Company, of each of which firms the defender was one of several partners. The defender alone is called upon to answer for the various firms and the other partners.

It appears to me that according to the authorities this is an incompetent action. The pursuer, however, desires that the action should not be thrown out, but that he should be allowed to cure the defect by a supplementary summons. I think that would be a bad form of procedure. The pursuer can bring a new action against all the partners. Whether he is bound to call the firm which has been dissolved depends on circumstances we do not know of, but he is at any rate bound to call all the partners, and there is nothing in dismissing the action that can prevent him from doing so.

Lord Mure—I agree with your Lordship.

The pursuer here knew that there were other partners of the firms, and according to the case of *Muir* v. *Collett*, even assuming that it was not necessary to call the firm as a defender to the action, I think he was bound to call all the partners.

Lord Shand—I am of the same opinion.

It is not said here that the other partners must be called for their interest merely in order that they may see decree pronounced in the cause. It is admitted that it would be necessary to have a separate action against the other partners, and then the two would be conjoined. I think that would serve no good purpose. It seems to me clear that the whole partners of the dissolved firm must be called in order to make a relevant action.

There may be a question whether the pursuer is not bound to call the firm in order to constitute the debt; but if the firm is dissolved, and has now no place of business, it would appear that the only way in which the firm could be called would be by serving the summons on all the partners.

Lord Adam—I see no good purpose to be served by keeping the action in Court. The conclusions of the action should be sufficient to exhaust the whole matter, and that is not the case with the action before us.

The Court varied the interlocutor of the Lord Ordinary to the effect of sustaining the first and third pleas-in-law for the defender, and dismissed the action.

Counsel for Pursuer and Reclaimer—Scott—Salvesen. Agent—T. M'Naught, S.S.C.

Counsel for Defender — Rhind. Agents — Ferguson & Junner, W.S.

Thursday, December 17.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

PATERSON'S TRUSTEES *v.* CALEDONIAN HERITABLE SECURITY COMPANY (LIMITED), AND LIQUIDATOR.

Public Company—Heritable Security Company—Power to Receive Money by Loan—Purchase to Avoid Sacrifice of Security—Ultra vires.

A heritable security company, the objects of which were to lend money on heritable security, and to "receive money by way of loan by cash-credit, debenture, deposit, or otherwise," and to do all such things as were conducive to these objects, received through their manager a loan, which he applied to the purchase of heritable property over which the company had lent money on a postponed bond, and which the prior bondholder had brought to sale. There being a doubt as to the company's power to hold heritage, the manager made the purchase in his own name; he also granted the lender a bond for his money over the subjects. The company and its liquidator afterwards disputed liability for the loan, on the ground that the company had no authority to purchase or hold heritable property, that the manager was the proper debtor, and that he had no authority from the directors for the transaction. *Held* that the company having borrowed the money through its proper officer, who was entitled to accept money on loan, the lender had no concern with inquiring into its powers to apply it, and was therefore entitled to demand repayment.

Opinions that the purchase by such a company of heritage in order to avoid a sacrifice of its loan was not *ultra vires.*

Prior to June 1877 the Caledonian Heritable Security Company (Limited) agreed to lend money to Robert Johnston, builder, the security being some house property which he was erecting at Clarinda Terrace, Pollokshields. The loan arranged was £1000. There was a prior security for £2500, and the company only advanced £650, depositing the rest in bank. By the articles of the association of the company the objects for which it was established were thus defined—"To advance or lend money on security of all kinds of heritable property, or for the purpose of building, draining, enclosing, or otherwise improving the same. To make advances for the execution of works undertaken, in virtue of powers conferred by any public or local Act of Parliament, on the securities thereby authorised; and also on the security of annuities, and on other assignable properties, and on or for the purchase of reversionary interests heritably secured. To receive money by way of loan by cash-credit, debenture, deposit, or otherwise; and the doing of all such other things as are incidental or conducive to the attainment of the above objects."

