money's worth, I see no difference in principle between such an assignment and the case of assignment of the lender's individual property with a relative obligation to restore the value of the goods. In the case before us the right of the defenders in the pledges was only a qualified right, but the question of security or preference in bankruptcy is independent of the nature of the right of the cedent in the thing conveyed, and depends only on the quality of the assignee's obligation. If that obligation can be fulfilled by a payment in money or goods *in genere* the obligation is personal, and only gives rise to a claim to participate in the distribution of the bankrupt's estate. This, in my view, is all that the defenders can claim under each of the two deeds challenged by the trustee.

It is perhaps unnecessary, but it may be satisfactory to the parties that I should say that we do not overlook the fact that the form of a lease is used. Where the substance of the contract between debtor and creditor is consistent with the existence of a right of security or real right in the creditor, form may be important, especially in determining the creditor's remedies, as in comparing, for example, the cases of a bond and disposition in security and an *ex facie* absolute deed, where the rights and remedies of the parties are different, depending on the terms and clauses of the deed of security.

But when, as in the present case, the contract is not in substance a security contract, it will not be made any better by giving it the name of a lease, while the rights conferred on the grantee are not those of a tenant but of an owner entitled to dispose of the subject at his pleasure.

I do not think it is necessary for the purposes of this case to enter on a review of the decisions in this chapter of bankruptcy law. The construction of the Statute 1696 is now very well understood, and I do not think that the circumstances of any of the previous cases throw much light on this case, which is indeed very special in its features. Probably the nearest case to the present is that of *Gourlay* v. *Hodge*, 2 R. 738, where the debtor in exchange for an advance undertook "within one month from this date" to give delivery-order for grain, and the obligation was held only effectual to give a ranking in bankruptcy. The whole subject is most fully discussed in the elaborate and luminous opinion of the late Lord President in *Steven* v. *Scott & Simson*, and I shall conclude by reading a few lines from that opinion which appear to me to be directly applicable to the present case—"An obligation of a general kind to give security is plainly nothing at all in itself. It is an obligation no doubt that the party is bound in honour to fulfil, but it is an obligation not applicable to any particular subject, and it is not in itself a specific obligation, and until it is made special in some way or other it cannot be said to be a security for the debt at all. In that view it is only when the so-called obligation is fulfilled that there comes to be any security. And therefore that is the point of time at which the security is granted, and if that point of time occur within sixty days of bankruptcy the application of the statute is clear, because that is security given within sixty days for a prior debt."

In the present case the fulfilment of the obligation to restore was the executive of the deed of renunciation. As between the debtor and the creditor there is nothing to be said against the deed, but because it is a deed in satisfaction of an antecedent obligation it is annulled by the statute, and it follows in my opinion that the trustee is entitled to decree in terms of the Lord Ordinary's interlocutor, with the variation suggestion by your Lordship.

LORD KINNEAR was absent.

The Court adhered to the Lord Ordinary's interlocutor except in so far as it decerned for the sum of £2153, 10s. 3d., with interest on said sum at the rate of 4 per cent. from 1st September 1888 until payment; and in place thereof, of consent of parties decerned for the amount of £2430, 1s. 6d., with interest on said sum at said rate of 4 per cent. from said 1st September 1888 until payment, and found the pursuer entitled to additional expenses, &c.

Counsel for Pursuer—W. Campbell—Crole. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for Defenders—D.-F. Balfour, Q.C.—Baxter. Agents—Duncan Smith & Maclaren, S.S.C.

Friday, November 13.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

SMYTH *v.* MUIR AND OTHERS.

Process — Summons — Declarator — Payment—Competency.

Two limited companies bought separately from the firm of B & Company several properties at prices amounting in all to £79,000. A shareholder in the two companies sued these companies, and their directors, and the private firms of B & Company and F & Company, for declarator that the sale of these properties was null and void, and that the directors of the two companies were not entitled to enter into the sale, and to have the two firms ordained to repay the sum of £79,000 to the two companies in the proportions paid by each respectively, or to have the directors of the two companies ordained to pay to them the sum of £79,000. The pursuer did not seek reduction of the sale.

