That rule seems to me to be applicable to the present case. It is a rule which has operated with some severity upon shareholders in circumstances where they cannot get the better of a dubious transaction, because they cannot restore the person who was not at fault to the position which he occupied before the date of the transaction.

I may say that if Mr Bayley had agreed to take the shares, and his name had therefore been properly upon the register of the company, I should have taken a different view of the case, because I think he has failed to explain satisfactorily his transaction with Doyle. It was incumbent on him to explain it in defending himself against this application, and I am quite unable to understand why anyone in his position should agree to give up a right to £150 of debentures which were held at the time to be as good as cash, and instead of that to allow £150 of stock to be issued in the name of his servant, unless that servant were a trustee for him.

If it had been necessary to consider that point I should have had great difficulty in concurring in the proposed decision, but for the reasons which have been given I think it is quite unnecessary to consider what was the nature of the real transaction between Bayley and Doyle, because whatever it was, it was part of the bargain between Bayley and Cæsar, the secretary of the company, that the stock should be put into Doyle's name.

LORD SHAND was absent.

The Court adhered.

Counsel for the Petitioner—Low—Orr. Agents—Davidson & Syme, W.S.

Counsel for the Respondent—J. C. Thomson—A. S. D. Thomson. Agents—Philip, Laing, & Company, S.S.C.

Thursday, February 20.

FIRST DIVISION.

[Sheriff of Lanarkshire.

SHAW v. CALEDONIAN RAILWAY COMPANY AND RAYNER.

Contract—Gaming—Contract for Payment of Differences.

A had a series of dealings in stocks and shares with B, an outside dealer, in the course of which he executed in favour of B a transfer of certain Caledonian Railway Company stock, which he deposited with B as a security against his indebtedness in future transactions with him. The dealings between the parties continued for ten months, during which delivery of stock was never asked for on either side, the transactions being settled by payment of differences. At the close of the dealings A owed B about £68 which he refused to pay.

In an action by B against the Caledonian Railway Company and A for registration of the transfer, *held* that the transactions between A and B were not gambling transactions in respect that A might have demanded delivery of stock bought from B, or have compelled B to take delivery of stock sold to him, and that the company were bound to register the transfer, and issue a certificate in B's favour.

John Shaw was a dealer in stocks and shares in London, outside the Stock Exchange. He had several places of business, to which prices of stocks and shares quoted on the Stock Exchange were telegraphed by the Exchange Telegraph Company, these prices being shown on a tape run off by an electric machine. There were always two prices for each stock, a higher and lower, being the prices at which the dealers on the Stock Exchange were ready to sell and buy respectively. Shaw was ready to do business at the same prices. In September 1886, John Rayner, 89 High Street, Eccleston Square, London, entered into dealings with Shaw. The dealings were of the nature of transactions on cover—that is, a limit was fixed of one or two per cent, within which the loss to be sustained by Rayner, if the stock went against him, was to be confined, and a sum was lodged by Rayner to cover this possible loss. When Rayner's loss reached the amount of the cover, Shaw was bound to close the transaction by entering into one of an opposite character. In February 1887, Rayner deposited with Shaw a certificate for £80 Caledonian Railway stock, and a deed of transfer of the same in Shaw's favour, as a security against Rayner's indebtedness in future transactions between them. The transactions between the parties came to an end in June 1887, when there was a balance of £67, 18s. 2d. against Rayner, which he refused to pay.

In November 1887 the present action was raised by Shaw in the Sheriff Court at Glasgow against the Caledonian Railway Company to compel them to register the transfer above mentioned, and to deliver to the pursuer a certificate in his favour.

The railway company lodged defences to the action, in which they stated that they had received notices from Rayner forbidding them to register the transfer.

The railway company pleaded—(1) All parties not called. (2) No jurisdiction. (4) The defenders being interpelled by the notices from the said John Rayner from registering the transfer of stock in question, decree of absolvitor ought to be pronounced.

The Sheriff-Substitute (GUTHRIE) sustained the defenders' first plea-in-law, and dismissed the action.

The pursuer appealed to the First Division, and after hearing parties the Court recalled the interlocutor of the Sheriff-Substitute, repelled the first two pleas for the defenders, and appointed them to intimate the dependence of the process to Rayner, certifying him that if he failed within eight days to appear and state objections to the registration of the transfer, judgment

would be pronounced against the defenders.

Rayner having appeared was allowed to lodge defences. In these defences he averred that "the pursuer acted throughout said transactions not as a broker or agent for the defender, but as a dealer with defender, and the conditions of the dealings were fortnightly settlements, payment of differences, and deposit of security by defender for such differences as might be due by him."

The case having been remitted to the Sheriff proof was led before him on 7th November 1888. The defender Rayner deponed that the transactions between him and the pursuer were gambling transactions, that the contract between them was only for payment of differences, and that delivery of the stocks was never contemplated. No contrary evidence was led for the pursuer.

On 27th November 1888 the Sheriff-Substitute found that the transfer of the stock which the pursuer claimed to have registered was granted in security of gambling transactions between him and Rayner, and dismissed the action.

