1852.
19th and 20th April, and 17th May.

INGLIS, ... APPELLANT.
GREAT NORTHERN RAILWAY COMPANY, RESPONDENTS. (*a*)

Under the 6 Geo. IV. c. 120, s. 34, the Court, when ordering a new trial, has power to direct an issue, better calculated than the former one, to meet the justice of the case.

Notwithstanding the forfeiture and cancellation of shares, and the issuing of new ones, the right to recover, in an action for calls, held to remain unimpaired in the Company.

By the Companies' Clauses Consolidation Act, the book containing the register of shareholders is required to be authenticated by the seal of the Company; but this "book" may consist of a series of volumes, in which case it will be sufficient if the seal be affixed to the last; provided there be a reference to the preceding ones, so as to identify and connect them together.

Where a meeting of the Company's Finance Committee was adjourned, held sufficient that the minutes of the adjourned meeting were signed.

THE circumstances of this case, and the principles which governed its determination, are fully explained by the Lord Chancellor in moving for judgment.

Mr. *Bethell* and Mr. *Anderson* were heard for the Appellants; and the *Solicitor-General* (Sir *F. Kelly*) and Mr. *Phipson* for the Respondents.

The LORD CHANCELLOR (*b*):

My Lords, the action which has led to this appeal was brought by the Great Northern Railway Company against Mr. Inglis, as the holder of a few shares, for two calls, amounting together to 34*l*.

The right to bring the action in Scotland arises under the Act establishing this Company; and although we have heard some argument upon the particular wording of the clause, I think it gives all the remedies provided by the Companies' Clauses Consolidation (Scotland) Act, 1845.

Mr. Inglis, after having put in defences which were overruled, went, under the order of the First Division of the Court of Session, to trial upon an issue "whether he is the holder of the eight shares in the Company, and as such is indebted" to them for the calls in question. And upon the trial of that issue, the jury

(*a*) Lord St. Leonards.

(*b*) Reported in the Court of Session Reports, Second or New Series, vol. xiii. p. 1315.

found for Mr. Inglis. But upon a bill of exceptions a new trial was granted. The Company then applied to have the issue altered on the ground that they had, subsequently to bringing the action, declared the shares forfeited, and further that the Directors had cancelled them.

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Mr. Inglis then alleged that the shares having been cancelled, and new shares issued, the Company had made a profit upon the transaction; and that, in point of law, he was not liable, because the shares no longer existed. He also contended that the Company having, by the issue of new shares, realised more than the whole nominal amount of the capital stock, including the calls sued for, they could not recover in the action; and that, at any rate, he was to be allowed credit for the sums received by them.

The Lords of the First Division allowed the issue to be amended.

Mr. Inglis then moved for the production of certain books and documents of the Company. But the Lords made an order, refusing the diligence prayed for, without prejudice to any demand Mr. Inglis might make for the recovery of the documents referred to at a later stage of the proceedings.

My Lords, the issue, as altered, was "whether the Defender was, *at the date of making the calls*, the holder of eight shares in the Company, and, as such, indebted to the Pursuers" in the sums claimed; and upon the trial of this second issue the jury found for the Company. Whereupon Mr. Inglis took exception to the rulings of the Judge at the trial, and the exceptions having been argued before the First Division, they were disallowed.

The appeal now before the House is by Mr. Inglis against the interlocutor which allowed the issue to be altered, and against that which refused the diligence

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prayed for in regard to documents; and it is also against the final judgment of the Court below disallowing the bill of exceptions.

Now, my Lords, the first objection made before your Lordships was, that the Court below had no power to alter the issue. This depended upon the 6 Geo. IV. c. 120, s. 34, which gives power to the Court to direct a proper issue, or to alter it as framed; and which provides that if either party objects to the issue as sealed by the Court, he may, within ten days, apply to the Court, and the Court may make such order as the justice of the case may require; and which order shall be final.

Under this statute it is insisted that the Court had no power to alter the first issue. Several decisions on this legislative provision were cited at the bar, but they do not apply to the case before the House. And it was at last admitted by the counsel for the Appellant that the point had never been decided.

My Lords, the finality mentioned in section 34 refers to the issue as settled; but that section contains no terms of restriction or exclusion to prevent the Court, when ordering a new trial, from directing an issue better calculated to meet the justice of the case than the first proved to be,—and I am of opinion that the Court possesses that power, and therefore that this objection cannot be sustained.

It would not have been necessary to alter the first issue, if the shares had not been cancelled subsequently to the commencement of the action. But these statutes have received a liberal construction (*a*). And it is quite settled that the word "is" means "is at the time of calls made" (*b*). The words of the Act are

(*a*) *East Lancashire Railway Company* v. *Croxton*, 5 Exch. Rep. 287.

(*b*) *Belfast &c. Railway Company* v. *Strange*, 1 Exch. Rep. 739.

cumulative (*a*). And indeed it is not disputed by the Appellant that if the shares in question had been merely declared to be forfeited, the right of action would have remained.

But it was insisted that the cancellation superinduced upon the forfeiture, and the issue of new shares, dissolved the contract and destroyed the right of action. The power to cancel the shares was given to this Company by the 12 & 13 Vict. c. 84 (*b*), which enacted that where the market-price of shares, which might be forfeited for nonpayment of calls, should be such as to render it impossible for the Company to sell the same so as to realise a sum equal to the arrears of calls due, it should be lawful for the Company to cancel the same shares, and to issue so many new shares, and of such nominal amount, as they might think fit, provided that the capital to be represented by such new shares should not, in the whole, exceed the capital represented by the unpaid portion of the shares.

