paying money may desire it to be appropriated towards the discharge of any portion of his obligation; and the person who accepts it, must accept it in that way. If there be no specific appropriation, the question would arise, as to how it should be applied; and the question arises here as to the right of Cullen to appropriate it as he has done. (His Lordship then referred to the correspondence and continued)—I am clearly of opinion, and I submit that opinion to your Lordships for your consideration, that the true construction of this correspondence, and of the whole transaction, admits of no doubt whatever, that the £150 is a sum which is to be carried to the account of the particular transactions to which I have called the attention of your Lordships.

As far as regards that question, therefore, in my opinion, the judgment of the Court below ought to be reversed; and it should be declared by your Lordships, that the £150 must be deemed to have been paid by Kerr on account of the debt of Mitchell in the case of *Mitchell* v. *Ranson*, and that credit must be taken for that as a specific payment.

Then, my Lords, we come to the other point, which, if possible, would appear to be still more clear than the one to which I have called your Lordships' attention. The Lord Ordinary was of opinion in favour of the appellant. The Lords of the Second Division overruled his decision; but nothing can be more clear or plain to my mind, than that the Lord Ordinary was right in the view he took of the case. The question simply is, whether, upon the two letters which passed between these parties, Cullen did agree to take £120 for a debt of £152 and upwards; and if he did so, whether the terms upon which he offered to do that were sufficiently accepted and acted upon to make that offer binding upon him, so that he could no longer depart from it. Upon that question there was a difference of opinion in the Court below, the Lord Ordinary being of opinion in favour of the appellant, and the Lords of the Second Division overruling that interlocutor, and deciding in favour of the respondent. (His Lordship then referred to the correspondence and continued)—Cullen says to Mitchell in the most clear and explicit terms—"It is a hard case upon you—you have sustained a great loss, and have incurred great expense: I will take £120 instead of £152 2*s.* 3*d.*; if you will send me £100 the remaining £20 may stand over." Then, having said that, he afterwards comes and says—"You have not paid me the £20, and therefore I claim to charge you the whole £152 which I claimed in the first instance." It seems to me that that is a most unrighteous demand, and wholly without foundation.

To the argument upon the *nudum pactum*, I need not refer, because no point can possibly arise upon it; consequently, this part of the interlocutor of the Lords of the Second Division, your Lordships, if you agree with me, will think ought to be reversed. I think it should be declared that the account of Mitchell was an account for the sum of £120, and that the £100 which was paid must be considered as having been paid in discharge of £100, part of that £120. Those two declarations I should propose to your Lordships. I propose that your Lordships should reverse the interlocutor complained of, adding those two declarations, and remitting the case to the Court below to do what is just.

Interlocutors reversed, with declarations and remit.

Second Division—Lord Robertson, *Ordinary*.—Thomas Deans, *Appellant's Solicitor*.—Surr and Gribble, *Respondent's Solicitors*.

MAY 17, 1852.

HENRY INGLIS, W.S., *Appellant*, *v.* THE GREAT NORTHERN RAILWAY CO., *Respondents.*

Railway—Register of Shareholders—Appointment of Committee—Proof—Jury Cause—Issues—Statutes 8 and 9 Vict. c. 16; 6 Geo. IV. c. 120; 12 and 13 Vict. c. 84—Act of Sederunt 15th February 1841—1. *An issue in an action for payment of railway calls, went to trial, and resulted in a verdict for the defender. On a bill of exceptions, a new trial was granted; but before the trial, an alteration was made in the issue with the approval of the Court in order to give effect to certain powers conferred by* § 84 *of the railway act, of which the company had availed themselves subsequent to the granting of the new trial.*

HELD *that, in the circumstances, the alteration in the issue was proper, as meeting the justice of the case.*

2. *In the course of the new trial, the register of shareholders, consisting of several volumes, was produced in evidence. The last volume only was sealed, but not the volume containing the defender's name—the expression "calls" was also used to denote payments made on shares, in place of the expression "subscriptions," as used in the statute.*

HELD (affirming judgment) *that these objections were untenable, as all the volumes formed one.*