"*Note.*—The pursuer has not adduced any evidence, but the defender Rayner distinctly swears that the blank transfer in question was given by him for a gambling debt, and for no real transaction. Had the pursuer appeared and sworn that there were real contracts under which he was bound to deliver stock or shares at the prices named in his account, it may be questioned what decision should have been arrived at. As the case stands, the pursuer's failure to appear in answer to the averments in Rayner's defences, or even to ask an adjournment in order to get evidence in answer to Rayner's, is sufficient corroboration of Rayner's evidence.

"If the certificate and transfer were given to the pursuer in payment or security of wagering transactions, then the question whether or not the balance on these dealings is in favour of one or the other of the parties involves an inquiry of a kind which the Courts of Scotland decline to entertain, and this rule of law precludes me from considering the other point founded on by the compearer.

"The pursuer having appealed, the Court allowed the defender to add the following additional plea to his record—'The said transfer having been granted in security of a gambling debt is null and void, and cannot therefore be founded on.'

"Both parties were also allowed additional proof, which was taken before Lord Adam on 13th January 1890. Alexander Willis, clerk to the pursuer, deponed—'In dealing in stock we do not in every case, if the stock rises, pay the buyer the difference; we give him the stock. We never in any case gave Rayner stock. He never asked for it. He could have had it at any time he wished. When he sold stock to us we could most decidedly have asked him for it. . . . Every transaction between Rayner and the pursuer was accompanied by a contract note, which bound pursuer either to sell or to buy a certain stock as the case might be. Assuming that Rayner had upon those contracts asked for delivery of a stock he had bought, pursuer would have been prepared to deliver him that stock. As matter of fact, Rayner never asked that any stock which he had bought should be delivered. In numbers of cases persons operating with pursuer ask for delivery of stock—operating, so far as the tape is concerned, in exactly the same way as Rayner was operating. Rayner always signed a contract slip giving authority for each transaction which was embodied in the contract notes. . . . If the stock goes against Rayner to the extent of the cover specified in the slip, pursuer is authorised by Rayner to make an opposite transaction so as to allow that transaction to close so far as Rayner is concerned. That does not at all affect the original transaction—namely, that the pursuer is obliged to deliver the stock if called upon. So long as a man keeps his stock covered he can always have delivery of it, and he can at any time increase his cover so long as the stock has not been actually closed, and when he takes it up he is given credit for his cover. In a case where Rayner had sold and pursuer bought, if Rayner had come upon the settling-day with the stock in his hand pursuer would have accepted it. . . . In the course of these transactions there was one instance in which a dividend accrued upon stock held by Rayner at the time, and that dividend was credited to him. The date of that was May 4, 1887. The stock was Egyptian Unified, and the amount of the dividend credited to him was £9, 13s. 4d. An instance also occurred where there was a conversion of Metropolitan Railway stock which he had purchased. Before the date when he sold it the holder was entitled to convert it. He was to get new stock, and when he sold his Metropolitan he also sold his new stock, which gave him a fractional value of 12s. 6d., and that also was credited to him. These credits would have been impossible except on the assumption that he was really the proprietor of the stock he bought from pursuer." . . .

Alfred Grieve, the pursuer's manager, gave evidence to the same effect. It also appeared that in certain cases where stocks had been carried over to another settling-day Rayner had been credited with contango.

The pursuer and appellant argued—1. The transactions between the pursuer and the defender Rayner were *bona fide* and real transactions embodied in written contracts which gave the buyer right to require delivery of stock sold to him, and the seller the right to compel the purchaser to take delivery of the stock bought by him. It was the rights of parties which must be looked to, and not their intentions. The dividend on Egyptian Unified stock and the profit on the sale of the converted Metropolitan stock credited to Rayner, and also the instances in which he had been credited with contango, all showed that the transactions between the parties were real transactions. The essence of gambling was absent, as it was not necessary from

the nature of the transactions that one party must lose where the other gained—*Thacker* v. *Hardie*, December 7, 1878, L.R., 4 Q.B.D. 685; *Newton* v. *Cribbes*, February 9, 1884, 11 R. 554; *Grizewood* v. *Blane*, November 20, 1851, 11 C.B. 526; *Maffett* v. *Stewart*, March 4, 1887, 14 R. 506. 2. Even though the transactions were held to be gaming tranactions still the transfer was effectual. Though the Court would not enforce gaming transactions, these transactions were not void, and a security granted for them was effectual. The maxim *melior est conditio prohibentis* applied—*Thacker's* case, *supra*. Opinion *per* Lindley, J., and cases collected there; Bell's Comm. i. (7th ed.), 319.

Argued for the defender and respondent Rayner—1. The parties never contemplated that stock should be delivered, and the transactions were really for differences, involving a loss on one hand and a gain on the other. It was the intention of parties which must be got at. When Rayner was purchaser he could not be obliged to take delivery, but was only liable for the amount of the cover—*Foulds* v. *Thomson*, June 10, 1887, 19 D. 803, opin. *per* Lord Wood; *Calder* v. *Stevens*, July 20, 1871, 9 Macph. 1074; *James* v. *Sheppard*, November 30, 1889, L.J. 83; *ex parte Marnham in re Morgan*, 1860, 30 L.J., Bankruptcy, 3; *Heiman* v. *Hardie & Company*, January 7, 1885, 12 R. 406. 2. The pursuer was the person founding on the contract, and the security was not available to him unless he proved his claim, and therefore the defender was the person in the condition favoured by the maxim *melior est conditio prohibentis*.

