[HEARD 18*th*—JUDGMENT 21*st June*, 1850.]

JOHN BAIN, Esq., of Morriston, *Appellant*.

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The WHITEHAVEN and FURNESS JUNCTION RAILWAY COMPANY, *Respondents*.

Process.—An objection that the minute of parties agreeing to close the Record, omitted in its specification of the Record the summons and defences in a supplementary action, was disregarded by the House.

Ibid.—An interlocutor closing the Record, written upon a separate sheet of paper, without any authentication having been made by the Judge on each step of the process, sustained as sufficient compliance with the Statute 6 Geo. IV. c. 120, sect. 10.

Ibid.—*Exceptions*.—Uuder a Bill of Exceptions, which objects to evidence upon a particular reason assigned it, is not competent to support the objection upon another reason not assigned.

Evidence.—A witness who had been a shareholder of the Company by whom he was called, but had parted with his shares before his examination, and had recorded the transfer in a temporary register, used in the period between the meetings of the Company at which the sealed register was made up, is not open to the objection of interest. *Semble*.

Ibid.—Surprise is not a ground of exception to the reception of evidence tendered at a trial, the exception being unaccompanied by any objection to the admissibility of the evidence, had there been no surprise.

Ibid.—The *lex fori*, not *loci contractus*, is that by which Courts must be governed, in determining as to the admissibility of evidence.

Statute—Railway Acts.—Those clauses in the Railway Acts in regard to the books of the Companies being evidence of partnership against the shareholders, are imperative, and not merely directory, as to the mode in which the books are to be kept.

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Statute—Railway Acts.—The numbers of a partner's shares in a Railway Company, need not each be stated in the register of shareholders where the numbers are running, but are sufficiently distinguished by stating the first and the last numbers of the series, and placing the word "to" between them.

Ibid.—Ibid.—The amount of money paid by a railway shareholder upon the shares held by him, is sufficiently stated in the register of shareholders, by placing the aggregate amount paid on all the shares held by him opposite a circumflex of these shares.

THE Respondents, a Company which was formed and is domiciled in England, brought an action against the Appellant, alleging that he was the proprietor of 565 shares of their stock, and that a variety of calls of capital upon these shares had been duly made on him, but had not been answered, and concluding for payment of the calls.

The Appellant pleaded in defence that he was not a shareholder; that the calls had not been legally made, and proper notice of them had not been given to him; that the requisites of the statutes under which the Respondents' Company was constituted had not been observed, and therefore they were not entitled to recover.

The summons and defences in this action were marked by the Clerk of Court respectively 1 and 11 of process.

Subsequently, the Respondents brought another action against the Appellant for another call, which had been made upon him after the date of raising the first action. The Appellant put in the same defences to this action as to the first. This new summons and defences were marked by the clerk respectively 14 and 17 of process.

On the 6th of February, 1849, these two actions were conjoined, and an issue was directed to try the question between the parties in the following form: "Whether the said John Bain "was, at the dates of making the calls after-mentioned, respec-

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" tively. The holder of 565 shares of the Whitehaven and " Furness Junction Railway Company, and is indebted and " resting owing to the Pursuers in the following sums, or any part thereof viz. :" then followed a specification of the calls, including that embraced by the second action.

After this issue had been adjusted, a minute agreeing to close the Record was signed by the counsel for the parties, upon a separate sheet of paper on which the interlocutors in the cause had been written, in these terms: "We, the counsel for the parties " agree to close the record on the summons and defences No. " 1 & 11 of process." Underneath this minute the usual interlocutor closing the record was written and signed by the Lord Ordinary; but no minute or writing of any kind was put upon any steps of the process to identify them as forming part of the record.