Johnston was sequestrated on 13th June 1877, and the prior bondholder, after an unsuccessful

exposure, advertised the subjects for sale at £2800. The manager of the company (Richard Wilson, C.A.) came to be of the opinion (which had been suggested to him by the Glasgow agent of the Company, Mr Bell) that it would be for the best interests of the company if they bought in the subjects. Accordingly the subjects—1 and 2 Clarinda Terrace—were bought by him as agent at £2800, the upset price, and the purchase was completed. Mr Bell attended at the sale, and as appeared from the minute of enactment of sale, gave the name of the purchaser as Richard Wilson, C.A., Edinburgh.

The disposition was in favour of "Richard Wilson and his heirs and assignees." In order to pay the price Wilson borrowed £2600 from the trustees of the late Robert Paterson. Mr Bell was one of these trustees and their agent. At their their meeting of 11th September 1877, there was submitted for their consideration a proposal for a loan of £2600 over 1 and 2 Clarinda Terrace at 5 per cent. They granted the loan, and the £2600 was applied by Mr Wilson to pay the price of the subjects, the balance necessary for completing them, paying legal expenses, &c., being paid out of the company's funds, and paid by a cheque signed by him, as manager, and by two directors of the company.

Of the same date as the disposition, 10th October 1877, Wilson granted a bond and disposition in security over the subjects for £2600 in favour of Paterson's trustees. This bond, though granted by Wilson, was sealed with the company's seal, and an investment account as to the property was opened in the company's books. Though entries relating to the subject appeared in the company's books and balance-sheet, there was no minute of directors authorising any such purchase.

In 1880 the company went into liquidation, and the marriage-contract trustees lodged a claim in the liquidation for the sum lent, but the claim was rejected by the liquidator.

Wilson became insolvent, and was sequestrated on the 26th April 1881.

This action was raised against the company by the trustees for repayment of the sum of £2600, and payment of £148, 19s. 5d., being arrears of interest. The liquidator disputed liability, on the ground that it was not within the scope of the company's business to purchase heritable property and grant bonds over it, and that in point of fact the alleged purchase and the bond were not known to or authorised by the company or directors, that Wilson had no authority to advance any money on behalf of such a purchase or to grant such a security, and that in point of fact the disposition and bond were in Wilson's name as an individual.

The pursuers averred and the liquidator denied that the loan was to the company or applied for their purposes.

The pursuer alleged that the form of the transaction was merely what has been above described in consequence of a doubt whether the company could hold or grant securities over heritable property, and that therefore Wilson's name was used.

The liquidator pleaded—"(2) Neither the purchase of the said subjects by Mr Wilson nor the granting of the said bond and disposition in security by him having been sanctioned or authorised by the company or the directors, the said transactions are not binding on the company, and no liability has been incurred by it in connection therewith. (3) The said transactions not having been authorised by the constitution of the said company, they were *ultra vires* of the directors (assuming that they were sanctioned or authorised by them), and are not binding on the company. (4) The said bond and disposition not having been granted by the company, nor subscribed on its behalf by the directors and manager, it is not binding on the company, and the defenders are not liable for the amount thereof."

At the proof Wilson deponed that the purchase was for the company and in order to save the money they had advanced, and that the title was placed in his name at Mr Bell's suggestion, and that this was so, either from motives of convenience in selling it, as they expected soon to do, or because of a doubt as to the company's power to hold heritage. He deponed that the matter had been before the directors, but there was no minute of that, and several directors who were examined had no recollection of its being so or of having heard of it till this action was raised. Mr Bell and he both deponed that a declaration of trust by him to the company was talked of but had never been granted. The latter had doubted whether the company could purchase or hold heritage and he had looked on Wilson as the proper debtor to the trustees. Two of Paterson's trustees deponed that they had understood and been informed by Mr Bell that the loan was to the company, and that Wilson was acting for it, and that they received this information on enquiry made when the bond was granted, and they observed upon it Wilson's name and the company's seal.