At advising—

LORD SHAND—This action originated in the Sheriff Court at Glasgow in the form of a petition by Mr Shaw, the pursuer, who is a sharebroker in London, directed against the Caledonian Railway Company; and the purpose of the petition was to have the company ordained to register a transfer of £80 of stock in his favour which had been granted by a Mr Rayner of London, who has since appeared in this process. Apparently, from the pleadings of the Court below, the Caledonian Railway Company had received by the same post as that which brought them the request to register this transfer, a protest on the part of Mr Rayner against the transfer being registered, stating that there were grounds upon which he was to maintain that the transfer was ineffectual and could not be registered. And the result was that the Caledonian Railway Company were induced to put in defences to the action—at all events with the view of having the question left open as to whether they were bound to register or whether Mr Rayner was entitled to prevent the registration. The Caledonian Company, besides resisting on the merits of the claim to have the deed registered, stated certain preliminary pleas as to jurisdiction and otherwise, and, unfortunately, I rather think for them, these pleas were sustained by the Sheriff in the Sheriff Court, and the result was an appeal to this Court. After the case was heard here we were all of opinion that the preliminary pleas were not well founded, and accordingly recalled the Sheriff's judgment on that point.

But it appeared, as the case then presented itself to this Court, that the parties really in dispute with each other were not before the Court, and that it was quite evident that the question to be remitted to proof was a question not properly between Mr Shaw, the pursuer, and the Caledonian Company, but between Mr Shaw, the grantee of this transfer, and Mr Rayner, the person who granted it, as to whether or not it was to receive effect. Accordingly, an order was issued to have a notice of the dependence of the action served upon Mr Rayner, with an intimation to him that if he did not appear the Court would order registration of the transfer. But Mr Rayner did appear and he put in defences, in which he resisted the registration of the transfer upon various grounds, and the case is now before us upon a proof which has followed upon these defences. The proof was partly taken in the Sheriff Court, to which the case was remitted, and was partly taken here after an appeal from the judgment of the Sheriff.

It appears that the pursuer, who designs himself as a sharebroker in London, is also a dealer in shares, acting, as appears from the proof, very much in the same way as jobbers of shares do in London on the Stock Exchange, but with this difference, that he is not upon the Stock Exchange. He sells shares to members of the public, or buys shares from members of the public upon terms which I shall immediately refer to. It also appears that Mr Rayner, after a series of dealings, extending over, I think, some months, with the pursuer Mr Shaw, on the 15th February 1887 brought to the pursuer's office a certificate of stock of the Caledonian Railway Company, and proposed that he should be allowed to go on with his dealings with Mr Shaw on the footing that he should leave the certificate with the pursuer and transfer the stock to him as a security for the dealings that were to take place. So far as I can see, there is no dispute about the footing upon which the transfer was executed, and the certificate handed to the pursuer. Both parties, I think, are agreed that the purpose was to cover Mr Rayner's indebtedness upon the transactions to be entered into between him and Mr Shaw, the pursuer. Accordingly a number of transactions did take place, and the question which has been raised between the parties relates practically to these particular transactions.

Mr Rayner put in defences after he appeared in the action, and what he states in regard to these transactions is to be found in his first statement and fourth plea-in-law. He says in his first statement that "the pursuer acted throughout said transactions" [these were transactions in stocks and shares] "not as a broker or agent for the defender, but as a dealer with defender, and the conditions of the dealings were fortnightly settlements, payment of differ-

ences, and deposit of security by the defender for such differences as might be due by him." Upon that statement as it stands, without proof, the defender represents that the whole of his transactions were transactions which, by contract, and by the dealing which followed on that contract, were mere dealings for differences. That was denied by the pursuer, and the proof has related chiefly to the question whether that statement of fact is true or not. The defender's plea is to this effect, that "the said transfer having been granted in security of a gambling debt is null and void, and cannot therefore be founded on."

The argument which we have had upon the proof was presented—at least by the senior counsel for the pursuer—under two branches or two points. In the first place, it was maintained by Mr Murray, upon authorities which seem to be exclusively in the law of England, that even if it appeared that this was a transfer which had been granted because of transactions which might be described as of a betting or gambling nature, nevertheless it was effectual; that it was not a transaction which could be regarded as an immoral contract with an immoral consideration; and that although the Court would not in the ordinary case give a remedy for recovery of money due upon a gambling transaction, yet that if a person granted a deed or conveyance of his property, following upon that transaction, that deed must be effectual.

Upon that point I think it is unnecessary to express an opinion, because upon the second point in the case, viz., the merits of the question between the parties, I have come to be of opinion that the defender has failed to make out that these transactions between the parties were transactions for differences, and for differences only.