The parties then went to trial upon the issue which had been adjusted. At the trial, the Respondents called John Meyer, the Secretary of their Company, as a witness. In his examination *in initialibus*, Meyer said he was not a shareholder; he had sold in December, 1849 (the trial taking place in January, 1850); that the transfer was not yet entered in the transfer book, but it would be entered in the half-yearly register. It was recorded in the supplementary register of shareholders which was not yet sealed, but was kept in the interval between the meetings at which the completed register was sealed, and it would be copied out before the next half-yearly meeting into the register book, and duly sealed. Whereupon the counsel for the Appellant objected to the examination of Meyer, on the ground that he was a partner of the Respondents' Company, and had not legally transferred his shares to any other party; but the Judge overruled the objection, and thereupon the Appellant tendered his *first* Exception.

The Respondents, in order to prove that the Appellant was the holder of the shares stated in the issue, tendered three

books, which bore the title "Register of Proprietors," and contained each of them the following entries:—

Register No.	Name.	Residence.	Description.	No. of Shares.	Numbers. From	Numbers. To	Amount paid to Aug. 26, 1847.
320	Bain, John	of Moriston, in Glasgow	Esq.	50	1,551	1,600	3390
				25	8,470	8,494	
				5	8,765	8,769	
				15	8,770	8,784	
				7	11,974	11,980	
				5	12,031	12,035	
				8	12,046	12,053	
				10	12,064	12,073	
				20	12,299	12,318	
				50	15,319	15,368	
				20	13,484	13,503	
				100	13,374	13,473	
				250	13,514	13,763	
				565			

The Appellant objected to the reception of these books, upon four grounds, First, because they were not titled "Register "of Shareholders;" Second, because they did not distinguish each share by its number, or the total number of shares held by the Appellant; Third, because they did not show distinctly the amount of subscriptions paid on each of the shares held by him; Fourth, because his name was not entered in a proper manner to distinguish him as the holder of the shares mentioned in the issues, and the entries opposite his name were made in an informal and irregular manner. The Judge repelled these objections, and thereupon the Appellant tendered his *second* Exception.

The Respondents then, in order to prove the calls stated in the issue, tendered a variety of letters bearing the printed signature, "John Meyer, Secretary," and proposed to prove by the evidence of English Counsel, that documents of that

description did not require to be signed, and at any rate that a printed signature was sufficient. Thereupon the Appellant "objected to the evidence proposed, on the ground of surprise, "in respect that English law was not averred or mentioned "on the record. The Counsel for the Pursuer, however, did "insist that the proposed evidence was competent and admis- "sible, and the said Lord Justice Clerk did repel the objection "preferred by the Counsel for the Defender, and allowed "English Counsel to be examined as a witness." Thereupon the Appellant tendered his *third* Exception.

Of these Exceptions the first was given up at the bar of the Court below, but the second and third were fully argued, and after argument, were disallowed by the interlocutor, which was the subject of appeal.

Mr. Turner and *Mr. Anderson* for the Appellant.—The interlocutor appealed from ought to be reversed because the record was not prepared and authenticated in the manner required by the statute. The minute signed by counsel bears express reference to the first summons and defences, Nos. 1 and 11 of process, as being alone the record which they had agreed to close, but the issue embraced the call for which the second action had been brought, the record as to which were Nos. 14 and 17 of process. The 7th section of the 6th Geo. IV, c. 120, requires the parties to state whether they are willing to hold the summons and defences as containing their full and final statement of facts, and that their counsel shall sign a minute to that effect. This had not been complied with in regard to the second action, for no such statement had been made in regard to it. *Expressio unius est exclusio alterius.*

If this objection could be got over, the objection would remain that the 10th section of the same statute had been disregarded as to both of the actions, first as well as second

That section requires that "the record of the pleadings, as "adjusted, shall be authenticated by the Lord Ordinary by "his signature." This could only have been done by the Lord Ordinary signing each step of the process—without this there was nothing to identify any particular step as forming part of the record to which the interlocutor referred.

[*Lord Brougham.*—In English pleading, if a party plead a plea of not guilty, which is a nullity, and the other goes to trial without signing judgment, as for want of a plea, or demurring to the plea as informal, the verdict cures all, and he can't afterwards move in arrest of judgment.]