The Lord Ordinary (M'Laren) decerned against the defenders in terms of the conclusions of the libel.

"*Opinion.*—This is an action for the repayment of money alleged to be lent by the pursuers to the Caledonian Heritable Security Company, Limited, and secured by a bond and disposition in security granted by Mr Richard Wilson, their manager.

"The company, which is in liquidation, repudiates the loan, explaining that by its articles of association it is not empowered to purchase heritable property or to lend money on heritable security. I may here observe that the articles of association in the passage very fairly quoted by the defenders, empowers them 'to receive money by way of loan by cash-credit, debenture, deposit or otherwise,' and it is necessary to distinguish between the power to receive money in loan and the power to grant heritable security for such loans when obtained.

"The facts are these—Prior to June 1877 the defendant company had lent money to Robert Johnston, the builder and owner of the subjects in question, and had received from him a bond and disposition in security over that property. This bond was postponed to a prior security for £2500. Johnston was sequestrated on 13th June 1877, and the property was exposed to sale at the successive upset prices of £3000 and £2800. On the second exposure the property was purchased by Mr Walter Bell, who was the agent of the defendant company, and also of the marriage

trustees, on the instructions of Mr Richard Wilson, the manager. The purchase was made in order to save the security.

"Mr Wilson states that the proposed purchase was brought before the directors, and that he had their authority for making it; but there is no record of such authority being given in the minutes of the company. According to Mr Wilson's evidence the title was taken in his name because it was doubted whether the company had the capacity to hold heritable property, and in this statement he is confirmed by Mr Bell, the agent, who prepared the deed.

"The money of the marriage trustees now sued for was used in paying a part of the price of the heritable subjects in question, and in exchange for the money a bond was obtained from Mr Wilson acknowledging the receipt thereof, binding himself in repayment, and conveying the property in security to the marriage trustees. The marriage-contract trustees authorised the loan, being, however, under the impression that the loan was to the company, and that it was to be secured by the company's bond. The directors did not expressly authorise their manager to borrow the money; but the business of the company was money-lending, which they carried on, like other companies of this description, by borrowing from all and sundry at a lower rate, and lending out money at a higher rate of interest. In point of fact, money was regularly received by the manager from depositors without the intervention of the directors, and I do not see how such a business could be carried on if the manager had not a general authority to receive money on loan for the uses of the company. The money of the pursuers was passed through the books of the company, being credited and debited to the company and the marriage trustees respectively.

"On these facts I am of opinion that the defendant company is liable. It may be that the company had not the power to grant heritable security for borrowed money; but the company borrowed the money—its books being evidence of the loan—and its manager granted the security. There is nothing contradictory or even unusual in the circumstance that security is granted by a person other than the borrower. A cash-credit bond is an example, and I have known cases where the banks have given credit to a customer in consideration of heritable security granted by one of the customer's family or friends.

"But it is said the company got no benefit from the loan; it is all gone to pay for a house which the company had not the capacity to purchase or pay for. It may be so; but the company had the capacity to borrow the money, and the creditor was not bound to see to its application. If the directors authorised the purchase of the house, and if the articles of association prohibit such a purchase, even through the intervention of a trustee for the company, a question between the directors and the company may arise. If the purchase was made by the manager, or by the manager and agent, on his or their responsibility, the question will be between him or them and the company. It is in my view sufficient for the decision of this case that the marriage trustees lent their money to a company whose business it was to borrow money and lend it out again.

"Such a case as this could not have arisen if the marriage trustees and the company had been represented by separate agents, and it is much to be desired that the legal profession would take steps to prevent the misuse of the practice under which the same agent acts for borrower and lender, thus depriving the lender of the benefit of independent advice as to the validity and value of the offered security."