Before referring to the evidence in the case, perhaps it would be best that I should state what appears to me to be the law applicable to cases of this class. I think that the rule or principle to be applied is of this nature—If it appears clearly that the contracts and dealings between the parties were for differences only, and were not intended in any sense to be real transactions, and were not in fact real transactions, then they must be regarded as gambling transactions, and the Court will not give effect to them. And I may say further, that if it appears that any writings which passed between the parties in the form of sale-notes or otherwise were a mere form, intended by both parties to give a colour to the transactions, and to have no legal effect of any kind, then I do not think that writings in such circumstances would take the case out of the rule I have mentioned. Transactions carried through by writings of that kind would be colourable merely, the transactions in themselves being truly for differences, and for nothing else. But, on the other hand, I think it appears from the authorities, and on sound principle also, that if contracts for the sale of stock or shares or of goods, as the case may be, are entered into, they create mutual obligations upon the parties, on the one hand to give, and on the other to take, delivery of shares or stock or of goods, as the case may be. If the obligation is such as can be enforced if either of the parties think fit to do so, then I think we get out of the region of arrangements for mere differences of the nature of betting or gambling. If either one or both parties may, as he thinks fit, demand or give delivery of stock, and ask payment of the price under the contract—if that can really occur as to one of the parties—then I think the transaction can be stamped as a real transaction, and is inconsistent with the notion of a transaction for mere differences. I have said that the writings may not be conclusive upon the matter. For example, if both parties upon oath were to admit, and it appeared quite clear upon the evidence, that the writings were a mere blind, and that both parties understood their contract, and were prepared to act upon their contract as one for payment of differences only, then I should hold that that was a gambling transaction. But unless the case could be brought up to that, and if it appeared that the contracts did create obligations which could be enforced, then I think the case would no longer be in the region of a contract for the payment of mere differences, and therefore out of the rule as to gambling contracts.

That rule is expressed in the case which was referred to, of *Newton* v. *Cribbes*, 11 R. 554, in a sentence in the judgment of Lord Craighill—a judgment which was concurred in by Lord Rutherfurd Clark and Lord M'Laren. His Lordship was there dealing with a case such as we have here, of a dealer selling and buying shares. He says, after a reference to a question that had been decided by the Sheriff-Substitute——"On that question, should it be necessary to decide it, I should concur in the opinion of the Sheriff-Substitute, for, assuming that the transactions in question were entered into by the defender, it has not been proved that the contract was nothing but an agreement for the payment of differences, or, in other words, a wager on the rise or fall in the price of the stock which was the subject of speculation." And he then goes into the evidence, and he explains that acting upon that view of the law he would not have been prepared to hold that the contract was one for differences, as it was one which might have been enforced by one or other of the parties. Accordingly, so far as that ground of action was concerned, his Lordship thought that the defence of gambling could not succeed. The defender did succeed upon another point, which does not touch the question I have now dealt with. I should notice that *Newton* v. *Cribbes* merely follows in the lines of the *dicta* in the very important and leading case of *Thacker*, which was referred to in the discussion, and in which the view which I have now stated is very fully set forth by a number of the Judges.

In another case, that of *Heiman* v. *Hardie & Co.* (12 R. 406), which was also referred to yesterday, there is a passage in the report which gives the German law upon this subject, and which I think is quite worthy of

notice, with reference to the general view which I think should guide the Court in dealing with a case of this kind. The German Jurisconsult, who was there adduced as a witness, states very shortly and very clearly that the German law is as follows (12 R. p. 410)—"Both in theory and practice it is now almost universally assumed by the greatest authorities in the legal profession, and the highest German law courts, that only such gambling debts and differences are held to be not recoverable by law where the contracting parties at the time of closing the transactions concurrently declare and distinctly agree that the right and the obligation to deliver and to receive the goods shall be excluded; the right and obligation to be confined solely to an amount of money (the difference), and the transaction understood to be settled on the settling-days only by paying and receiving payment of the difference in price to the exclusion of real delivery. Though numerous exchange transactions requiring delivery of stocks, or of grain, may be entered upon with the idea to settle the same by a mere payment of difference, still this intention does not much affect the legal character of these transactions so long as the right to deliver and to take delivery is not, according to distinct agreement, excluded. This theory is in no way affected by the fact that there has never been a real delivery of the wheat, or that a settlement of the original time bargain has been so affected that similar quantities of wheat for the same settling-day, before expiry of the latter, have been re-settled, viz., have been re-sold, respectively re-bought, by the original buyer respectively seller, to the original seller respectively buyer."

Now, that statement of the law had reference to grain specially, but it is equally applicable to a case of dealing in stocks and shares, and while I am not prepared to adopt that statement as to the law of this country absolutely as so expressed, still it gives a principle which I think must guide us in cases of this kind, the principle, namely, that unless it appears in the proof that the transactions are really for differences, and for differences only, then the transaction will not be regarded as one of a gambling nature.