He alleged that the two firms were represented in the directorate of the two companies; that B & Company

were indebted to F & Company; and that by a fraudulent scheme among the partners of the firms the properties, which were valueless, were sold to the companies in order to raise money to pay B & Company's alleged debt.

Held that the action was incompetent in respect (1) that even assuming the alleged fraudulent scheme, the contract induced thereby was not void but only voidable; (2) that it proceeded on two distinct and separate wrongs against two distinct and separate persons; (3) that it concluded for a lump sum as the amount of the loss sustained by two persons.

Peter Roy Smyth was a shareholder to the extent of three shares of £100 each, paid up to the extent of £70 each, in the North Sylhet Tea Company, Limited, and of three shares of £100 each, paid up to the extent of £70 each, in the South Sylhet Tea Company, Limited. These companies were incorporated under the Companies Acts on 18th September 1882, the capital of each being £400,000 in 4000 shares of £100 each. The objects of the companies were primarily to acquire lands in the district of North and South Sylhet, and elsewhere in the Presidency of Bengal and other parts of India, and to plant and rear tea plants thereon, and the manufacture and sale of the produce thereof.

Smyth alleged that in or about the month of November 1884 a proposal was made to the boards of the companies to purchase certain tea gardens which then belonged to the firm of Messrs P. R. Buchanan & Company, merchants, Fenchurch Avenue, London, and ultimately in or about the month of April 1885 a sale of these gardens to the companies was arranged at the price of £79,000. At the date of the transaction Mr P. R. Buchanan, the senior partner of the vendors' firm, was, and he still was, a director in the said companies. There were at said date seven directors of the companies, of whom two, the chairman Mr Muir, and Mr A. M. Brown, were partners of the firm of James Finlay & Company, merchants, Glasgow, the secretaries of the companies, and a third, Mr A. B. Murray, was a relative of Mr Muir. The firm of James Finlay & Company had made large advances to Messrs P. R. Buchanan & Company, who at the date of the sale were indebted to Messrs James Finlay & Company in a sum largely exceeding the sum of £79,000, payable to them as the price of the tea gardens. The price paid by the tea companies jointly was applied in reducing the said debt by Messrs P. R. Buchanan & Company to Messrs James Finlay & Company. In this way the firm of Messrs P. R. Buchanan & Company, the principal partner of which was a director of the tea companies, were relieved of a large portion of their obligations in return for properties of little or no value, while Messrs James Finlay & Company had a corresponding benefit, all to the detriment and loss of the tea companies. Smyth further averred that the transaction was a fraudulent scheme entered into between Messrs P. R. Buchanan & Company, Mr P. R. Buchanan, and Messrs James Finlay & Company, and Mr John Muir and Mr A. M. Brown, partners of that firm, who were also connected with the shareholders of the tea companies, whereby P. R. Buchanan & Company disposed of certain properties of little or no value, in the knowledge of said defenders, to the tea companies for a large price, which was by said fraudulent scheme applied to the reduction of the foresaid debt due by Messrs P. R. Buchanan & Company to Messrs James Finlay & Company, and the scheme was carried out by the directors of the tea companies, and in default of their duties as directors. The directors commanded a majority of the voting power of the companies, which they were using for the purpose of preventing inquiry into the acts in question, and promoting their own interests fraudulently at the expense of the companies.

