Friday, January 13, 1888.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

FALKNER, BELL, & COMPANY *v.* SCOTTISH PACIFIC COAST MINING COMPANY (LIMITED) AND LIQUIDATOR.

Public Company—Duties and Obligations of Directors—Payments by Vendors to Directors—Knowledge of Firm of which Director Partner.

A company was formed for the purpose of acquiring and working certain mining properties in California, described in a provisional agreement mentioned in the published prospectus. This agreement was made between the vendor and certain persons who afterwards became directors of the company, one of whom was W, a partner of the firm of F. B. & Co., whose name appeared in the prospectus as one of the provisional directors. This prospectus set forth that W, of the firm of F. B. & Co., of San Francisco, should be the managing director, and that his firm and other parties in San Francisco would subscribe £10,000. A prior agreement had been made between the vendor and F. B. & Co., by which it was agreed that if the latter should, by their introduction, enable the former to find a purchaser for the mines in this country, one-half of the profit of the transaction was to be paid to their firm. The vendor was introduced by W to the promoters, and an agreement was made by which the mines were purchased for the company. F. B. & Co. took their share of the profit partly in shares, while part remained at their credit in the company's books. This latter sum they subsequently contributed for the purposes of a syndicate to take up those shares which had not been taken up by the public. W was an acting director after the company was incorporated. F. B. & Co. were the company's agents in San Francisco, and in the course of business drew bills upon the company which were accepted. These bills having been dishonoured, F. B. & Co. raised an action against the company for payment. The company having gone into liquidation, the liquidator pleaded that he was entitled to retain against these bills the amount by which the pursuers had benefited by the agreement between W and the vendor.

Held that at the time the agreement was made W stood in a fiduciary relation towards the company both as a promoter and a director, and that therefore the transaction could not be sustained as against the company; and that as his firm were aware of the whole transaction, their liability could not be separated from that of W, and that the liquidator was entitled to retain as against the claim made upon the bills.

Falkner, Bell, & Company, merchants, San Francisco, raised actions against the Scottish Pacific Coast Mining Company (Limited), for payment of three bills of exchange for £1000, £2000, and £3000, drawn by the pursuers and accepted by the defenders in June 1884.

The Scottish Pacific Mining Company then brought a suspension as of a threatened charge by Falkner, Bell, & Company on the £1000 bill, and the actions were conjoined.

The main question between the parties was as to the right of the Scottish Pacific Company to retain as against Falkner, Bell, & Company on the ground that the latter had taken benefit to a greater extent than the amount sued for from a sum alleged to have been illegally paid to J. D. Walker, a partner of the firm, and a director of the company, by C. Sutherland, the vendor of the properties acquired by the company.

The Scottish Pacific Coast Mining Company (Limited) had been incorporated on 8th March 1881. It went into liquidation, and on 18th February 1885 Mr Francis More, C.A., was appointed liquidator. Falkner, Bell, & Company were the agents and managers of the company in San Francisco.

The statements in the process of suspension were as follows—The complainers averred—"(Stat. 7) The prospectus of the company issued in January 1881 set forth that the company was proposed to be formed for the purpose of acquiring certain gold drift claims in Sierra County, California, shown on an accompanying map, and proposed in the provisional agreement of 13th January 1881 to be purchased by the company for 400,000 dollars, about (£83,000), provided the statements contained in the prospectus were reported to be correct. The prospectus contained a variety of statements regarding the situation, nature, and extent of the mines, and that the company would not be incorporated until these statements, which were made on the authority of the vendors, were confirmed by Mr Thomas Price, mining engineer, San Francisco, who had been employed to report thereon. The prospectus also bore that the capital of the company was to be £100,000 in 10,000 shares of £10 each, and gave the names of the provisional directors, including that of James D. Walker, of the respondent's firm of Falkner, Bell, & Company, San Francisco, and stated that it was proposed that he should be managing director in California, and also that his said firm and other parties in San Francisco would subscribe £10,000. The respondents, and in particular their partner James D. Walker, took an active part in the promotion of the said company, and in the preparation and issue of the said prospectus, and they also took an active part in the negotiations with the vendor of the said mines." The respondent's answer was—"Explained that Mr Walker, although named therein as a provisional director, never possessed the necessary qualification of 50 shares in terms of article 76 of the articles of association, and by the provisional agreement between the vendor and the provisional directors Mr Walker was excluded from taking any part in considering whether the American property should be purchased or not, and as to what reports and evidence of value should be obtained. In point of fact it was intended that Mr Walker should be merely managing director or manager, and it was not necessary that to hold that office he should be a member of the company. He never was, and, as

above explained, was not qualified to be a director in the ordinary sense of that term."

The provisional agreement of 13th January 1881, which was made between Charles Sutherland of San Francisco, and certain persons who afterwards became directors of the company, of whom Mr Walker was one, was disclosed in the prospectus as the only one entered into on behalf of the company. By the agreement (1) Sutherland agreed to sell to the projected company the various mining claims and other subjects for the price of 400,000 dollars to be paid by the company simultaneously with their acquiring a title; (2) Sutherland agreed that before paying the price the second parties should employ an engineer to report on certain matters, and a lawyer to report to them whether a good title could be obtained. It was provided (3) that if favourable reports were got the company should be formed with the specified capital, and that the parties subscribing should take the amount of stock set opposite their names; and (4) that the parties therein named, being the provisional directors named in the prospectus (other than James D. Walker), should have the sole right to determine whether the investigation had so resulted that the company should be formed, and if so, should adjust the articles and incorporate the company, which should in that case pay the price stipulated.

The complainers averred—"The investigation proved satisfactory, and the company was incorporated on 8th March 1881, the provisional directors, including the said James D. Walker, being appointed in the articles of association the first directors of the company. The said James D. Walker was and acted from the first as a director of the company. The firm of Falkner, Bell, & Company (the respondents) throughout acted as the agents, managers, and factors of the company at San Francisco. Following on the formation of the company the provisional agreement with the vendor was confirmed, and the stipulated price of 400,000 dollars was by or with the authority of the directors paid to or on account of the vendor."

The respondents denied that Mr Walker ever was a director of the company, or ever acted as such.