That being the law applicable to the case, we are now to inquire what are the facts here? And I must say at once that the result of the proof upon my mind is, that the transactions were real transactions. I have very little doubt that the defender Mr Rayner, in his own intention, meant after purchasing stock to sell it again either in time for the first or second settling-day, and that, if he sold stock, he meant to buy other stock to meet it at some future time. But I do not think that his intention is by any means conclusive on this matter. The footing upon which these parties dealt was I think that delivery might be demanded from Mr Rayner of the stock he sold, or, on the other hand, if he bought stock, that he might have demanded delivery on the settling-day from the gentleman with whom he dealt. It appears that the mode in which the transactions were carried on was this. There seems to have been in the pursuer's premises a telegraphic instrument which ran off a tape, and upon this tape there was a constant stream of information flowing into the office as to the value of different stocks. The tape did not necessarily disclose, as I understand, actual transactions in stocks, but it did disclose with reference to the stocks the names of which were mentioned, two prices, viz., the prices at which the dealer on the Stock Exchange was willing to buy or to sell a particular stock. The tape records the dealers' offers to buy and to sell. They offer to buy stock at the lower price, and they offer to sell stock at the higher price that is recorded. The pursuer Mr Shaw's position, as I understand it, was this, that although not a dealer on the Stock Exchange, he was ready to deal exactly as the dealers on the Stock Exchange—that is to say, he was ready to sell any particular stock at the higher price which appeared on the tape, or to buy it at the lower price, and practically there was an offer of these stocks either for purchase or sale as the case might be. The defender, coming in, judged whether he would purchase or sell certain stocks, and he bought and sold accordingly. These were, so far as the mere externals were concerned, just ordinary purchases or sales for investment. They were generally purchases but sometimes sales, and it appears that unless the stock was carried over to another settling-day, there was either a re-sale or a re-purchase of stock, which enabled the defender to avoid making delivery of the stock on the one hand or taking it on the other, and meet the result by merely paying or receiving the difference. There is this particular feature in the transaction, but I do not think it really affects the result, viz., that there was a certain sum given by way of cover. The purpose of that undoubtedly under the contracts of the parties was this—On the one hand, to put Mr Shaw, in dealing with Mr Rayner, in the position that if stock which had been sold by Rayner rose in price he was in a position to avoid losing through Mr Rayner's inability to fulfil his contract, because he was entitled and indeed bound under the contract to immediately provide stock to meet Mr Rayner's obligation, and the cover was intended for that purpose. But while the cover operated in the way of preventing a loss either by the dealer in the shares or by Mr Rayner who had bought them, it is to be observed that if the stock went in an opposite direction, if Mr Rayner's transactions were turning out favourably, then undoubtedly he was entitled to hold by his sale or purchase whichever it might happen to be, and to require delivery of the stock or compel the pursuer to take delivery as the case might be. I think that shows the general nature of the transactions.

There is this further to be observed, that in every case which occurred the parties made contracts by writing. There was a slip authorising the transaction to be entered into and signed by Mr Rayner, the defender, and there was, secondly, a bought or

sold note as the case might be, which was issued by the pursuer and received by Mr Rayner recording the transaction. I think the proof shows that these transactions did create obligations. If Mr Rayner sold stock, as I have said, he could have delivered it, and I think Mr Shaw was bound to take delivery. Mr Rayner might have a difficulty in finding it; he seems not to have been a man possessed of means, but he might have bought stock otherwise by borrowing money, and coming and presenting it. And so in like manner if he bought stock, I think it is clear upon the evidence that if the stock rose from time to time he would have been quite entitled to say to Mr Shaw, "I demand delivery of that"—and Mr Shaw would have had no answer but to give delivery. This appears to be very clear upon one or two passages in the evidence, to which on this part of the case I shall in conclusion refer. Mr Willis, the pursuer's clerk, says—"Every transaction between Rayner and the pursuer was accompanied by a contract-note which bound pursuer either to sell or to buy a certain stock as the case might be. Assuming that Rayner had upon those contracts asked for delivery of a stock he had bought, pursuer would have been prepared to deliver him that stock. As matter of fact Rayner never asked that any stock which he had bought should be delivered." Then again he says—"If the stock goes against Rayner to the extent of the cover specified in the slip, pursuer is authorised by Rayner to make an opposite transaction so as to allow that transaction to close as far as Rayner is concerned. That does not at all affect the original transaction, namely, that pursuer is obliged to deliver the stock if called upon. So long as a man keeps his stock covered he can always have delivery of it, and he can at any time increase his cover so long as the stock has not been actually closed, and when he takes it up he is given credit for his cover. In a case where Rayner had sold and pursuer bought, if Rayner had come upon the settling-day with the stock in his hand pursuer would have accepted it." Now, these passages in the evidence make it quite clear, I think, that there was this reality in these transactions, that they did create obligations to give and to take delivery respectively; and therefore it appears to me that that takes the case quite out of a gambling transaction as for mere differences only. That view is confirmed by the circumstance which Mr Willis mentions, where he says that "In the course of these transactions there was one instance in which a dividend accrued upon stock held by Rayner at the time, and that dividend was credited to him. The date of that was May 4th 1887. The stock was Egyptian Unified, and the amount of the dividend credited to him was £9, 13s. 4d. An instance also occurred where there was a conversion of Metropolitan Railway Stock which he had purchased. Before the date when he sold it the holder was entitled to convert it. He was to get new stock, and when he sold his Metropolitan he also sold his new stock, which gave him a fractional value of 12/6, and that was also credited to him. These credits would have been impossible except on the assumption that he was really the proprietor of the stock he bought from pursuer." And in that view of the witness I entirely concur. So without further observation I am of opinion that the pursuer has failed to make out that this was a contract for differences and a dealing in differences only.

