insurance effectual. He cannot insure his goods except on the footing of giving an implied warranty of seaworthiness, and so the law holds in the contract of carriage that seaworthiness is plainly implied as an obligation on the shipowner. I am therefore of opinion that that plea maintained on the part of the defenders would not have availed them. But on the facts of the case otherwise, as I have stated, I am of opinion that the defenders ought to succeed, and that the judgment of the Lord Ordinary should be recalled.

LORD PRESIDENT—I concur entirely in the opinion of Lord Adam, and have nothing to add.

The Court recalled the interlocutor of the Lord Ordinary, sustained the defences, and assoilzied the defenders from the conclusions of the action.

Counsel for the Pursuer—Asher, Q.C.—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Defenders—Balfour, Q.C.—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, December 21.

FIRST DIVISION.

KLENCK *v.* EAST INDIA COMPANY FOR MINING AND EXPLORATION, LIMITED.

Limited Company—Memorandum and Articles of Association—Issue of Shares at a Discount—Companies Act 1862, *secs.* 7, 8, 12, 25, *Table A* (27)—*Companies Act* 1867, *sec.* 25.

It is *ultra vires* of a company incorporated with limited liability under the Companies Acts 1862 to 1880 to issue its shares at a discount (whether the memorandum of association bears to confer such a power or not), because such a company has no power to reduce the capital specified in the memorandum of association.

The articles and memorandum of association of a limited company, incorporated under the Companies Acts 1862 to 1883, bore to confer power on the company to issue shares at a discount. The company issued such shares in conformity with certain special resolutions and a contract registered with the registrar. A shareholder, who was a party to these special resolutions and contract, presented a petition to the Court to have the register of the company rectified by deletion of his name as holder of 300 shares issued at a discount, on the ground that the issue of these shares was *ultra vires* of the company, and that consequently their allotment to him and the entry of his name on the register were also *ultra vires* and illegal. The Court *granted* the petition.

Opinion (*per* Lord Shand) that in certain cases the shares of railway and other companies which have adopted the Companies Clauses Acts may be issued at a discount.

The East India Company for Exploration and Mining, Limited, was incorporated under the Companies Acts 1862 to 1880 in 1881. The capital of the company was £100,000 in 100,000 shares of £1 each, of which 99,000 were taken up.

The memorandum of association contained the following clause:—"The objects for which the company is established are—From time to time to make the shares of capital original, increased, or reduced, or any part thereof ordinary or preferred, or guaranteed or deferred shares, and to convert the same into shares of different nominal amount, . . . and to issue all or any of such shares at par, or at a discount, or at a premium, or as paid up or partly paid up."

By the articles it was provided, *inter alia*—"(8) The company may from time to time by special resolution increase the capital by the creation of new shares." . . .

"(9) Such increased capital may be issued as ordinary shares, or preferred or guaranteed or deferred shares, or partly by one of these modes and partly by another or others, and may be issued at par, or at a discount, or at a premium." . . .

By special resolution passed on 6th January 1886, confirmed on February 5, 1886, and registered on 16th May 1886, it was resolved that the capital of the company should be increased from £100,000, divided into 100,000 shares, to £300,000, divided into 300,000 shares of £1 each.

By special resolution, passed on 13th June, confirmed on 30th June, and registered 8th July 1887, it was resolved, *inter alia*—"(1) That the directors be, and they are hereby authorised to issue 150,000 shares of £1 each, *quoad* 123,270 shares at a discount of not more than 12s. 6d. per share."

In pursuance of this resolution the company offered 123,270 shares at a discount of 12s. 6d. per share, and John Matthew Klenck applied to the directors for 300 shares, and at the same time remitted £15, being 1s. per share thereon. On 26th August 1887 he received notice that these shares had been allotted to him, and that he was entered in the company's books as holder of these shares.

