proof would be limited to the defender's writ, because a lease for a term of years can only be proved in that way. In my opinion there is no difference in a question between the pursuers and defender; further, I think that the defender may appeal to the rule under which contracts connected with land, or innominate contracts of an unusual character, are provable by writ only—*Edmonston* v. *Bruce or Edmonston*, June 7, 1861, 23 D., 995. It seems to me that this case falls under both or one of these categories, and that as the pursuers have not produced any writ of the defender their action fails.

It was contended that the pursuers expended money on the faith of the defender's agreement, and that they are entitled to recover the money so expended. If their allegation were true, I think that their argument would be well founded. But I agree with the Sheriff in thinking that at the end of season 1878-79 the defender intimated that he would have no further connection with the shootings. Therefore, in this alternative view, the pursuers' case fails on the fact.

I have only to add that if I had thought it competent to proceed on the parole evidence, I do not think the pursuers would have succeeded in proving their averments.

The Lord Justice-Clerk was absent.

The Lords therefore recalled the interlocutor of the Sheriff-Substitute and assoilzied the defender.

Counsel for Appellant — Solicitor-General (Asher, Q.C.)—V. Campbell. Agents—Maitland & Lyon, W.S.

Counsel for Respondents — G. Smith — M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Thursday, February 2.

FIRST DIVISION.

PETITION—THARSIS SULPHUR AND COPPER COMPANY.

Public Company—Companies Act 1867 (30 *and* 31 *Vict. c.* 131), *secs.* 11 *and* 13—*Special Resolution for Reduction of Capital—Confirmation Order—Process—Title to Appear.*

In an application to the Court by a limited company for an order in confirmation of a special resolution passed under the provisions of the Companies Act 1867, and providing for the reduction of capital and other objects, a shareholder who avers that the resolution is illegal is entitled to appear. Procedure in such a petition *sisted* until the compearer should bring an action for reduction of the resolution and relative declarator.

The Tharsis Sulphur and Copper Company (Limited) was registered as a company in 1866, with an original capital of £300,000, which was in 1868 increased to £1,000,000, and in 1878 to £1,236,660.

The Companies Act 1867 (30 and 31 Vict. c. 131), enacts, section 9, that "Any company limited by shares may by special resolution so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed, or as altered by special resolution, as to reduce its capital; but no such resolution for reducing the capital of any company shall come into operation until an order of the Court is registered by the Registrar of Joint-Stock Companies as is hereinafter mentioned."

By section 10 of the said Act it is provided that "The company shall, after the date of the passing of any special resolution for reducing its capital, add to its name, until such date as the Court may fix, the words 'and reduced' as the last words in its name, and those words shall until such date be deemed to be part of the name of the company within the meaning of the principal Act."

By section 11 of the said Act it is provided that "A company which has passed a special resolution for reducing its capital may apply to the Court by petition for an order confirming the reduction, and on the hearing of the petition the Court, if satisfied that with respect to every creditor of the company who under the provisions of this Act is entitled to object to the reduction, either his consent to the reduction has been obtained, or his debt or claim has been discharged, or has determined or has been secured as hereinafter provided, may make an order confirming the reduction on such terms and subject to such conditions as it deems fit."

By section 13 of the said Act it is enacted "That where a company proposes to reduce its capital, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company, shall be entitled to object to the proposed reduction, and to be entered in the list of creditors who are so entitled to object;" and that "the Court shall settle a list of such creditors, and for that purpose shall ascertain as far as possible, without requiring an application from any creditor, the names of such creditors, and the nature and amount of their debts or claims, and may publish notices fixing a certain day or days within which creditors of the company who are not entered on the list are to claim to be so entered or to be excluded from the right of objecting to the proposed reduction."

On the 24th November 1881, at an Extraordinary General Meeting of the company, certain special resolutions were passed, which were subsequently confirmed on 9th and registered on 14th December, with the view, *inter alia*, of reducing their capital, and of subsequently increasing it by the creation of certain new shares.

With a view to have the said resolution to reduce their capital confirmed by the Court the company presented a petition under the Companies Acts 1862 and 1867 praying the Court "to fix the date at which every person who is then entitled to any debt or claim against the company within the meaning of section 13 of the Companies Act 1867, shall be entitled to object to the proposed reduction of capital, to settle a list of the creditors of the said company who shall at the date to be fixed by your Lordships be entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the

company; and if your Lordships shall think proper, to order publication of notices fixing a certain day or days within which any creditors of the company not entered in the said list are to claim to be so entered or to be excluded from the right of objecting to the proposed reduction; and thereafter to make an order confirming the reduction of the capital of the said company" . . . "in terms of the said resolution" . . . "and afterwards to approve of a minute showing, with respect to the capital of the company as altered by the said order, the amount of such capital, the number of shares into which it is to be divided, and the amount of each share; and to direct such notice of the registration of the said special resolutions, confirmed by the said order, as your Lordships shall think fit; and also to fix the date up to which the company shall add to its name the words 'and reduced.'"

