delay by the proprietor in rendering such subject fit for occupation.

At a Valuation Court for the city and burgh of Dundee, held on 12th December 1890, to dispose of appeals against the valuation of the Assessor of the city and burgh, an appeal was made by the Right Honourable the Earl of Home against the following entries in the valuation roll:—

Description of Subjects.	Proprietor.	Tenant or Occupier.	Yearly Rent or Value.
Barracks.	Earl of Home, per John Ogilvy, Harecraig.	Unlet.	£305.

The Magistrates sustained the valuation, and the Earl of Home appealed.

From the case it appeared that the subjects in question consisted of three large buildings in the Barrack Park of Dudhope, Dundee, formerly in the occupancy of the Crown (War Department), and used as (1) a military barracks, (2) officer's quarters, and (3) an hospital, together with the adjoining ground chiefly occupied and required for access to the buildings. Prior to Martinmas 1889 the subjects had been held by the Crown as sub-tenant of the appellant. Under the sub-lease the rent payable by the Crown for the ground was £163, 16s. After the sub-lease the Crown erected barracks on the ground. Subsequently, and at a comparatively modern date, they erected in addition officers' quarters and an hospital. Up to the year 1887-88 only the ground sub-rent of £165, 16s. was entered in the valuation roll. The Crown not being subject to taxation, it was not considered of practical importance to insist on a valuation of Crown property. The question having been raised by various public bodies throughout the kingdom as to whether the Crown, as a matter of expediency, might not voluntarily bear their share of local assessments, the War Office was approached in this instance to consent to include the buildings erected by the Crown in the valuation. In 1887-88 the consent of the rating department of the Treasury was obtained to include the whole buildings *in cumulo*, as of the annual value of £305, and as belonging to and occupied by the Crown. They have remained at that sum ever since, and the Crown have paid rates on them till now both as owners and occupiers. The tenancy of the Crown ceased at Martinmas 1889, and the subjects have since been in the possession of the appellant, and unoccupied. No rent has since been paid for them by any party to the appellant. It appeared further from the evidence led that the subjects could not be let in their present condition for any purpose, and that a considerable expenditure would be necessary so to alter their condition as to give them a lettable value. The appellant stated that he was willing that the subjects should be entered at the nominal value of £100.

At advising—

LORD WELLWOOD—In this case we think the valuation should be £100 and not the old rent. On the evidence the barracks could not be let in their present condition for any purpose. Considerable expense will be necessary to make them lettable, and therefore as the buildings stand they really have no lettable value at all. While I am of opinion that for this year the valuation should be reduced to a nominal sum, I do not want to lead the appellant to suppose that this state of matters can go on indefinitely. There will probably be a limit to the time for consideration as to what should be done with the buildings. The question may be different next year if nothing has been done to the buildings to render them fit for occupation.

LORD KYLLACHY—I concur. All I decide is that the old valuation of £305 is not a proper valuation for the subjects in their present condition. What the proper valuation for the subjects may ultimately be found to be I do not inquire. All I say is, that £100 on which the appellant is willing to pay appears on the information before us to be ample.

The Court were of opinion that the valuation should be reduced to the sum of £100.

Counsel for the Appellant—C. K. Mackenzie. Agent—Robert Strathern, W.S.

COURT OF SESSION.

Friday, June 26.

FIRST DIVISION.

[Lord Trayner, Ordinary.

EDINBURGH NORTHERN TRAMWAYS COMPANY *v.* MANN AND BEATTIE.

Company—Promotion Money—Liability to Account.

M, the agent, and B, the engineer of a newly incorporated cable tramways company, of which they had been the chief promoters, arranged on behalf of the company the contract for the construction of its works By this contract the contractors undertook, besides constructing the works, to pay the expenses incurred by the company in obtaining their Act. M and B at the same time entered into an agreement with the contractors on their own behalf, whereby they bound themselves to relieve the contractors of their liability for the expenses of the Act in consideration of the payment of a sum of £17,000.

Five years afterwards the company called on M and B to account for the sum they had received under their agreement with the contractors. In answer the defenders maintained that the company were barred from challenging the agreement, in respect that everyone interested in the shares of the

company knew of and had assented to the agreement, and the company's shares had never been issued to the public.

Held (1) that the agreement was of an illegal character, as it had been entered into by the defenders for their own advantage, at a time when they occupied a pecuniary relation to the company; and (2) that whether all the existing members of the company at the date of the agreement had assented thereto or not, the company were entitled to call the defenders to account in the interest of subsequent allottees who had never assented thereto.

Opinion (by Lord Kinnear) that where a shareholder was personally barred from challenging an illegal agreement in consequence of having been a party thereto, the plea in bar did not transmit against his onerous transferee.