The complainers averred—"(Stat. 10) Notwithstanding the stipulation that the price was to be 400,000 dollars, the sum which was actually paid for the mines, &c., to the owners was 330,000 dollars; and it was agreed between Charles Sutherland, the vendor, and the respondents Falkner, Bell, & Company (of which firm Mr James D. Walker, who was a promoter and director of the company, was a partner), that the balance of 70,000 dollars (upwards of £14,000), should be divided as commission between them, the said Charles Sutherland and the respondents Falkner, Bell, & Company. The said arrangement was known to Mr J. D. Walker, but was not disclosed nor known to the board of directors, nor to the company or its shareholders. (Ans. 10) Denied that Mr Walker was a party to the agreement here mentioned, or knew that it was to be made. Explained that it was made in America between Mr Sutherland and Mr Thomas Menzies, a member of the respondents' firm, before Mr Sutherland came to this country to try and dispose of the mining properties he had for sale. Mr Walker knew nothing of said agreement till after Mr Sutherland came to London. It is denied that the arrangement as to the respondents receiving a share of Mr Sutherland's profit on the sale of the mines was not disclosed or known to the company. The provisional directors and other gentlemen were made aware of the arrangement at a meeting or meetings held preliminary to the purchase of the properties. The amount remitted to California in payment of the mines, according to the entries in the company's books, was 350,000 dollars; 20,000 dollars of this sum was paid to Sutherland, as mentioned by the complainers in statement 11. *Quoad ultra* denied. (Stat. 11) The division of the 70,000 dollars was made as follows:—20,000 dollars were paid to Charles Sutherland in cash, and the balance, 50,000 dollars, was placed to the credit of the respondents in the books of the complainers' company. It was agreed between Charles Sutherland and the respondents that they should take between them 1000 shares in the company, and the first call of £8, 10s. per share, amounting to 41,225 dollars was debited, leaving a balance of 8755 dollars at the credit of the respondents' account with the company. The secretary of the complainers' company on 9th June 1881 intimated to the respondents that the said balance was at their credit, and that they could take credit for it in their next account, which was done. (Stat. 12) Of the said 1000 shares the respondents agreed to take 700, and Sutherland 300, and the respondents, writing from San Francisco on 16th August 1881, instructed the secretary of the complainers' company that 'the 700 are for our account, to be registered in the name of Mr H. D. Harrison,' a partner of the pursuers' firm in London, 'and 300 for Mr Sutherland, to be registered in his name.' . . . The said shares were accordingly registered, 700 in the name of Mr Harrison and 300 in name of Mr Sutherland, and the respective certificates were sent to them in September 1881."

The complainers pleaded—"(3) The sum of 35,000 dollars, equal to £7000, or thereby, being a payment obtained by the respondents —the firm of a promoter and director of the complainers' company—out of the price of subjects sold to the company, falls to be credited to the complainers in account with the respondents. (4) In any event, the complainers are entitled to retain the amount of the said bill in extinction *pro tanto* of the said debt due to them."

The respondents pleaded—"(5) No part of the sum of £7000 mentioned in the complainers' third plea having been paid to or being in the hands of the respondents, the complainers' pleas of compensation and retention are excluded."

A proof was taken, from which the following facts appeared—On 1st December 1880 Mr Thomas Menzies, one of the partners of Falkner, Bell, & Company, wrote to Mr Walker, who was then in London, asking the latter if he could place the Bonanza Mine on the London market, and that if he thought it could be placed, the holder of the bond over the mine would go to London and arrange with Walker about it. On 7th December 1880 Mr Charles Sutherland, the holder of the bond referred to, wrote to Falkner, Bell, & Company, mentioning that as arranged he would go to London and co-operate with Mr Walker there in disposing

of the mines. He also stated that it was agreed that the profits, after paying the bonds, &c., were to be divided between himself, a Mr Ralston, and Falkner, Bell, & Company, the latter to get half of the profits. T. Menzies wrote to Walker informing him of this agreement with Sutherland on 8th December 1880, and subsequently sent him a copy of the agreement between Sutherland and Falkner, Bell, & Company.

On 31st December 1880 Walker wrote to Mr W. J. Menzies, W.S., Edinburgh, mentioning that T. Menzies had given a letter of introduction to Sutherland to him (Walker); that Sutherland was coming to London to offer a gold mine for sale, and asking if Mr W. J. Menzies thought that such a property could be floated in Edinburgh, and that Falkner, Bell, & Company would act as agents.

In the beginning of January 1881 a meeting took place in London, at which were present Mr Walker, Mr Sutherland, Sir George Warrender, and Mr W. J. Menzies. Mr Sutherland at this meeting gave the gentlemen present information about the mine. Subsequent meetings took place in Edinburgh between Mr Thomas Nelson, Mr J. D. Lawrie, stockbroker, and Mr E. L. I. Blyth, C.E., Messrs Walker and Sutherland being present at some of these meetings.

A provisional agreement dated 13th January 1881 was then entered into between Sutherland of the first part and those who agreed to take shares when the company was incorporated of the second part.

The first clause was an agreement on the part of Sutherland to sell to a company to be named the Scottish Pacific Coast Mining Company the mines, &c., for the price of 400,000 dollars.

The second head of the agreement provided that before the price was paid the second parties should get a report from an engineer, and also a report from a lawyer as to the title to the mines.

It was provided in the third place that if the reports above referred to were favourable the company should be incorporated.

The *fourth* clause was—"The following parties, Sir George Warrender, Baronet, Mr Edward Lawrence Ireland Blyth, Mr Thomas Nelson, Mr James D. Lawrie, and Mr William John Menzies, shall have the sole right to determine whether in terms of this agreement the investigation made by the second parties has so resulted that the company ought to be incorporated, and if they so determine they shall adjust the terms of the articles of association and incorporate the company, and the company in that case shall pay the price above stipulated. In witness whereof," &c. Mr Walker, as one of the second parties, signed this agreement. On the same date Mr W. J. Menzies sent Falkner, Bell, & Company, letters of instruction to an engineer and solicitor to report on the matters submitted to them. On the 15th of January 1881 Mr Menzies also sent them two printed copies of the provisional agreement, and on 18th January 1881 a proof of the prospectus was sent.

The prospectus was issued on 21st January 1881. The capital was to be £100,000 in 10,000 shares of £10 each—£4, 10s. per share to be called up not sooner than 1st March, and £4 not sooner than 1st May following. Among the provisional directors was James D. Walker, of the firm of Falkner, Bell, & Company, San Francisco.

The prospectus, after referring to the objects of the company and the mines, *inter alia*, stated—"It is proposed that if the company be incorporated Mr James D. Walker, of the well-known firm of Falkner, Bell, & Company, San Francisco, should be managing director in California. His firm and other parties in San Francisco will subscribe £10,000."

A meeting of the committee under the provisional agreement was held on 25th February 1881, at which were present all the persons mentioned in the provisional argeement, to whom the question whether the company should be incorporated was finally left, with the addition of Mr Walker. The report of the engineer proving satisfactory the committee agreed that Falkner, Bell, & Company, on being satisfied that the title was good, were to be authorised to draw on the company for the price. Another meeting was held on 5th March 1881, at which Mr Walker was not present, which authorised the company to be registered, which it was on 8th March 1881. In the memorandum and articles of association which Mr Walker signed, his name appeared as one of the ordinary directors. Falkner, Bell, & Company took as part of their commission 700 shares of the company, £8, 10s. of which had been previously paid up, and they were accordingly entered on the register at their request in name of Mr H. D. Harrison, one of the partners, for behoof of the firm.