On 31st May 1888 Mr Klenck presented a petition craving the Court "to ordain that the register of said company be rectified by deleting therefrom the entry of the petitioner's name as holder of the 300 shares of the capital stock of the said company (part of the shares issued in July 1887) standing in his name in the said register; and to direct that due notice of such rectification be given to the Registrar of Joint-Stock Companies in Scotland; and further, to interdict and prohibit the said company from making or enforcing any call or calls upon the petitioner in respect of the said shares, or from charging him for any alleged price in respect thereof, or from in any way holding or treating him as a shareholder of the said company in respect of the said 300 shares; and further, to decern and ordain the said company to make payment to the petitioner of the sum of £15, paid by him in respect of said shares, with interest thereon at the rate of 5 per centum per annum, from the 25th day of July 1887; and to find the said company liable in the expenses incurred in this application."

The petitioner averred that his application for the shares had been made on his part and accepted by the company on the condition that on

each share 12s. 6d. was to be credited as paid up, and that each share was to be subject only to a liability of 7s. 6d. thereon. This issue of shares at 12s. 6d. discount per share was *ultra vires* of the company, and consequently the allotment of the shares to the petitioner and the entry of his name on the register were also *ultra vires* and illegal. The company had refused to comply with his request to have his name removed from the register.

In their answers the company denied that the issue of shares at a discount, and their allotment to the petitioner and the entry of his name on the register were illegal, and averred that the said shares were issued in terms of the memorandum and articles of association, and of an agreement between the company and Mr James Napier and the Goldfields Prospecting Company, Limited, dated 24th and 27th May 1887, and of the resolutions of the company. The petitioner and the other shareholders further agreed with the company that the said shares should be so issued; and the agreement to this effect, dated 25th October 1887, was duly registered in terms of the Companies Act 1867, section 25, before the shares were issued. Numerous obligations had been incurred by the company on the faith of the petitioner and the other persons in the same position being shareholders. Both the company and the creditors relied on the petitioner and the said other persons being shareholders. The petitioner applied for and accepted the shares in question in full knowledge of the terms of the memorandum and articles of association. The respondents submitted that the petitoner was barred from insisting in the petition; that his allegations were irrelevant, and, so far as material, unfounded in fact; and that the petition should be refused, with expenses.

By section 7 of the Companies Acts 1862 it is enacted:—"The liability of the members of a company formed under this Act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound-up."

Section 8 of the same Act provides, *inter alia*:—"Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things—that is to say, . . . (5) The amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount."

Section 12 provides:—"Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorised to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock; but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association."

By section 25 it is enacted:—"Every company under this Act shall cause to be kept in one or more books a register of its members, and there shall be entered therein the following particulars—(1) The names and addresses, and the occupations if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number; and the amount paid or agreed to be considered as paid on the shares of each member." . . .

Table A, section 27, provides that "subject to any direction to the contrary that may be given by the meeting that sanctions an increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offer shall be made by notice specifying the number of shares to which the member is entitled, and litmiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company."

Section 25 of the Companies Act 1867 provides as follows:—"Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares."

Reference was also made in the course of the discussion to certain sections of the Companies Clauses Acts, which are quoted in the opinion of Lord Shand.

Argued for the petitioner—It was illegal and *ultra vires* of the company to issue shares at a discount. At common law there was no such thing as limitation of the liability of partners. Such limitation was entirely the creation of the Companies Acts, and could only be pleaded in the terms of these statutes, which did not authorise the issuing of shares at a discount. The memorandum and articles of association could not confer a power on the company to limit the liability of its shareholders in this way. The limitation of liability in the Act of 1862 was to the "amount, if any, unpaid on the shares"—secs. 7 and 38 (4). The amount of the capital and the shares was fixed by the memorandum under sec. 8, and with the exceptions enumerated in sec. 12, no alterations were to be made on the conditions contained in the memorandum of association. A company could neither buy its own shares nor issue them at a discount, for this reason, that every creditor was entitled to assume that the subscribed capital was in the coffers of the company, either in money or money's worth, or available to it in the pockets of its shareholders, except in so far as it had been diminished by the legal operations of the company. Section 25 did not authorise the issuing of shares at a discount. What it did was to recognise payment in kind, and that was regulated by sec. 25 of the

