five o'clock on the 4th, but that did not arise from anything out of the ordinary course of business. It was a pure accident, from which I am unable to hold him responsible. On the whole matter, I think that the interlocutor of the Lord Ordinary should be recalled and the defenders assoilzied.

LORD RUTHERFURD CLARK—I am of the same opinion. The Lord Ordinary holds the defender liable on no other ground than this—that when Mr Young learned on his return to his office on the afternoon of the 4th January that there were funds in the bank to meet the cheque, he should at once have countermanded the poinding. I am unable to assent to that view. I do not think he would have been doing his duty to his client if he had so acted. Although his clerk then told him there was money in the bank, there was no certainty that it would be available to meet the cheque when it was presented next morning. He was therefore entitled to allow the diligence to proceed till he got the money.

LORD TRAYNER—I agree. I think with the Lord Ordinary that no fault can be attributed to Mr Young down to five o'clock on the afternoon of the 4th. Then, according to the Lord Ordinary, he should have returned the cheque or countermanded the poinding. I am unable to agree with the Lord Ordinary in this opinion. I think, on the evidence, that it is perfectly plain that Mr Young did not accept the cheque on the afternoon of the 4th as an equivalent for the money, but held it at the request of the pursuer, who had sent it to him to be presented a second time. He does present it with due despatch next day, and it is paid, but I think that he would have been wanting in his duty to his client if he had accepted it on the 4th as equivalent to payment, and I entirely concur with Lord Rutherfurd Clark that Mr Young was not bound to countermand the diligence on the 4th, because although the clerk ascertained that there were funds to meet it on the 4th, there was no ground for thinking that there would still be funds when the cheque was presented on the 5th.

LORD YOUNG was absent.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Pursuer—Comrie Thomson — W. Thomson. Agent — Thomas M'Naught, S.S.C.

Counsel for the Defenders — Guthrie Smith. Agents — Adamson & Gulland, W.S.

Tuesday, November 21.

FIRST DIVISION.

BLAIKIE AND OTHERS *v.* COATS AND OTHERS (THE BRITISH MEXICAN RAILWAY COMPANY).

Company—Shares Allotted as Promotion Money — Rectification of Register — Whether Petition Competent or Appropriate—Form of Procedure—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 35.

Section 35 of the Companies Act of 1862 provides that "If the name of any person is without sufficient cause entered in or omitted from the register of any company under this Act . . . the person or member aggrieved, or any member of the company, or the company itself, may, . . . as respects companies registered in Scotland, by summary petition to the Court of Session, or in such other manner as the said Court may direct, apply for an order of the Court that the register may be rectified." . . .

A petition was raised under this section by certain shareholders in a company craving the Court to order that the register of the company should be rectified by deleting therefrom the names of certain shareholders, in respect that their shares had been illegally allotted to them as promotion money. The respondents pleaded that the questions at issue could not be competently raised by a petition under the section.

The Court, without expressing a decided opinion as to the competency of the application, *held* that petition under the section was a very inappropriate and inconvenient way of dealing with the questions raised, and that the proper course for the petitioners was to raise an action of reduction in ordinary form, pending the raising of which the petition should be sisted.

Opinion by Lord M'Laren that section 35 was not intended to create a substitute for the ordinary forms of procedure in cases where there was a strong divergence between the parties as to facts.

The petitioners John Blaikie, Leadenhall Street, London, James Moore Dickey, St Enoch's Hotel, Glasgow, and William Niven, St James Terrace, Glasgow, were shareholders in the British Mexican Railway Company, Limited, which was registered under the Companies Acts upon 22nd August 1892. The objects of the company, as set forth in the memorandum of association, were to "adopt and carry into effect, with or without modification, an agreement dated 11th May 1892, entered into and made between James Moore Dickey . . . as representing and on behalf of the Chihuahua Eastern Railway Company, ... and Charles Knight, Rutherglen, on behalf of this company."