As all the shares were not taken up by the public, a syndicate was formed among the directors to take up the shares in order to float the company. Mr Walker was asked by Mr W. J. Menzies to allow the balance of the commission due to Falkner, Bell, & Company, viz., 8775 dollars or £1809, to be applied to this fund, and Mr Walker, in a private letter in answer, agreed to this on behalf of his firm. The sum first mentioned was paid over or put to the credit in an account in name of Mr W. J. Menzies, who represented the syndicate. This exhausted the whole commission of 50,000 dollars due to Falkner, Bell, & Company.

Sir George Warrender, Mr Blyth, and Mr Nelson all denied that they knew that Walker had any interest as a vendor in the purchase of the mines, and the three former said they only became aware of the fact for the first time in 1884. Mr W. J. Menzies admitted that he was cognisant of the agreement between Walker and Sutherland as to the commission, but he could not say that the other directors knew of this.

Walker, on the other hand, and Sutherland, both swore that at the meetings in London and Edinburgh in January 1881, referred to above, full information was given concerning the commission and its division.

As to Walker's name being omitted from the committee mentioned in the provisional agreement, the evidence was as follows—Sir George Warrender's explanation was that Mr Walker was recommending the purchase of the mine, and that the others, who knew each other better, determined to consult together. Mr Blyth said—"It was a mere suggestion on my part that Mr Walker's name does not appear in the last paragraph of the provisional agreement, because he was expected to be out of the

country before Mr Price's report came." Mr Lawrie could not suggest any reason why Mr Walker's name was omitted, unless it was that he was not to be in this country at the time. Mr Nelson could not speak positively on the subject. Mr Walker said on this point—"A provisional committee was appointed. I was not allowed to be a member of it; I was especially debarred from it on the ground that I was an interested party. It was left to that committee to settle the question whether the report of the expert would justify the purchase of the property, and whether the property should then be purchased or declined. My interest, on account of which I was debarred from the committee, was that I was a member of the firm of Falkner, Bell, & Company, which was to receive one-half of Mr Sutherland's profit;" and he went on to say that there was no foundation for the suggestion that his name was excluded because he was leaving for San Francisco, as in point of fact he did not leave till the beginning of March. Sutherland also said that he thought Walker's name was omitted because he was an interested party. Mr W. J. Menzies said he thought that the omission was owing to Walker being the introducer of Sutherland the seller.

Both Messrs Blyth and Nelson stated that the fact of Falkner, Bell, & Company subscribing £10,000, as stated in the prospectus, influenced them in joining the company.

Mr H. D. Harrison and Mr T. Menzies, both partners of Falkner, Bell, & Company, who were examined on commission, denied that they ever gave instructions for placing the £1809 to the account of Mr W. J. Menzies.

The Lord Ordinary (KINNEAR) on 24th June 1887 pronounced this interlocutor:—"Sustains the respondents' and pursuers' claims upon the bills libelled (*i.e.*, the £1000 and £3000 bills), but in respect the complainers' and defenders' counter claim exceeds the amount thereof in the suspension and interdict, interdicts and suspends as craved; and in the action for payment, assoilzies the defenders from the whole conclusions of the action: . . . Finds the Scottish Pacific Coast Mining Company (Limited) entitled to expenses in both actions, and in the conjoined actions, &c.

"*Opinion.*— . . . [*After stating his opinion that the pursuers had no title to sue on the* £2000, *and that the defenders were liable on the bills for* £1000 *and* £3000]. Assuming the sums contained in the bills to be due, the next question is, whether the liquidator of the defenders' company is entitled to retain, and the ground on which he claims to do so is, that the pursuers' firm has taken benefit to a greater extent than the amount sued for, from an unlawful agreement between one of its partners and the directors of the defenders' company, or some of them. The facts upon which this claim arises do not appear to me to be doubtful.

"The company was formed for the purpose of acquiring and working certain mining properties in California described in a provisional agreement mentioned in the published prospectus. The nominal vendor of these properties was a Mr Charles Sutherland of San Francisco, and the provisional agreement was made between him and certain gentlemen, who afterwards became directors of the company, and one of whom was the pursuers' partner Mr Walker. But before any negotiation had taken place between Mr Sutherland and the promoters, other than Mr Walker, a prior agreement had been made between him and the partners of the pursuers' firm in San Francisco, by which it was agreed that if the pursuers should by their introduction enable Mr Sutherland to find a purchaser for the mines in this country, one-half of the profit which Mr Sutherland might make upon the transaction was to be paid to their firm. In pursuance of this arrangement Mr Sutherland was introduced by the pursuers' partner Mr Walker to the gentlemen who promoted the company, and an agreement was made by which the mines were purchased for the company for 400,000 dollars, of which 330,000 dollars went to certain prior owners or bondholders on the property, and the remaining 70,000, which represented the vendor's profit upon the sale, was to be divided according to their previous arrangement between Mr Sutherland and Falkner, Bell, & Company. It was subsequently arranged that Falkner, Bell, & Company should take their share of the profit in shares, paid up to the extent of £8, 10s. on £10 shares. The agreement was carried out after the formation of the company by payment of 350,000 dollars in cash, of which 330,000 was paid to the original owners, and 20,000 dollars to Mr Sutherland. This left 50,000 dollars of the price, and in June 1881 that sum was put to the credit of Falkner, Bell, & Company in the company's books, and in their current account with the company, and on the same day they were debited with 41,000 dollars odds, which represented £8, 10s. per share on one thousand shares. Seven hundred of these shares were registered at the pursuers' request in name of one of their partners, Mr Harrison, and three hundred in name of Mr Sutherland. This left 8775 dollars at the credit of Falkner, Bell, & Company. But in May 1882 certain of the gentlemen interested in the company formed what is called a syndicate for the purpose of taking up the shares which had not been taken up by the public. Mr Walker agreed that he should contribute to the purposes of the syndicate the sum with which his firm was credited, and accordingly that sum was paid over or put to the credit of Mr Menzies, as representing the syndicate. The result is that apart from this last transaction Falkner, Bell, & Company have received seven hundred partly paid-up shares as their portion of the price of the mines. There is no question that this arrangement was made for them by their partner Mr Walker, and it is equally certain that at the time it was made and carried out Mr Walker stood in a fiduciary relation towards the company, both as a promoter and a director. His name appears, with a statement of his position as a partner of Falkner, Bell, & Company, of San Francisco, in the published prospectus as one of the provisional directors; his name is in the list of original directors in the articles of association, and although it appears to have been dropped out from the list published in 1881, it reappears in the following year, and he continued in fact to be a director in 1884. He put himself therefore in a fiduciary position towards the company. As a provisional director he held himself out to intending shareholders as one of the persons who had undertaken the duty of considering the expediency of the purchase on behalf of the company, and as an acting director when