Act of 1867. The bargain between the company and the petitioner was therefore void as involving impossible conditions—*In re Almada and Tinto Company*, May 19, 1888, W.N.; *Trevor* v. *Whitworth*, L.R., 12 App. Cas. 409, *per* Lord Macnaghten; *In re Financial Corporation*, L.R., 2 Chan. App. 714, *per* Lord Cairns, 732-3; *Ashbury Railway Carriage and Iron Company* v. *Riche*, 7 Eng. and Irish App. 653, *per* Lord Cairns, 672. The argument from the provisions of the Companies Clauses Acts did not throw much light upon this case, where difficult statutes had to be construed. With regard to the question of prejudice to creditors, it was settled that if a man was induced by misrepresentation to become a shareholder, he might cease to be a shareholder if he sought redress before liquidation—*Smith's* case, 2 Ch. App. 604; *Oakes* v. *Peck*, 3 Eq. 576.

Argued for the respondents—The petitioner founded mainly on section 7 of the Act of 1862. That section, however, did not fix the liability of shareholders to the company. To ascertain that it was necessary to go to the conditions and regulations of the company, and in this case these allowed the issue of shares at a discount. The liability of shareholders to creditors was their liability to the company and nothing more—*Waterhouse* v. *Jamieson*, March 13, 1868, 6 Macph. 591—*aff.* May 24, 1870, 8 Macph. (H. of L.) 88, L.R. 2 Scotch App. 29. In the memorandum of the company there was a provision that shares might be issued at a discount, and there was nothing illegal in shareholders agreeing to this effect—*Oakbank Oil Company* v. *Crum*, December 2, 1881, 9 R. 198. The issue of shares at a discount was recognised in section 25 of the Act of 1862, which should be read along with sections 26, 27, and 28 of Table A. The company could issue shares at a discount if allowed by the articles—*Ramwell's* case, July 22, 1881, 29 W.R. 882; *Nice Hall Rolling Mill Company*, 23 Ch. Div. 545. It was argued for the petitioner that section 25 merely recognised payment in kind or money's worth, but that surely could not mean money's worth of the nominal value of shares. If goods were given for new shares when other shares were in the market at a discount, no one would give in goods more than the real value of the shares, and cash payments must be on the same footing—Palmer's Company Precedents, 39. Whatever payment in cash might mean in section 25 of the Companies Act of 1867, the operation of that section was avoided by registering a contract in terms of its provisions—*Birkenshaw* v. *Nicolls*, L.R. 3 App. Cas. 1004, *per* Lord Blackburn, 1025. If a contract were registered, the Court was not to ask whether the consideration given was equal to the nominal value of the shares or not. To take the case of the sale of a going business where the seller agreed to take payment in shares, the consideration on one side must be held equal to that given on the other, unless the agreement were impeached as fraudulent—*Pell's* case, L.R., 8 Eq. 222—*rev.* 5 Ch. App. 11; *Anderson's* case, L.R., 7 Ch. Div. 75; Buckley on the Companies Acts. The Companies Clauses Act 1845 (8 and 9 Vict. cap. 17) was a very kindred statute to the Companies Act 1862. It contained very similar provisions as to the amount of shares, and the liability of shareholders. The shares were to be of "prescribed amount" in the one case, of "fixed amount" in the other. By section 63 of the 1845 Act power was given to issue shares at a discount by the words "in such manner and on such terms,"—*cf.* 26 and 27 Vict. sec. 21, and 32 and 33 Vict. cap. 48. Why should not a similar power be conferred by the words "in such manner" in sec. 27 of Table A of the 1862 Act? There being no express prohibition of issuing shares at a discount in that Act it must be assumed to be legal. The benefit of the Act was that it created a general way to enable limited companies to incorporate themselves without special Acts of Parliament, but none the less the limitation of liability depended on the incorporation. In the *Almada* case founded on by the petitioner there appeared to have been no reference to the terms of section 25 of the 1862 Act, or to Table A. Two of the most cogent arguments on the point in question had therefore been overlooked. The power here contained in the memorandum of association was a further distinction between the two cases, and to a great extent the Judges in the *Almada* case proceeded on a mistaken analogy between that case and *Trevor* v. *Whitworth*. The issue of shares at a discount was not the same as the buying by a company of its own shares. The petitioner could allege no hardship in being kept on the register, as he had been present at the meetings at which the special resolutions were passed.