That is not statutory. The statute here declares that there shall be no order or judgment delivered until there is authentication. In Wilson *v.* Wemyss, 6 *Bell*, 394, the House refused to give any judgment upon the merits, because the interlocutor below had not complied with the statute in that behalf. In Dallas *v.* Fraser, 11 *Co. of Sess. Ca.* 1058, the Court held it incompetent even to dismiss a summons as irrelevant, until the record had been prepared. In Parish of Lasswade *v.* Charity Workhouse, 6 *Co. of Sess. Ca.* 637, every step of the process which formed part of the record was authenticated as such by the Lord Ordinary, and the necessity for this was fully recognized by the Court. And in Arbuthnot *v.* Thom, 26 *Mor.* 1130, the Court refused to allow the parties to cure the objection taken by the Court that the record had not been closed.

[*Lord Brougham.*—May you not waive the objection of want of jurisdiction?—Can't you give it by prorogation?]

In Forest *v.* Harvie, 4 *Bell*, 197, the proceedings were held to be void because the warrant of citation was signed by the Clerk of the Magistrates instead of the Clerk of the Justices.

[*Lord Brougham.*—There there was no jurisdiction originally by any means.]

If the record may be closed at any time, or the defect cured

by consent, there would cease to be any use in closing at all and the statute would in time be rendered nugatory.

The Respondents were heard in answer upon this preliminary objection, and afterwards it was intimated by Lord Brougham, the Peer on the Woolsack, that the House did not consider the objection of any weight, but no formal judgment was pronounced. On the following day the case proceeded on the merits.

The First Exception regards the reception of the evidence of the witness Meyer.

[*Mr. Butt* for the Respondents submitted, that as the Appellant had given up this objection in the Court below he was not entitled to be now heard upon it.]

In Burnes *v.* Pennel, 6 *Bell*, 541, it was held that the Appellant might argue an objection which had not been taken by him in the Court below.

[*Lord Brougham.*—There is a great difference between abandoning and never taking an objection.]

In Luke *v.* Mags, of Edinburgh, 8 *Will.* and *Sh.*, 241, the House allowed a question to be argued which had been raised by the pleadings, but had not been argued before the Court below.

Meyer admitted he had been a shareholder, but said he had executed a transfer of his shares. Till, however, that transfer had been entered in the books of the Company and the name of the Transferee appeared there as the shareholder, Meyer continued the shareholder as between him and the world. The 36th sect. of the Company's Clauses Consolidation Act gives a right of execution against shareholders, and a right to inspect the register for the purpose of discovering who bear that character. Any creditor, therefore, seeing Meyer's name upon the register might have sued him effectually. No doubt the 15th sect. says that shareholders shall continue liable until the transfer of their shares are delivered to the Secretary and a certificate is endorsed by him, leaving the inference that after

this is done the liability is at an end; but that is only as between the Transferer and the Transferee. As between the world and the Transferer the latter continues liable until the name of the Transferee is substituted for his upon the register Meyer continued a shareholder, and as such his evidence was not admissible.—Padon *v.* Bank of Scotland, 3 *Sh.*, 250; Margs. of Earlsferry *v.* Malcolm, 7 *S.* & *D.*, 755.

Second Exception.—The books of the Company are not at Common Law any evidence *per se* of their contents, in favour of the Respondents. They are made so by the Company's Clauses Consolidation Act, 1845, which, in its 28th sect. declares, that the "Register of Shareholders" shall be *primâ facie* evidence in "favour of the Railway Company." In order to have the benefit of this enactment the Company must have complied strictly with the terms of the statute in regard to the form and mode of keeping the register, as was decided in Birkenhead Co. *v.* Brownrig, 13 *Jur.*, 943; and in Davidson *v.* Gill, 1 *East*, 64, where an order of Justices stopping up a way was held to be invalid because its form was not precisely that given in the schedule of the statute under which the Justices derived their power. Now the 9th sect. of the Company's Clauses Consolidation Act is in these terms:—"The Company shall keep a "book, to be called the 'Register of Shareholders;' and in "such book shall be fairly and distinctly entered, from time to "time, the names of the several Corporations, and the names "and additions of the several persons entitled to shares of the "Company, together with the number of shares to which such "shareholders shall be respectively entitled, distinguishing "each share by its number, and the amount of the subscriptions "paid on such shares, and the surnames or corporate names of "the said Shareholders, shall be placed in alphabetical order; "and such book shall be authenticated," &c. This provision was disregarded in the ways which were stated on the trial. 1st. The title of the book which was tendered to prove that the