3. *In order to prove the appointment of a finance committee, the company produced a minute of a meeting of the directors, dated* 18*th August, which bore that a finance committee was appointed, and concluded with a resolution of adjournment to the next day; as also a minute, dated* 19*th August, which commenced with the words, "At the meeting adjourned from yesterday," and was signed by the chairman. It being objected that there was no proof, under the Companies Clauses Act, of the appointment, in respect the minute of* 18*th August was not signed.*

HELD, *in the circumstances* (affirming judgment), *that there was sufficient proof by a witness of the appointment of the finance committee.*[1]

The respondents brought an action against the appellant for payment of calls, as a holder of eight shares of the company. It was defended on the ground, *inter alia*, that the appellant was not truly a shareholder; and further, of an allegation that the company had entered into a private arrangement for relieving several of the shareholders from payment of calls, while the necessary calls were to be levied only from others. This, it was maintained, had the effect of relieving the appellant, as being an arrangement *ultra vires* and illegal. An issue was sent to trial on 29th Dec. 1849, as to whether the defender was holder of shares and was indebted to the Company. The result of the trial was a verdict in the appellant's favour. On a bill of exceptions for the respondents, the First Division of the Court (9th July 1850) sustained the fifth exception and granted a new trial.

The respondents resolved to avail themselves of the power of cancellation, and issuing of new shares. At a meeting of the Directors held subsequent to the granting of the new trial, viz. on 27th August 1850, they resolved, in terms of § 29 of the Companies Clauses Consolidation Act, that certain shares, including those of the appellant, "be declared forfeited." At the half-yearly general meeting of the company, held on 29th August 1850, it was resolved that the forfeiture of the said shares "be and hereby is confirmed." The shares of the appellant were thus cancelled, and, in room of them, new shares with certain privileges, not possessed by the cancelled shares, were issued to other parties. For the market value of the shares thus cancelled, the respondents offered to give credit to the appellant. The company afterwards applied to have the issue altered into this, "whether the defender was the holder of shares," &c., and this was allowed. The trial took place before Lord Robertson on 24th March 1851, and it resulted in a verdict for the respondents. A bill of exceptions was tendered by the appellant against the ruling of the presiding Judge, regarding the competency and sufficiency of evidence produced by the respondents at the trial, forming the subject of the 1st, 2d, and 6th exceptions of the bill—and also as to the disallowance of inquiries into which the appellant proposed to go, relative to the cancellation of the shares and their value, being the subject of the 3d, 4th, and 5th exceptions. No discussion took place on these last points under the bill of exceptions, as that was matter arising upon the application of the verdict,—the only inquiry being, whether the appellant was a shareholder when the calls were made, and whether such calls were made as directed by the act.

The Court, on 9th July 1851, disallowed the bill of exceptions for the appellant.

The present appeal was taken against the interlocutors of 17th and 25th January, and 9th July 1851, and it was maintained in the appellant's *printed case*, that they ought to be reversed for the following reasons:—1. The motion made by the respondents for leave to alter the issue settled by the Court for the trial of the cause, was incompetent, as it had been already submitted to a jury, and because the sole reason assigned for proposing such alteration, consisted in a change of circumstances which was produced by the voluntary acts of the respondents—6 Geo. IV. c. 120, § 34; Act of Sederunt, 15th Feb. 1841; *Cochrane* v. *Wallace*, 2 Mur. 294; *Skene* v. *Maberlys*, 3 Mur. 360; *Cooper* v. *Mackintosh*, 3 Mur. 358. 2. After the respondents had averred upon record that they had forfeited and cancelled the shares which are said to have belonged to the appellant, the Court, instead of pronouncing the interlocutor of 17th January, 1851, whereby they allowed the issue to be altered, ought to have given effect to the appellant's pleas, and either dismissed the action, or assoilzied him from its conclusions, in respect,—(*1st*,) That by the forfeiture and cancellation of the shares, the respondents discharged the appellant of all claim which they might have had against him as holder; and, (*2d*,) That as the shares had been extinguished by the respondents' own acts, the form of the action, and the averments on which the parties had closed the record and gone to issue, were inapplicable to the existing state of matters, and did not admit of the rights of parties being properly extricated.—8 Vict. c. 16, § 25; 12 and 13 Vict. c. 84; *Great Northern Railway Company* v. *Kennedy*, 4 Exch. Rep. 418. 3. At any rate, the appellant was entitled to call the respondents to account in this action, and to be allowed credit for all sums received by them in respect of the shares in question, or in respect of the new shares created and issued in lieu thereof after these shares were cancelled; or at least