LORD ADAM—The defender Rayner objects to the registration of this deed of transfer on the ground that the transfer was granted by him in security of a gambling debt. And he says it is a gambling debt because it arose out of transactions with reference to the buying and selling of stock, these transactions being for the payment of differences only. If that were well founded it might or might not be a good defence. As Lord Shand has pointed out, even supposing it were well founded, there were reasons urged by Mr Murray why the transfer should be held to be valid. But I agree with Lord Shand upon that matter also, that it is not necessary to decide that point, because upon the evidence I hold it proved that these were not transactions for the payment of differences only. Indeed it would occur to me upon the authorities that the test whether certain transactions in the buying and selling of stocks were only transactions for differences or not would depend upon this, whether the buyer or seller could demand actual delivery of the stocks or shares sold. If he could—if the buyer could go to the seller and demand from him specific implement of the contract—then I should say it was impossible to hold that that was not a real transaction. I think that this, which is stated by Lord Craighill in the case of *Newton* v. *Cribbes* to be the test, is the proper test in such circumstances.

Now, the course of dealing here was that Rayner bought and sold on what is called a cover. That is to say, there was a limit fixed—a certain percentage—one or two per cent. as the case might be—or, as in this case, security given to a certain amount—so that in the case of stock or shares bought or sold, if they rose or fell, as the case might be, to the amount of the cover, then it was the duty of Mr Shaw to put an end to the transaction by buying in or selling out a like quantity of stock or shares. That was the nature of the cover. Now, it is not disputed that in each case—in each transaction in the buying and selling of stock—there was a bought-and-sold note passed between the parties. That appears clearly upon the evidence, and it is not disputed that in point of fact everything at least in point of form was exact and proper. That constituted the contract between the parties with reference to the purchase or the sale of the subject of the contract. In point of form it is unobjectionable, and I see no reason why it should not be presumed to be what it pretends to be, unless it be proved by Mr Rayner that notwith-

standing its form it was a purely colourable transaction, and that it was agreed behind and apart from the contract itself, that nevertheless it was not a real contract but a contract for the payment of differences only. I think that with this contract it is clear that there was incorporated a second contract by which if the stock should fall or rise to the amount of the cover for which Mr Rayner had given security, that Mr Shaw was bound to buy or sell, as the case might be, and so close the transaction.

Now, the effect of that appears to me to be twofold. In the first place, it is obvious that, as far as Mr Rayner was concerned, it saved him from loss beyond the amount of the cover, because if Mr Shaw was bound to buy in or sell out as soon as the stock rose or fell to the amount of the cover, of course that put an end to the transaction, and Mr Rayner would and did lose no more upon that particular transaction than the cover. On the other hand, it is clear that the cover afforded Mr Shaw a security in the case of shares or stock bought or sold by him that he should recover the price at the figure at which he had bought or sold to Mr Rayner.

Now, take the case that Mr Rayner bought certain stock from Mr Shaw, and that that stock fell in the market, and fell to the extent of the cover. Then it was Mr Shaw's duty to go into the market and put an end to the transaction by buying at the market price; and the then market price and the cover between them represented exactly the price at which Mr Shaw had bought from him, and there was an end of that transaction. On the other hand, it is quite clear that if the stock happened to rise in the market after Mr Rayner had bought, Mr Rayner might hold that stock as long as he pleased. There was no obligation upon him as far as I can see to part with it or to give it up at any moment. He could hold it as long as he liked; he could sell it; there was no limit in that direction. Again, if Mr Rayner sold stock to Mr Shaw, the operation of the cover was just the same, because if the stock in that case rose to the amount of the cover, then Mr Shaw could go into the market and buy stock, and in that case the cover and the price which he had to pay in the market, or at which he bought in again, would be the exact price at which he had bought from Mr Rayner, and at which he might be bound to deliver the like amount to a third party. And if that stock fell in the market, then Mr Rayner might hold it just as long as he liked. There was no doubt about that, so that the operation of the cover was only in one direction in each case. Now, I confess that with Lord Shand I see nothing in all that course of dealing, with reference to the effect of the cover, to show that it was a dealing in differences only. I see nothing to prevent, so far as we have gone, Mr Rayner at any time going to Mr Shaw and saying to him, "Deliver to me the stock I bought from you"—at any particular date. And I do not see how the fact that this agreement as to cover had been incorporated into the transactions at all affects the question of the right of the parties to demand execution of the contract they had entered into.

Now, I agree with Lord Shand that upon the evidence that was the true nature of the contracts. So far from there being any evidence that there was an agreement behind the apparent contract of the parties that nevertheless they should deal for the differences only, I think the evidence is all the other way. Both Mr Willis and Mr Grieve tell us that there was no such arrangement or agreement; and they tell us that in actual operations or dealings—although it never occurred in Mr Rayner's case—parties who are dealing exactly in the same way as Mr Rayner often come and demand delivery. And I do not see why that should not be supposed to be the true nature of the transactions here.