The following interlocutors were pronounced by the First Division in this petition:—"22*d December* 1881.—The Lords, on the motion of the petitioners, fix the 31st day of December current as the date at which every person who is then entitled to any debt or claim against the company within the meaning of section 13 of the Companies Act 1867 shall be entitled to object to the proposed reduction of capital." "11*th January* 1882.—The Lords having resumed consideration of the petition, with the note for the petitioners, and list of creditors, fix Saturday the 28th day of January current as the day before or on which the creditors of the company who are not entered on the said list are to claim to be so entered or are to be excluded from the right of objecting to the reduction of capital proposed in the petition;"—and certain intimation by advertisement of the petition was then ordered.

Thereafter, on 27th January 1882, a minute of compearance was lodged for Andrew Hoggan junior, a shareholder of the company. The minute contained, *inter alia*, the following averments:—"That on 9th December 1871 the compearer, along with others, protested against the special resolutions confirmed at the extraordinary general meeting of the petitioners' company held on that date as being illegal and *ultra vires*. That the compearer maintains that the resolution of 9th December 1881 authorising dividends to be paid on the amount paid up on each share is beyond the powers of the company, inasmuch as the shareholders have right to an equal division of the dividends according to the amount of nominal capital held by each, which right being a fundamental condition of the contract cannot be taken away by any resolution. The compearer further maintains that the resolutions adopted by the petitioners relating to the reduction of capital are not authorised by the Companies Act of 1867, and are therefore illegal."

The compearer further stated that he was in course of raising an action against the company for reduction of the said resolutions, and he prayed the Court to sist procedure in the petition until that action should be disposed of.

The petition and minute having been sent to the summar roll, the compearer argued—He had a good title to object to the granting in the meantime of the prayer of the petition. Though the sections of the Act above-quoted applied verbally only to "creditors" of the company, it was obvious that a shareholder was entitled to object to the confirmation of resolutions which he averred to be illegal and *ultra vires* of the company, and prejudicial to his interests as a shareholder. Procedure in the petition should be sisted until the merits of the question should be settled in the action of reduction which he was in course of raising against the company.

Replied for the company—The compearer had no title to object to the granting of this order. The petition was brought under the Companies Acts 1862 and 1867, under the provisions of which none but creditors of the company could take up such a position. The granting of the confirmation order could not prejudice the compearer's right to challenge by other proceedings the legality of the resolutions—which was his proper remedy—whereas the company, on the other hand, were desirous of obtaining the order at once with a view to the issue of the new shares in a favourable market, and to enable them to remove the words "and reduced" from their designation as a company.

At advising—

Lord President—Of course no member of the Court is pronouncing at this stage any opinion as to the question which is to be tried in the action of reduction, and I should be sorry to express the faintest shadow even of a leaning towards any opinion on that matter. The only question we are now deciding is, whether that matter ought or ought not to be decided before a confirmation order is pronounced in the petition. Now, I think there is no force in the objection made to the compearer's title to appear and ask the Court to delay the order until the issue of his action of reduction. It is true that in the ordinary case of a petition of this kind under the Companies Act of 1867 the only parties who have an interest to object are the creditors of the company, and the statute enacts that until the consent of the creditors be obtained, or their debt or claim has been discharged or determined, or has been secured, the confirmation order shall not be pronounced. But it does not follow that if a company proceeds in an illegal way (as is here alleged to be the case) to pass resolutions for reducing the capital, and subsequently increasing it again, so as to affect illegally and injuriously the rights of certain shareholders, those shareholders may not apply to the Court to withhold the order. I think the shareholders' title to do so is quite clear, and I pronounce no opinion upon anything else except this, that the question which is to be raised by this action of reduction is one upon which I should not like to give judgment without very full consideration and inquiry.

Lord Deas and Lord Mure concurred.

Lord Shand—I do not doubt that the proper course here is to sist procedure pending the issue of this reduction, for I think it is clear that if the company were to go on on the strength of this resolution and issue this new stock, and it were ultimately found that the resolution as a whole was bad, most difficult questions would arise with the holders of the new shares, and the compearer and others in a like position seem to me to have a fair interest to object to the confirmation order being now pronounced. I think the shareholders' title to object is quite clear, but I do not understand why parties should not come direct to the

Court with a Special Case instead of raising an action of reduction in the Outer House—a far less summary mode of procedure, as I think.

The Lords, on the motion of the compearer, sisted procedure.

Counsel for Petitioners—Lord Advocate (Balfour, Q.C.)—Mackintosh. Agents — Webster, Will, & Ritchie, S.S.C.
Counsel for Compearer—Robertson—Pearson. Agents—Graham, Johnston, & Fleming, W.S.