In 1883 George V. Mann, S.S.C., and William Hamilton Beattie, along with some other persons, promoted a bill in Parliament for the incorporation of a company to construct and work certain lines of cable tramway in Edinburgh. In that year the bill was thrown out, but another bill was promoted and passed in the ensuing year, and became "The Edinburgh Northern Tramways Act 1884," the Royal Assent being given on 7th August 1884, and under this bill the Edinburgh Northern Tramways Company was incorporated with an authorised capital of £90,000 in 9000 shares of £10 each. During the progress of the bill through Parliament the interests of the promoters and the projected company was to a large extent entrusted to Messrs Mann and Beattie, and before the bill had passed they opened negotiations with the Cable Corporation, Limited, a company who were in possession of certain patents for the construction of cable tramways, which after the passing of the bill resulted in the following contract and agreement.

By contract between the Cable Corporation and the Northern Tramways Company, dated 24th October 1884, it was agreed, *inter alia*, (1) that the corporation should, at their own cost, purchase and convey to the company certain heritable property in Edinburgh; (2) that they should construct the tramway lines authorised by the company's Act; (3) that they should pay or provide for the whole costs, charges, and liabilities incurred by the company in obtaining their Act; and (4) that in consideration of these obligations the Cable Corporation would receive the sum of £3000 from the Tramways Company by monthly instalments, and in shares and mortgages of the Tramways Company if that company did not have cash in hand.

By agreement, dated 25th October 1884, between the Cable Corporation and Messrs Mann and Beattie, on the narrative that the corporation had by the foresaid contract undertaken to pay the costs and liabilities incurred in obtaining the company's Act, and "with a view to fixing the amount they may be called upon to pay under the said contract," it was agreed (1) that Messrs Mann and Beattie should relieve the corporation of the liability it had undertaken as aforesaid for the expenses of the Act; and (2) that in respect thereof the corporation should pay to Messrs Mann and Beattie the sum of £17,000 (£5000 in cash, £8500 in debentures by the corporation, and £3500 in fully paid-up shares of the company).

These two agreements were in reality part of the same arrangement. At the time when they were entered into, Messrs Mann and Beattie were respectively the agent and the engineer of the Tramways Company, and were especially charged with the duty of arranging the contract for the construction of the company's works.

In February 1889 the Edinburgh Northern Tramways Company brought an action against Mann and Beattie, concluding in the second place for decree ordaining them to render account of all moneys, shares, or debentures received by them in virtue of the agreement of October 25, 1884, on the ground that when occupying a fiduciary relation towards the company they had entered into an agreement to their own advantage and the company's prejudice, and were bound to communicate to the company the benefit received by them at its expense.

The defenders denied that they had received under the agreement of 25th October 1884 more than the costs of the Act, and the legitimate expenses of the promotion of the company, and further averred that the pursuers' company had never truly become a public company, but that its shares had all along been held by nominees of, or persons who represented the defenders, their co-promoters, and the Cable Corporation; and that all the parties who had even had any interest in the pursuers' company had either been parties to the agreement challenged, or had subsequently confirmed the same, or had acquired their shares in the knowledge thereof.

They pleaded—(3) The pursuers' company are barred by their actings and acquiescence, as condescended on, from pursuing the present action. (5) The second and remaining conclusions of the summons being based on the ground that the defenders Mann and Beattie occupied a fiduciary relation to the company when they entered into the agreement of 25th October 1884 and compromise of 31st May 1886, and the whole persons who have at any time been interested, either directly or indirectly, in the shares of the pursuer's company, having been parties to, or being bound by said agreement, these defenders should be assoilzied from these conclusions.

A proof was allowed from which the following facts appeared—Following on the agreement of 24th October 1884, 500 shares of the pursuers' company were transferred to the Cable Corporation, and in part implement of the agreement of 25th October the Cable Corporation paid the defenders the sum of £5000 in cash.

The Cable Corporation, however, delayed

to proceed with the execution of their contract for the construction of the lines, and in consequence, as the time allowed for the execution of the works had not expired, and the Tramways Company could therefore not sue on their contract, it was resolved, at a meeting of the directors of the Tramways Company on 28th September 1885, "that Messrs Mann and Beattie be requested to sue the corporation for the expenses of and incidental to the formation of the company, and which the corporation had undertaken to pay."

An action was accordingly raised by Mann and Beattie in England against the Cable Corporation, the main conclusions of which were for specific performance of the agreement of 25th October 1884, so far as it remained unfulfilled, and for an injunction to restrain the corporation from dealing with the 500 shares in the Tramways Company which had been issued to them in such a way as to prejudice the plaintiff's security under the agreement of 25th October 1884. The Cable Corporation by way of defence stated a counter claim to have the agreement set aside, and the £5000 which had been paid under it repaid. The Cable Corporation further raised an action in the Court of Session against the Tramway Company and Messrs Mann and Beattie for reduction of the contract of 24th, and the agreement of 25th October 1884. The parties thereafter entered into negotiations with each other, and these negotiations resulted in agreements being come to, which were embodied in two documents called heads of compromise, and formed a settlement under which the actions were taken out of Court. These documents were both dated 31st May 1886, and were entered into at the same time. By the agreement between the Cable Corporation and Messrs Mann and Beattie the former agreed to transfer to the latter, "in further part payment under agreement of 25th October 1884," 350 fully paid shares of the Tramways Company; to pay the interest due on the £8500, for which the corporation were bound to issue them their debentures, and in security of said £8500 debentures to transfer to trustees 150 shares of the Tramways Company and 20 per cent of the shares, debentures, bonds, or cash, which they should receive under their contract with the Tramways Company. By the compromise between the Tramways Company and the Cable Corporation the contract of 24th October 1884 was modified, the price to be paid by the Tramways Company being increased to £98,000, and this compromise was also embodied in an agreement between the Cable Corporation and the Tramways Company dated July 22, 1886, supplementary to the agreement of 24th October 1884.