At advising—

Lord President—This is a summary petition presented under the authority of the 35th section of the Companies Act of 1862 against a company called the East India Company for Exploration and Mining, Limited, which has its registered office in Glasgow, and the registered capital of which was 100,000 shares of £1 each. The company resolved in the year 1886 to increase its capital from £100,000 divided into 100,000 shares of £1 each, to £300,000 divided into 300,000 shares of £1 each. That was simply an increase of capital exactly upon the same terms and footing as the original capital of the company, and is quite unobjectionable. But there followed upon that in the next year 1887 a special resolution of the company, by which it was resolved "that the directors be and they are hereby authorised to issue 150,000 shares of £1 each *quoad* 123,270 shares at a discount of not more than 12/6 per share;" and that was followed by certain other resolutions as to the proportions in which these new shares were to be offered to the existing partners of the company. Now, in pursuance of that resolution the company caused a prospectus to be issued offering these shares, 123,000 odds, at a discount of 12/6; and the petitioner applied for 300 of these shares and had them allotted to him, and he was entered in the company's books as the holder of 300 shares accordingly, upon the footing and condition, although that was not expressed in the register, that he was to be credited with 12/6 per share as paid up, and consequently that each share held by him was to be subject only to a liability of 7/6. The petitioner maintains that the issue of the shares at a discount is *ultra vires* of the company and void, and consequently that the allotment of shares to him was also *ultra vires* of the company, and that he is entitled to have his name removed from the register, and to have the

