidator is, on that matter, entitled to investigate. The same amount of full and exact averment required from any ordinary litigant cannot be expected from the liquidator, who is in the position of being entitled and bound to inquire; and he has made averments in regard to which I am prepared to allow inquiry. But, even assuming the fact of *bona-fide* transfer, I concur in the opinion of Lord Deas, both as regards our own law and as regards the effect of the important decision in the case of *Oakes*.

On the separate and special point urged onbehalf of Mr Waterhouse, I am of opinion, first, that since he ceased to be a holder of shares within one year prior to the commencement of the winding-up, he must, in terms of sec. 63 of the Act of 1856, be deemed to be an existing shareholder; and secondly, that the liquidator is entitled to instruct, by evidence, his allegation, that Mr Waterhouse's transference of his shares to Charles Ford was made fraudulently, and in order to evade his just liabilities as a shareholder.

This last point is not free from difficulty, for the shares are undoubtedly transferable by law. But all that I say at present is, that a sale of shares to a person known to be a mere name, or a man of straw, made in the knowledge of the position of the transferee, and of the circumstances of the company, and for the sole purpose of evading liability, may be a fraud, and that opportunity of ascertaining the facts ought not to be refused to the liquidator. I am of opinion that, on this point also, the liquidator is entitled to inquiry. But if I am right in regard to the meaning and application of the Act of 1856, this inquiry will not be necessary.

In accordance with the opinion of the majority of the whole court, a proof was allowed to the petitioner.

Agent for Petitioner—H. Buchan, S.S.C.
Agents for Waterhouse—C. & A. S. Douglas, W.S.
Agents for Lewis—Goldie & Dove, W.S.
Agents for Jennings—Murray & Hunt, W.S.

Friday, March 13.

BOWE AND CHRISTIE *v* HUTCHISONS.

Cautioner — Mercantile Guarantee — Construction—Proof. A guarantee given to a firm of wholesale sugar merchants for "sugar," to be sold by them to another dealer in sugar, *held* to cover furnishings of treacle and syrup, the firm stating in evidence that such was the construction of "sugar" in the trade, and the defender leading no evidence to disprove that construction.

Cautioner—Cash transaction—Credit—Giving time to debtor—Bill. Observed that an entry of "Terms cash in fourteen days, less 2½ p. c. discount," in an invoice of goods furnished, did not mean that payment must actually be made within fourteen days, but only that such discount would be given, provided payment was made within fourteen days; and that the seller, by taking three months bills, did not thereby "give time," so as to liberate the cautioner.

Bill—I.O.U.—Holograph. Question as to validity of I.O.U. which was not holograph of granter.

The pursuers, Bowe & Christie, are sugar merchants in Edinburgh, and the defender, Andrew Hutchison, was also a sugar merchant there, and one of their customers; and the action concluded for the sum of £1178, 15s. 2d., as the price of sugar furnished to him. The other defender, John Hutchison, a brother of Andrew, granted to the pursuers, in January 1866, a letter of guarantee, by which he bound himself to the extent of "fifteen hundred pounds sterling, for sugar sold and to be sold" by them to his brother. Andrew, in his defences, pleaded that the pursuers had drawn bills upon him on 8th December 1866 for the whole sum sued for, and that on 24th December he had paid these bills to the pursuer Christie, in the office of their firm in Glasgow. The pursuers denied this, but explained that on 8th December, one of them had at Burntisland, on that day, taken bills from Andrew, by John's advice, and that the same day he had sent them by post, to be signed also by

John; that John sent them back unsigned; and that they were forthwith cancelled by deletion of the signatures, and returned to Andrew. John further maintained that by this transaction the creditors had "given time" to Andrew, and so liberated him from his obligation as cautioner. A diligence to recover documents was granted; and after letters of second diligence had been obtained against Andrew, he disappeared, and has not since been heard of. Decree was taken against him. John still continued to defend, and a proof was led before Lord Kinloch. The pursuers proved that they had furnished the goods sued for, and that the allegation of payment by Andrew was false. The defenders, in the course of the proof, laid the foundation for the following additional defences:—(1) That treacle and syrup were furnished to the extent of £120, and that they were not sugar in the sense of the guarantee; (2) that the pursuers had "given time" to Andrew by previously drawing their bills upon him involving about £1000, while their invoices bore "Terms, cash in fourteen days, 2½ per cent. discount," and that therefore the surety was liberated to the amount of these bills; (3) that an indefinite payment of £500 made by Andrew had been by the pursuers applied to the open account; and (4) that a sum of £60 given by the pursuers to Andrew to retire a bill stood upon an I.O.U., which was not holograph of Andrew, but merely signed by him.

