quire these lands, or, if he acquired them, to open up a road through from the Great Western Road to his lands of Dowanhill. He might have acquired them, and yet, for anything the feu-contract contains, he might have dedicated these lands to an entirely different purpose from that to which reference was made in the feu-contract. It is not said that the pursuer was under any obligation to get these lands. It is not said that if he got them he was bound to form a road through them; and certainly, even if it were said, I should think we should look in vain through the feu-charter for anything by which such an obligation would be constituted. Now, is there anything by which an obligation not imposed upon the pursuer is imposed upon the defender.—Was he bound to acquire these lands? It is not stated. If he did acquire these lands, was he bound to use them to any extent in opening up a road from the Great Western Road to the march of Dowanhill? There is nothing in the contract about that—nothing whatever. The only thing about which he entered into a contract with or undertook an obligation to the pursuer was this, that once there was a road opened up through Kelvinside to the march of Dowanhill, and once he was called upon by the pursuer to open up this Victoria Circus Road so far as opposite to his feu, then that obligation would be upon him. But the parties made no reference to Kelvinside. There was no obligation undertaken by the one to the other with reference to the acquisition of these lands or with reference to the use to which these lands were to be put once they were acquired.

It appears to me that the reasons which were urged on the part of the pursuer here for asking decree in terms of the second conclusions of the summons to be pronounced are reasons which are not supported, in so far as fact is concerned, by the proof which has been led, and in so far as legal principle is concerned, are not supported by those principles and those authorities to which reference was made in the argument. It would be in vain for me to go over or bring forward the reasons by which I am influenced in coming to this conclusion as regards this last point, because I think those reasons have been made plain in the opinions that have already been given.

The Lords adhered.

Counsel for Pursuer—Asher—Jameson. Agents—J. & J. Ross, W.S.

Counsel for Defenders—D.-F. Kinnear, Q.C.—Ure. Agents—Smith & Mason, S.S.C.

Thursday, March 17.

FIRST DIVISION.

MOLLESON AND ANOTHER *v.* FRASER AND OTHERS (FRASER'S TRUSTEES).

Public Company—Liability of Promoters—Where Promoter dies before Formation of Company.

A promoter of a company put down his name in an informal memorandum for £1000 of stock He took an active share, by correspondence and otherwise, in the formation of the company, representing to several persons who became shareholders that he would take £1000 of stock; and he was one of the seven persons who signed the memorandum of association, entering his name there as for one share of £10 only. Before the company was actually formed he died, the two events taking place on the same day. The company failed. *Held* that his trustees were not liable as contributories, except to the extent of the single share for which he had signed the memorandum of association, in respect that there was no other contract with the company.

In October 1876 William Fraser, Town Clerk of Inverkeithing, and three other persons purchased the Inverkeithing Foundry at a price of £4400. Thereafter the following memorandum was written by Fraser, and signed by him and by a number of other persons:—"This foundry having been purchased at the low price of £4400, which is considered to be not nearly half its value, it has been proposed to form a joint-stock company to carry the works on. The proposed capital to be £20,000, the half of which it is expected will be sufficient, leaving the half uncalled up. On the company being formed, the works will be made over by the purchaser to the company." The subscribers to this memorandum marked figures for various sums of money after their signatures, amounting in all to £5650. Against Fraser's name there was £1000, of which £500 was stated as paid. Thereafter Fraser, as secretary to the promoters, conducted a variety of correspondence with a view to getting up the proposed company, in which he repeatedly stated that he had put himself down for £1000. He also attended meetings of the promoters, and was in the draft prospectus of the company mentioned as its secretary and solicitor. It did not, however, appear from correspondence that the purchasers of the foundry had in making the purchase definitely committed themselves to the formation of a company if they found that a private re-sale of the works would be more to their advantage.