money which he paid for these shares, which amounted only to £15, repaid to him. The answer that is made on the part of the company is, in the first place, that the issue of these shares was perfectly legal and within the competency of the company, and secondly, that the petitioner having applied for and accepted the shares in the full knowledge of the terms on which they were issued, is barred from insisting in this petition and from having his name removed from the register. Now, the question whether this resolution of the company was illegal, and whether the issuing of the shares at a discount by this company was *ultra vires* and therefore void, is a question of very great importance, and depends, I think, truly upon the clauses of the Companies Acts, particularly upon the clauses of the Act of 1862. The seventh section of that statute prescribes the mode in which the liability of members of a company may be limited, and it must be observed that the limitation of liability is a statutory privilege purely. There is no such thing as limited liability at common law, and therefore no company can have limited liability that does not comply with the conditions upon which that privilege is granted. The 7th section is in these terms—"The liability of the members of a company formed under this Act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up." The latter is what is called limitation by guarantee, with which we have nothing to do in the present case. The limitation that we are dealing with here is a limitation which is "to the amount, if any, unpaid on the shares respectively held" by the members. The 8th section provides that "where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things—the name of the proposed company, with the addition of the word 'Limited' as the last word in such name;" the place where the registered office of the company is to be situated; "the object for which the proposed company is to be established; a declaration that the liability of the members is limited;" and lastly, "the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount." Now, I do not think there can be any ambiguity in these two clauses. The limitation is to the amount unpaid on the shares. Nobody can have a greater amount of limitation of liability than is prescribed here; and the limitation is this, that he shall not be called upon to pay more than remains unpaid upon the amount of his shares. Supposing the share to be £1, he never can be called upon for more than £1 for each share, and if any portion of that £1 has been paid, then his liability is limited to what remains unpaid. But that his liability extends to every shilling that remains unpaid is perfectly clear. In connection with this it is also necessary to consider the 12th section of the same statute, which provides that "any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorised to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock, but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association." Now, keeping in view that the leading condition of the memorandum of association is to be in all cases that the liability of members is limited to the unpaid portion of the shares which they have taken, and is not and cannot be extended farther, it appears to me that this clause, sec. 12, affords an additional confirmation of the importance attached to the rule established by sections 7 and 8, because, with the exceptions enumerated in section 12, no alteration shall be made by the company on the conditions contained in the memorandum of association. Now, the conditions contained in the memorandum of association are that the capital shall be divided into shares of a certain fixed amount, and that the liability of members extends to the whole amount of these unpaid shares, and extends no farther. The 25th section of the subsequent Act of 1867 was also referred to in argument, and quite properly, because it must be construed also in connection with the sections of the Act of 1862 that I have read. That 25th section provides that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares." The evil which this enactment was intended to remedy was very well-known. There were a number of transactions of rather a doubtful kind entered into between persons contracting with the company for works and the like, by providing that they should be paid by giving them shares—fully paid-up shares, or shares held to be fully paid-up—and the like, and to check these irregular transactions this section provided for payment of the shares in cash only, unless it shall have been otherwise determined by a contract made in writing before the issue of the shares—that is to say, that the contract made in writing must specify and publish the consideration which the company took in place of cash for the shares. So that that I think does not advance the argument at all in support of the issue of shares at a discount, because the issue of shares at a discount involves this, that whereas the share capital of the company is all divided in £1 shares, that being the certain fixed amount prescribed in section 8 of the Act of 1862, in point of fact they have given a discharge to those people who took the shares at a discount of a considerable portion of that which *ex facie* of the share they are bound to pay. That seems to me to be exactly the same thing in principle as the company buying its own shares. It is just a diminution of the apparent

capital of the company. In the one case—the case of purchasing its own shares, and holding them without re-issue—the company just return to the shareholders the whole or a portion of the capital which he has paid; and in this case, instead of returning a portion of the capital which he has paid, they fail to lay him under an obligation to pay up the unpaid portion of the shares, or rather they grant him a discharge of that, without consideration, to a certain amount. In short, the two violate the principle of the statute exactly in the same way. The memorandum sets out—and is bound to set out—the precise amount of the capital of the company divided into shares of a certain fixed amount, and the effect of that is to show to the public and to the creditors dealing with the company, what is the amount of the fixed capital upon which they are entitled to rely in so dealing with the company. But if by either of the means that I have suggested—either the purchase by the company of its own shares, or by such a transaction as this, issuing shares at a discount—the public and the creditors are misled entirely, then the memorandum is set at naught, and the provision of the memorandum is for all the purposes for which it was intended practically useless. These are the grounds upon which it appears to me that the issue of shares at a discount cannot possibly be maintained to be legal.

This is the first time that the question has occurred for decision in this Court, but there have been some cases in the English Courts upon the subject, and there has been apparently a good deal of variance of opinion among the English Judges. However, there was a case cited to us in which the Court of Appeal in England seems to have come to a unanimous decision, precisely to the effect that I have now indicated, and it is very satisfactory, especially after the apparent differences of opinion that existed among the English Judges, to find at least something like an authoritative judgment upon this question. I shall only say that the case of the *Almada Company* appears to me to be upon all fours with the present. It is very difficult to conceive two cases so nearly the same. I forbear from quoting the judgments of the learned Judges in that case, because your Lordships have had them before you, but I am happy to be able to say that I concur not only in the judgment at which the Court of Appeal arrived, but in the reasons which are given by the learned Judges for their opinions. But there is another and perhaps still more authoritative guide which we have in the present case, and that is the judgment of the House of Lords, in the case of *Trevor* v. *Whitworth*. That was a case where the company had purchased up its own shares and held them without re-issue, and the House of Lords held that that was an entirely illegal and void transaction, and must be set aside upon the ground which I have already indicated as being the ground of jugment in the present case, that this was just a defeating of the object of the memoandum of association in that part of it where it is required to set out the precise amount in money of the capital of the company divided into a certain number of shares of a certain fixed amount. The two cases—the case of the purchase of shares by the company, and the case of issuing shares at a discount—I think depend entirely upon the same principle.