[1] See previous reports 13 D. 497, 1315; 21 Sc. Jur. 500; 22 Sc. Jur. 548; 23 Sc. Jur. 207, 615. S. C. 1 Macq. Ap. 112: 24 Sc. Jur. 434.

the appellant ought to have been allowed credit for the amount of the market value of the shares at the date of cancellation. And the interlocutor of 25th January 1851, refusing the diligence craved by the appellant, to recover evidence of his averments as to the amount of the sums received by the respondents in respect of the shares in question, or of the new shares issued in place thereof, was erroneous and contrary to law; and the third, fourth, and fifth exceptions taken to the ruling of the Judge who presided at the trial, in so far as he refused to permit a similar line of inquiry, were erroneously disallowed by the judgment of the Court of 9th July 1851, and ought now to be sustained.—*Great Northern R. Co.* v. *Kennedy*, *supra*; *Lindsay* v. *Great Northern R. Co.*, 13 D. 457. 4. The volumes tendered in evidence by the respondents at the trial, as the "Register of Shareholders," ought not to have been received,—the alleged register not being in conformity with the provisions of the 9th section of the Companies Clauses Consolidation Act,—in respect that, (1*st*,) The seal of the company was only attached to the recapitulation in one of the volumes, called the supplemental volume, and not to any other volume, and especially, not to the volume in which the appellant's name appeared; and, (2*dly*,) The register did not contain the particulars required by the statute, in so far as, though calls are entered as paid, there was no entry of the amount of subscriptions paid; and, accordingly, the exception taken by the appellant (being his first exception) to the admissibility of the register in evidence, ought to have been sustained.—*Per* Lord Brougham in *Bain* v. *Whitehaven and Furness Junction R. Co.*, 7 Bell's App. 89; *Birkenhead R. Co.* v. *Brownrigg and Taylor*, 4 Exch. 426. 5. The unsigned minute, purporting that a finance committee had been appointed by the directors of the Great Northern Railway Company (the respondents), was inadmissible in evidence; and there was no competent evidence that such committee had been appointed, or that the calls sued for had been made; and the exceptions (viz. the 2d and 3d exceptions) taken by the appellant to the ruling of the Judge who presided at the trial, were erroneously disallowed by the Court below, and ought now to be sustained.—*Whitehaven and Furness Railway* v. *Macfadyen*, 11 D. 846; *Bain* v. *Whitehaven and Furness Railway*, *supra*; Tait on Evidence, p. 52; Bell's Prin. § 2222; *Hamilton* v. *Hope*, 4 Mur. 239; *King* v. *Magistrates of Elgin*, Morr. 12,537.

The respondents in their *printed case* supported the judgment on the following grounds:—1. Because the alteration allowed by the Court upon the issue was competent and necessary to meet the altered circumstances of the case—8 Vict. c. 17, § 30; Companies Clauses Act, 8 Vict. c. 17, § 28. 2. Because the register of shareholders tendered by the company, was rightly received in evidence at the trial, being sufficiently authenticated, as proved in England, and in conformity with the requisites of the statute. 3. Because, with reference to the matters embraced by the second and sixth exceptions, the evidence of the calls in dispute having been duly made was competent and sufficient—1*st*, Because it was not necessary for the respondents to prove the appointment of the finance committee who made the calls: 2*d*, Because, supposing that to be necessary, the appointment of the committee was sufficiently proved.

Bethell Q.C., and *Anderson* Q.C., for appellant.—The Court had no power to alter the issue, which, once adjusted, cannot be recalled—6 Geo. IV. c. 120, § 34; Bell's Dict. "Issue." A verbal inaccuracy may be corrected—*Cooper* v. *Mackintosh*, 3 Mur. 358; but the Court will resist all attempts to make any other alteration. *Leys, Masson and Co.* v. *Forbes*, 5 W. S. 384; *Cochrane* v. *Wallace*, 2 Mur. 296; *Skene* v. *Maberlys*, 3 Mur. 360.