It was eventually agreed that a company should be formed, of limited liability, with a capital of £25,000, divided into 2500 shares of £10 each. The memorandum and articles of association were dated on the 1st March 1879. Of the seven parties who, in terms of the Companies Act of 1862 (25 and 26 Vict. cap. 89, sec. 7), are required to sign the memorandum of association, Fraser was one, putting down his name for one share. The company was registered on 3d March, Fraser, along with two directors, signing the notice sent in terms of the statute to the Register of Joint-Stock Companies for Scotland. On the day following Mr Fraser died.

Meetings of the directors were held on 10th March, the 16th April, and 4th June; and the minute of the last mentioned meeting bears that "The secretary intimated that he had received applications for shares from the following parties, viz.—[Here follow their names]. The directors proceeded to allot shares to the following, who had agreed to become shareholders of the company in terms of the prospectus and articles of association of the company, in addition to those above mentioned, who were also alloted the shares standing against their respective names:—[Then follow the names of those who signed the memorandum written by Mr Fraser as mentioned

above, with the exception of two, who declined to join the company; and shares were alloted corresponding to the sums affixed to their names in the memorandum. Mr Fraser's name was put down for 100 shares].

The company did not prosper, and at a general meeting of the company held on 23d December 1878 it was unanimously resolved that the company should be wound up voluntarily under the provisions of the Companies Acts 1862 and 1867. Thereafter, at a general meeting of the company held on 13th January 1879, the resolution was confirmed, and the petitioners, James Alexander Molleson and Hall Grigor, were appointed joint liquidators of the company. The calls made by the directors had been paid by all those on the register of members, with the exception of Mr Fraser and five other persons, Mr Fraser's trustees having denied liability except for one share. The liquidators of the company made up a list of contributories, and the names of the trustees and executors of William Fraser were placed on the second part of this list as holders of 100 shares, and those of the other shareholders on the first part.

The liquidators then presented this petition under the 101st and 138th sections of the Companies Act 1862, and prayed the Court "to ordain the several contributories named in the first part of the said list individually, and the contributories named in the second part of the said list as trustees and executors of the said deceased William Fraser, to make payment to the liquidators at the office of the petitioner, the said James Alexander Molleson, No. 5 North St David Street, Edinburgh, of the sums therein certified to be due by the said contributories respectively, with interest from the dates therein specified at the rate of five pounds per centum per annum till payment."

Answers were lodged by Mr Fraser's trustees, in which they admitted that he was a shareholder, but to the extent of one share only, and "Explained that if the said William Fraser's name is entered on the register, it was so entered subsequent to his death, which occurred on 4th March 1877, the day after the company was registered; and that neither the company nor the petitioners had any authority for placing the name of the deceased or the names of the respondents on the register, except to the extent of the one share subscribed for as before set forth." The respondents further averred that "deceased was, it is believed, one of several joint adventurers who purchased, or contemplated purchasing, the foundry and plant in question with a view to selling it at a profit to a limited company; and a sum of £500 was, prior to the formation of the company, advanced by the deceased to account of the purchase-price. This sum was ultimately put to the credit of the company in settling the transaction, and it was so put to its credit upon the footing that it should be dealt with as an advance by the deceased to the company.

After a proof it was argued for the petitioners—(1) In order to his liability as a contributory it was enough that Fraser had agreed to become a member; and he had so agreed by signing the memorandum which he himself wrote, the company having been afterwards formed. (2) The company and its promoters were one; they brought it into existence, and it took benefit from their actings. What they did was binding on the company. Fraser therefore was liable.

Authorities — *Universal Salvage Company* (*Sharpe* and *Lord Mansfield's* cases), 1849, 3 De Gex and Smale, 49; *ex parte Cookney*, Nov. 3, 1858, 28 L.J. Chanc. 12; *Helensburgh Harbour Trustees* v. *Caledonian and Dumbartonshire Railway Company*, Dec. 2, 1852, 15 D. 148, *rev.* 2 Macq. 391; *Palmer's* case, 1868, Irish Law Reps. (Equity) 573; Lindley on Partnership, 1337, 1369; 30 and 31 Vict. cap. 31, sec. 38; 7 and 8 Vict. c. 110.