Prior to this settlement the Cable Corporation had been in difficulties, but about the time of the compromise the Debenture Corporation, Limited, agreed to advance them £40,000, for which the Cable Corporation granted mortgage debentures, and to secure repayment of the £40,000 the Cable Corporation executed an assignment to the Debenture Corporation of, *inter alia*, the benefit of their contracts with the pursuers' company and their interest in all moneys, shares, and debentures issuable thereunder, subject to the agreement of 25th October 1884 as modified by the terms of compromise. Thereafter by deed dated 4th January 1888 the Debenture Corporation assigned the debentures they held of the Cable Corporation and all rights effeiring thereto to the Assets Realisation Company, but subject to the agreement of 25th October 1884 as subsequently varied.

After the execution of the agreement of July 1886, part of the works which the Cable Corporation had thereby and by the contract of 24th October 1884 agreed to execute, were carried out on their behalf by their sub-contractors, Dick, Kerr, & Company, of London, and part of the line was opened in January 1888. From time to time during the progress of the works the Cable Corporation became entitled to certain payments, and the Tramways Company in satisfaction thereof elected in terms of their contracts to issue them shares and mortgages of the company to the amount thereof. In February 1888 4500 shares had been issued, and of these 3190 were held for behoof of the Assets Realisation Company in security and the Cable Corporation in reversion. The remaining 1310 were held as follows:—255 by the defenders and their nominees; 923 in trust for the defenders under their agreement with the Cable Corporation; 120 by the first directors of the company who had been promoters, and whose qualifications had been in part paid by the defenders; 2 by the first auditors of the company; 5 by the agent in London who had acted for the defenders at the time of the contract and agreement of 24th and 25th October 1889 in the action against them at the instance of the Cable Corporation; and 5 by a director of the Cable Corporation.

In January 1888 the Cable Corporation was by order of the Court of Chancery appointed to be wound up, and thereafter Dick, Kerr, & Company, who were creditors of the corporation to a large amount, with the approval of the Court purchased the whole assets of the Cable Corporation, including the shares and mortgages of the pursuers' company held in trust for the Assets Realisation Company. This arrangement was embodied in an agreement dated 22nd May 1888 between the liquidator of the Cable Corporation, the Assets Company, and Dick, Kerr, & Company, in which it was declared that the said assets were sold subject to all incumbrances, if any, having priority over the said mortgage debentures, and to all agreements affecting the same, and that the purchasers should accept such title as the Cable Corporation and the Assets Company had to the property to be sold. In a schedule to the agreement, the agreements between Mann and Beattie and the Cable Corporation were, *inter alia*, set forth.

On 15th June 1888 an agreement was concluded between Dick, Kerr, & Company, the Cable Corporation and its liquidator,

and the Tramways Company, whereby Dick, Kerr, & Company undertook to complete the unfinished portion of the Tramways Company's lines for a sum of £75,000 (60,000 in fully paid shares and £15,000 in mortgage debentures), and that agreement was afterwards sanctioned by the Court of Chancery.

No prospectus of the pursuers' company was ever issued, nor was the company ever advertised. The defenders failed to show that the pursuers' company had ever directly confirmed or adopted the agreement in question.

On 18th July the Lord Ordinary (TRAYNER) pronounced this interlocutor:—"Finds that the defenders George Villiers Mann and William Hamilton Beattie are bound to account to the pursuers for the whole sums of money, debentures, shares, or other considerations received by them under and in virtue of the agreement entered into between them and the Patent Cable Tramways Corporation, Limited, dated 25th October 1884: Appoints the said defenders to lodge in process by the first sederunt day of next session an account of all sums of money, debentures, shares, or other considerations received by them under said agreement, as also an account or accounts of all sums which they claim respectively to be entitled to set against the before-mentioned sums of money, debentures, shares, or other considerations, with the vouchers of such account or accounts: *Quoad ultra* continues the cause: Grants leave to reclaim."