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Appellant was a shareholder was not that which the statute prescribed. The title prescribed was "Register of Shareholders," but that used was "Register of Proprietors." It may be very true that in the interpretation clause "Shareholder" is declared to mean "Proprietor:" but it is not there declared that "Proprietor" shall mean "Shareholder. It is only persons who have complied with the 8th sect. of the statute by paying the subscribed sums and having their name entered in the Register of Shareholders who are to be considered as "Shareholders," but there may be many persons who have acquired right only to scrip-certificates which they have not returned. These persons would be "Proprietors," although they would not be shareholders, under the 8th section. 2d and 3d. The Register book does not show that the Appellant was proprietor of 565 shares, describing them by their numbers in the way in which the statute prescribes, neither does it show the amount of money paid in respect of each individual share, as was obviously the direction of the statute. The object of the Legislature in making the provision was to protect the public against the shareholders and the shareholders against each other by enabling them to trace the possession of every individual share and its actual value at any given time. This is well seen by attending to the terms of the 36th clause of the Company's Clauses Act. The terms of that clause are, "If "any execution, either at law or in equity, shall have been issued "against the property or effects of the Company, and if there "cannot be found sufficient whereon to levy such execution, "then such execution may be issued against any of the share-"holders to the extent of their shares respectively in the "capital of the Company not paid up; and for the purpose "of ascertaining the names of the shareholders and the amount "of capital remaining to be paid upon their respective shares it "shall be lawful for any person entitled to any such execution "at all reasonable times, to inspect the Register of Shareholders."

Now, with a register kept in the way in which the one in question was, it would not have been possible for a creditor to obtain the information which this section intended to put within his reach.

Third Exception.—It was not competent to allow the evidence of English counsel to show that the minutes authorizing calls, and the letters making the calls, did not require to be signed. The law of the *forum* was that alone which should have been considered in regard to the nature of the evidence to be allowed. Yates *v.* Thomson, 3 *Cl. & Fin.*, 544; Don *v.* Lipman, 2 *Sh. & McL.*, 682.

[*Lord Brougham.*—Do you object more on the record than surprise?]

The exception was to the examination of the witness. The reason now assigned for the objection may not then have been present to the minds of the party's advisers, but there is no ground for saying that a bad reason having been assigned, a good one shall not be inquired into. The main objection is to the reception of the witness. The reasons for this may be various and different. Even if the reason assigned, viz., surprise, were to be now argued, the objection would still be to the admissibility of the witness, or to the result at which the Judge arrived when allowing the examination. It is not competent to except to the steps by which the Judge arrives at the result, but it is competent to except to the result itself upon any ground which can be assigned. Here the law of England was quite foreign to the matter, whereas if the question had been determined upon the law of Scotland, the objection to the evidence must have been sustained;—that was so ruled upon the trial of a case with the Great Northern Railway Company, where the same question occurred; and that ruling was consistent with the terms of the statute. By the 22nd sect. no form of call is prescribed, but by the 139th sect. it is enacted that "every summons, notice, "or other such document, requiring authentication by the

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"Company, may be signed by two Directors, or by the Trea-
"surer or the Secretary of the Company, and need not be
"under the common seal of the Company, and the same may be in
"writing or in print, or partly in writing and partly in print."

[*Lord Brougham.*—That means, that what is common to every one of the instruments mentioned may be in print, and what is particular to any one of them may be in writing?]

We submit not. What the statute looks to is authentication, but a printed signature would not give any authentication.