There is just one other point to which it is necessary to advert in disposing of this petition. It is maintained upon the part of the respondents that they are entitled to issue shares at a discount, because they have a power to do so within the memorandum of association itself, whereas in the cases that have been decided, both in the *Almada* case and in the case of *Trevor* v. *Whitworth*, the power was not in the memorandum of association but in the articles of association. I do not think that makes any difference in the case at all, because if the power to issue shares at a discount be inconsistent with setting forth the precise amount of the capital of the company, divided into a certain number of shares of fixed amount, then that is superadding to the memorandum of association something that takes away its value, or rather something that utterly contradicts its most important provision. The point was dealt with, and very ably dealt with, by Lord Macnaghten in the case of *Trevor* v. *Whitworth*, and as expressing my own views of the question, although it did not actually arise for decision in *Trevor* v. *Whitworth*, I am prepared to adopt Lord Macnaghten's views upon that question. He says—"It seems to me that if a power to purchase its own shares were found in the memorandum of association of a limited company it would necessarily be void;" and further on he says—"It seems to me that one way of trying whether it is permissible or not would be to read it"—that is, the decree—"into the memorandum in connection with the condition which states what the capital is to be;" and then he puts it in this form—"The condition would then run thus—'The capital of the company is £150,000 in 15,000 shares of £10 each, but the board may buy back shares whenever they think it desirable for the purposes of the company to do so.' It seems to me that a condition so qualified would be repugnant and contradictory to itself. At anyrate, the qualification would have the effect of reducing one of the statutory conditions of the memorandum to an empty form." I cannot better express my own opinion than it is there expressed by that noble and learned Lord. I think if you add to the memorandum of association anything that derogates from or annuls one of the statutory requisites of the memorandum of association that must necessarily be an illegal condition. Upon these grounds I am for granting the prayer of this petition, removing the petitioner's name from the register of shareholders, and ordering the company, as I think we may by the 35th section, to repay the £15.

Lord Mure—I entirely agree in the grounds on which your Lordship has so very clearly based your judgment in this most important case, and I have nothing to add.

Lord Shand—I am entirely of the same opinion, and I adopt your Lordship's judgment upon all the points with which it has dealt.

I consider that this case is really decided by the case of *Trevor* v. *Whitworth*. Looking at the question which was there settled, and the grounds of the decision, I think we have practically the same question raised in this case. In *Trevor* v. *Whitworth* the company had bought back a number of its own shares, and in that

way the capital was diminished. The Court held that this was illegal and *ultra vires*, because the company had no power to diminish the capital which was specified in the memorandum. It appears to me that what was done here, although not done in the same way, has precisely the same effect. The Court in *Trevor* v. *Whitworth* expressed a strong view that the creditors were entitled to look to the capital as it was defined in the memorandum, and that the shareholders and directors of the company could not, unless under special conditions, and with the sanction of the Court under the Statute of 1867, reduce that capital by any process, and of course buying back their shares was practically reducing their capital. Now, can it possibly be said that if £1 shares are issued at a discount of 18s. that is not reducing the capital? In the one case the capital is paid back; in the other the obligation of the shareholder to pay his share of capital is discharged. The operation in the one case has precisely the same effect as in the other although it is done in a different form, and therefore I hold the case of *Trevor* v. *Whitworth* to be decisive of this case, except on the point to which your Lordship last alluded, that here the power to issue shares at a discount is contained in the memorandum, but on that matter also I agree with your Lordship. A power to issue shares contrary to the express provisions of the statute cannot be given by a provision in the memorandum.