"*Opinion.*—. . . . These two documents—the contract and the agreement [of 24th and 25th October 1884]—although bearing to be executed of different dates, were in reality parts of one transaction arranged and agreed upon by the corporation and the said defenders, the purposes of which were, on the one hand, to secure to the corporation the contract for constructing the authorised tramway lines in Edinburgh, and, on the other, to secure to the said defenders payment of the sum of £17,000. This transaction presents several objectionable features. In the first place, it was in violation of the stipulations made by the corporations of Edinburgh and Leith in giving their consent to the construction of the tramways (consents without which the Act obtained by the company would not have passed), to the effect that the contract for the construction of the lines should be offered for public competition. These stipulations—stated as plainly as language could state them in the agreements which were scheduled to the Act—were stipulations which the corporations who made them had an undoubted interest to enforce. The transaction between the Cable Corporation and the defenders Beattie and Mann was entered into with these stipulations fully in view, and the pretence they made—for it was only pretence—of advertising the contract as one open for competition, only shews that the violation of the foresaid stipulations was deliberate and intentional. *Secondly.* The transaction was in violation of the duty which the defenders owed to the pursuers' company. The defender Mann was the solicitor of the company, and Beattie was its engineer; and they were charged with the interests of the company, whom (and at whose expense) they were in London representing. The interest of the company clearly was to have the construction contract given to the contractor who would undertake it at the lowest price. Instead of this, however, without competition, and indeed without any honest inquiry as to the amount for which any other contractor would undertake the construction of the line, the defenders agreed to give, and did give, the construction contract to the Cable Corporation at a price agreed upon between themselves, that price including a sum of £17,000 to be paid to the defenders. *Thirdly,* If the defenders had claimed from the company, for whom they were acting, the amount due to them for work done and disbursements made in connection with obtaining the company's Act, it is plain that they would have required to have given a detailed and, to some extent, a vouched account of such work and disbursements. By including the £17,000, however, in the contract price of £93,000 the defenders were adopting a course by which the rendering of any such account would be made unnecessary, and all examination of such account avoided. That this was the purpose and intention of the defenders in entering into this transaction becomes to my mind clear enough from the attitude which the defender Mann assumed towards Mr Turnbull, one of the company's directors, when he demanded from Mr Mann 'particulars of the amounts which had been paid towards expenses.' I think this purpose and intention is further evidenced by the mode in which the transaction was carried out. It being one transaction, it could easily, and would naturally, have been embodied in one deed, if nothing more was intended to be done than to give expression to the agreement which had been concluded. It would have been as easy in the construction contract to have said that the Cable Corporation had undertaken out of the contract price to pay Mann and Beattie £17,000 in full payment of the expenses incurred in connection with the obtaining of the company's Act, as to say that they, the corporation, undertook to relieve the company of liability for such expenses. To have done so, however, would have brought the bargain between Mann and Beattie before the consideration of the company, and would probably have led to the inquiry which the defenders, I think, desired to avoid. Accordingly the second deed, in the form of an agreement between the Cable Corporation and the defenders, was executed, as a deed embodying a bargain with which, as Mr Mann expresses it 'the directors had nothing to do.' *Lastly,* The sum of £17,000 to be paid to the defenders was not fixed upon a consideration of any account of what charges were due to them, or of what disbursements they had made—it was a mere guess.

"It is not enough, however, to entitle

the pursuers to the accounting which they seek that the transaction I have been dealing with presents features which are objectionable, or that the circumstances surrounding it throw some discredit upon its character. It may still be a transaction of which the defenders are entitled to take any benefit which it confers, and one which the pursuers cannot now effectually challenge. This is the position which the defenders now maintain, and I proceed to notice the grounds on which they maintain it.

"*First*, It is said that the £17,000 is not 'promotion money,' in the usual sense of that term, which the defenders are bound to refund. This may be so, but it does not seem to me to be material by what name the £17,000 may be called. The defenders may be bound to account for the £17,000 although it was not in the ordinary sense promotion money.

"*Second*, The defenders plead that the pursuers are barred from insisting in the present action by reason of their actings and acquiescence. So far as I can gather from the proof, there have been no 'actings' on the part of the pursuers which would bar their present demand. As regards acquiescence, it is plain enough that the pursuers could not acquiesce in a matter of which they had no knowledge, and therefore it has to be considered, first, what knowledge they had of the agreement in question, and when they obtained it.