Mr. Butt and *Mr. McFarlane* for the Respondents.

LORD BROUGHAM.—The two points which are chiefly for consideration in this case are upon the Bill of Exceptions. The main contention between the parties resolves itself into this; the second exception, upon the ground of evidence being admitted which ought to have been rejected, and the third head of the first exception upon the want of distinct statement of the amount of subscription paid on the shares. Mr. Butt, will you refer me to the part of the Clauses Consolidation Act upon which you rely, to which the third exception applies, that the books don't show the amount of the subscriptions?

Mr. Butt.—It is in the 9th section.

Lord Brougham.—And which is the Evidence Clause?

Mr. Anderson.—The 28th Clause provides that the register is to be *primâ facie* evidence.

Lord Brougham.—The 28th Clause provides that the production of the register shall be *primâ facie* evidence of such Defendant being a Shareholder, and of the amount of his shares. I was anxious that you should be both here because my judgment goes on a very narrow point as to the construction of the Act, but it is very material.

My Lords, the first point we have to consider, is as to the reception of the evidence of an English counsel that documents

of this description do not require to be signed, and at any rate that a printed signature is sufficient "whereupon the Defender, "the present Appellant, objected to the evidence proposed on the "ground of surprise in respect that English Law was not averred "or mentioned on the Record."—The ground of surprise therefore is the only ground of his exception up to this stage. Let us see whether that ground is enlarged. "The Counsel for the "Pursuers however did insist that the proposed evidence was "competent and admissible, and the Lord Justice Clerk did repel "the objection preferred by the Counsel for the Defender and "allowed English Counsel to be examined as a witness."

Now what objection is it that the Lord Justice Clerk repelled, and his repelling which is the sole ground of this exception? It is the objection preferred by the Counsel for the Defender; What is the objection preferred by the Counsel for the Defender? The Counsel for the Defender says he shall object to the evidence proposed on the ground of surprise in respect of the English Law not having been averred on the Record.

Then that was the ground of his exception, and it is necessary by law that when a party objects, be it to the receiving of evidence, be it to the rejection of evidence, be it to the direction of a learned Judge to the Jury, whatever is the subject matter of his exception, he must state the ground of his exception, otherwise he cannot except. It is not enough for a party to say "I except to the receiving of A. B's. evidence," or "I except to "the rejection of A. B's. evidence," or "I except to the first "passage in the charge or direction of the learned Judge to the "Jury." If he objects to A. B's evidence, he must show why he objects to it, as by stating that A. B. is an incompetent witness. If he objects to the rejection of A. B's evidence, he must show why he objects to its being rejected; he must state that A. B. is a competent witness and that the rejection of him was not good in law. If he objects to the learned Judge's observations to the Jury, he must state, not merely that he objects, but he

must state on what ground he objects; that it is contrary to law to give such directions, and therefore he objects; he must show distinctly and specifically the ground of his objection. In all those cases therefore, the ground of the objection must be stated, and beyond the ground of the objection the Court is not bound to look at all. Even if an unnecessary specification of the ground of objection be made, beyond that specific ground the Court is not to look. The only question for it is the objection on the stated ground.

Now, my Lords, the ground of the objection to the evidence proposed was surprise and surprise only; not that the evidence was inadmissible (*per se*) but that it was inadmissible because it had not been notified properly on the record. It was surprise and surprise only. The Court held that surprise was no sufficient ground of objection, overruled the objection, and therefore repelled the exception.

But, say the learned counsel for the Appellant, the counsel for the Pursuer did insist that the proposed evidence was competent and admissible. No doubt he said it was competent and admissible. But this was only a reiteration of his tendering the evidence. "And the said Justice Clerk repelled the objec-" tion preferred by the counsel." What objection? Not a general objection to the evidence as inadmissible, but an objection, that though admissible, he had had no notice upon the record; that is, he was taken by surprise. Consequently, that which the Lord Justice Clerk did, was, not to repel an objection to the evidence as inadmissible generally, but to repel an objection to the evidence, whether admissible or not, as taking them by surprise. On this ground, therefore, I am perfectly clear that they are shut out from their objection, because the only ground taken was surprise, and surprise is no ground; indeed, it has hardly been taken now.