The defenders reclaimed, and argued—The transactions were not binding on the company, in respect (1) that under its constitution the directors had no power to borrow; and (2) assuming they had such power, they had never authorised the transaction—*Balfour and Another* v. *Ernest*, January 1859, 28 L.J, C.P. 170, and 5 L.R., C.P. (N.S.) 601, *vide* opinion of Chief-Justice Cockburn; *Mahoney* v. *Holyford Mining Company*, July 1875, 7 L.R., Eng. & Ir. App. 869, *vide* opinion of Lord Hatherley, p. 893; *Ashbury Railway Company* v. *Riche*, June 1875, 7 L.R., Eng. & Ir. App. 653, *vide* opinion of Lord Hatherley, p. 684; *Shiells' Trustees* v. *Smith and Others*, July 13, 1883, 10 R. 1198, and November 24, 1884, 10 H. of L. App. Cas. 119. (3) The trustees knew the money was to be applied by the company to an illegal purpose.

The pursuers replied—It was within the power of the company to take this money on loan. There was nothing in the memorandum as to borrowing being competent to the directors only. Wilson had clearly authority, and the transaction was treated as a loan to the company in its books. There was nothing illegal in applying the money as it was done. Inasmuch as the company had power to borrow there was implied a power to do everything to make this security good in the best way they could—*Asiatic Banking Corporation Company*, June 1869, 4 L.R., Chan. App. 252. In *Shiells'* case, which was quite different from this, the directors had given a personal guarantee which was quite ineffectual. No money passed, and there was no consideration. Here the company could have taken over the first bond, but instead of that they bought. That was not *ultra vires*, but a reasonable exercise of their powers, done to save their security.

At advising—

LORD JUSTICE-CLERK—The question is, whether we are to adhere to the Lord Ordinary's interlocutor? On reading his judgment I was impressed with the views which he has there expounded, and after hearing a full argument in the case I remain unshaken in that opinion.

I doubt greatly whether the parties here are within the category of any of the cases quoted. It is, I think, a simple case of lender and borrower, and the company, who were the borrowers, were entirely within their powers in entering into that contract. There is no suggestion that an ordinary loan by bond is not within the powers of the company, and none that the giving heritable security for such a loan would alter its position. Therefore, passing from that, *ex facie* the transaction is one of ordinary loan, and there is nothing on the surface to show that the money was borrowed for any particular purpose. But it is sought to bring the lender into contact with the prior transaction whereby the borrowing company acquired the property. The

company had lent money on property in Glasgow. In course of time their security came to be in a somewhat doubtful condition. Prior bondholders advertised the subjects for sale. The state of the markets was such that there were apparently well-founded fears that the property would sell for a sum which would not pay the preferable debts. The office-bearers of the company came to be of opinion that it would be a good thing for the company to buy in the property when thus brought to sale rather than allow the money which they had advanced on it to be irretrievably sacrificed.

Now, all that was quite outside the transactions between the parties here. But it happened that Mr Bell, the company's agent, was also agent both for the company and for the marriage-contract trustees, who are the pursuers here. Mr Bell bought in the property for the company, and though the title is taken in the individual name of Wilson, the company's manager, there is no room for the suggestion that the company is not the true proprietor, and that Wilson had not full authority not only to purchase for the company but to take the title in his own name.

After the purchase was made, if not before, it came to be doubtful whether the prior bondholders, under burden of whose bonds the property had been bought, would allow their money to lie. This proved to be the case, and accordingly after the purchase, not for the purpose of paying the price directly, but no doubt with the same result, Mr Bell advanced to the company the money of these marriage trustees to take up the prior bonds. I do not go into the question whether the company authorised the transaction or not; there is the strongest possible reason for assuming that they did, and that in carrying it out they trusted, according to their ordinary practice, to the manager and agent, in whom they had perfect confidence. To those dealing with it the company's intervention is sufficiently proved by the impress of the company's seal on the bond.

The question then, to my mind, is simply this, Had the company power to borrow? I have already answered that they had. They did borrow, and with the application of the money the lenders had no concern. It so happened, somewhat unfortunately perhaps for all concerned, that the agent who acted for the lenders was also the agent of the company who had carried out the previous transaction of purchase. But except in so far as his knowledge is to be imputed to his clients, they were not brought into contact with that prior transaction at all.