"There is evidence given by Mann and Beattie to the effect that the construction contract and the agreement were both submitted in draft to a meeting of the directors of the pursuers' company held on 19th August 1884, and this is corroborated by Major Boulton, one of the directors, who was present. I am of opinion that this evidence does not prove the fact. (1) The evidence of Mr Mann and Mr Beattie is open to the observation that it is the evidence of interested parties, and I say no more about it than this, that it is insufficient to satisfy me if not supported. (2) While I say nothing against the truthfulness of Major Boulton, it is plain that his recollection is not good. He admits that in another action he gave evidence recently to an effect quite different from and contradictory of that which he now gives. (3) There are other two persons who were present as directors at the meeting referred to, available as witnesses for the defenders, who were not called. (4) The minutes of that meeting made no reference whatever to the construction contract or the agreement having been produced, read, or exhibited at the meeting. On the contrary, the minutes contained an authority to certain persons (including the defenders) 'to solicit offers from persons likely to enter into suitable arrangements, both as regards *construction* and capital, *advertise for tenders*,' &c., which could scarcely have been done if the deeds I have mentioned had been before the meeting showing that the construction' had already been arranged for, and that further advertisement 'for tenders' was consequently unnecessary. (5) Mr Turnbull was present at this meeting, and if the agreement had been read and explained then he would not have made the demand which he subsequently made on Mr Mann for information regarding the amount paid as the expenses of obtaining the Act—information which Mr Mann refused to give. And (6) it is difficult to understand why Mr Mann should have refused the information sought by Mr Turnbull on the ground that it was a matter with which the directors had nothing to do, if that information had already been given, even partially, to a meeting of directors as now stated. I am of opinion, for the reasons I have given, that it is not proved (not to put it higher) that the agreement between the Cable Corporation and the defenders was submitted or brought to the knowledge of the directors of the pursuers' company at their meeting of 19th August 1884. If not brought to their knowledge then it is not proved that it was brought to their knowledge until long after it was concluded and partly implemented by the payment of £5000 in cash. Even when brought to the knowledge of the pursuers' directors it was never approved or adopted, and it is certain that the directors never had before them, and never asked, the necessary information to enable them to determine whether they should approve of the agreement or not. If the directors had approved of the transaction embodied in the agreement as one which authorised the defenders to charge the company, or take payment out of its funds of a sum of £17,000 in name of expenses for obtaining the Act, without the production of an account or a single voucher showing how that expense had been incurred, I should have held any such approval or adoption of the agreement in such circumstances as *ultra vires* of the directors, and in no way binding on the company. I do not take into account in this connection the question whether the then directors were independent of the defenders, or whether the defenders furnished the directors with their qualification. But there is enough proved to show that the directors were at least to a large extent indebted to the defenders for their qualification, and the pursuers' suggestion that the defenders' generosity to the directors was not quite disinterested does not strike me as being improbable." . . .

"The fifth plea brings me to what I think is the real point in the case. It appears to me to be established that the defenders, while occupying a fiduciary relation to the pursuers' company, entered into an agreement to their own advantage and to the detriment of the company to which effect should not be given. As I have already stated, the defenders at the date of the agreement in question were, the one the solicitor and the other the engineer of the company. Not only so, but they were, when the agreement was made, in London specially charged with watching over the interests of the company. They took advantage of their position to arrange that they should be paid out of the company's funds (the amount which the company were to pay for the construction of their

lines) a sum for their expenses in promoting and carrying the company's Act through Parliament, which included, as is now admitted, expenses not incurred with reference to that Act. So far as the advantage thus obtained by the defenders was gratuitous, they were bound to communicate it to the pursuers. I think the defenders must now account for the £17,000 which they received under that agreement in cash or securities. Whatever they can show was really due to them in connection with the passing of the company's Act of 1884 they will be entitled to retain. But I think they cannot charge against the pursuers' company any expense incurred in connection with the bill of 1883 which did not pass."

The defenders reclaimed, and argued—The shares of the pursuers' company had never been issued to the public, and when the Lord Ordinary spoke of the company, he was really speaking of the defenders, the Cable Corporation and their nominees. All these parties knew of the agreement now challenged. The Lord Ordinary had found that knowledge on the part of the company or those interested in it had not been proved, and had referred, *inter alia*, to the late Mr Turnbull's demand for information, and the fact that two of the then directors had not been called, the answer was that the *onus* lay on the pursuers to show that what was before everyone was not known. Whether or not, it was approved at the time the agreement had been adopted, when the directors requested the defenders to sue the Cable Corporation upon it. There was no objection to the promoters of a company taking a present if they did not do so secretly. If such an agreement were mentioned in the prospectus it would be quite lawful. In the same way if all the then existing shareholders knew of the agreement and consented to it, and if any shareholder who had since acquired shares had acquired them in knowledge of the agreement, the company would be barred from challenging. In the present case there was no shareholder in existence who had become an allottee without notice of this agreement. In particular, Dick, Kerr, & Company knew of it, as it was specially referred to in their agreement with the Assets Company, and must be held to have acquiesced in it. The company were therefore barred from now challenging the agreement—*British Seamless Paper Box Company*, 17 Ch. Div. 467; *Ambrose Lake Company, ex parte Taylor*, 14 Ch. Div. 390; *Henderson* v. *Huntington Copper and Sulphur Company*, January 12, 1877, 4 R. 294—*aff.* November 29, 1877, 5 R. (H. of L.) 1; *New Sombrero Company* v. *Eclanger*, 5 Ch. Div. 73, *per* Jessel M. R., 113; *Riche* v. *Ashbury Railway Carriage Company*, L.R., Eng. & Ir. App. 653; *Spackman* v. *Evans*, L.R., 3 Eng. & Ir. App. 171, see especially pp. 189-90. Where all the existing members of a company had known and consented to an agreement whereby a promoter received some benefit, the company could not challenge that agreement in the interest of transferees—*Peek* v. *Gurney*, L.R., 13 Eq. 79, and 6 Eng. & Ir. App. 377.—The defenders should therefore be assoilzied.