I also agree with Lord Shand that there are certain small matters spoken to by the witnesses pointing exactly in the same direction. There is the fact that in the case of certain stock which Mr Rayner held, having previously bought it from Mr Shaw, a dividend fell due, and that he got payment of it. And why did he get it? He got it, as stated by the witnesses, upon the ground only that he was the true owner of the stock, and therefore was entitled to the dividend.

Then we have the other matter pointed out also in the evidence that he got the value of certain new stock which was issued, because he happened to be the holder of the old stock at the time. He got that on the ground that he was the owner of the stock, and upon no other ground. There was another matter pointed out by Mr Murray in the course of his speech, that he got payment of a certain thing which is called contango, viz., a payment in the nature of interest because the transaction was held over for a fortnight till next settling-day. That represented interest upon the price of the stock which should have been then paid. It was not then paid, but remained in Mr Shaw's pocket, and continuing in Mr Shaw's pocket, he paid Mr Rayner this contango of 2s. 6d., which was equivalent to the interest on the money thus left in his pocket. Now, all this points in the same direction, and shows that these were true and *bona fide* transactions.

I quite agree with Lord Shand that as far as writing went, everything is apparently in the most perfect and indisputable form. If it could be shown that behind that it was the agreement and understanding of parties that there should still be a payment of differences, and nothing else, then that would prevail. But I see nothing of that nature here. What I see here, and what I do not doubt in the least, is that Mr Shaw in dealing with Mr Rayner had good grounds for believing, and might think it extremely probable, that Mr Rayner would not come and demand actual performance of the contract and delivery of the stock he bought. I think it very probable that he held that opinion, and that

that would be the course of the dealing. But that does not affect their legal rights. Whatever Mr Rayner's intention might be within his own mind, as to whether he would take delivery of the stock or not, or whether Mr Shaw might think that that was probable or not in the circumstances, does not affect the rights of the parties. That would not affect Mr Rayner's right to come forward and say to Mr Shaw —"Fulfil that contract." If that be, as I think it was, the true position of the parties, I have no hesitation in agreeing with Lord Shand that this was not a case of dealing for differences only, but was a true case of a contract for the sale and purchase of stock.

LORD M'LAREN—I concur wholly and unreservedly with the exposition of this case and of the law relating to it which has been given by Lord Shand, and I shall only make one or two general observations regarding this class of cases, of which I have tried a considerable number in the Outer House.

It appears to me from what I have heard in these cases that there is a class of impecunious speculators who are affected with what I may call a latent or imperfectly developed form of conscientiousness which shows itself in this way, that the innocent unreflecting speculator is quite willing to take the profit of the speculation if it succeeds, and it is only under the pressure of losses that his conscientiousness comes into full play and activity. He then discusses the immoral character of the transactions in which he has been engaged, and declares that it is positively against his conscience to pay or even to allow the broker to keep a security which he has given to him.

I think that perhaps the kindest thing to be done to this class of gentlemen is to let them see plainly that it is extremely difficult for them to succeed in such defences as have been here stated. I apprehend that the principle of our decision is this, that while maintaining the law that a contract for differences is void, yet, if the result of the contract is that the speculator —I mean the person who deals with the broker—has a right to require delivery of stock, that is a real transaction which the Courts will enforce. Lord Adam has stated this to be his opinion, and I understand Lord Shand's view to be to the same effect; and that is certainly the view which I have taken in this case. No doubt if it could be shown that there was a subcontract or latent understanding that the contract for delivery of stock was not to be enforced, then the case would result into one of differences.

But no stockbroker who knew his business ever would enter into a bargain of that kind. And again, if there be an obligation legally enforceable to deliver stock, the mere circumstance that the speculator in his own mind does not mean to enforce the contract, but will be content to take his differences when offered to him, will not make the contract one for differences which the law will not enforce.

I think that perhaps if we had known as much of this case when it first came before the Court as we now do, probably the Court might not have appointed intimation to be made to Mr Rayner with a view to his appearance. And as an order to call parties is always a discretionary matter, it may be for consideration whether in a similar case such an order could be usefully pronounced. I rather think that where a company like the Caledonian Railway Company is called upon to register a transfer of stock, which is purely a ministerial proceeding, and they receive intimation from some other person that he has an interest in it, their true position is to say, "Unless you follow up your intimation by an application for interdict or other legal measure we will register the transfer." Now, if that be the position which a company may safely take up, then in a case of this kind the transferor never could maintain his case, because if he attempted to bring an interdict he would be immediately reduced to silence by the application of that powerful logical weapon the dilemma. Either he admits that it is a real transaction—in which case of course the security must be registered and his claim is only for any balance that may be due—or if he says that it is a gaming contract, then he is equally barred, because the Courts will not sustain an action by a person who has deposited a security on a gaming contract for the restoration of that security, but always leave those interested in such investments to whatever satisfaction they can derive from the possession of other people's property.