the company was formed he undertook the duty of carrying out the contract of purchase and sale in their interest, while at the same time he was truly in the position of a vendor, because he was receiving a considerable portion of the purchase money, and contributing nothing to the purchase money as a buyer. There can be no doubt whatever, if that were all, that a transaction made by him in these circumstances for the benefit of his firm could not be sustained as against the company. But that is not all, because the intending shareholders were not only entitled to rely upon his services as a director bound to consider their interest alone in making the purchase, but they were specially invited to rely on his special knowledge and experience, and on the material interest which he and his firm were to have in the company as considerable contributors, because it is set forth in the published prospectus that if the company is incorporated it is proposed that Mr James D. Walker, of the well-known firm of Falkner, Bell, & Company, of San Francisco, should be managing director, and that his firm and other parties in San Francisco will subscribe £10,000. And therefore the public are invited to have confidence in the adventure, because Mr Walker is to be a director, and his firm with others is to subscribe £10,000, although at the time when this prospectus is published there is a concealed agreement between him and certain promoters that he and his firm are to subscribe nothing but the company's money, which is to be paid to them as a commission on the sale. He represents himself to be acting for the buyers, and to be one of their number, and he invites the public to have confidence in the purchase upon that account, while at the same time he is really identified with the vendors, contributing nothing of his own to the purchase money, and taking for himself and his firm a share of the price. It is said that he was not in a fiduciary position when the provisional agreement was made. That would be of no consequence if he was a party to a wrongful agreement after he became a director. But he did more than that, because he made himself a party to the representations in the prospectus upon which the public were invited to take shares. I think it right to say, however, because questions of this kind involve character, that I do not suppose Mr Walker intended to wrong the shareholders. I do not doubt, upon consideration of the evidence, and of a very voluminous correspondence which I have read, that he believed the adventure to be a promising one, and his part in the transaction to be perfectly legitimate. His error was that he mistook his position. But acquitting him of any wrongful intention, the fact remains that while he was charged as a director of the company with the duty of protecting their interests, he made a contract on their behalf for the purchase of a property, having at the time when he made it an agreement with the vendors to receive a portion—amounting to 35,000 dollars—of the price. The case appears to me to be a very clear one for the application of the rule which is established by many decisions, and which is thus stated by Lord Young in one of the most recent—'Whenever it can be shown that the trustee has so arranged matters as to obtain an advantage, whether in money or money's worth, to himself personally through the execution of his trust, he will not be permitted to retain it, but will be compelled to make it over to his constituent.'—*Huntington Copper Company* v. *Henderson* 4 R. 299.

"It is said that the whole transaction was made known to all the directors. This would be of no consequence if it were not made known to the company—that is, to the shareholders, and to the public who are invited to take shares. But I see no reason to distrust the testimony of those directors who have been examined, and who depone that they knew nothing of the matter. The active conduct of the company's affairs seem to have been left almost entirely to Mr Menzies; and there can be no doubt that the arrangement between Sutherland and Falkner, Bell, & Company was perfectly well known to him, or that, failing to advert to Mr Walker's fiduciary position, he supposed it to be a legitimate arrangement, and accordingly consented to it, and carried it into effect. But he is unable to say that he explained the matter to the other directors, and they in the witness-box have distinctly denied all knowledge of it. There is a conflict between their evidence and that of Messrs Walker and Sutherland. But it is quite impossible that they should be mistaken on such a point; and on the other hand, it is by no means improbable either that Messrs Walker and Sutherland, in speaking at this distance of time to what took place in conversation, may not have a perfectly accurate recollection of the part taken by particular gentlemen, or that they may have supposed without sufficient ground that what was known to Mr Menzies was known to his co-directors also. It may be, also, that things may have been said in the presence of the other directors which, if they had had the key to them, might have shown that there was some arrangement with Mr Walker or Falkner, Bell, & Company. But, however the discrepancy is to be accounted for, I prefer the evidence of the directors who were examined, both because they are perfectly clear and positive in their statements on the subject, and because, while there is a possibility of honest error on the other side, I think there is no such possibility on theirs. The question, however, is not material to the present action, because if all the directors had known of the transaction their knowledge would not have bound the company.

"The remaining question is, whether assuming the illegality of the transaction by which Falkner, Bell, & Company have been benefited, the liquidator is entitled to the remedy which he maintains against them. It is said that he cannot retain the money due to the firm against the liabilities of one of its partners; that the firm cannot be made liable in damages for the wrong done by a partner, so as to bring the case within the rule of *M'Kay's* case, 2 Ch. Div. 1, and *Pearson's* case, 5 Ch. Div. 336; and that, although they might be bound to account for any benefit which had been communicated to them by their partner, they have in fact received no benefit except in the shape of a transfer of shares, and their liability will therefore be satisfied if the shares are re-transferred. I cannot assent to this argument. I do not think it doubtful that the firm must refund whatever benefit they have taken, just as Mr Walker

must have done so had he been acting for himself alone, and I do not think their liability will be satisfied by a re-transfer of the shares.

"It is clear upon the evidence and the correspondence that they were acquainted with the whole transaction from first to last. The two bargains which Mr Walker made for them, first for a portion of the price, and secondly, for a certain number of shares, were made with their authority; and they accepted and ratified both by directing the shares to be registered in the name of their nominee Mr Harrison. But they were aware at the same time of Mr Walker's fiduciary position, because they were the agents of the company, and knew that he was a managing director. In these circumstances the doctrine laid down by the House of Lords in the *Imperial Mercantile Association* v. *Coleman*, 6 E. and I. App. 203, appears to me to be applicable. The other partners, as the Lord Chancellor says in that case, are 'parties to and implicated in the breach of trust;' with the knowledge they had their 'liability cannot be separated from that of' Mr Walker, and they are liable to refund to the liquidator whatever he could have been compelled to refund if he had been the sole partner of his firm.

"But if that be so, I think they are liable on the authority of *Hay's* case, 10 L.R., Ch. App. 593, for the whole amount which was put to their credit in the books of the company, and applied in the purchase of the shares which stand registered in the name of Mr Harrison. They have contracted to become shareholders in respect of these shares, and *ex facie* of the transaction they have paid for them by applying a sum of money which did not belong to them, but to the company, and which they would undoubtedly have been compelled to refund in full if it had been applied for their benefit in any other way. On the authority of the case cited I think the liquidator is entitled to say that the transaction must be treated in one or other of two ways—The shares held for Falkner, Bell, & Company stand in the books as paid up to the extent of £8, 10s. They must either be treated as already paid for, but paid for with the money of the company, and in that case Falkner, Bell, & Company will be liable to refund the money which has wrongly been applied for their benefit. Or they have not been paid for, and then the shareholders will be liable as contributories for the unpaid calls.

"In either view the liquidator is in my opinion entitled to retain as against the claims made in these actions."