Argued for the pursuers—The agreement had never been ratified by the company, though it might be admitted that at the time the agreement was made all the shareholders would have consented to it, because they were nominees of the defender. The company, however, had an existence separate from the existing shareholders in the power to issue shares to subsequent shareholders, and if the interest of future allottees was prejudiced, the company would have a right to set aside the agreement as having been entered into by the defenders to their own advantage and the detriment of the company at a time when they occupied a fiduciary relation towards the company. The plea of bar could not prevail unless it were proved that all present and possible future shareholders had consented to the agreement challenged—Buckley (6th ed.), 577; *Society for the Illustration of Practical Knowledge* v. *Abbott*, 2 Beav. 559. The cases quoted by the defenders supported this argument. In the *Ambrose Lake Company's* case the ground of judgment was that no future allottees were possible. The *Seamless Box Company's* case was a very special one, and the Court proceeded on the view that all the shareholders had consented to the arrangement challenged, and that there was no intention to issue the shares to the public. Further, the company had a right to call the defenders to account in the interest of the onerous transferees of existing members, for the knowledge of individual allottees did not transmit to their transferees so as to bar the company from challenging the agreement in the interest of the latter. *Peek* v. *Gurney*, as decided in the House of Lords, was not an authority against this view. To take the present list of shareholders, Dick, Kerr, & Company had acquired as transferees, the shares originally belonging to the Cable Corporation, and were allottees of a number of shares under their contract of 1888 with the pursuers' company. Assuming it to be held that the knowledge of individual shareholders transmitted to their transferees, that only applied in Dick, Kerr, & Company's case to the shares acquired by them from the Cable Corporation, and left the company unfettered in respect of Dick, Kerr, & Company's interest as allottees. The only thing which could bar the company in respect of these shares would be proof that Dick, Kerr, & Company had assented to the agreement. It was not enough to say they knew of it, it was necessary to prove that they had confirmed it, and this the defenders had failed to do. The mere acceptance of an allotment was not a confirmation.

LORD PRESIDENT—The defenders and some other persons having conceived the project of constructing tramways upon the cable principle, which are now called the Edinburgh Northern Tramways Company, presented a bill to Parliament in the year 1883 for the purpose of incorporating

themselves, and of obtaining powers to construct the lines. They did not succeed in obtaining their bill in the year 1883, but in 1884 there was an Act passed incorporating the defenders and other persons, for the purpose of exercising the powers therein conferred and constructing these tramways. It does not appear very clearly who promoted—I mean in the way of personal engagement or employment — the bill of 1883, but undoubtedly in the year 1884 the management of the bill in its passage through Parliament was entirely in the hands of the two reclaimers, Mr Mann and Mr Beattie, and they stand therefore towards the incorporation which was created by that bill in the relation of fiduciary persons.

The object of the present action is to call Mr Mann and Mr Beattie to account for certain moneys to the amount of £17,000 which it is said came into their hands in the course of conducting that business in London, and one question which has been considered by the Lord Ordinary is, whether that £17,000 is of the nature of promotion money? His Lordship hesitates to call it by that name, but I confess I do not see any difficulty as to the name from the nature of the moneys which were received by the reclaimers. They were vested by their co-promoters with the whole management of the bill, and they received from the contractors for the work the sum of £17,000, half in cash, and the other half in shares and debentures of the company which was to be brought into existence. Now, I have no other name for that than promotion money, but whether it be called by that name or not, I quite agree with the Lord Ordinary that it is of the same illegal character as promotion money, and must be dealt with in the same way.

Having obtained the bill, and so brought the Tramways Corporation into existence, they proceeded to deal with another corporation called the Cable Corporation, who were in the habit of contracting for the construction of such works, and their agreement with them was that they should receive as the contract price of the work to be done by them the sum of £93,000. The agreement is dated 24th October 1884, and there is another agreement dated upon the following day, 25th October 1884, by which it is arranged that the reclaimers, Messrs Mann and Beattie, are to receive £17,000, the sum I have already mentioned. These two agreements, although dated respectively the 24th and 25th October, are really one transaction, and the nature of it, I think, may be very easily described. It was an arrangement by which the sum nominally payable to the Cable Tramways Corporation was £93,000, but it was stipulated that there should be deducted and paid over to the reclaimers the sum of £17,000, which is the sum now in question.

The Lord Ordinary has appointed the defenders Messrs Mann and Beattie to render an account of this £17,000 by the interlocutor which is now under review. The ground upon which his Lordship proceeds, I think, is plain enough, that this is either promotion money or something equally illegal, and therefore that there must be an accounting between the parties, and in that conclusion I entirely acquiesce. I think it is out of the question altogether to say that these parties are to receive £17,000 without accounting in any way for the manner in which the expenditure was made, and for the services for which the remainder of the sum of £17,000 was supposed to be paid.