Accordingly Smyth sued the directors of the two companies, and Buchanan & Company and Finlay & Company, and the two limited companies themselves, to have it declared that the sale by Buchanan & Company to the two companies "was null and void, and that the defenders, the directors of said companies, were not entitled, and could not legally enter into the said contract to purchase said lands, or the leasehold rights thereof, or the said plant, machinery, and houses; and further that the defenders, the said Messrs P. Buchanan & Company, and the said defenders Messrs James Finlay & Company, jointly and severally, or one or other of them, are bound to repeat to the said companies, in the proportion in which the said companies were respectively interested, the sum of £79,000, or such other sum as was paid for said lands or leasehold rights and others, with interest thereon at the rate of 5 per centum per annum from the date when the said sum was paid to the said defenders until repetition or repayment; and the said defenders Messrs P. R. Buchanan & Company and Messrs James Finlay & Company, jointly and severally, or one or other of them, ought and should be decerned and ordained by decree foresaid to repeat and pay the said sum of £79,000, or such other sum as was paid by the said North Sylhet Tea Company, Limited, and by the South Sylhet Tea Company, Limited, with interest as aforesaid, and that to each of said companies in the proportion paid by each respectively, or otherwise that the said directors, all jointly and severally, should be decerned and ordained by decree foresaid to make payment to the said North Sylhet Tea Company, Limited, and to the said South Sylhet Tea Company, Limited, of the sum of £79,000 sterling, with interest as aforesaid."

The pursuer pleaded, *inter alia*—"(1) As the defenders control a majority of the voting power of the company, and are using this power fraudulently for the purpose of preventing inquiry and promoting their own interests at the expense of the company, the pursuer is entitled to sue on behalf of himself and others

to compel them to make good the funds improperly expended. (2) The contracts of sale by Messrs P. R. Buchanan to the said companies being illegal and *ultra vires*, the pursuer is entitled to decree of declarator as concluded for. (3) The said contracts of sale being a fraudulent scheme for the benefit of firms in which the directors of said tea companies were partners, are null and void."

The defenders pleaded, *inter alia*—"(1) The action is incompetent, in respect it relates to two separate contracts between different vendors and vendees. (5) The pursuer's averments are irrelevant and not sufficiently specific. (10) *Restitutio in integrum* being impossible, the remedy craved is incompetent."

On 10th June 1891 the Lord Ordinary (STORMONTH DARLING) found the pursuer's averments irrelevant and dismissed the action

"*Opinion.*—This is an action of a very peculiar nature. It is brought by an individual shareholder in two limited liability companies, called the North Sylhet Tea Company and the South Sylhet Tea Company, and it is directed against the directors of these companies, the companies themselves, and two private firms—Messrs P. R. Buchanan & Company of London, and Messrs James Finlay & Company of Glasgow. There are no reductive conclusions, but the main purpose of the action is to have it declared that a sale by Messrs P. R. Buchanan & Company to the companies of certain tea gardens in India, made in 1885, was and is null and void, and to have Buchanan & Company and Finlay & Company ordained to repay to the companies the sum of £79,000, being the price of the tea gardens. There is an alternative conclusion for payment of the sum of £79,000, by the directors, jointly and severally, to the companies.

"The allegations of the pursuer are that these tea gardens were, at the time of the sale 'practically valueless,' that they were the property of the firm of P. R. Buchanan & Company, that Mr P. R. Buchanan, the senior partner of that firm, was then a director of the two companies, that the firm was largely indebted to James Finlay & Company, two of the partners of which firm (Mr Muir and Mr A. M. Brown) were also directors of the companies, and that a fraudulent scheme was concocted between Mr Buchanan, Mr Muir, and Mr Brown, whereby the tea gardens were palmed off upon the companies at an exorbitant price, in order that the money so raised might be applied in reduction of Buchanan & Company's debt to Finlay & Company. The pursuer does not say that prior to raising the action he took any steps to obtain redress within the companies themselves, but he says that the directors 'command a majority of the voting power of the companies,' and that they are using that power to prevent inquiry into the acts in question.

"Since the action was brought it appears that the pursuer did attempt to enlist his fellow shareholders on his side, for he addressed to each of them a circular asking them to join him in the action, and he alleges that some of the replies were favourable; but certain it is that at the general meeting of the companies, held on 18th May last, a resolution was passed expressing the meeting's entire confidence in the directors, disapproving of the action, and instructing them to defend it. The pursuer proposed an amendment for the appointment of a committee of investigation, but he did not even succeed in finding a seconder.