[LORD CHANCELLOR.—These are cases where the Court was asked to alter the issue on the day of trial. Shew me a case where the Court refused, after a first trial and before a second, to alter an issue, so as to meet the justice of the case.]

There is no such case, and therefore we rely on the statute. As to the interlocutors, and the effect of the new matter introduced into the record:—Even if it had been competent for the Court to alter the issue, they ought not to have done so; for, after the cancellation, the issuing of new shares, and sale had taken place, the ground of action was cut away, the contract was rescinded, and the liability of the appellant at an end. We rely on the Companies Clauses Consolidation Act (8 and 9 Vict. c. 17, §§ 14-30). In *Great Northern R. Co.* v. *Kennedy*, 4 Exch. 417, it was held, that so long as the shares remained unsold, the company could sue for calls; but we contend, that after cancellation and sale have taken place, the action can no longer be maintained. Suppose a share of which £10 is paid, and £10 to be paid, the directors can only sell that share with the latter liability impressed on it. They can only sell what stands in their books.

[LORD CHANCELLOR.—And if only £5 is got for the share, can the company go against the shareholder for the difference? Or suppose a share of which only £5 is paid, and £20 to be paid, and the shares are at a discount, then there could be no sale, there being no market. Yet they are authorized to sell, and take what they can get; but, in your view, they could never sell at all.]

They could do what was equivalent to sale. A share is partly a liability to contribute to the stock of the company, and partly a right to the profits. If you sell or transfer the right to

another, the liability attaches, and he whose name is erased, ceases to be liable at the same moment.

[LORD CHANCELLOR.—But suppose a case where £10 is paid, and £10 to be paid, and only £5 can be got for it, where is the implied discharge of the shareholder—how is the contract got rid of?]

By this, that the capital which he is bound to supply, is to be supplied by a new contract.

[LORD CHANCELLOR.—But I am supposing a case where it can't be supplied.]

That is to import a contingency not contemplated by the act. You assume, that, for every £10 only £5 can be realized; but we say directors have no power to sacrifice their property by selling shares in a market overt in that way. They can only issue stock to subscribers in return for subscriptions. They are not bound to issue new shares; but if they do so, that is a financial operation which must be left to themselves; they do so for the best, and must bear any loss themselves. All that the act points out as necessary is, that the whole sum represented by the new shares, shall not exceed the unpaid amount of the old. The moment shares of commensurate value are issued, the subscriptions are full. The company may either forfeit and sue, or forfeit and sell. We admit that forfeiture of itself cannot interfere with the action for calls, as § 30 says. But the company cannot both sue and sell. It is only an alternative, not a cumulative remedy which they possess, as is shewn by the words of § 164 of the English Companies Clauses Act, 8 and 9 Vict. c. 16 under which section this action was brought.

[LORD CHANCELLOR.—But sale follows on forfeiture.]

Yes; and sale alters ownership. The original shareholder has an equity to get his shares back, after they are forfeited, up to the moment when they are sold, after which a new liability commences and the old is extinguished. Such is our position under the Companies Clauses Act: but we think we stand better on the special act of the respondents, 12 and 13 Vict. c. 84, § 25. The latter act shews it is the amount of the unpaid half of the share, that determines the price of the new share.

[LORD CHANCELLOR.—But suppose they can't issue them at the sum remaining due, then they must take a smaller sum.]

The company may issue shares to a less amount, but they cannot issue to a greater amount, than what is due on the old shares. In the present case, they issued them for the exact sum of the old shares, and have actually gained by the sale. This we averred in our answers to the minute for respondents, and our additional pleas in law, which were taken into the record, and these not being denied, were thereby admitted to be true. As these additional allegations were made part of the record, we were at least entitled to the diligence asked, to enable us to prove them, and the Court were wrong in refusing that application.

[LORD CHANCELLOR.—You do not seem to have insisted on obtaining an issue framed so as to bring out the fact of cancellation, assuming that the Court had power to alter the issue?]