Friday, February 3.

FIRST DIVISION.

[Lord Lee, Ordinary.

STAVERT *v.* STAVERT.

Husband and Wife—Divorce—Foreign—Domicile.

A domiciled Englishman sold his house and property in England, and eloped to the Continent with a paramour. He consulted a Scotch agent as to how a divorce could be obtained in Scotland, and was informed that he must come to Scotland with the intention of remaining there. He came to Scotland, taking the lease of a house and shootings for six months, and continuing to cohabit for a period of upwards of five months there with his paramour. A summons of divorce was personally served upon him in Scotland. He disputed the jurisdiction of the Court. *Held*, upon consideration of his evidence, in which he said he never had intended to remain in Scotland after obtaining his divorce, and of the whole facts and circumstances, that a domicile had not been acquired, in respect that there was no intention of remaining permanently in Scotland.

Foreign—Divorce—Jurisdiction ratione delicti commissi.

Jurisdiction in actions of divorce cannot be established *ratione delicti commissi*, coupled with personal service of the summons upon the defender.

Husband and Wife—Matrimonial Domicile—Divorce.

Will the Court recognise in actions of divorce a matrimonial domicile—*i.e.*, a domicile of a less complete character than that required to determine questions of succession so as to found jurisdiction? *Negative per* Lords Deas and Shand; *per* Lord President (Inglis)—"If the answer depended on the decisions pronounced by this Court it is pretty clear what it would be."

Expenses—Action of Divorce—Where Plea of no Jurisdiction sustained.

A husband had by his conduct and representations invited his wife to bring an action of divorce for adultery against him in Scotland, and thereafter pleaded that the Court had no jurisdiction. This plea was sustained, but the Court awarded expenses to the wife, holding that the objection to their jurisdiction did not affect their power to pronounce such a decree.

This was an action of divorce on the ground of adultery at the instance of Mrs Emma Ward or Stavert, "presently residing at 53 Castle Street, Edinburgh," against her husband Thomas Stavert, "residing at Castlehill House, Blairgowrie, Perthshire."

The defender pleaded—"(1) No jurisdiction. The defender not being a domiciled Scotchman, the Court of Session has no jurisdiction to entertain the present action."

The Lord Ordinary (LEE) allowed the parties a proof of their averments *quoad* the defender's domicile.

The result of the proof was to show that the defender was born in Manchester in 1836, and had lived in and about that city till 1880, being connected with the mercantile house of Stavert, Zigomala, & Co. there. His father was a domiciled Englishman. In 1870 he married the pursuer, an Englishwoman, at Manchester, and they lived together there and in the neighbourhood until July 1880, when the defender eloped with Miss Amy Fisher, with whom he resided on the Continent until the spring of 1881, and thereafter at a furnished cottage, Castlehill, Blairgowrie, in Perthshire, which he took for six months from the 12th of May. With regard to his object in coming to Scotland, the defender's evidence was as follows:—"I came to Scotland, and finally took Castlehill, Blairgowrie, from Mr Anderson. I took it for six months, and entered into possession on 12th May. (Q) Had you ever any intention of remaining in Scotland beyond six months?—(A) Certainly not. Towards the end of July 1881 I saw an article in the *Standard* newspaper which showed me that I was committing a fraud on the Scotch law. (Q) Did that lead you to reconsider your intention of remaining even six months in Scotland?—(A) Yes. I went to Edinburgh to consult Mr Haddon (his law-agent) on the subject. I said he knew the purpose that I had come for; that acording to the article in the *Standard* I saw that I was committing a fraud on the Scotch Courts, and that I wished to right myself on that matter; that there was no chance of marrying Miss Fisher with a Scotch divorce, and consequently I wanted to leave at once. I also told him that I was very sorry to have done anything of the kind as to come here and take advantage of the Scotch law. Mr Haddon advised taking the opinion of Scotch counsel. That opinion was communicated to me about 8th September; it confirmed my view, and I wanted to leave Blairgowrie at once. Mr Haddon wrote that there was no necessity for leaving at once, and I stayed at Blairgowrie till November. I was served with the summons in the present action on 27th or 28th September. (Q) Did it take you by surprise?—(A) Of course it did; after learning from Mr Haddon that the action could not go on, and Mr Haddon advising Mr Purves (the pursuer's law-agent) that I was only here temporarily, according to my instructions. (Q) Is it the fact that you were here only temporarily?—(A) Yes. (Q) And that you never had any intention of staying?—(A) I never had any intention at all of staying."

The article in the *Standard* referred to was dated 30th July 1881. The passages in it most appropriate to Mr Stavert's position were as follows:—. . . . . "There is, however, one broad rule of private international law which hitherto all States alike have agreed to recognise. By ac-