"The pursuer is the holder of six recently acquired shares of £100 each in the two companies, the total capital of which is £800,000. The case thus presents the remarkable aspect of an attempt made by a man whose interest in the concern is 1/1333rd part of the whole, to rescind on behalf of the companies contracts made six years ago, with which the companies themselves are perfectly satisfied. The boldness of the attempt is further shown by the fact that the pursuer, while demanding repetition of the price, does not, because he cannot, offer restitution of the land; and it is not wonderful that the companies should be unwilling to take such a course when it appears from the pursuer's own admission in answer 9 that a very large capital expenditure has been made upon the tea gardens since their purchase.

"The defenders, besides denying all the pursuer's material averments, state a number of preliminary pleas. Of the first I will only say, that while it has much force in point of form, the companies are so closely connected that I do not think any practical end would be served by sustaining it; but if the action were to go on, it would be necessary to call as defenders the vendors mentioned in stat. 11. The second plea, of no title to sue, which is to be taken along with the new plea founded on the proceedings of the recent general meeting, raises the important and interesting question how far an individual shareholder can sue on behalf of a company against the wish of the majority, without alleging either that the act complained of was *ultra vires*, or that it constituted an attempt by the majority to gain some advantage for themselves at the expense of the minority. I was referred to many cases on this point which would require very careful consideration, if it were not that there are averments here of fraud which make it, I think, desirable to decide the case on the broader ground of relevancy. I am of opinion that the pursuer being a minority (and, as it happens, a minority of one), has not stated a case relevant to sustain either his conclusions for annulling the sale, or for recovering the price from the individual directors by way of damages.

"To the conclusions for annulling the sale the objections are, I think, insurmountable. It is enough, in my opinion, that the pursuer does not and cannot offer restitution of the subject of sale. The complaint that Mr Buchanan, the vendor

of the greater part of the properties, was at the time of the sale a director of the companies is obviated by the admitted fact that his resigation was accepted on 12th November 1884, the day before the bargain was closed, and I cannot assent to the pursuer's view that the directors were not entitled to waive, if they chose, the condition in the 67th article of association, that a director must give one month's notice in writing of his intention to resign. Even if Mr Buchanan were to be held in law as still a director on 13th November, the 75th article provides, and I think lawfully provides, that a director may transact business with the company in the same manner as if he were a third party. Moreover, while the pursuer avers a fraudulent scheme for enabling the debt of Buchanan & Company to Finlay & Company to be paid at the expense of the companies, it is obvious that the whole sting of this averment lies in the allegation of excessive price, for apart from that there was nothing wrong in Buchanan & Company making, or in Finlay & Company receiving, payment of a just debt. Now, it is not said that either Buchanan & Company or Finlay & Company, or their partners, used any arts or practised any misrepresentation or concealment to persuade their brother directors to consent to the transaction, and without their consent the transaction could not have been carried out. Neither is it said that the three persons who alone were parties to this alleged fraud (viz., Buchanan, Muir, and Brown) themselves possessed a majority of the votes in the companies, though it is loosely said that the directors as a whole commanded a majority of the voting power, so that when the shareholders deliberately adopted and ratified the transaction, I must assume that an independent majority of the shareholders were of opinion that the purchase was not at an excessive price, but for the benefit of the companies. In such a state of matters I think it would be in the highest degree improper for a court of law to interfere in the internal regulation of a company, and at the suit of a single dissentient shareholder to order an elaborate and costly inquiry into the value of properties which the company itself is determined to retain.