Under that agreement the company

were to purchase from the Chihuahua Company certain concessions, rights, and subsidies granted to them by the Mexican Government for the construction of a railway in Mexico. The price to be paid to the vendors was £300,000, which was to be satisfied by the allotment to them of 30,000 fully paid-up shares of £10 each. It was provided by article 4 of the articles of association that the capital of the company should be £310,000, divided into 31,000 shares of £10 each.

The allotment of shares was made on 20th March 1893. Though the said agreement bore upon the face of it that the consideration to be given to the vendors should be £300,000, it was arranged that the real price to be paid them should be only £171,000, the balance of 12,900 shares being alloted to the respondents Archibald Coats, George Coats, James Adam, Neil Buchanan, and James Hamilton Dunn.

The petitioners having acquired shares in the company, raised this petition in order to have the register rectified by deleting therefrom the names of the respondents as holding the above shares. They averred that the transaction was an illegal one, that the respondents were the real promoters of the company, and that the shares had been handed over to them as promotion money, and that they had thus acquired a benefit at the expense of the company and the other shareholders, having obtained the shares without any consideration. The petitioners did not ask to have the names of any other persons placed upon the register as holders of the shares, but that the shares should be regarded as unissued capital in the hands of the company.

The respondents lodged answers to the petition, in which they denied that they were in any sense promoters of the company, and alleged that they had given good consideration for the shares in question. They pleaded that the petition was incompetent, that the petitioners' statements were irrelevant and unfounded in fact, and that they had no title to sue.

Section 35 of the Companies Act of 1862 provides—"If the name of any person is without sufficient cause entered in or omitted from the register of any company under this Act, or if default is made, or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company the person or member aggrieved, or any member of the company, or the company itself, may, . . . as respects companies registered in Scotland by summary petition to the Court of Session, or in such manner as the said Court may direct, apply for an order of the Court that the register may be rectified, and the Court may either refuse such application with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained. The Court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceedings to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally the Court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register." . . .

Argued for petitioners—This was a competent case to be dealt with by petition under the 35th section. It was not so complex as to prevent its being tried in a summary way, but was one of the alternative cases mentioned in the section to which it was intended to apply. The case of *ex parte Shaw*, 2 Q.B. Div. 463, showed it was in the discretion of the Court to decide whether a petition between members and alleged members could be dealt with in this summary way. The only cases where this procedure was not applicable—as shown by the English decisions—were those in which specific performance was asked, or which were considered more suitable to be tried before a jury—*Askew's* case, L.R., 9 Ch. 664. Moreover, in England the process was a more informal one, being tried in Chambers, where it was not possible to dispose of such difficult and complicated questions. The limits assigned to the operation of the section by Lord Cairns in *Ward & Henry's* case were too narrow, and were adversely criticised in *ex parte Shaw*, and the section was given a wider scope. The company could compel the respondents by an action to restore the shares, and the petition was a shorter method of bringing about the same result, which caused no injury to the respondents. They were not called upon to pay any damages, but merely to have their names removed from the register, and so this case was distinguished from the English cases, in which similar procedure was not allowed. The Courts in Scotland had dealt in this way with cases for the rectification of the register—*Klenck* v. *East India Company*, December 21, 1888, 16 R. 271; *Chambers* v. *Aerated Bread Company*, July 3, 1891, 18 R. 1039. Nor was it excluded because the shares were fully paid up—*Denton Colliery Company*, L.R., 18 Eq. 16. The remedy was an appropriate one, because the challenge had been made instantly on the discovery of the fraud, before the transference of any of the shares by the respondents, which were therefore merely in the position of unissued capital. No certificates had been issued, and all that it would be necessary to do would be to delete their names from the register. There were *dicta* of judges to the effect that this was the appropriate remedy when the circumstances were suitable—*Carling's* case, L.R., 1 Ch. Div. 115; *M'Kay's* case, L.R., 2 Ch. Div. 1; *Pearson's* case, L.R., 5 Ch. Div. 336; at 341; *Anderson's* case, L.R., 7 Ch. Div. 75, at 94; *Weston's* case, L.R., 10 Ch. Div. 579,

Nant-y-Glo Iron Company, L.R., 12 Ch. Div. 738; *Metcalf's* case, L.R., 13 Ch. Div. 169; Buckley on the Companies Acts, p. 98.