After a declaration of forfeiture, the Directors ultimately, in September, 1850, cancelled the shares in question, and this was long after the institution of the action.

Now, unless some solid distinction can be shown, as regards the interest of the shareholders, between forfeiture and cancellation, it appears to me, my Lords, that the same rule must prevail as to both.

The provisions of the Companies' Clauses Consolidation Act, which apply to this case, enable the Company to enforce the payment of calls by action or suit, and give power to the Company to forfeit shares for nonpayment of calls, whether the Company have sued for the amount of such calls or not. And it has been

(*a*) *Great Northern Railway Company* v. *Kennedy*, 4 Exch. Rep. 417.

(*b*) Section 25, local and personal Acts of 1849.

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decided that this right to declare shares forfeited is not an alternative remedy. Much argument was raised upon the right to issue new shares, so as to make up the amount of capital in the Company; but it does not appear to me that this is an objection which it is competent to the Appellant to make.

The Companies' Clauses Consolidation Act provides in every way for the real interests of the shareholder, even after forfeiture. And in the *Great Northern Railway Company* v. *Kennedy* (*a*), Mr. Baron *Parke* and Mr. Baron *Alderson* were both of opinion that, if the forfeited shares were converted into other shares, the shareholder, against whom an action for calls had been brought, would be entitled to the benefit, in satisfaction *pro tanto;* so that on applying to the Court to stay proceedings, on payment of the portion of debt and costs beyond the value of the new shares, the Court would stay the proceedings accordingly. If, therefore, the forfeiture of shares, and the conversion of them into other shares, where there is no direct power to cancel the original shares and issue new ones, would give to the original shareholder any benefit to which he might be entitled after payment of the calls and costs, it cannot vary the case that a direct power is given to the Company to cancel shares and issue new ones; for the right of the shareholder to the benefit of the new shares would be precisely the same as in the first case.

The power to cancel only arises where, after forfeiture, the arrears of calls cannot be raised by a sale, and therefore the right of action to recover the deficiency remains in the Company.

This view of the case answers the objection, which was strongly urged at your Lordships' bar, that the alteration of the first issue had excluded the Appellant from showing that a change of interest had taken

(*a*) 4 Exch. Rep. 417.

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place; because that circumstance could not go in bar of the action;—Mr. Inglis would be entitled to any benefit to be derived from such change; and the interlocutors have reserved to him the means of enforcing his rights.

At the trial of the second issue, the counsel for Mr. Inglis tendered evidence to prove the cancellation of the stock, and the issue of new shares, &c., but that evidence was rejected by the learned Judge who presided; and his rejection of that evidence formed part of the Bill of Exceptions—it constituted the 3rd, 4th, and 5th exceptions. Now, Lord *Fullerton*, in delivering his opinion upon the hearing of the Bill of Exceptions, observed that "the 3rd, 4th, and 5th exceptions were not insisted in, as the cancellation of the shares, if it has had any effect, may receive that effect in the accounting on that head; of which the Pursuers admitted the competency, notwithstanding the verdict" (*a*). This, my Lords, appears to me to be conclusive.

The Appellant's remaining objections were technical. —The first was to the reception in evidence of the register of shareholders. The law enables Companies to produce their registers as evidence; but provides that the book shall be authenticated by the common seal of the Company affixed thereto. In the present case, the register consisted of sundry volumes, and the last only had the common seal of the Company attached to it. There were several very bulky volumes. They followed each other consecutively and alphabetically, and manifestly formed parts of the same series; the last volume containing not only a completion of the register, but (which was not required by the Act of Parliament), at the end of it and before the seal, a recapitulation of the contents of the preceding volumes. They were laid upon the table of this

(*a*) Second or New Series, vol. xiii. p. 1324.

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House, and every volume was bulky and ponderous. The Appellant's contention was, that, instead of being enclosed in several bindings for the sake of convenience, they ought to have been bound up together in one great volume, which would have rendered it impossible to make use of them in the course of business.

It would be contrary to the real meaning and spirit of the Act to put this restricted construction upon it. These volumes did together constitute a book containing a register of the shareholders, to which the common seal of the Company was properly affixed. And, therefore, my Lords, I hold that this objection is clearly groundless.

The next exception to the ruling of the Judge was, that the evidence of the appointment of the Finance Committee, necessary to prove the call, was not admissible; because a minute of a Board of the 18th of August, 1846, at which the Finance Committee was appointed, had not been signed. Now this Board had been adjourned to the 19th of the same month, and the minute of the adjourned meeting *was* duly signed. The secretary to the Company swore that it was "one continuous meeting and minute;" and that the minute of the next meeting, on the 1st of September, began thus: "The minutes of the last meeting, held 18th of August, read and confirmed;" thereby treating the 18th and 19th as *one;* and this is confirmed by the books. On the 27th of September, at a meeting, the minute of which was regularly signed by the chairman, the committees were reappointed; and all these proceedings took place before the first call.

But independently of the evidence furnished by the books of the Company, the fact of the due appointment of the Finance Committee was proved by a witness whose testimony was unobjectionable; for the Act

does not make the books the *only* evidence of the proceedings (*a*).

The result is that all the objections urged by the Appellant's counsel at your Lordships' bar have failed; and therefore I beg to move that the appeal be dismissed with costs.

Interlocutors affirmed, with Costs.

(*a*) See *Miles* v. *Bough*, 3 Queen's Bench Reports, p. 845.

LAW, HOLMES, ANTON, & TURNBULL.—BAXTER, ROSE, & NORTON.