That is the short and simple view of the case which I have taken, and which agrees substantially with the judgment of the Lord Ordinary, and I therefore move your Lordships to adhere to his interlocutor.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I am of the same opinion. I think the statement which the Lord Ordinary has given of the facts, and also the exposition of the law of the case with which your Lordship concurs was not very seriously traversed by the reclaimers' counsel, but they said that the grounds of judgment were displaced by a consideration to which they thought the Lord Ordinary had not adverted. Therefore it appears to me to be clear, entirely concurring with your Lordship, that the reclaimers in this case were in a fiduciary position towards the company—that is to say, not towards the existing members only, but towards the company itself, and all its members present or future. They were certainly in a fiduciary position in executing for the company the contract with the Cable Corporation which is now in question. One of them was the solicitor of the company, and the other was the engineer, and was also in the position of acting as managing partner of the whole adventure, but, apart altogether from that, they had undertaken to make this contract for the company, and they were therefore acting as trustees in completing it, and so became subject to the inflexible rule by which trustees are not allowed to take any benefit or advantage, however reasonable, from a contract which they are making on behalf of those with whose affairs they are entrusted. It therefore appears to me, that apart altogether from the question to which the Lord Ordinary has adverted, and whether this is properly promotion money or not, as to which I concur with your Lordship, the reclaimers have made a bargain for their own advantage which cannot stand. It was their duty to make the best bargain they possibly could for the company, and it was quite inconsistent with that duty to make any collateral bargain or any stipulation by which a part of the price to be paid by the company to the corporation was to come into their hands. I assume that they were acting in perfectly good faith in making that arrangement. I assume also that they were entitled to adequate remuneration and reimbursement for all the expenses that they had incurred, and it may very well be that the bargain made was quite a reasonable one in itself, but being made a

it was through the Cable Corporation, and as part of the transaction between the Cable Corporation and the company with whose affairs the defenders were entrusted, it must be held that any benefit which could come to them through that bargain was obtained for the company and not for themselves.

Now, the ground upon which it is said that the general rule of law is displaced in this case, as I understood the argument, was this—that the whole transaction between Messrs Beattie and Mann and the Cable Corporation had been ratified and confirmed by the company. There is no ratification of the agreement in the challenge by the company. I do not think anything can be pointed to which can be suggested as being a direct confirmation. But then there is an implied confirmation by reason of an agreement for the compromise of certain actions between Messrs Beattie and Mann on the one hand and the Cable Corporation on the other, and between the Cable Corporation and the pursuers' company. It appears to me that there was no interest involved in the actions which form the subject of that compromise except the interest of the parties whom I have mentioned. Questions between Messrs Beattie and Mann and the Cable Corporation, and questions between the Cable Corporation and the company, were raised in the actions and settled by the agreement for compromise, but the question whether the defenders could retain for themselves the full benefit of the £17,000, which they were to receive from the Cable Corporation, or whether they were bound to account for it to the Northern Tramways Company, was not raised in that action, and could not be affected by its settlement.

Then I think it was maintained on a somewhat different plea, that if the agreement in question was not confirmed by the company, it was confirmed by the existing members of the company, or at all events, that all the existing members have acted in such a way as to bar them from challenging it, and it was urged further that there is nobody now in the company who does not represent some one of those persons that were so barred, and therefore that there is no interest to be protected by the present administrators of the company of persons who are not precluded from challenging the agreement. It was maintained that this company was really in the position of a private copartnery, and that there had been no publication of any prospectus, no shares issued to the public, and everybody really interested in the matter was in the full knowledge of the transaction now in dispute and agreed to it.

I do not think that that was the position of the company. It is a corporation created by Act of Parliament for the purpose of carrying out a public undertaking. It does not consist of its present corporators, or the corporators who formed part of it at any one time, and it appears to me that the directors at the time that the transactions in question were carried through, and now, are trustees, not for the existing members, but for all the future members of the corporation also. If that be so, I confess I am unable to see how this action of individual shareholders, as distinguished from the company, can bar the company as it now exists, from challenging a transaction of this kind, and from calling the defenders to account for money which is alleged to be theirs. I think that even amongst the present shareholders there are persons who would not be affected by the supposed plea in bar, which is said to affect the directors and members of the company at the time of the compromise, or at any other period prior to the raising of this action, and I think that Messrs Dick, Kerr, & Company are in that position. I do not think it necessary to examine the whole list of shareholders, because it appears to me that Messrs Dick, Kerr, and Company, whose case was specially pressed upon us as showing that the existing members of the company could not be allowed to challenge this transaction, are in no way barred from challenging it, if they had been the only members of the company now in existence. In the first place, I think they hold shares which they did not receive through the Cable Corporation, and the ground upon which the plea in bar is taken against them, as I understand it, is that they are in exactly the same position as the Cable Corporation, and that the Cable Corporation, who had themselves made the agreement in dispute, could not be allowed now to find fault with it. But then, apart altogether from that first consideration, admitting that the Cable Corporation could not, as shareholders, after they had acquired shares in the company, challenge the agreement which they had previously made with Messrs Beattie and Mann before they acquired such shares, I see no ground for holding that the same disqualification would attach to onerous transferees. The transfer being of shares, makes them subject to all the conditions by which they might be affected in consequence of transactions that have been validly carried out by the company, but there is no principle, so far as I know, and no authority for holding that the transferee of shares takes them also subject to personal pleas in bar that may be stated against the transferor. The case of *Peck* v. *Gurney*, which was referred to as an authority for that principle, and which was decided in the House of Lords, affords no countenance to it whatever. It appears to me therefore that transferees for onerous causes obtain a statutory title, and they take their title subject, in my opinion, to those conditions only which affect the shares themselves, into whose hands soever they may fall, and not subject to any mere personal pleas in bar, by which the transferors from whom they acquired might have been affected. Nor do I say that there is anything in the special terms of the agreement between Dick, Kerr, & Company, the Assets Company, and the Cable Corporation, which could deprive the first named, as share-