The English counsel was then allowed to be examined; whereupon the counsel takes the third exception, but it really is

the second. "The counsel for the Defender did then and "there, on his behalf, object to the aforesaid opinion of the "Lord Justice Clerk, and did tender his exception accordingly." Not the opinion allowing English counsel to be examined; but the opinion of the Lord Justice Clerk, that surprise was no ground, for that (taking the whole together) is his Lordship's opinion, that surprise was no ground; and therefore the evidence was inadmissible.

Now, I have considered the only case which was given to me to consider on this point; and I am of opinion that it does not apply, for the reason I threw out to the Bar. I very much regret that this clumsy mode of proceeding has been adopted in the Court below. There has been a slip on the part of the learned counsel for the Appellant in the Court below; they ought to have taken their objection, not on the ground of surprise, but on the irrefragable ground, that the testimony was no evidence, and not anything like evidence. And I am sorry that we cannot go into that here. I am sorry that your Lordships have not the opportunity of setting the Court below right on a most important point. For it is not merely on this case that the point bears, but it is a point of general importance. The Court of Session has gone against all the principles of the law in this country on the subject—the principles of the law of evidence—which, unless in certain excepted cases, they generally profess to go by. They have gone directly against those two important cases—Scottish cases decided here on appeal—Donne *v.* Lipman, and Yates *v.* Thompson; the latter, indeed, turning on facts closely resembling those in this case.

The case of Donne *v.* Lipman was on the Statute of Limitations; Yates *v.* Thompson was on all fours with this case; and it is perfectly evident that these cases are the law of the land on the subject, and only follow the law which had been clearly laid down in the Court of Queen's Bench, and particularly in the Court of Common Pleas in well-known cases, one

especially which draws the distinction between the *lex loci contractus* and the *lex fori*, and lays it down that the *lex loci contractus* is to be the governing rule in all contracts between parties, and in all transactions regarding personal property, and not affecting real property; and that the *lex fori* is to govern trials respecting real property. For instance, in the case of a foreigner domiciled abroad making a will disposing, or assuming to dispose of real estate in this country, the will must be made according to the real property law of this country; and the law of the country where he is domiciled is totally inapplicable to the case. On the other hand, in a personal matter, the *lex loci contractus* rules entirely the disposal of that property, not only in the country where the contract is made or sought to be executed, or damage sought to be recovered for its non-execution, but also in the courts of this country. These courts are bound by the foreign law, which must to them be matter of fact. But it is a totally different thing as to the law of evidence. The law of evidence is the *lex fori* to govern the courts. Whether a witness is competent or not; whether a certain matter requires to be proved by writing, or not; that is to be determined by the law of the country where the question arises, and the court sits to try it; that is, therefore, termed the *lex fori*.

The only point in Donne *v.* Lipman that required to be settled, was, whether the Statute of Limitations (or, as it is called in Scotland, Prescription), is *lex fori* or not. One party contended that it was part of the *lex loci contractus*, admitting that if it was *lex fori*, their case was gone. But we held that the Statute of Limitations or Prescription was parcel of the *lex fori*. I held it to be quite clear, and your Lordships determined the case on the ground that it was parcel of the *lex fori*.

In Yates *v.* Thompson there was no doubt entertained upon the subject, and the rule was clearly laid down.

Now, quite contrary to this rule, the Court of Session has proceeded here against all principle and all authority. The objection on the ground of surprise was rightly overruled. But the evidence was wholly inadmissible, and should have been rejected at the trial, whether objected to or not.

I trust, therefore, that while it is known that we affirm the judgment on this point, it will also be understood upon what ground we affirm, namely, because this objection was not taken below, for if it had been taken it must have prevailed. The learned Judge who tried the case should not have allowed such evidence. The Court, on the Bill of Exceptions, was of course confined to the question of surprise, raised, and alone raised, on the record. Though some of their Lordships, by a manifest oversight, consider the question of admissibility generally to be before them, which it was not, and gave an erroneous opinion on it, deeming the evidence admissible.