We did all that was essential for that purpose. The matter as to the cancellation was added to the record. Yet the Court said it was not material, and hence the miscarriage of which we now complain. If, however, our liability was not extinguished by the cancellation and sale, we were at least entitled to credit for the sums realized by the sale. As to the *exceptions*:—The register was not admissible, as § 28 of the Companies Clauses Act was not complied with. The last volume only being sealed, the previous ones might have been altered at pleasure. The statute must be strictly construed, as it makes an inroad on the common law of evidence.—*Bain* v. *Whitehaven and F. R. Co.*, 7 Bell's Ap. 79; *Cheshire Jn. Co.* v. *Brown*, 4 Exch. R. 426. The register ought either to have been in one volume, or, if in several volumes, each volume should have been sealed. The minute of the finance committee ordering the call was not signed, and it was not sufficient that the minute of the adjourned meeting should be signed. The minute appointing the finance committee not being signed, there was no evidence of its existence.—*Whitehaven and F. R. Co.* v. *Macfadyen*, 11 D. 846. It cannot be said, if there are minutes of twenty meetings, always adjourned, scattered up and down the books, that they are all to be held signed by the chairman, if only the last is signed. The Judge should therefore have directed the jury, that the appointment of the finance committee was not complete. It is a well-known rule, that where a statute requires a certain superior quality of evidence to be given in proof of a certain fact, an inferior quality cannot be admitted.—*Birkenhead R. Co.* v. *Brownrigg*, 4 Exch. R. 426. By the law of Scotland, the acts of public bodies can only be proved by their minutes.—*Hamilton* v. *Hope*, 4 Mur. 239; *King* v. *Mag. of Elgin*, Mor. 12,537.

Phipson for respondents.—The Court had a right to alter the issue. The Judicature Act does not prohibit the Court, either expressly or impliedly, from exercising this power; and when the issue is said to be final, that means that the interlocutor ordering the issue is not subject to review by this House. But even though the issue had not been altered, the old issue was quite sufficient. It brought out all that the Statute 8 and 9 Vict. c. 17, required to be proved; and any other allegation than what the statute said was necessary, was mere surplusage.—*Belfast, &c. R. Co.* v. *Strange*, 1 Exch. 739; *East Lancashire R. Co.* v. *Croxton*, 5 Exch. 287. As to the cancellation of the shares:—If the appellant thought that was a sufficient defence, he

ought to have raised the point, and asked to have the issue framed so as to bring it out; but the reason why the issue was continued, seems to be, that the appellant had never yet admitted that he was a holder of shares at all.

[LORD CHANCELLOR.—No. In his additional pleas, he does not deny his original liability, but merely asserts his discharge by the subsequent acts of the company. Now, the Court allowed these allegations to be introduced into the record, yet said they were irrelevant to alter the issue.]

At all events, the Court was right in retaining the substance of the original issue, for that contained all that the statute required, and any further claim the appellant could make, was fully reserved by the Court in their interlocutor. It is said the company had only an alternative, not a cumulative remedy; but this cannot be maintained after the case of *Great Northern R. Co.* v. *Kennedy*, *supra*. We also contend there is no real distinction between forfeiture and sale, as far as the liability of the original holder is concerned. The case is like that where a chattel is left with a party for the satisfaction of a debt. If the amount received on sale of the chattel is not equal to the debt, the liability of the debtor is not extinguished, but the holder of the chattel has a cumulative remedy. The record here merely discloses the fact of cancellation; there is no proof that the company ever got any money. But even if the company sold, they could not recover a deficiency from the buyer. Thus, if £20 has been paid, and £5 is to be paid, and the company cannot get this sum, the company may forfeit the share; but, if they sell, they must do so as if the latter sum had been paid up. The contract, therefore, is not got rid of, and the mere fact of cancellation has nothing to do with the liability of the original shareholder. As to the bill of exceptions:—The register was sufficiently authenticated within the meaning of the act. The sole question is, whether the book is authenticated which the company *bonâ fide* keep as a register. It is not the less a book because it is in several volumes. We may as well say every page must be sealed, as that every volume must be sealed. As to the minute appointing the finance committee not being signed:—It is well ascertained here in Sessions practice, and in the case of vestries, that when a meeting is adjourned, the original and the adjourned meeting are one meeting, and the signature of the latter by the chairman is sufficient—*R.* v. *Justices of Suffolk*, 16 Law J. M. C. 36: 4 D. & L. 628. Besides, the minute is not the only way of proving the fact of appointment. The act was intended to give a privilege to the company to put their own books in evidence, but these are not to be the exclusive evidence. Now, the witnesses proved that they were present when the finance committee were appointed, and that is enough. *Miles* v. *Bough*, 3 Q. B. 845.