holders of the Northern Tramways Company, of any right which would be competent to other transferees for value. The stipulations of the agreement to which our attention was specially called, by which Dick, Kerr, & Company acquired their shares from the Assets Company and from the Cable Corporation were, as I understood the argument, these—In the first place, a stipulation that they should accept such title as the vendors might be able to give them; and in the second place, it was pointed out that the agreement contained a special reference—I mean the agreement between Dick, Kerr, & Company, and the liquidator of the Cable Corporation, and the Assets Company—to a number of previous agreements, one of which was the agreement now in dispute. Now, it does not appear to me that there is anything in that transaction which can at all affect the right of Dick, Kerr, & Company, having become shareholders of the Northern Tramways Company, to take any objection which might be competent to other shareholders in such a transaction as that now in dispute. They obtained a perfectly good and unqualified title to the shares, and the reference to the agreement now in dispute and the other agreements would appear to me to have no other effect than this, that it would bar them from maintaining as against the vendors, who were the only other parties to their contract, that there was anything in that agreement which would entitle them to set aside the contract. If there were any plea, which I do not at this moment see, which they could have raised against the vendors upon the contract of purchase and sale with them, founded upon the existence of that agreement, if they had not known of it, they are precluded from raising such a plea against the vendors by knowing that such an agreement existed. But I do not see how such knowledge can affect their position as shareholders of the Northern Tramways Company after they have acquired their shares, and I hold that the moneys payable under that agreement by the Cable Corporation to Messrs Beattie and Mann are moneys really belonging to the company, and for which Messrs Beattie and Mann must account.

Now, these were the arguments upon which it was maintained that the grounds of the Lord Ordinary's judgment were displaced, and I am of opinion that they are not well founded, and therefore agree with your Lordship that the interlocutor should be affirmed.

The Court adhered.

Counsel for the Pursuers — Graham Murray — Salvesen. Agents — Graham, Johnston, & Fleming, W.S.

Counsel for the Defenders—H. Johnston —Ure. Agents—A. & J. V. Mann, S.S.C.

Wednesday, July 8.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

MURRAY AND HENDERSON (LIQUIDATORS OF COUSTONHOLM PAPER MILLS COMPANY, LIMITED) *v.* LAW.

Company — Vendor — Agreement to Take Payment in Fully Paid-up Shares—Liability to Pay for Shares in Cash—Liquidation—Companies Act 1867 (30 *and* 31 *Vict. cap.* 131), *sec.* 25.

An owner of paper mills agreed to sell his mills to a company to be formed for the purpose of acquiring and carrying them on, "at the price of £12,000," payable to the extent of £4500 in fully paid-up shares of the company, and the balance to be met by the company relieving the vendor of certain bonds and debts incurred by him in connection with his business. This agreement was subsequently modified, the vendor, "in respect the price of the mills, amounting to £12,000, less amount of bonds, say £3500, will amount to £8500," agreeing to accept the entire sum of £8500 in fully paid-up shares. After the company had been going some years it was ordered to be wound up, and the liquidators applied to the Court to settle a list of contributories, and entered the vendor's name as a contributory in respect of £1300 of shares standing in his name on the register which had been allotted to him as fully paid-up shares in pursuance of the company's agreement with him.

Held (*diss.* Lord Young, and *aff.* Lord Stormonth Darling) that the rights of parties were to be regulated by the later agreement; that under that agreement the vendor had no money claim against the company which could be set off against the cash due upon the shares; and that therefore he was liable to pay the liquidators the full amount of the shares standing in his name, as the agreement had not been filed with the Registrar in terms of section 25 of the Companies Act 1867.

Opinion by Lord Justice-Clerk, that under the original agreement the vendor had no money claim against the company.

Opinion by Lord Young, that the company having originally contracted to relieve the vendor of his debts to the extent of £7500, and having failed to fulfil this contract to the extent of £4000, were debtors in that sum to him, and that this was a money claim against the company which could be set off against the cash due upon the shares.

Opinion by Lord Trayner, that assuming that the vendor had under his original contract a money claim