"The same considerations have led me to the result that the pursuer has not stated a relevant case for his alternative conclusion, which is not put either in his condescendence or pleas-in-law as a conclusion for damages, but which I am asked to regard in that light. The conclusion is aimed at all the directors, yet it is not said that four of them (Mr Murray, Sir Robert Moncrieffe, Mr James Coats, and Mr Thomas Glen Coats) were aware of the alleged worthlessness of the properties, or took any part in the alleged fraudulent scheme, or profited in any way by the transaction. Against them, therefore, the conclusion is plainly irrelevant, for I never heard of an action of damages against directors for mere negligence or want of prudence in paying too much for a property, particularly when the company itself was perfectly satisfied with the bargain. Even as against the three defenders who are said to have profited by the transaction, I do not see my way to sustain the relevancy on this head, and thereby to allow a proof which would involve those very evils which I have mentioned as necessarily arising from an inquiry with a view to cut down the sale. I am far from saying that there are not frauds by directors of a kind for which even a single shareholder might be allowed to recover damages in name of the company, particularly if he could show that he was prevented from obtaining redress within the company itself by the actual votes of the wrongdoers. But when the alleged fraud resolves entirely into an allegation of excessive price paid from a sinister motive, and when it appears that a majority of the shareholders, apart from the alleged wrongdoers, are content to abide by the transaction as fair and reasonable, I am of opinion that there is no case for the interposition of the Court.

"I shall therefore find that the averments of the pursuer are not relevant to sustain the conclusions of the summons, and dismiss the action."

The pursuer reclaimed, and argued that he was entitled to succeed in one or other of the conclusions of his summons, as the transaction which he sought to set aside was fraudulent, and entered into solely for the benefit of the contracting parties. The pursuer was not the only shareholder who sought redress, but being in a minority, inquiry into the true state of matters could only be obtained through the intervention of the Court by means of an action, and the averments of the pursuer on record were ample to warrant inquiry. The sale to the companies of these two estates was *ultra vires*, and being so were illegal—*Lewis*, L.R., 8 App. Cas. 1050; *Rixon* v. *Edinburgh Northern Tramways Co.*, March 20, 1889, 16 R. 653.

Argued for the respondents—There was no title to sue, because, deducting the votes of all shareholders charged directly or indirectly with fraud, there was an overwhelming majority against the pursuer—Lindley, p. 581; *Foss* v. *Harbottle*, 2 Hare, 461. *Rixon's* case did not displace this rule in cases of fraud. There was no nullity in the contract with a director, for the articles of association permitted this—*Southall*, L.R., 6 App. Cas. 619; *United Switchback Company*, L.R., 40 Ch. Div. 135; *United Transportation Company*, 12 App. Cas. 589. There was no conclusion for reduction, no relevant averments of fraud entitling to reduction, and no offer to restore the properties to the vendors. The same observation applied to the conclusion for damages against the director. Besides, the action was clearly incompetent—*Harkes* v. *Mowat*, March 4, 1862, 24 D. 701; *Gibson* v. *Macqueen*, December 5, 1866, 5 Macph. 113.

At advising—

LORD KINNEAR—The pursuer holds three shares in a limited company called the

North Sylhet Tea Company, and three shares in another limited company called the South Sylhet Tea Company, and he brings this action on behalf of both companies for the purpose of recovering payment of the sum of £79,000 which is said to be the amount paid by both companies to the firm of P. R. Buchanan & Company, merchants in London, as the price of several properties purchased separately by each company from that firm.

The first plea-in-law stated for the defenders is this—"The action is incompetent in respect it relates to two separate contracts between different vendors and vendees;" and I understand that to mean, that inasmuch as the two companies on whose behalf the action is brought are separate persons in law, the conclusions of the summons are, as at the instance of these two separate and independent persons, incompetent conclusions.