Falkner, Bell, & Company reclaimed, and argued—The first question was as to Mr Walker's position prior to the formation of the company. The provisional agreement and the committee appointed under it deprived Walker of any fiduciary position. Every shareholder got a copy of the agreement, and therefore knew that Walker had no right to determine whether the property was to be bought or not. To make such an agreement illegal there must be actings both on behalf of the sellers and the buyers, and Walker here had no say in the matter of determining the question of purchase. The matter of the commission was known to the directors. The letters to the company contained the information about the commission, and therefore there was a strong *onus* on the directors to show that they did not know of it. The documents clearly proved that Walker was not allowed to act as agent for the buyers. The memorandum of association showed that Walker was merely to act as the executive in California, and the directors themselves confirmed this. The other side to succeed must show that Walker was in a position of trust at the time of the purchase of the mines. In point of fact the provisional committee did authorise the formation of the company, Walker being absent. There was no case where a promoter or director had been held liable, unless at the time when the alleged agreement was made he was in a position of trust. Walker joined the board after the formation of the company. This was different from the case of the *Huntington Copper Company* v. *Henderson*, 4 R. 299, because Walker was excluded from the provisional committee. The complainers could not succeed unless they showed that Walker had a legal duty of advising the board in the purchase—Buckley on the Companies Acts (4th ed.) 363. Duty to the company was the basis of all the decisions—*Erlanger* v. *New Sombrero Phosphate Company*, July 31, 1878, 3 L.R., App. Cas. 1218; *Bagnall* v. *Carlton*, August 8, 1877, 6 Ch. Div. 371, Cotton, L.J., 407; *Arkwright* v. *Newbold*, February 28, 1881, 17 Ch. Div. 301, James, L. J. 319; *Lydney and Wigpool Iron Ore Company* v. *Bird*, June 1886, 33 Ch. Div. 85. The important question was, whether the directors or shareholders understood that Walker was to have a say in determining whether the purchae was to be gone on with? The five persons on the committee were provisional directors *quoad hoc*. Under the agreement they had an absolute discretion after the reports were got. If there was no discretion the fourth article had no meaning—[Lord President — It is a very important fact that Mr Walker is one of the purchasers]. It was not conceivable that Walker's advice would be asked as to whether the purchase should be made. Even if he were a provisional director, he was not in a fiduciary relation to the company.

Assuming, however, that the case as against Walker was well founded, the firm, *i.e.*, Falkner, Bell, & Company were not liable for Walker's wrongdoing. It was not part of the business of Falkner, Bell, & Company that Walker should be a director of the Scottish Pacific Coast Mining Company. The case of *The Imperial Mercantile Association* v. *Coleman*, 6 E. & I. App. 203, was a very different case, because here Falkner, Bell, & Company never got any of the money. In that case, also, the other partner knew what was going on. Here one of the partners, Harrison, said he did not know of the arrangement as to commission till after the formation of the company. There was no suggestion that Falkner, Bell, & Company authorised Walker to become a director of the company. They only saw the provisional agreement and the prospectus. They were entitled to presume that Walker held no fiduciary position. The provisional agreement showed them that Walker was debarred from acting on the committee, and they also saw that W. J. Menzies knew of the commission. Whatever, therefore, might be Walker's position, the sum in question could not be set off in a question with Falkner, Bell, & Company—*Hay's*

case, July 19, 1875, 10 Ch. App. 593. This was an action against a firm for malfeasance of a partner not known to the firm. The case of *in re Cape Breton Company*, May 4, 1885, 29 Ch. Div. 795, applied. When Falkner, Bell, & Company entered into the contract with Sutherland, they had nothing to do with the Scottish Pacific Coast Mining Company. The *Cape Breton Company's* case had been followed in *The Ladywell Mining Company* v. *Brooks*, April 2, 1887, 35 Ch. Div. 400. It showed that the point of time to look at was the date of the agreement, and if this was so, then the date in the present case was 1880, and Falkner, Bell, & Company could not be in a fiduciary relation towards the mining company at that time. [LORD PRESIDENT—If after getting the promotion money they put themselves in a fiduciary position towards the company, the principle of the *Huntington Copper Company* applies]. In any view, Falkner, Bell, & Company could not be treated as contributories. The only agreement was that they were to get so many paid-up shares, and therefore the case of *Hay*, *supra*, did not apply—*Carling's* case reported under *Hespeler* and *Walsh's* cases, November 12, 1875, 1 Ch. Div. 115. There might have been a claim for damages under the 165th section of the statute—*Coventry* v. *Dixon's* case, May 1, 1880, 14 Ch. Div. 660. [LORD PRESIDENT—Suppose the agreement is held to be illegal, then Falkner, Bell, & Company are on the register without any qualification]. In *Hay's* case Sir John Hay was in the position of an ordinary applicant for shares. But here it is admitted that Falkner, Bell, & Company never agreed to take shares—*De Ruvigne's* case, February 8, 1877, 5 Ch. Div. 306; *Gover*, December 1, 1875, 1 Ch. Div. 182. As to the sum of £1809, it had never been paid to anyone. It was still *in bonis* of the company, and yet they still asked to get credit for it just as if they had paid it away.

The complainers and defenders (respondents) replied—*Prima facie*, looking at the documents, Walker did occupy a fiduciary position. He took part in framing the prospectus, and was one of the provisional directors therein mentioned. It was said the fourth article of the provisional agreement took away any fiduciary position he held towards the company. But the fact of there being this committee did not alter the relations of the directors towards the public through the prospectus. It still remained for the provisional directors, including Mr Walker, to settle the expediency of going into the purchase, assuming the report obtained was favourable. A trustee was bound to give his whole judgment in any matter in which he was concerned—*Bennett ex parte*, Feb. 11, 1805, 10 Vesey, 380, Eldon, L.C., 393. Walker, by holding the position first as a provisional, and then as an ordinary director, put himself before the public as being in a fiduciary position. [LORD ADAM—Even supposing he was never an ordinary director, is it not enough for you that he was a provisional one?]. That was so. The law went further than the case of the *Huntington Copper Company*. It was not necessary that the person who took the benefit should be a director of the company—*Lydney Wigpool Iron Ore Company* v. *Bird*, June 24, 1886, 33 Ch. Div. 85. The question was, whether he was a promoter in the sense of bringing the company into existence? If he was, then he became liable to refund as a constructive trustee. Walker assumed a fiduciary position from the earliest period of the company's history. In the provisional agreement he appeared as a purchaser, and he could not deny he was a party to the incorporation, because he signed both the memorandum of association and the articles. Even if he was not at first in a fiduciary position, he was so when the company was formed. The *Cape Breton Company's* case, cited by the other side, did not apply, because the mines in the present case did not belong to Falkner, Bell, & Company. The agreement was that Walker should create a company, and in point of fact he did so. This was a case for the ordinary application of the rule laid down in the *Huntington Copper* case, *supra*.