But now see the consequence of not taking the objection, and see how impossible it is for us to overleap the bounds by which I have now stated we are limited. Were we to take this objection now, it would be said, "If this objection had been "taken below, instead of the party confining himself to surprise "as the ground of objection, *non constat* that the Court would "have allowed the evidence, and then there would have been "no ground of exception; or *non constat* that the Respondents "would not have withdrawn the witness, and there would have "been no ground of objection; or *non constat* that they would "not have put up another witness, and proved their point "*aliunde* in an unexceptionable way."

That leads me to the conclusion, which I advise your Lordships to adopt, namely, to overrule the exception and support the decision below, on the ground, not that the exception could not have been taken, but, on the contrary, that it has been wrongly taken, or taken upon a wrong point, when, had it been taken on the right point, it was invincible.

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Then we come to the only point which seemed to me to require much consideration. I do not think, upon the whole, it can be contended that the books omitting to distinguish each share by its number is a sufficient objection.

You are not to give a construction to this part of the statute that would make it so absurd as to require, that if a man has a thousand shares, there must be a thousand lines stating his shares. If every one of his shares stands in the same predicament, there is a substantial compliance with the statute.

At the same time one part of the exception says, "Because "the books do not distinguish each share by its name (that I "have dealt with), or the total number of shares held by the "Defender." I apprehend, Mr. Anderson, they do state the total number of shares held by the defender?

Mr. Anderson.—You must go through an arithmetical operation to arrive at it.

Lord Brougham.—But you can do it with a very little arithmetic. But what did really operate with me was the third ground of exception—"Because the books do not show dis-"tinctly the amount of subscriptions paid on the shares held by "the Defender." Now if I had certainly found that this was not distinctly set forth, my opinion would have been in favour of the Appellant; because it is most important that everything should be done which the statute (8th and 9th Vict., chap. 16) requires to be done; and for this reason. A great privilege is bestowed by the Act upon the Company, neither more nor less than the privilege of making evidence for themselves. They are allowed to make their own books evidence, which, unless it is rebutted by counter-evidence, shall give them the verdict in each case. That is a very great privilege, as must be admitted on all hands. By the rules of evidence, and the rules of common sense and justice, what a man writes is always evidence against him, but no evidence for him. But here is a case in which what he writes is made evidence for him, and against his adversary. So

that by writing in my books, "A. B. holds a certain number of "shares," I go into Court and make A. B. answerable for those shares, and produce my own entry in my own book as evidence against him, and for me. That is a great privilege. Therefore I think the directions of the statute must be most strictly complied with whenever Companies are in possession of that extraordinary privilege; and I hold that it is much safer to consider each of those directions or conditions precedent as imperative, not directory, on account of the great importance of the privilege, and on account of its being an exception to all ordinary rules. Therefore, if I had found that there was not a distinct compliance with the requisition of the other section (sect. 16), I should not have considered that sect. 28 availed to the applicant in making his books evidence for him and against his adversary.

Let us, then, look at the terms of the 9th section: "The "Company shall keep a book, to be called the Register of "Shareholders." Now I do not see any force in the objection that it was called a Register of Proprietors, because it seems quite a sufficient compliance with the terms of the section; and Mr. Butt, I think, will agree in waiving that objection, and confining himself to the others: "And in such book shall be fairly "and distinctly entered from time to time the names of the "several corporations, and the names and additions of the "several persons entitled to shares in the Company, together "with the number of shares to which such shareholders shall be "respectively entitled, distinguishing each share by its number." My opinion goes upon a very narrow ground, and you will presently see it is upon a single letter, "distinguishing each share "by its number, and the amount of the subscriptions paid on "such shares," in the plural, "and the surnames or corporate "names of the said shareholders."