The Lord Ordinary observes with reference to this plea, that "while it has much force in point of form, the companies are so closely connected that he does not think any practical end would be served by sustaining it." But if the plea is well founded at all, it is by no means a merely formal or technical plea, but on the contrary rests upon practical considerations that are very material to the parties. Nor does it appear to me that its validity is in any way affected by the supposed connection between the companies. It is true that the same persons are directors of both, and that others besides the directors may hold shares in both, that they carry on the same kind of business, and that they have properties in the same district in India, and the pursuer says that they may probably be amalgamated. But in the meantime they are distinct and separate corporations, each having its own separate rights and obligations independently of the other. Now, the pursuer's averments, assuming them to be relevant, disclose a separate ground of action in each of these two companies. His allegation is that in 1884 the defenders, Mr Buchanan, Mr Muir, and Mr Brown, were, as they still are, directors of both companies; that Mr Buchanan's firm of P. R. Buchanan & Company was largely indebted to Mr Muir's firm of James Finlay & Company; that the defenders whom I have named, with the view of reducing the debt, made an agreement or agreements on behalf of the two tea companies with Buchanan & Company, the result of which was that certain properties belonging to the firm which at the time were practically valueless, were sold to the companies for £79,000; that the money so received by Buchanan & Company was applied in reducing their debt to Finlay & Company; and that this "transaction was a fraudulent scheme entered into between the persons mentioned whereby the said P. R. Buchanan & Company disposed of properties of little or no value in the knowledge of the said defenders to the said tea companies for a large price, which was by the said scheme applied to the reduction of the said debt, and this scheme was carried out by the said directors to the loss and damage of the said companies, and in default of their duty as directors."

The pursuer deduces from these averments two alternative conclusions—First, a conclusion directed against the firms of Messrs P. R. Buchanan & Company and Messrs James Finlay & Company that these two firms should be ordained, jointly and severally, to repeat and pay the sum of £79,000, with interest, to the North Sylhet Tea Company and the South Sylhet Company, and that to each of said companies in the proportions paid by each respectively; and secondly and alternatively, a conclusion against the directors, jointly and severally, to pay the said sum of £79,000 to the two companies without any conclusion for determining the proportion in which the money is to be paid to each. I think both of these conclusions incompetent. It must be observed that the averments do not mean that the properties which are said to have been valueless were conveyed to the two companies jointly, or that they had jointly paid a lump sum as the price of the whole. The meaning is that each company acquired for itself a separate property or properties, and paid a separate price to the same vendor. The pursuer therefore alleges two distinct and separate wrongs done by the same persons against two distinct and separate corporations. There is thus no community of interest between the two companies, and if they had resolved to challenge the transactions for themselves, I think it clear that they must have brought separate actions for that purpose. The gravamen of the charge is that an extravagant price was paid by each purchaser for certain properties in which the other has no concern. That may be true or it may be false in regard to both purchases. But it is also conceivable that it may be true in regard to one and false in regard to the other. And therefore in the procedure which would follow upon this summons, if it were sustained, there must be two separate inquiries, which might conceivably result in entirely opposite judgments, and yet the two cases are so tied together that the only separation of interest which the summons contemplates appears to be an apportionment of the sum of £79,000 between the two companies after it has been determined that that sum is payable to both. I know of no authority by which a summons framed in this way can be supported. It has been held in *Harkes* v. *Mowats*, 34 D. 701, that where two persons have sustained injuries by one and the same wrong, they may insist for damages in the same action provided the summons contains conclusions applicable separately to each pursuer, and that each takes a separate issue. But the present is a very different case from that, because if there is a good ground of action to either company, it must rest upon an allegation of fraud perpetrated against that company alone in carrying out on its behalf a contract of purchase and sale with which the other company had no concern. It is not a case of separate injuries arising from a

single wrong, but of two separate wrongs done to two different persons.