The next question related to Falkner, Bell, & Company's position. If a firm took the benefit of constructive fraud on the part of one of its partners, the firm was liable apart from all questions of cognisance—*Blackie*, 1 Macq. 477. But here there was no attempt made to prove Falkner, Bell, & Company's ignorance. The matter was initiated by Falkner, Bell, & Company through Mr T. Menzies, one of their partners. What Walker did was communicated to the firm. Not only was no objection taken, but the shares were registered in name of one of the partners—Mr H. D. Harrison—after communication with the firm. Falkner, Bell, & Company therefore adopted what had been done by Walker. The respondents were therefore entitled to retain—*Imperial Mercantile Association*, *supra*. In *Lydney's* case the partner did not know of the profit being got, and so that case did not apply. There was a contract on the part of Falkner, Bell, & Company with the Pacific Mining Company to take the shares, as appeared from the prospectus. That contract was to be fulfilled by a payment in money. The shares were paid for with the money of the Pacific Company, and Falkner, Bell, & Company were bound to refund it. If there was no such contract, then the other alternative put by the Lord Ordinary applied. It was said there was simply an undertaking to take paid-up shares. The class of cases relied on by the other side applied only where there was no such contract as in the present case. *Hay's* case was the same as the present. Falkner, Bell, & Company became shareholders. *Carling's* case, relied on by the other side, was peculiar, because the vendor in that case had got paid-up shares, and the contract was registered under the 25th section of the Act of 1867, and therefore the company were barred from maintaining that the contract was illegal. The sum of £1809 was placed to the credit of Falkner, Bell, & Company at their own request.

At advising—

LORD MURE—It does not, as it appears to me, admit of doubt, upon the evidence adduced in the conjoined actions, (1) that before the formation of the complainers' company the respondents Falkner, Bell, & Company had entered into an agreement under which they were to receive a very considerable sum of money from the vendor of the mines afterwards acquired by the complainers, in the event of a company being formed for the purchase of those mines, through the influence and co-operation of the respondents

and their partner Mr Walker; (2) that the mines in question were acquired, and the complainers' company formed for their acquisition, in a great measure through the introduction and exertions of the respondents, and of their partner Mr Walker in particular; and (3) that the stipulated promotion money was paid to the respondents, after the complainers' company was formed, in the shape of paid-up shares of the company, which were duly issued to the respondents, and which they deliberately agreed to take in payment of the moneys due to them under their agreement.

So standing these facts, it cannot, I apprehend, well be disputed that under the rules of law applicable to such transactions, as the law has for some time been administered both in this country and in England, the respondents are liable to refund money so paid, if it is proved that at the time the complainers' company was incorporated the respondents' partner, Mr Walker, who took an active part in promoting the sale of the mines, stood towards that company in a fiduciary position, more particularly if the fact that he was in that position was well known to the respondents. The discussion accordingly which took place under the reclaiming-note was in a great measure confined to this important point, and the main question to which, as it appears to me, your Lordships have now to direct your attention with a view to the disposal of the present case, is as to whether there has been evidence adduced sufficient to instruct that Mr Walker must be held to have stood in a fiduciary relation to the complainers' company at the time when that company was incorporated.

Now, the solution of this question appears to me in this case to depend upon what is proved to have taken place relative to the formation of the complainers' company between the date of the agreement entered into between the vendor and Falkner, Bell, & Company in San Francisco in December 1880 and the 8th of March 1881, being the date of the company's incorporation, and the evidence as to this, which is, I think, chiefly documentary, is substantially to the following effect.

Upon the agreement between Mr Sutherland and Falkner, Bell, & Company being concluded, Mr Sutherland appears to have proceeded to London to put himself in communication with Mr Walker as provided for in the agreement. For the correspondence which took place between Mr Walker and Mr Menzies of Edinburgh in the beginning of January 1881, shows that Mr Sutherland had then arrived in London, and had met with Mr Walker, Mr Menzies, and some other gentlemen from Edinburgh, and that a meeting had been arranged to be held in Edinburgh for the further consideration of the proposed purchase.

This meeting, at which Mr Walker and Mr Sutherland were present, was held on the 13th of January, and a provisional agreement appears to have been then entered into for the purchase of the mines, subject to some further inquiries. That document is produced, and bears to have been entered into between Mr Sutherland of the first part, and the parties whose names are subscribed thereto of the second part, and among the parties so subscribing of the second part I find the name of Mr Walker. In this agreement the price to be paid for the property is fixed, subject to inquiries as to title, &c., and subject to the report of an engineer to be named by the second party as to the position and condition of the mines, and by the fourth head of the agreement five gentlemen are named, of whom Mr Walker is not one, who are to "have the sole right to determine whether in terms of this agreement the investigation made by the second parties has so resulted that the company ought to be incorporated, and if they so determine, to adjust the terms of the articles of association and incorporate the company, and the company in that case shall pay the price above stipulated."

The next step taken by the promoters, after selecting an engineer to report upon the mines, appears to have been the preparation of a prospectus of the proposed company, which was issued to the public about the 21st of January 1881. This document is an important one, for it gives, among other things, the names of the provisional directors, and among them is the name of Mr Walker, "of the firm of Falkner, Bell, & Company, of San Francisco." It contains the usual information supposed to be necessary to enable parties intending to take shares to judge of the advantages or disadvantages of such a proposal, and it also contains the following clauses—"It is proposed that, if the company be incorporated, Mr James D. Walker, of the well-known firm of Falkner, Bell, & Company, San Francisco, should be managing director in California. His firm and other parties in San Francisco will subscribe £10,000. The company will not be incorporated until the above statements, which are made on the authority of the vendors, are confirmed by Mr Price." It concludes by stating that "a copy of the articles of association may be seen at the office of the company."

The prospectus appears from the correspondence to have been largely circulated. Copies were admittedly sent out to Falkner, Bell, & Company at San Francisco, and to Mr Walker, who had returned to London, for circulation there, and it appears from the evidence that those sent to London were duly distributed by Mr Walker among parties likely to apply for shares. The result of all this was that by the beginning of March 1881 the promoters considered themselves in a position to have the company incorporated. The articles of association, which are mentioned in the prospectus as lying for inspection at the office of the company in Edinburgh, were by that time adjusted, and in those articles, which were admittedly signed by Mr Walker, his name is entered as one of the first directors of the company.

It thus appears from the prospectus of the company, and from the articles of association, that Mr Walker was announced as a provisional director, and as one of the first directors of the incorporated company, and that he acted in both capacities is, I think, shown by the minutes of the meeting of 25th February 1881, in which his name is entered as one of the parties present when the report of the engineer's inspection was received from San Francisco, and by the minutes of the meetings of directors on 14th May, and of shareholders on the 22nd of May 1883, at which he was present, and the minutes of the latter of these meetings bear that

Mr Lawrie and Mr Walker, the retiring directors, were re-elected."

The accuracy of the statements in these documents as to Mr Walker being appointed a director is challenged in the record by the respondents, who allege that Mr Walker was not qualified to act as a provisional director, and that it was never intended to do more than make him managing director in California as stated in the prospectus. It is also denied on record that he was a director of the company, or ever acted as such, and it is alleged that his name erroneously and without his consent was inserted in the articles of association. With reference to the last of these averments, it appears to me that the respondents cannot now be allowed to raise any such objection, because Mr Walker deliberately signed the articles of association, in one of which he is named as one of the first directors, and he afterwards attended meetings of the directors when he happened to be in this country.

As regards the prospectus, on the other hand, it is plain from Mr Walker's own evidence that although he may not have been originally aware that he was to be appointed a provisional director, he raised no objection to his name being included as one of them when he saw it in the prospectus, but entered upon the duties of the office with considerable zeal.