Counsel for the respondents maintained an argument upon the Companies Clauses Acts, and as to what could be done with reference to the issue of a railway company's stock at a discount, and it is right to notice the argument that was so presented. It was maintained with reference to the provisions of these statutes, in the first place, that it was obvious that the Legislature did not consider that it was in all cases an illegal proceeding to issue shares at a discount; and, in the second place, that if we applied the analogy of these statutes to the present case, it would be found with reference to issuing shares at a discount that a company under the Companies Acts really had the power. It was said that power will be found to exist in the case of railways and other companies which come under the Companies Clauses Acts, and the statutes with which we have to deal are substantially the same.

Now, it appears to me that the argument succeeded so far. I think Mr Murray was able to show us—at least he satisfied me—that in the case of companies which come into operation under the Companies Clauses Acts of 1845 and subsequent statutes, there is power to issue shares at a discount, subject to certain conditions and restrictions. But I think the argument entirely fails to show that the clauses which allow of that power in the case of railway companies, and other companies adopting the Companies Clauses Acts, are at all the same either in terms or in effect as the clauses which we have to deal with in the Companies Acts of 1862 and 1867. In the Companies Clauses Act of 1845, section 6 provides that "the capital of the company shall be divided into shares of a prescribed number and amount, and such shares shall be numbered in arithmetical progression," and section 38 contains this provision as to the liability of shareholders, that "if any legal diligence or execution shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy under such diligence or execution, then such diligence or execution may be used against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid-up, and for the purpose of ascertaining the names of the shareholders" access shall be given to the register. Now, if these had been the only provisions in that statute affecting a question of this kind, it appears to me that the result would have been precisely the same as under the Acts we are dealing with. There would have been limited liability, but I think there would have been no power to the company to purchase its own shares or to issue shares at a discount. But we are referred to the special provision touching this matter contained in section 63 of the Companies Clauses Act of 1845, which deals with unissued capital authorised to be issued by the conversion of the power to borrow money into a power to issue capital stock. Section 61 provides—"If at the time of any such augmentation of capital taking place by the creation of new shares, the then existing shares be at a premium or of greater actual value than the nominal value thereof, then, unless it be otherwise provided by the special Act, the sum so to be raised shall be divided into shares of such amount as will conveniently allow the same to be apportioned among the then shareholders in proportion to the existing shares held by them respectively," and they are to be offered to existing shareholders accordingly. But section 63 provides that "if at the time of such augmentation of capital taking place, the existing shares be not at a premium, then such new shares may be of such amount, and may be issued in such manner and on such terms as the company shall think fit." Now, I am disposed to hold, and I think the subsequent course of legislation shows that by that clause with its wide powers having reference to augmentation of capital, where the existing shares are not at a premium, the new shares may be issued at a discount. But that is, I think, because of the very special terms of this particular clause, which provides that the shares may be issued "on such terms as the company shall think fit." The power of issuing the shares on such terms does, I think, include the power to issue shares at a discount. And subsequent legislation on the subject shows that the Legislature had taken that view of the section, because the Act of 26 and 27 Vict. c. 118, sec. 21, which follows on a number of sections providing for the issuing of new shares, and new stock in the case of a railway company, provides that "subject to the foregoing provisions the company may from time to time dispose of new shares and new stock at such times to such persons on such terms and conditions, and in such manner as the directors think advantageous to the company," but it goes on to enact—"but so that not less than the full nominal amount of any share or portion of stock be payable or paid in respect thereof." This clause, it may be observed, directly prohibits the issuing of shares at a discount, and accordingly if the enactments had stood there, in the case of railway companies that could not have been done.