Anderson, in reply.—It is said it was sufficient to prove at the trial, that the defender *is* a shareholder—*i. e.* "*is* at the time of making the call." But a defender may displace the proof by alleging, that though then he *was*, yet that now he *is* not liable. The object of the alteration was to prevent our proving that which we contended had the effect of releasing our liability.

[LORD CHANCELLOR. — What possible mischief could the alteration of the issue do to you? What could you have introduced under the first, which you could not under the second issue? Down to the call, you cannot complain; after the call, your right was expressly reserved.]

The question was, not if we could have had an account afterwards, but if we were indebted and resting-owing to the company. The important part of the issue was, debt or no debt. We denied any account was necessary to be taken at all. What we alleged, and which was not denied, should have rendered unnecessary any trial whatever. The cancelling of the shares reduced the capital *pro tanto*. A blank was thereby left in the capital, and it was filled up by a re-issue of shares. The full value was received. How, then, could the company bring an action when they had got all they wanted? The second trial was the same as if a new action had been brought. We did all we could to resist the trial, and now we claim redress.

LORD CHANCELLOR ST. LEONARDS.—This is an action brought by the Great Northern Railway Company against a holder of a few shares, for two calls amounting together to £34.

The right to bring the action in Scotland is given by 8 and 9 Vict. c. 16, § 164, which act is incorporated in 9 and 10 Vict. c. 71, being the act establishing this railway company; and although some argument was raised upon the particular wording of the clause, yet I think that it gives to the company all the remedies provided by the Companies Clauses Consolidation (Scotland) Act, 1845.

[His Lordship then stated the case, and continued]—The first question raised before your Lordships was, that the Court below had no power to alter the issue. This objection depended upon 6 Geo. IV. c. 120, § 34, which gives power to the Court to direct a proper issue, or to alter the issue as delivered, and which provides,—that if either party should object to the issue, as settled 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, 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. The finality mentioned in § 34, refers to the issue as settled, but that section contains no terms

of restriction or exclusion to prevent the Court, when directing a new trial, to direct an issue better calculated to meet the justice of the case than the first proved to be ; and I am of opinion that they have that power, and that this objection cannot be sustained.

Your Lordships have already seen why the issue was altered, but this requires a little further explanation. The 8 and 9 Vict. c. 17, § 27, enacts, that in any action or suit to be brought by the company against any shareholder, to recover any money due for any call, it shall be sufficient for the company to aver that the defender is the holder of one share or more in the company, and is indebted to the company in the sums claimed ; and by § 28 it is enacted, that on the trial or hearing of such action or suit, it shall be sufficient to prove that the defender, at the time of making such call, was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given, as directed by this or the special act. Now the new issue adopted the very terms of § 28, which by law would equally have applied to the first issue, which was framed under § 27, and it would not have been necessary to have altered the first issue if the shares had not been cancelled subsequently to bringing the action. It is quite settled that the term "is," means, "is at the time of calls made."—(*Belfast* and *County Down Railway Co.* v. *Strange*, 1 Exch. 739.) And the statute has received a liberal construction—*East Lancashire Railway Co.* v. *Croxton*, 5 Exch. 287.

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 non-payment of calls, whether the company have sued for the amount of such calls or not. And it has been decided, that the right to declare shares forfeited, is not an alternative remedy with the right of action, but that the words of the act are cumulative—(*Great Northern Railway Co.* v. *Kennedy*, 4 Exch. 417). 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 12 and 13 Vict. c. 84, § 25, which enacted, that where the market price of shares which might be forfeited for non-payment of calls, should be such as to render it impossible for the company to sell the same, so as to realize 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 shewn, as regards the interest of the shareholder, between forfeiture and cancellation, it appears to me, my Lords, that the same rule must prevail as to both. 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, if it be one, which it is competent to the appellant to make.