Upon this his evidence is very frank and explicit. When asked as to the prospectus he says —"I was present when Mr Menzies was preparing the prospectus that was to be issued to the public. I had no means of giving him any information except what I had got from Mr Sutherland. I had no hand in framing the prospectus. I had never drawn a prospectus in my life. After I went to London, which I think was towards the end of January, a completed copy of the prospectus was sent to me there. I saw then that my name was in the list of directors. That was a new idea to me. I did not know before that it was intended to make me a director. The suggestion had never been made to me. I then proceeded to bestir myself to get friends to take shares in the company. About the 8th of February I returned to Edinburgh, and again paid visits to Mr Menzies' office. I was to be managing director of the company in California, and Mr Menzies was to be managing director in this country. When intending shareholders communicated with me I gave them any information I could—in fact I went a little further than that, because there was a small meeting of shareholders called one day in Mr Menzies' office, and the map was spread out, and I told those present what I knew about the Empire property, and about the property generally, explaining at the same time that personally I had no knowledge of it. I was never asked as to whether Mr Price's report was satisfactory or not. His cable report had come to hand before I left this country, but not the detailed one. I sailed for New York on the 5th of March. I never was a member of the provisional committee."

In saying that he never was a member of the provisional committee, Mr Walker must have meant that he was not one of the committee of five who were nominated to decide whether the company should be incorporated after receiving the report of the engineer, Mr Price, because he was undoubtedly one of the provisional directors. For he signed the provisional agreement as one of the second parties to it, and appears to have attended a meeting of that committee when they were considering the report on the 25th of February 1881, after he was fully aware that he had been named a provisional director in the prospectus, and had, as he himself explained in the passage I have first read, acted in that capacity. In a subsequent part of his evidence, when again questioned as to the prospectus, and as to whether, after explanation, he was satisfied the prospectus was substantially correct he says—"I suppose so. I was not surprised to find in the prospectus that I was to be managing director in California, because that had been arranged. I was surprised to find my name appear as a director, because I did not see what use I could be to the company here, and I had never been asked to be a director. I got copies of the prospectus sent to me immediately on its issue, and I sent copies to various of my friends. I did not take any objection when I saw my name included as a director. I did not mention to the friends to whom I sent copies of the prospectus that that was a mistake, because when I got the prospectus, and saw my name in it, I took no objection to it, and I thereby gave consent. I afterwards signed the articles of association in which I was named as one of the first directors of the company. I cannot say whether I attended any of the meetings of directors in Edinburgh after the company was formed, but if the minutes show that I did I will accept that."

Upon considering this evidence I have been unable to see my way to any other conclusion than that of holding that the case must be dealt with on the footing that Mr Walker was appointed and acted as one of the provisional directors for the formation of the complainers' company, and that he was also appointed and acted as one of the first directors of the incorporated company. And if I am right in this, the case is, I think, clear, and distinctly ruled, in so far as Mr Walker is concerned, by the decision of this Court in the case of the *Huntington Copper Company*, referred to by the Lord Ordinary in his opinion. Here, as in the *Huntington* case, the interest of Mr Walker as a partner of Falkner, Bell, & Company was in direct conflict with his duty as a director or trustee for the complainers' company. His duty as a director was to acquire the property at as low a price as possible for the company. His interest as a partner of the complainers' company was to get as large a sum as possible for it for the vendor, because the larger the price obtained by the vendor, the larger under the terms of the agreement would be the profit divisible between the vendor and Falkner, Bell, & Company, and wherever such a conflict between duty and interest exists, the party who has the duty to discharge cannot, I conceive, as the law now stands, be allowed to retain money paid to him under any such agreement as that here in question.

I therefore concur in the result at which the Lord Ordinary has arrived on the main question raised, and generally in the able exposition he has given of the law and of the evidence applicable to the various branches of the case.

The circumstance that the question is here raised with the firm of Falkner, Bell, & Company, and

not directly with Mr Walker, which is the main distinction I see between this and the case of the *Huntington Copper Company*, cannot in my opinion be held to make any difference in the application of the general rule, more particularly in a case where, as here, the firm were throughout quite well aware that their leading partner was acting as a director of the company. The firm in a question of this description cannot, in the view I take of it, be in any better position than the partner himself who assumed the fiduciary character; and the general rule has been applied by this Court in the case of a firm of law-agents, in which the whole Court was consulted. I refer to the case of *Lord Gray and Others (Paterson's Trustees)*, Nov. 12, 1856, 19 D. 1, where one of a firm which acted as agents for a trust-estate was himself one of the trustees for whom the firm acted, and an objection was on that ground taken to the accounts of the firm. It was not disputed that the objection must have been sustained had the trustee been sole agent for the trust, but it was contended that the objection was obviated by the circumstance that it was not the firm, but only one of the partners, who had acted as trustee. There was some difference of opinion on the bench, but the great majority of the Court were agreed that the objection was well founded, and disallowed the claim of the firm. That was decided relative to the claim of a firm of law-agents. But in principle I am unable to see any good reason why the same rule should not be applied in the case of a mercantile firm, and upon the whole matter I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

Lord Adam—The leading question is, whether Mr Walker at the date of the sale of the mines to the Scottish Pacific Coast Mining Company was in a fiduciary position to that company? Now, I think with Lord Mure and the Lord Ordinary that at the date referred to, Walker was a promoter and a provisional director prior to being an ordinary director. He was the person who introduced Mr Sutherland to the company. His name appears as a provisional director in the prospectus. He signs the memorandum and the articles of association, in which his name again appears as a provisional director of the company, and Lord Mure has pointed out that although Mr Walker did not at first know that he was to be a provisional director, yet when he saw his name in that capacity in the prospectus he adopted it, and is therefore in the same position as if he had originally consented. In face of these facts it appears to me quite impossible to say that Mr Walker did not occupy a fiduciary position towards the company. It also appears, as he tells us himself in his evidence, that he took an active part in promoting the company. The next important document is the provisional agreement. Now, that is an agreement between Sutherland of the first part, and the second parties, one of the latter—who were future purchasers of the mine—being Mr Walker. He is therefore on the face of this document a purchaser beyond all question. As to his relation to the vendor there is no dispute, because at that time there was an agreement between Sutherland and Falkner, Bell, & Company that the latter should have half of the profits of the sale. If this is so, it is clear that Mr Walker occupied the two inconsistent positions of being both a vendor and a purchaser, and therefore in my opinion the principle applied in the case of the *Huntington Copper Company* v. *Henderson* applies here.