But by two subsequent statutes, the latter being the Act 32 and 33 Vict. c. 48, sec. 5, it was provided, with reference to the section which I have now read—"Section 21 of the Companies Clauses Act of 1863 shall, with respect to any company to which it is applicable under the provisions of this or any other Act, be read to have effect as if the following words, that is to say, 'but so that not less than the full nominal amount of any share or portion of stock be payable or paid in respect thereof,' had not been inserted in that section." So that the prohibition to issue shares at a discount was removed by the Legislature, and apparently in certain limited cases the shares of railway and other companies which have adopted the Companies Clauses Acts may be issued at a discount.

But while the argument goes this length, I do not think it goes a step further. The mode in which that authority is given in certain limited cases is by the provision of the statute that the directors may issue the shares on such terms as they think fit. There is nothing of that kind in the Companies Acts of 1862 and 1867. The only reference to which counsel for the respondents could make upon this matter is contained in Table A containing the articles of association which might be adopted by any company. Table A, sec. 27, provides that "subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offers shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company." Now, the distinction between the two classes of cases is two-fold. In the first place, the Companies Clauses Act of 1845 itself in one of its enactments gives the power. We have no such power given in the Companies Act of 1862, and even if there were inserted in the articles of association a power of that kind, or indeed even in the memorandum of association, it would not be effectual as against the direct provisions of the statute, which in effect directly prohibit any such proceeding. But further, when you turn to the articles of association you find there is no such wide power given as to authorise directors to issue shares "on such terms" as they think fit, and the absence of these words, I think, makes all the difference between the two cases. On these grounds it appears to me that the argument founded upon the Companies Clauses Acts has no material bearing on the question which we are to decide, and that under the Companies Acts of 1862 and 1867 the issue of shares at a discount is *ultra vires*.

Lord Adam—I concur for the reasons now stated by your Lordship, and for the reasons stated by the English Judges in the *Almada* case. The only difference between this and the *Almada* case that I can see is that in this case the company has taken power by its memorandum of association to issue shares at a discount, as they have attempted to do. Nobody disputes that there must be certain conditions inserted in the memorandum of association, and that these are essential conditions under the Act. If that be so, it has always appeared to me to be a very clear proposition that in the same memorandum of association you cannot insert valid conditions which will give power to the company, if exercised, to destroy all or any of the essential conditions required by the Act to be in the memorandum of association. Take, for example, the first condition which must be inserted, viz., that the name of the company shall be followed by the word "limited," would it be possible to insert a valid condition in the same memorandum of association giving the power to the company to alter the name of the company by the omission of the word "limited?" The thing would be absurd. And so you might go through every one of the essential conditions, and take power in the memorandum which would enable the company to destroy every one of the statutory essential conditions, and so reduce the memorandum to a nullity. This would be out of the question, and I quite agree with the reasoning of Lord Macnaghten on that point.

The Court pronounced the following interlocutor:—

> "Grant the prayer of the petition, ordain the said respondents to rectify the register of the company, and to delete therefrom the entry of the petitioner's name as holder of 300 shares of the capital stock of said company (part of the shares issued in July 1887) standing in his name in the said register, and direct that the respondents give due notice of such rectification to the Registrar of Joint-Stock Companies in Scotland: Further, interdict and prohibit the said company from making or enforcing any call or calls on the petitioner in respect of said shares, or from charging him for any alleged price in respect thereof, or from holding or treating him in any way as a shareholder of said company in respect of the said 300 shares, and decern: Further, decern and ordain the said company to make payment to the petitioner of the sum of £15 paid by him in respect of said shares, with interest thereon at the rate of five per centum per annum from the 25th day of July 1887: Find the petitioner entitled to the expenses incurred subsequent to the lodging of the answers by the respondent," &c.

Counsel for Petitioner—D.-F. Mackintosh, Q.C.—Lorimer. Agents—John C. Brodie & Sons, W.S.

Counsel for Respondents—Graham Murray—Ure. Agents—Webster, Will, & Ritchie, S.S.C.