Argued for the respondents—Fraser had never agreed to become a member. He had never agreed with the company. There had been no allotment of shares and communication of such an allotment to him. A company was not bound by the contracts of its promoters. *Sharpe* and *Cookney's* cases went entirely upon the Act 7 and 8 Vict. c. 110. All that Fraser had done he might resile from, *quoad* the company at least.

Authorities—*Pellet's* case, April 13, 1867, L.R. 2 Chan. Apps. 527; Deas on Railways, 3; Lindley, 395 and 1374.

At advising—

Lord President—In this voluntary liquidation the liquidator has placed upon the second part of the list of contributories the names of the trustees and executors of the late William Fraser. In the ordinary case that imports that they are so entered as the representatives of a deceased shareholder. I do not say that in order to entitle the liquidator so to enter parties in such a representative character, the deceased shareholder must during life have been entered upon the register of shareholders. But in order to justify such an entry it must be proved that the deceased had agreed to become a member of the company, and by that I mean that he had agreed with the company to become a member. The liquidator represents the company and no one else. He represents neither the individual shareholders nor the creditors, and therefore unless Mr Fraser was bound to the company to become a member, the liquidator cannot succeed in this application.

The history of this company is not very remarkable, and resembles that of a number of others which we have seen. It started with the purchase of the Inverkeithing Foundry in 1876. Four parties were the purchasers, and they bought the works at a price which they thought very much below their value, thus considering that they were entering into a profitable transaction. They induced others to take shares, their proposal to form a company being expressed in the following memorandum:—"This foundry having been purchased at the low price of £4400, which is considered to be not nearly half its value, it has been proposed to form a joint-stock company to carry the works on. The proposed capital to be £20,000, the half of which it is expected will be sufficient, leaving the half uncalled up. On the company being formed the works will be made over by the purchaser to the company." That memorandum or note was written by Mr Fraser, and was signed by a number of other persons, who indicated after their signatures the sums they were prepared to subscribe for the purpose of paying for the works. These figures were also intended to represent the interest which each was

to have in the joint-stock company when it was ultimately formed.

The question is, what is the effect of this memorandum, in the first place, as between the parties who subscribed it? I think it is no more than that they are liable for the sums opposite their names with a view to provide the funds requisite to vest them in the property of the foundry works, and to entitle them to deal with them as their own. The memorandum does not explain, and I do not think it at all follows from it, that in the event of a company being formed the subscribers will take shares in it. That is not implied as a matter of contract or of undertaking between the parties, although at the same time I do not doubt that it was agreed that if the money was subscribed the subscribers would take shares. It was not certain that a company would be started. There was obviously this alternative present to the minds of the subscribers, viz., that the foundry works might sell at a greater price than had been paid for them. At the meeting which took place in November 1876 after the purchase of the foundry, that was adopted as the view of the meeting; that course recommended itself, not merely because it might be found difficult to subscribe the capital, as indeed was actually the case, but also because the owners thought they would be able to sell at a larger profit than they could otherwise make. The case of the petitioners, in so far as it is rested upon the minute, cannot be advanced further than this, that there was a general understanding that the parties named had entered into a speculation to the extent of the funds opposite their names, but they were not bound by any mutual contract beyond that.

The company was thereafter formed, not without difficulty, but the capital was subscribed by persons outside, though judging from the allocation of the shares only a very small amount of it was got from the general public. The company did not start under the most favourable auspices, but Fraser had got so much encouragement that it was resolved to launch it, and accordingly a memorandum of association was subscribed and registered. It was subscribed by seven persons, of whom Fraser was one, and the other six were all parties to the original memorandum of October 1876. They were each subscribers for one share, which was all that was necessary under the Act of Parliament. The effect was to make these seven persons, representing £70 of stock, the joint-stock company. The memorandum of association bears that—"We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names."