The Lord Ordinary (KINLOCH) sustained the two first of these additional defences, thus liberating the cautioner as to the £1081 contained in the bills, but holding that the indefinite payment of £500 could be applied in payment to goods for which they were granted. He held that by the terms of the invoices it was proved that the pursuer's contract with Andrew was for credit merely for fourteen days, and that it was contrary to the true faith of the guarantee to draw bills at three months for the price of goods. He further pointed out that the pursuers had charged interest at 6 per cent. on two of the bills, and 9 per cent. on the third; and stated his opinion that "this is not contract, but indulgence." Both parties reclaimed—John claiming complete absolvitor in respect of the transaction of the 8th December, and the pursuers seeking decree for their account in full.

CLARK and J. C. SMITH, for pursuers, argued that no irregular or unusual term of credit had been given; that it was the object of the guarantee to "give time;" that if time was to be given at all, three months was not an unreasonable period; and that the Lord Ordinary had erred in supposing that interest had been charged on the invoice prices; that, on the contrary, discount to a small amount had been allowed.

FRASER and BLACK for pursuers.

LORD PRESIDENT—There are a number of separate points raised by this reclaiming note. The letter, of guarantee is certainly not open to any charge of ambiguity in general expression, and the words are said to require construction in order to justify the demand of the pursuers. The defender, John Hutchison, guaranteed the pursuers to the extent of £1100 for sugar sold and to be sold by the pursuer to his brother Andrew. Now in the course of dealings which followed between the pursuers and Andrew Hutchison, there was sold and delivered to them not only crushed sugar, which formed a constantly recurring *item*, but also treacle and syrup, and it is objected by the cautioner that his guarrantee does not include treacle and syrup. On the other hand the pursuers contend that the term sugar is used in the trade, and was understood by the cautioner himself, as including all the produce of the sugar cane. That is a question which required to be solved by the evidence, that is, if the defender intended to raise any question as to whether the goods sold to his brother fell within the guarantee. It was for him to lead evidence to show what was the ordinary trade meaning of that term; and accordingly, the pursuers having been examined on behalf of themselves, the defender naturally put to them this question, What is the meaning of 'sugar'? and they both answered very clearly that it was always understood to mean all saccharine matter, meaning of course all saccharine matter forming the subject of the trade. The defender having got that answer, led no evidence himself. If he meant to dispute the accuracy of this construction, I think he was bound to lead evidence to show that that was not the proper trade construction of the term. And it is remarkable that, though the defender himself was examined in defence, and though he had an opportunity as a man of experience and of skill of stating his view, there is nothing on this subject in his evidence; and that leads to the conclusion that his counsel refrained from putting that question to him because he could not on that matter say anything favourable to himself. We are therefore bound to hold that the term sugar means and was understood to mean treacle and syrup as well as sugar, *i.e.*, all the things in which the parties dealt. To that extent, therefore, I differ from the Lord Ordinary.

But then comes a more important question connected with the two branches of the account, the first being that standing on open account, and the second that charged as the amount of dishonoured bills. The defence by the cautioner is that he is liberated by the transactions of 5th December 1866. It was at one time pleaded that that proceeding operated as an entire discharge of the debt, but the only extent to which it is pleaded now is that the cautioner is liberated by the bills taken from Andrew Hutchison, by the pursuers, which operated as giving time to the debtor, and tying up the hands of the creditor and the cautioner. It is impossible on the evidence to sustain that defence. There is no doubt that one of the pursuers did take bills from the debtor, Andrew Hutchison; but when he went to advise with his partner and his law agent he found out his mistake, and by his partner's advice the bills were cancelled and returned to Andrew Hutchison. It is impossible to say in these circumstances that time was given, and if not, the foundation of the defence is gone. The hands of the cautioner were not tied up.

Then it is said that time was given by taking bills applicable to that part of the account amounting to £1160. There are four bills taken for the amount of goods furnished after the guarantee. One objection to this plea was, that it was not within the record. That is a formidable objection, but I am more disposed to deal with it on its merits, for I think it is a bad objection. Andrew Hutchison had been in use to buy sugar from the pursuers for a considerable time before the date of this guarantee. The cautioner says he made no inquiry, and did not know whether Andrew Hutchison was in use to pay cash or on credit. It is in these circumstances that be granted this guarantee, which makes no mention of the nature of the dealings contemplated, as being either for cash or on credit. In

that respect the obligation is open and general. I should read it in the absence of evidence to construe it, as meaning either cash or on credit. But there is this further reason for thinking that the parties must have contemplated credit, that a guarantee is not much sought after except in credit transactions. When a party pays cash, a guarantee is not required, and it is a mistake to say that nothing is cash but when the money is paid at once before delivery of each parcel of goods. That is the meaning of a cash sale when the subject is one specific article delivered once for all; but in a course of dealing, when a retail dealer gets delivery of some quantity of goods, on twenty out of every thirty days in a month, it is out of the question that the money is to be paid on each occasion in cash over the counter, and, therefore, in all such trades cash is *prompt payment*, that is, within the time customary in the trade, and that must have been known to the parties here.