It was argued, however, that although Walker was in a fiduciary position he was relieved by a clause in the agreement I have before referred to, in which a remit was made to five persons to determine whether the company should be incorporated and registered, and if they should be of that opinion, to adjust the articles of association and incorporate the company accordingly. I confess I have been unable to see how that can relieve Walker. It is quite true, as Lord Mure has pointed out, that Walker attended the meeting of that committee. I do not know what took place at that meeting. But I do not see that that makes any alteration in Walker's fiduciary position. Then there is a great deal of evidence on this point, viz., whether Walker communicated the agreement between Sutherland and Falkner, Bell, & Company to his co-directors. The Lord Ordinary holds that he did communicate the agreement referred to to Mr Menzies, one of his co-directors. In my view that is quite immaterial. The question is not whether there was concealment from his co-directors, but whether there was concealment from the company. No amount of disclosure to his co-directors would relieve Walker if there was none to the company. There might have been a question if Walker had disclosed the agreement to his co-directors, and they had kept their information from the company, whether they would not have been personally liable for such concealment, but there is no such question here. I have no doubt therefore that upon the question, whether Walker is bound to repay the money which he has got under the agreement I have referred to, that he is so bound.

The next question is, are Falkner, Bell, & Company bound to repay? I think they are, on the authority of *The Imperial Mercantile Association* v. *Coleman*, referred to by the Lord Ordinary. That case decided, and I think rightly. that when a company have the knowledge of a breach of trust having been committed, and they take benefit therefrom, they are as much bound to repay money obtained in such circumstances as the individual partners are. As to the knowledge of Falkner, Bell, & Company there can be no doubt. The next question is, was the money paid to the firm? I think this is clear. The undertaking set forth in the prospectus is this—that Falkner, Bell, & Company should subscribe £10,000, not that they were to take paid-up shares. The money was paid in this way—The price paid for the mine was 400,000 dollars, 350,000 of which was paid in cash and bills. Of this latter sum, 330,000 dollars were paid to the original owners of the mine, and 20,000 to Sutherland. That left 50,000 dollars, equal to £10,309, of which 35,000 belonged to Falkner, Bell, & Company, and 15,000 to Sutherland. This sum was dealt with as follows — It was put to their, *i.e.*, Falkner, Bell, & Company's, credit in the books of the Scottish Pacific Coast Mining Company. The company took and paid for 1000 shares, £8, 10s. paid-up, which cost £8500. Of these, by the direct orders of Falkner, Bell, &

Company, 700 were registered in the name of Mr Harrison, and 300 were registered in name of Mr Sutherland. That left a balance of £1809, and what became of that was this—By order of Mr Walker the £1809 was transferred to the credit of Mr Menzies' account. It humbly appears to me that the 700 shares were paid for by the cash of the company, just as much as if Falkner, Bell, & Company had ordered the company to purchase anything else, and the £1809 is in the same position as if it had been paid to Falkner, Bell, & Company. This being so, it is clear this firm got the benefit of the money, and the question is, are they bound to repay it? If this had been a direct action against Falkner, Bell, & Company the latter would have been clearly bound to repay it; and if that is so, the Pacific Company are entitled to set it off against the claim made on them.

I have therefore no hesitation in concurring with Lord Mure and the Lord Ordinary.

Lord President—I am entirely of the same opinion, and your Lordships have exhausted the grounds of judgment, which are entirely satisfactory to my mind.

The Court adhered.

Counsel for the Respondents and Pursuers (Reclaimers) — Comrie Thomson—Dickson—G. W. Burnet. Agents—Henry & Scott, S.S.C.

Counsel for the Complainers and Defenders (Respondents) — D.-F. Mackintosh — Lorimer. Agents—Davidson & Syme, W.S.

REGISTRATION APPEAL COURT.

Thursday, January 19.

(Before Lord Mure, Lord Craighill, and Lord Kinnear.)

[Sheriff-Substitute of the Lothians.

STRACHAN *v.* BINNIE AND OTHERS.

Election Law—County Franchise—Representation of the People (Scotland) Act 1868 (31 *and* 32 *Vict. c.* 48), *sec.* 3—*Representation of the People (Scotland) Act* 1884 (48 *Vict. c.* 3), *sec.* 3—*Service Franchise — Inhabitant occupier— Effect of Strike.*

A number of miners who occupied houses belonging to their employers under their contract of employment, went out on strike, and decrees of ejection were issued against them. *Held* that although at the date of the Registration Court they were still in occupation of the houses, because the decrees of ejection had not been put in force, that they were not occupying as tenants under an existing contract of employment, and were therefore not entitled to be put upon the roll.

The Representation of the People (Scotland) Act 1868 (31 and 32 Vict. c. 48), by section 3, provides that "every man shall, in and after the year 1868, be entitled to be registered as a voter, and, when registered, to vote at elections for a member or members to serve in Parliament for a burgh, who, when the sheriff proceeds to consider his right to be inserted or retained in the register of voters, is qualified as follows:— . . . (2) Is and has been, for a period of not less than twelve calendar months next preceding the last day of July, an inhabitant occupier, as owner or tenant, of any dwelling-house within the burgh." . . .

The Representation of the People (Scotland) Act 1884 (48 Vict. c. 3), by section 2, provides that "a uniform household franchise . . . at elections shall be established in all counties and burghs throughout the United Kingdom." . . . And by section 3 it provides that "where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, he shall be deemed, for the purposes of this Act and of the Representation of the People Acts, to be an inhabitant occupier of such dwelling-house as a tenant."

At a Registration Court for the county of Linlithgow, held at Bathgate on the 6th day of October 1887, William Strachan, solicitor, Bo'ness, objected to the name of David Binnie, who stood on the assessor's list of person's entitled to vote, as "Binnie, David, Broxburn, miner, tenant of house, 80 Holygate," being retained in the list of persons entitled to vote in the county.

The Sheriff-Substitute (Melville) repelled the objection.

Objections were also taken to the retention on the roll of the names of other forty-five miners, in whose cases the circumstances were similar to those of David Binnie. These objections were also repelled.

The objector required the Sheriff-Substitute to state a special case for appeal.

The statement in the case was as follows:—"In the valuation rolls for the years 1886-87 and 1887-88 the said David Binnie is entered as 'inhabitant occupier, not rated (48 Vict. c. 3, sections 3 and 9),' of the house No. 80 Holygate, Broxburn, of which house the Broxburn Oil Company (Limited) are the proprietors. The said David Binnie was a miner in the employment of the said Oil Company, and occupied said house in virtue of said employment on the condition that the rent thereof should be retained by the said company from his wages, and that he should remove therefrom on leaving the employment of the said company. A strike of the miners in the employment of the said Oil Company took place, and a summons was issued against him at the instance of the said Oil Company, upon which the Sheriff on 24th August 1887 granted a warrant for removing and ejecting him from the said house—such ejection not being sooner than 1st September 1887. This warrant has not been enforced, and the said David Binnie still retains possession of said dwelling-house. The objection was, that the said David Binnie, having left the employment or service of the said Oil Company, was not an inhabitant occupier of the said house in virtue of service or employment with the company; that having received notice to leave the said house, and a warrant of ejectment therefrom having been obtained against him, he was in illegal possession, and that he was not entitled to be on the roll. The Sheriff-Substitute repelled the objection, on the ground that Binnie was an