The alternative conclusion seems to me even more clearly incompetent. It is directed against all the directors who were in office at the time of the purchase, jointly and severally. But the pursuer admits that three of these gentlemen knew nothing of the worthless character of the properties, or of the financial relations of Messrs Buchanan & Company and Finlay & Company, and the only charge against them therefore is that they failed in their duty as directors, inasmuch as they accepted Mr Muir's recommendation without inquiry. That being the state of the averment, the conclusion against the directors can only be justified as a conclusion for damages. I am not considering at present whether there is any relevant averment to support such a conclusion against all or any of the directors. But it cannot be suggested that directors who knew nothing of the alleged fraud, and received no part of the price, can be made liable on any other ground except that they are answerable in damages for negligence in the performance of their duty. And therefore the demand is that the defenders shall pay to two companies having no community of interest a lump sum of £79,000 as the amount of loss they have sustained, and there is no suggestion of any division or apportionment of the money. I think the case of *Gibson* v. *Macqueen* (5 Macph. 113) is directly in point. In that case the respective creditors in two bonds granted by the same person at the same time, over the same subjects, raised an action of damages against the law-agent of the borrower, on the allegation that he had delivered the bonds to the pursuers in the knowledge that certain of the signatures were forged. The action was held to be incompetent, and the observations of the Lord Justice-Clerk may be applied in terms to the present case —"The demand is that to these four ladies who are without community of interest, a lump sum should be paid as the amount of loss sustained by them. That conclusion appears to me to be hopelessly incompetent. We have indeed sustained a summons in which two parties alleged injury by one calumnious statement, but then they asked for £300 each. That was the case of *Harkes* v. *Mowat;* and I think it was going very far to sustain conclusions in these terms. But here we have no guide or clue to any mode of separating the claims of the two parties, and yet the claims are in their own nature as separate as can be. The one may succeed, while the other fails. The parties are different, and so are the injuries sustained, and yet I think they are so bound up that it is impossible to separate them."

I need hardly say that it can make no difference, in so far as this question of competency is concerned, that the action is not brought directly by the two companies themselves, but by a single shareholder who claims to be entitled to sue on behalf of both. For the reasons I have mentioned, I am of opinion that the first plea-in-law should be sustained and the defenders assoilzied from the conclusions of the summons.

If your Lordships are of the same opinion, we are not called upon to consider the other pleas.

But there is another objection to the competency to which I think it quite necessary to refer, because it appears to me to be perfectly fatal to the action in so far as the first of the two alternative conclusions are concerned. The pursuer alleges that the contracts of which he complains are frauds on the company. But he does not propose to reduce these contracts, and it was explained in argument that he does not seek for reduction, because in his view no reduction is necessary, inasmuch as the declaratory conclusion is well founded and sufficient, namely, that the sale of which he complains "was and is null and void, and that the defenders, the directors of the said companies, were not entitled and could not legally enter into the said contract for the purchase of the lands and leasehold rights" which formed the subject of that contract. Now, that appears to me to be altogether unsound in law. It is very clear in law that a contract induced by fraud is not null and void but voidable. It is valid until it is rescinded, and accordingly the party defrauded has in general the option when he discovers the fraud, of rescinding the contract or of affirming it. But he must do either one or other. He cannot take the benefit of contract in so far as it is beneficial to himself, and reject it in so far as it is burdensome to him. If he affirms it he must affirm it in all its terms. If he reduces it, he must give up any benefit he may have before the fraud was discovered, and therefore if the two companies were of the same mind as the pursuer, and were desirous of challenging the transaction which he says has been injurious to them, their remedy would be to reduce the contracts of purchase and sale, to give back the properties they have been induced to buy, and to recover the price from the vendors. It is out of the question to suggest that they could recover the price and yet refuse to give back the properties for which the price had been paid. But that is what the pursuer proposes by the conclusions of his summons. If he were to have decree in terms of the declaratory conclusion, and the first of the two operative conclusions, the effect of that would be that the companies of which the pursuer is a shareholder would recover payment of the whole price they have paid for certain properties of which they are at present in possession, and would still be allowed to retain the properties.