The company was registered on 3d March 1877. Mr Fraser died the next day, and it certainly cannot be assumed, and it was not the case, that anything happened after the registration of the memorandum of association which could in any way affect Mr Fraser's position. The company so formed had also articles of association drawn up which (art. 83) provided that—"The first directors shall be — Douglas Donald Cameron Menzies, Inverkeithing; James Ross, shipowner, Inverkeithing; Thomas Law, farmer, Boreland, Inverkeithing; Peter M. Thomson, Inverkeithing; Daniel Duncan, shipowner, Rothesay; Robert Slimon, merchant, Leith; with power to add to their number;" and it was further provided that each of these parties, in order to qualify him, should hold ten shares in the company. So soon as they began to act in the capacity of directors, they thereby undertook to take ten shares in the company. That was in addition to the £70 in the memorandum of association. They had an important duty to perform upon coming into office. It fell to them to allot the shares at the meeting held upon 4th June 1877. The secretary intimated that he had received applications for shares from certain parties, and forty-four shares were thereupon allotted to these parties by the directors. They then proceeded to allot to those who had subscribed the memorandum of association of October 1876. But the list of those to whom allotments were made does not contain the whole of the names appended to the memorandum of association. Some had withdrawn, and no shares were allotted to them. But shares were allotted to William Fraser. That seems to have been a blunder. It is impossible to regard Mr Fraser as upon the register of shareholders. Still that is hardly of importance as affecting the question raised in the present case.

The question is, whether the circumstances which happened during Mr Fraser's lifetime constituted him a member of the company and subject to liabilities as such. In order to that result, it seems to me that it will be necessary for the company to show that he had contracted with them so as to make him a member. Even supposing he were bound by the contract into which he entered, under the memorandum of October 1876, that would not have been a contract with the company. I do not think the company would have been bound to give him shares. Still less was he bound to the company to make an application for shares. His brother promoters who signed the memorandum might have a claim against him. I do not think so, but assuming that he was bound to them, they might enforce it against him so as to make good the terms of stipulations of the memorandum. But the binding character of that contract would not regulate in any way his position as regards the company.

I think it is unnecessary to go over more in detail the circumstances of this case. I do not find that there exists what I hold to be indispensable in order to make Mr Fraser's representatives liable to be placed upon the list of contributories, viz., an undertaking by Mr Fraser, their constituent, during his lifetime to take shares in this company.

Lord Deas—I think we must all be agreed that your Lordship has stated all the circumstances which have to be taken into account in this case. It raises a question of law, whether Mr Fraser, and consequently his representatives, are bound to the company? Equitable considerations are not enough in such a case. We must consider whether there was a binding contract made with the company during the lifetime of Mr Fraser. It is clear that there was no mutual contract between Mr Fraser and the company, and that being so, I am humbly of opinion that nothing more is needed to entitle us to hold that Mr Fraser's representatives ought not to be placed upon the list of contributories by the petitioners.

Lord Mure concurred.

Lord Shand—It is impossible to read the evidence in this case without coming to the conclusion that most of the shareholders were induced to take shares in the company by Mr Fraser, and that too upon the footing that he was to take £1000 of stock, for which amount the liquidators now seek to make his representatives liable. It is quite true that in the original memorandum the parties to it were not committed to any particular form of joint-stock company. But the proposal was made which ultimately led to the formation and registration of the company. Between the date of the original memorandum and the date when Fraser endorsed the printed private prospectus of the company there were several meetings of the promoters, which show distinctly that Fraser was to hold £1000 of stock. No doubt he was registered for one share only; but we have Mr Cruickshank's evidence in regard to that, that when Mr Fraser's attention was drawn to it, and he was asked what was meant by one share, he (Mr Fraser) replied—"Oh, that is a mere form. You know I have £1000, and you have £500. That putting one share is a mere form. It makes no difference. It is known what you have and what I have." So that, if I had seen legal grounds upon which I could have proceeded, I would have held Mr Fraser's representatives liable to be put upon the list of contributories.