But it is said that the time of payment was precisely fixed by the invoices, which show the nature of the business of Bowe & Christie, and that they limited all their customers to payment within a certain time. That view is adopted by the Lord Ordinary. I do not so read the invoices. They stand thus:—"Terms, cash in 14 days, less 2½ per cent. discount." Does that mean that Bowe & Christie deal on no other terms but on receiving cash in 14 days? No; but it means that if the customers will pay in 14 days they will get 2½ per cent. discount. But that does not interfere with the discretion of Bowe & Christie in granting an extension of credit to customers whom they can trust, or for whom they hold a guarantee; and no one granting such a guarantee can rely on such an entry in an invoice as excluding credit. It is only necessary to look at any of the accounts to see how impossible it is to apply the doctrine of absolute cash payments. In the month of May there were on nine different days nine different parcels. Is it to be supposed that there was to be a separate cash payment for each parcel? Certainly not. There must be settling days, and the invoices say that parties on settling within 14 days will get 2½ per cent. discount. That is cash payment. That being so, the terms of the invoices do not affect this matter, or preclude Bowe & Christie from giving any reasonable extent of credit to their customers. The credit they give is three months, and that is neither unusual nor unreasonable. It is a matter of general knowledge that three months is a very ordinary term of credit in trade, and it has not been shown that in this particular trade it is an unusually long term, or that the arrangements between buyer and seller are different in this from what they are in other trades. By taking these bills the pursuers did nothing out of the ordinary course of trade, and nothing but what was contemplated by the guarantee. The Lord Ordinary says that the effect of taking these bills was to innovate on the original transaction, and was, in fact, equivalent to a loan of money. That is an extraordinary doctrine. The only effect of extending the term of credit to Andrew Hutchison, and of his availing himself of it, was, that he lost his discount, and in one particular case he had to pay interest besides. But that is not inconsistent with the ordinary giving of credit. If you get discount, provided you pay cash, then if you don't pay cash, you lose your discount. That is nothing like giving time, so as to liberate the cautioner.

The result is, that the pursuers are entitled to a judgment for their entire claim, for the question of indefinite payment does not arise in the view I take of the case.

The only other matter for consideration is, whether we can sustain the item of £60 in the account, sued on under date 18th March 1866. It seems to me that if that is a good charge against Andrew, and if he could not object to it, it is a good charge against the cautioner, if within the guarantee. So the cautioner has conceded on record, for he says he "knows nothing of the state of accounts between the pursuers and the defender Andrew Hutchison; but he will, under reservation of his whole pleas, hold as correct the said state of accounts, as it may be adjusted in this process." That is, the state of accounts as libelled. Now, what is this state of accounts? It is spoken to in the second article of the condescendence:—"The pursuers accepted of that guarantee, and in implement of the arrangement, and on the faith of the said guarantee, supplied the defender Andrew Hutchison with sugar from time to time to a large amount. The said sugar was sold to him, or furnished to him on his order. An account of these sales to him, and his payments, is produced and referred to. The defender Andrew Hutchison had invoices and full details regularly furnished to him. He never objected to the amount of the account, or asked for further information." And what is Andrew Hutchison's answer? He says:—"The furnishings, for which payment is demanded under the present action, were not made exclusively on the faith of the said guarantee. Admitted that the said furnishings were made on the defenders' order, and that he had invoices and full details supplied to him, and that he never objected to the accuracy of the accounts so furnished." Now, there were various accounts in connection with those dealings, and, *inter alia*, two which formed the basis of the transaction of 1866. His Lordship then examined the accounts, for the purpose of tracing the history of this item of £60, and continued—It is impossible that Andrew Hutchison can be heard to ask a voucher for this sum. He has confessed the item to be correct. It is part of the transactions of payment for goods furnished in 1866. Therefore, it is unnecessary to inquire whether the I O U could be received as a voucher of account, not being holograph, and on that I give no opinion. The result at which I arrive on the whole matter is to give judgment for the pursuer.

The other Judges concurred, Lord Deas and Lord Ardmillan expressing their opinion that an I.O.U., if not holograph, could not be made the foundation of an action.

Agent for Pursuers—T. Maclaren, S.S.C.
Agent for Defenders—D. Curror, S.S.C.

Friday, March 13.

KER'S TRUSTEES *v.* JUSTICE AND OTHERS.

(5 Macph. 4; 2 Macph. 371.)

Liferent—Assignee—Trust-estate. Held, that trustees who held a trust-estate for the purpose, *inter alia*, of paying an annuity, securing provisions to younger children, &c., were not bound to convey the liferent of the estate to the party entitled to draw the annual rents and profits thereof, or to his assignee, as the effect of that would be to bar them from the management of the estate and prevent them from discharging the duties imposed on them by the testator.