The Companies Clauses Consolidation Act provides in every way for the real interests of the shareholders, even after forfeiture. And in the *Great Northern Railway Co.* v. *Kennedy*, *supra*, 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 the 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 to 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 excluded the appellant from shewing that a change of interest had taken place, because that could not go in bar of the action, but the defender would be entitled to any benefit to be derived from such change, notwithstanding the recovery in the action. And the interlocutors of 17th and 25th January 1851, I think, have reserved to the appellant the means of enforcing any rights to which he is entitled.

At the trial of the second issue, the counsel for the appellant 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 tried the cause—and his rejection of that evidence formed part of the bill of exceptions. It constituted the 3d, 4th, and 5th exceptions. Now, Lord Fullerton, in delivering his opinion in the Court of Session, upon the hearing of the bill of exceptions, observed, that the

3d, 4th, and 5th exceptions, were not insisted on, as the cancellation of the shares, if it had any effect, might receive it in the accounting on that head, of which the pursuers admitted the competency, notwithstanding the verdict. This, my Lords, appears to me to be conclusive upon this head.

The appellant's remaining objections are technical ones, raised by the bill of exceptions on the trial of the second issue. The first objection 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 should be authenticated by the common seal of the company being affixed thereto. The objection was, that the register was contained in several volumes, and that the last of the series only had the common seal of the company affixed to it. There were several very bulky volumes—they followed each other alphabetically and consecutively, and manifestly formed parts of the same series—and the last volume contained 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 House, and every volume was a ponderous one. The contention was, that instead of being enclosed in several bindings for the sake of convenience, they ought to have been bound in one volume, which would have rendered it impossible to make use of them in the course of business. I think, my Lords, 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. I rather think, that if the common seal had been affixed to every volume, the appellant would have considered the register still more objectionable.

The next exception to the ruling of the Judge was, that the evidence of the appointment of the finance committee, which was necessary in order 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, was not signed. Now, this board was adjourned to the 19th of the same month, and the minute of the adjourned meeting is signed. The secretary to the company swore that it was one continuous meeting and minute, and that the next meeting was on the 1st of September, and that the minute of it begins—"The minutes of the last meeting, held 18th of August, read and confirmed," treating the 18th and 19th as one meeting. This is confirmed by the books. At all these meetings, Mr. Astell was in the chair, and he signed both the minutes of the adjourned meeting of the 19th of August, and of that of the 1st of September; and on the 27th of September, at a meeting the minute of which was regularly signed by the chairman, all committees were re-appointed. And all these proceedings took place before the first call. The objection was founded upon the 101st section of the Companies Clauses Consolidation Act, which required entries of minutes to be signed by the chairman of each meeting, and made such entries evidence. 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, and his evidence was admissible evidence, for the act confers a privilege, but does not exclude other evidence of the fact. It is not necessary to make any further observations on these points, inasmuch as the validity of the minutes as signed, and the admissibility of the other evidence, will be ruled by your Lordships in favour of the respondents, upon the authority of *Miles* v. *Bough*, (3 Queen's Bench Reports, 845.)

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

Interlocutor affirmed with costs.

First Division.—Law, Holmes, Anton and Turnbull, *Appellant's Solicitors.*—Baxter, Rose, and Norton, *Respondents' Solicitors.*

MAY 28, 1852.

ROBERT DYCE, *Appellant, v.* The Right Hon. ELIZABETH FORBES (LADY JAMES HAY), and Husband, *Respondents.*

Servitude—Easement of Recreation—Title to Sue—Process—*In an action of declarator brought by a party designed as residing in, and a magistrate of, a royal burgh, and founded on alleged prescriptive usage, to have it found that he had right to a servitude of walking and recreation over a piece of ground in the vicinity of the burgh.*

HELD (affirming judgment), *that such alleged servitude is not recognized in the law of Scotland, being incompatible with the ordinary use of the soil, and that there was no sufficient title to sue.*[1]

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[1] See previous report, 11 D. 1266; 21 Sc. Jur. 506. S. C. 1 Macq. Ap. 305; 24 Sc. Jur. 465.