I do not therefore think that it is necessary to go further into the question as to the company's power to buy the property. At the same time, I may say that if they had power to lend on heritable security, which undoubtedly they had, I should if necessary be of opinion that they had power to do what they did by way of protecting their security from sacrifice, and that what they did do was a reasonable act in the interest of the shareholders.

Lord Young—I am of the same opinion. I do not say that the case is unattended with difficulty, or that every doubt in my mind has been removed. But we have had it very fully brought before us. All the evidence necessary for a judgment has been adduced. The law has been fully argued, and I have no hesitation, fully recognising the interests involved and the grounds of doubt, in agreeing with your Lordship and with the Lord Ordinary.

On the face of the documents of debt the company is not the debtor of the pursuers. There is, however, no doubt of the company's obligation, and as little that the company's property is pledged to the pursuer for that obligation. The pursuers do not abandon Mr Wilson, nor do they abandon the property which is truly the company's, though feudally vested in Mr Wilson's name, and the real question raised in the action is, whether, assuming Mr Wilson and the property insufficient to meet the pursuer's claim, they are entitled to come against the company's general funds for the deficiency?

To make out their case the pursuers must establish facts not appearing on the face of the documents. I am of opinion that they have done so.

The company held a security over certain house property in Glasgow, postponed to a prior bond or bonds. The prior bondholders brought the property to sale. It was deemed by the company's officials likely to sell at a sum which would sacrifice the company's interest in it. Being apprehensive of this the company's officials thought it prudent to buy in the property. I am by no means prepared to affirm that it was beyond the power of the company to do so. The inclination of my opinion is that it was within the scope of the legitimate business of the company to endeavour to save the sacrifice of money lent upon property by buying it in rather than let it go at a price which would involve the sacrifice of the money lent on it. Be that as it may, whether it was within or without the scope of the company's business to buy in this property with a view of avoiding loss to the company on their loan over it, it was thought by the company's officials prudent to do so, and they did so, and in order to do so they required to borrow money. Now, they certainly had power to borrow money. Whether they had power to apply the money when borrowed in buying heritable property I do not inquire. They had power to borrow, and if in borrowing they acted within their powers, though in applying the money borrowed they might be without their powers, the lenders had no heed to concern themselves with the application.

It would be unprofitable to speculate upon the different occasions on which such a company might borrow for the purpose of its business. But that those who formed the company and framed its constitution contemplated that it should borrow money is clear from the terms of the memorandum of association, which sets forth as one of the objects for which the company was established the receiving "money by way of loan, by cash-credit, debenture, deposit, or otherwise." There are manifestly contemplated two kinds of loan. There may be loans of money made for the purpose of trading it out again, or there may be loans made for the purpose of enabling the company to pay current expenses. Is the lender in lending to a company in such a position bound to inquire what the company are going to do with the borrowed money? If so, to make their action safe they must not only know what

the company is going to do with the money, but must insist upon being placed in the position of doing for the company what it proposes to do, for without that they could never be sure that the company will do what it proposes to do, and what the lenders have satisfied themselves the company can legally do. All this would be extremely inconvenient, and practically render the working of such a company impossible.

That the company did borrow the money is quite clear; that they did borrow it for the purpose and apply it for the purpose of securing the complete property title is also quite clear. If that purpose and application was within the company's powers, the pursuers are quite right on every point. But even if the purpose and application was not within the company's powers the pursuers had no concern with that.

Some matters were argued as to the powers of the company's manager and the sanction of the directors. I do not, however, think it necessary to discuss this matter in detail. It was reasonable that the manager and agent should recommend the transaction, both the buying in the property and the borrowing money for the purpose. And I have very little doubt that the directors knew all about it, for notice of it is regularly entered in the minute-book. No blame whatever attaches to the agent. The proper officers having recommended the loan, the company must make good the deficiency.