But upon consideration of the evidence I cannot see any good grounds for holding that Mr Fraser agreed to become a partner of this company. It was maintained for the petitioner that the company were bound to give Mr Fraser shares, because the incorporators had arranged amongst themselves that he should take shares. But that contention is unsound, because the company were not bound by any such agreement which was not part of the articles of association. Besides, as was pointed out by the respondent's counsel, there is a clause in the articles of association to the effect that the directors shall have an unfettered discretion in the allocation of the shares. On the other hand, there was an agreement between the promoters binding Mr Fraser to take shares as between themselves. But the point in which the case of the liquidators fails is, that if there was an agreement between the promoters themselves there never was any with the company. I do not think that Mr Fraser ever undertook such an obligation to the company itself after it was registered. Such an undertaking would have required writing as between him and the company, or at least an unequivocal mandate entitling the other promoters to take shares upon his behalf. But Fraser having died immediately after the registration of the company, and nothing having been done to allocate the shares before that time, I do not think the company were entitled to allocate any to him as they subsequently did. And therefore I do not think the liquidators of the company are now entitled to place his representatives upon the list of contributories in the liquidation.

The Lords therefore refused the prayer of the petition.

Counsel for Petitioners—D.-F. Kinnear, Q.C. —Lorimer. Agents—Boyd, Macdonald & Co., S.S.C.

Counsel for Respondents—Asher—Mackintosh. Agent—R. W. Wallace, W.S.

Friday, March 18.

FIRST DIVISION.

DOUGLAS *v.* M'VEIGH.

Poor Roll, Admission to—Time for Stating Objections—A.S. 21st December 1842, *sec.* 5.

Held (following *Allan* v. *Allan*, 28th Feb. 1872, 10 Macph. 510) that objections to the admission of an applicant to the benefit of the poor roll, on the ground that his circumstances do not entitle him to that benefit, must be stated when the application is moved in the Single Bills, and before a remit is made to the reporters on *probabilis causa*.

The 2d section of the Act of Sederunt of 21st December 1842 provides that no person shall be entitled to the benefit of the poor roll unless he shall produce a certificate from the minister and two elders of the parish where he resides, setting forth his other circumstances according to a formula annexed to the Act. The 3d section makes provision for party making a declaration before the minister and elders respecting his circumstances. Section 4 provides that ten days' previous intimation, by letter post paid, shall be given to the adverse party of the time and place fixed for making the declaration or statement before the minister and elders. By section 5 it is further provided "that said declaration of the party and certificate of the minister and elders, with the certificate of intimation to the adverse party, shall be transmitted, free of expense, to one of the agents for conducting the causes for the poor for the time, and shall, at the distance of not more than three months from the date of the declaration, and as much sooner as circumstances will permit, be lodged, with an inventory thereof, in the office of one of the principal Clerks of Session; and if the same shall appear to him or his assistant to be correct, notice thereof shall be forthwith entered in the minute-book in the form of the intimation at present given on applications for admission to the benefit of the poor's roll; and on the elapse of eight days after the date of insertion in the minute-book, or of four days next after publication of the printed minute-book containing said intimation, if the papers have been lodged during vacation or recess, the party's agent shall box a note to the Lord President of the Division, simply stating the names and designations of the parties, and craving a remit to the reporters on the *probabilis causa*; on moving which the Court may, on hearing any objections, either refuse the application *de plano*, or remit to the reporters, who, on considering the parties' case and hearing all objections, shall report whether the applicant has a *probabilis causa litigandi* and otherwise merits the benefit of the poor's roll," &c.

James Douglas being desirous of admission to the roll for the purpose of pursuing an action