LORD PRESIDENT—I agree entirely in the opinions which have been delivered, and I only desire to add a reference to the case of *Foulds* v. *Thomson*, 19 D. 803, which appears to me to be a very important authority in this class of cases. It is necessary perhaps in referring to that case to make it plain that the Judges there assumed that the Statute 8 and 9 Vict. cap. 109, applied to Scotland, or, as Lord Murray expresses it, that that statute made the common law of Scotland the statute law of England. I mention that circumstance, because it is necessary in order to make the opinion to which I am about to refer intelligible. Lord Murray says—"This party has stated as his defence the Statute 8 and 9 Vict. cap. 109, which, it is said, made the common law of Scotland the statute law of England. The question before us is—'Is there anything like gaming or wagering in the transactions complained of?' There is no difficulty as to the facts, for the defenders called the pursuer, than whom no one could be more capable of giving an opinion, and I give full credit to his testimony, although others give a somewhat different account. In all gaming one party gains and the other loses. All cannot gain, but here so much stock is bought—it rises. A has sold, B has bought, through a broker; A may have sold at a higher price than he paid, B may in turn do likewise, in which case all might be gainers. This cannot be

gaming. I am far from saying they are engaged in a laudable pursuit. But all the parties might equally lose. I cannot assimilate this to the nature of gaming or wagering, to constitute which there must be two parties, one of whom must lose." In like manner Lord Wood says—"To wagering or gaming there must be two parties. The provisions of the statute are all framed on that footing. The parties must come together directly or through their brokers. In contracts within the statute there must be opposite parties, and there can be no innocent ignorant parties. If a party or his broker go to another party or his broker and arrange or make a contract for the sale and purchase of shares where neither party is to be bound to deliver or accept the shares, but where they are merely to pay the differences according to the rise or fall of the market, that would be gaming within the statute. But in the present case there is no evidence that any one of the contracts forming the transactions in the account libelled was a contract for payment of differences, and to be implemented by such payment."

I think that case and these opinions afford an excellent test for determining the main question in this case, and applying that test here, I cannot have the slightest hesitation in adopting the view stated by my brother Lord Shand, that there is here a *bona fide* contract in each particular case which may be enforced in the ordinary way by requiring delivery or acceptance.

The result is that this transfer must be ordered to be registered, and for that purpose judgment must go against the Caledonian Railway Company. There are two of their pleas in defence which have been disposed of by a previous interlocutor, viz., the first and second, but the remainder of their pleas, I apprehend, must now be repelled also, as none of them afford a sufficient reason for refusing the registration of the transfer.

I am not making these observations with any reference to the question of expenses, but merely with reference to the form of the judgment. And of course Mr Rayner's pleas necessarily fall to be repelled also; and that having been done, there is nothing in the way of an order for registration of the transfer.

The Court pronounced this interlocutor:—

"Find in fact that the transfer of stock which the pursuer claims to have registered was not granted in security or payment of gambling transactions between the pursuer and the compearing defender John Rayner: Recal the interlocutor of the Sheriff-Substitute dated 27th November 1888: Repel the pleas-in-law for the defenders the Caledonian Railway Company, and repel also the pleas-in-law for the said compearing defender Rayner: Ordain the Caledonian Railway Company to register in their register of transfers the said transfer No. 8/2 of process, dated 26th July 1887, and to deliver to the pursuer a certificate in his favour for the amount of stock thereby transferred, and decern," &c.

Counsel for the Pursuer—Graham Murray—C. S. Dickson. Agent—David Turnbull, W.S.

Counsel for the Caledonian Railway Company—D.-F. Balfour, Q.C. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Rayner—M'Clure. Agents—R. Bruce Cowan, W.S.

Saturday, March 1.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

BELL *v.* BELL.

Parent and Child—Aliment—Liability of Grandfather for Aliment — Obligation Discharged by Offer to Receive Grandchild into Family.

In an action by the mother of a child against its grandfather for its aliment, the defender proved that he was eighty-five years of age; that his annual income was £173; that his house was occupied by himself, two daughters, a son-in-law, and five grandchildren. *Held* that the defender discharged himself of his obligation to aliment by offering to receive his grandchild into his family.

Mrs Mary Gregory or Bell, wife of Claud Hamilton Bell (who at the date of the present action was furth of Scotland), and Claud Hamilton Bell junior, one of the children of this marriage, raised an action in the Sheriff Court at Edinburgh against Charles Bell, M.D., the father of Claud H. Bell senior, Edinburgh, for payment of £16 per annum as aliment of Claud Hamilton Bell junior.

The defender admitted his liability to pay aliment, but in implement of his obligation offered to receive him into his family, and to support and educate him along with his other grandchildren.

To this proposal Mrs Bell refused to consent.

In the proof allowed by the Sheriff-Substitute the following facts were established—The spouses were married in London in March 1879, and two children were born of the marriage, Charles, aged ten years, and Claud, aged eight years. In December 1888 the spouses separated in terms of a minute of separation, which, *inter alia*, provided that the eldest child Charles should live with and be brought up by his grandfather the defender. Thereafter the pursuer supported herself and her youngest child by taking in lodgers. She had no means of her own, and her friends were not in a position to give her any assistance, and latterly she had found it impossible to subsist upon the sum she earned by letting her rooms. In June 1889 Claud Hamilton Bell senior left Scotland and went abroad. He