The result is that the Lord Ordinary's interlocutor is well-founded.

Lord Craighill concurred.

Lord Rutherfurd Clark—I confess I have found the case attended with difficulty, and my mind is not yet cleared on the question at issue. But as your Lordships have already decided the case, and have a clear opinion in favour of the pursuers, I should rather abstain from saying anything further on the matter.

The Court adhered.

Counsel for Pursuers—D.-F. Balfour, Q.C.—Ure. Agents—George Andrew, S.S.C.

Counsel for Defenders — Asher, Q.C. — Guthrie Smith — Strachan. Agents — Morton, Neilson, & Smart, W.S.

Friday, December 18.

WHOLE COURT.

NATIONAL BANK OF SCOTLAND (LIMITED) *v.* UNION BANK OF SCOTLAND (LIMITED).

Right in Security—Absolute Disposition with Back-Letter—Assignation by Debtor of Re-conveyance Intimated to Creditor—Further Advances by Creditor Holding the Disposition—Retention.

A in security of advances by the National Bank disponed thereto by disposition, duly recorded, certain heritable property belonging to him. By separate back-letter, never recorded, it was agreed that the National Bank should hold the disposition in security till payment of all sums then due, or which should thereafter become due by A's firm, and that on payment thereof the subjects should be re-conveyed to him. Thereafter A, in security of advances by the Union Bank, assigned to the Union Bank his whole right in the lands under the right of reversion arising out of the transaction with the National Bank. This assignation was intimated to the National Bank. After this intimation the National Bank continued as before to make advances to A, who eventually executed a trust for creditors, being largely indebted to both banks. The subjects were not sufficient to pay both, and a question arose between the banks whether the National Bank had any preference for the advances made after the intimation of the assignation. *Held*, by a majority of the whole Court, that they had, because by their contract they were proprietors of the subjects disponed, and entitled to retain them until payment of all their advances, which right their debtor's intimated assignation could not defeat to any extent.

The minority (Lords Shand, Young, Rutherfurd Clark, Adam, and Kinnear) were of opinion that the effect of the assignation to the Union Bank, duly intimated, was to prevent the National Bank from being entitled to the benefit of their security for loans made to A after intimation of the assignation.

Disposition ex facie *absolute, with Back-Bond—Security*—Pactum de retrovendendo.

When a debtor conveys his property to his creditor by absolute disposition with back-letter, what remains in him is not a radical right of property but a personal claim to enforce a *pactum de retrovendendo*.

Observations (*per* Lord President) on *Keith* v. *Maxwell*, July 8, 1795, M. 1163.

In February 1879 the firm of William M'Arthur & Co., Greenock, was liable on bills held by the National Bank to fall due in May in a sum of £1684, 7s. 11d. Upon 12th February 1879 Mrs M'Arthur (one of the partners of the said firm) disponed to the National Bank, for "certain good and onerous causes and considerations," certain heritable subjects belonging to her, and situated in Charles Street, Greenock. The disposition was recorded in the Register of Sasines on 15th February 1879. Upon the same date as the disposition Mrs M'Arthur addressed the following letter to the National Bank:—"*To the National Bank of Scotland, Edinburgh.*—Gentlemen—I, Mrs Mary Anne Brown or M'Arthur, residing in Greenock, widow of the late William M'Arthur, merchant, Greenock, herewith deliver to you a disposition, of even date herewith, granted by me in your favour, of subjects on the east side of Charles Street, Greenock, extending to 31 poles 20 yards imperial standard measure or thereby; and I agree that you shall hold said disposition in security, and until full and final payment of all sums of money now due, or which may hereafter become due, by the company firm of William M'Arthur & Company, merchants, agents, and warehouse keepers in Greenock, and me, the said Mrs Mary Anne Brown or M'Arthur, and William M'Arthur, the sole partners of the said firm, as such partners, to you: And as to the said herit-