Now I freely confess, so disposed am I to look at the strict execution of this direction as a condition precedent to the enjoy-

ment of the extraordinary privilege conferred by sect. 28 of making a man's own writing evidence against another party and for himself, that if, instead of being "shares," in the plural, it had heen "share," in the singular, I should have advised your Lordships to give judgment in favour of the Appellant; for then it would have been, "And distinguishing each share by its "number, and the amount of the subscriptions paid on such "*share*, and the surname," and so on. But it is not so. It is "the amount of the subscriptions paid on such *shares*"—that is to say, you must have the number of shares. That carries you back from the last antecedent in the singular, "distinguishing "each *share*," to the previous antecedent which is the number of shares which such shareholder holds, distinguishing each share by its number. Now I think each share is sufficiently distinguished by its number to give almost a formal, certainly a most substantial, compliance with the direction. When you put "No. 1,551 to No. 1,600," which is fifty shares in succession held by Mr. Bain, each share is distinguished by its number, because anybody reading that must know that 1,551 is the first, 1,552 is the second, and 1,600 is the last of that parcel; and then come the other parcels, each of which he appears to have held by a different title.

Then comes 3,600*l.*, which at first I was disposed to consider in favour of the Appellant's contention, because it gives a lumping sum together, and does not distinguish what is applicable to each share. But I do not think that can be taken advantage of, especially in the Court of last resort. I am not at all sure that if this case had been decided the other way I should have recommended your Lordships to have reversed the decision. But I do not think there is sufficient ground to recommend your Lordships to reverse as it now stands: it is one of those cases in which the point is so narrow. But it is very well for the party who has possession of the judgment. It is a case in which, if it had been the other way, we should not have interfered to

reverse it. Therefore I shall move, your Lordships, that this appeal be dismissed, and I shall consider the question of costs.

Have you anything to suggest, Mr. Butt, on the question of costs?

Mr. Butt.—If I might take the liberty of suggesting, my Lord, I was going to suggest very respectfully to your Lordships that there is on the merits here no real defence.

Lord Brougham.—I am quite aware of that. I stated so at the hearing. You are quite right. Mr. Anderson, you have not a leg to stand upon as regards merits.

Mr. Anderson.—We cannot get into the merits, my Lord.

Lord Brougham.—You never could have got into them with any advantage to yourself.

Mr. Butt.—They went to the jury on the point.

Mr. Anderson.—You proved your case against us. There is a little difference in the second appeal, my Lord; your Lordships will remember that the second appeal brings up a final judgment decerning against the Defender for the amount.

Lord Brougham.—It does not raise the other point, it makes no difference.

Mr. Anderson.—Your Lordships will remember that there was a motion for a new trial; the Counsel for my party wished that motion to stand over till your Lordships' judgment on the Bill of Exceptions should be given. That point of the admissibility of evidence would have been available on the motion for the new trial.

Lord Brougham.—Suppose we had given the judgment before, how could you have taken advantage of it?

Mr. Butt.—They would not go on with their motion, my Lord.

Lord Brougham.—I know that.

Mr. Anderson.—But I think it was quite reasonable that the motion for a new trial should not go on until your Lordships

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had disposed of the Bill of Exceptions, which we were aware is privileged by statute to be heard in four days after the cases are ready. The invariable practice hitherto has been where there has been a motion for a new trial and a Bill of Exceptions, to delay the motion until the Bill is decided.

Mr. Butt.—I am instructed, my Lord, differently.

Mr. Anderson.—We have the Record here. At page 61 your Lordship sees what took place. There is a motion that the Court should not take up the motion for the new trial, until this case was disposed of.

Lord Brougham.—Does your proposition go to affect the judgment on the appeal?

Mr. Anderson.—My proposition was, that the judgment should be recalled, and the Court below should be directed to dispose of the motion for the new trial.

Lord Brougham.—There is no ground for that, there have been proceedings enough; the case was not one of a conscientious defence at all.

Interlocutor affirmed with costs.

DODDS and GREIG—R. and W. G. ROY.