The mere statement of this proposition is enough to show that it is untenable, and that a demand of that sort cannot be regarded as a competent demand. That applies directly only to the first of the two alternative conclusions of the summons. But if we were considering the question of relevancy it might have a

very material bearing on this second conclusion also, because the scheme of the action is this—that the companies having been induced by fraud to execute this contract of purchase and sale have a direct action for repayment of the price against the vendors, and also against a certain firm into whose hands the price was paid by the vendors in the knowledge of the fraud; and second, that failing their remedy against the vendors they have an alternative remedy against their own directors, by whose fault or negligence they have suffered the loss of which the pursuer complains which they sustained. Now, if that be the nature of the second alternative conclusion, it appears to me the defenders have a very material interest to be informed as to the specific ground on which the alternative claim of damages is based. Whether they are to pay damages because the company is unable to restore the properties which they have bought, and therefore cannot recover the price from the vendor, or because the company, regarding these properties as advantageous and beneficial properties, declines to restore them. That would appear to me to be a very material point which would require to be the subject of specific averment in an action of damages against the directors. But I make that observation merely by the way, because I am of opinion that the true ground of judgment being that the action is incompetent, we have no concern with any question as to the relevancy of any of the averments on record. If the action is incompetent, we are not to inquire whether the pursuer's condescendence does or does not contain statements that might be relevant in support of some other demand which he has not thought fit to bring before us.

For the same reason I express no opinion on another question, which it would have been necessary to decide had we had any competent action before us, namely, whether the pursuer as a single shareholder has a title to sue on behalf of the two companies. The general proposition is perfectly clear, that where a company has been defrauded by the execution of a contract of purchase and sale, it is the company alone that has any title to complain, because they alone have a right to decide whether they are to give up the property they have bought and to recover the price, or whether the contract should be affirmed because the properties are too valuable to be given up. But then there is no doubt an exception to that rule of which the pursuer desires to avail himself in this case. The exception is that where the majority of the shareholders of the company are using their voting power to defraud the minority, there the minority may sue an action in name of the company which the majority decline to raise. But whether in a particular case the averments of a fraud of this nature on the part of the majority are sufficient to justify a proof is a question of relevancy which we cannot consider unless it arises in a competent action.

The conclusion to which I come is that the defenders ought to be assoilzied from the conclusions of this summons as incompetent. I should propose to sustain the first plea-in-law for the defenders. It does not appear to me that we can sustain the tenth plea. That is a plea that "*restitutio in integrum* being impossible, the remedy craved is incompetent." Now, we cannot tell whether restitution is impossible or not. There is nothing in the record to suggest that it is at all impossible to give back those properties, although there is a statement by the defenders that the properties are valuable, and have increased in value by the possession of the companies, and therefore ought not to be restored. But the true objection to competency is not that restitution is impossible, but that the pursuer proposes to recover the price without offering restitution of the subjects he has bought. That appears to me, as I have said, to be a totally untenable position, and therefore I am of opinion that we should assoilzie the defenders.

LORD ADAM and the LORD PRESIDENT concurred.

LORD M'LAREN, who was absent at the hearing, delivered no opinion.

The Court sustained the first plea-in-law for the defenders, and assoilzied them from the conclusions of the action.

Counsel for the Pursuer—Guthrie Smith—J. A. Reid. Agents—Adamson & Gulland, W.S.

Counsel for the Defenders—H. Johnston—W. C. Smith. Agents—Forrester & Davidson, W.S.

Friday, November 13.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

SEDDON, PETITIONER.

Trust-Settlement — Pupils — Maintenance and Education—Administrator-in-Law.

In a petition presented by a father domiciled abroad, for himself and his two pupil children, craving the Court to ordain Scottish testamentary trustees to make an annual payment to the petitioner for the maintenance and education of his said children from the revenue of a fund held by the trustees for the children, the Court *refused* to grant the order craved, but intimated that they would be prepared to re-consider the application on being informed by the petitioner that steps were being taken to have the children provided with a legal guardian.

By his trust-disposition and settlement Stephen Adam conveyed his whole estate to trustees, directing them to hold the shares falling to daughters during their lifetime, and to pay to them, or apply for their behoof, the annual income of such