Argued for respondents—This case could not be competently raised in the form of a petition under the 35th section. The section was in the second part of the Act, which dealt entirely with the preparation and keeping up of the register, and Lord Cairns was right in holding that the scope of the section was limited to affording a summary method for keeping right the company's register—*Ward & Henry's* case, L.R., 2 Ch. 431, at 441. There was no case in which promotion money had been recovered by this procedure. The proper course for the petitioners to take was to raise an action of reduction, with a petition ancillary to it, and following on its decision. This was the customary procedure, and was adopted in the case of *Howe* v. *City of Glasgow Bank*, July 4, 1879, 6 R. 1194. This was not a case for summary procedure, involving as it did questions of fraud which could only be fairly dealt with by an action raised in the ordinary way, with a proper record. It did not fall under the section, which presupposed that names were wrongly on the register, while here it was admitted that, taking the contract as stood, they were rightly on it. The cases of *Shaw* and *Klenck*, founded on by the petitioners, were really in favour of the respondents, for in both cases the procedure was only allowed by the Court because all parties agreed in wishing for it.

Arguments were also submitted on the questions of title and relevancy, but as they were not considered by the Court, it is unnecessary further to refer to them.

At advising—

LORD ADAM—We have had a very full discussion in this case, and the result at which I have arrived is that it is not a case which is appropriate for being tried and disposed of under the 35th section of the Act. From all I have heard it does not appear to me to be a case fitted for summary procedure of this kind. It is a question between shareholders and shareholders; it is not a winding-up or a case of that kind. It is a case raising questions of fraud and other considerations. It appears to me that in such a case the respondent is entitled to a very precise statement of the allegations of fact which he is called upon to meet, and I do not think we have that here. Upon the whole matter, while—and I am quite clear upon the subject—I do not say the application is incompetent under the 35th section, I say it is not convenient that the case should be tried under that section, or rather that the 35th section is not appropriate to its trial. Therefore I am of opinion that we should, I do not say dismiss the petition, but keep it alive and sist it until we see the result of such reduction or other process as the petitioners may choose to raise.

LORD M'LAREN—I am of the same opinion. The hypothesis of the 35th section is that when a mistake has been made in entering the name of someone on the register, or in omitting to make the necessary entry, it can be corrected upon the facts being brought under the notice of the Court.

Now, when the right of the party claiming to be put on the register or to be taken off depends on written documents—it may be on a contract to take shares or a contract to transfer shares, or upon the question whether the directors have the power to decline to accept a transferee, or any other consideration which admits of instant verification from documents—it has undoubtedly been the practice to dispose of such questions under an application presented in terms of the 35th section. We have had cases also under that section that depended on proof—I think only where the proof did not involve matter affecting the constitution of the company—especially where, as in the case of the *Aerated Bread Company*, no interest except that of the shareholder making the application was involved. But while I agree with Lord Adam that the terms of the 35th section are so comprehensive that we should have jurisdiction to entertain and determine the merits of this case in the present application, yet that jurisdiction is not meant to be substituted for the ordinary jurisdiction of the Court where the matters in controversy depend upon fact, and raise questions extrinsic to the proper object of the petition—the rectification of the register.

Probably no precise line can be drawn between the cases that are suitable for disposal in a summary form and those which are more appropriate for trial by action of declarator or reduction, but the present case is clearly one which is unsuited for investigation in a proceeding under the 35th section. In the event of the petitioners' allegations being proved, they will doubtless have a right to have the register rectified, and while on that account they are probably entitled to have this petition kept alive in order that the correction may eventually be made, yet I think the facts set forth are such as can only be properly investigated in an ordinary action, and therefore this proceeding ought to be sisted, leaving the petitioners to seek redress in a different form.

LORD KINNEAR—I do not think it necessary to express or to form any opinion upon the question whether this proceeding taken alone would be a competent remedy to the petitioners, because I quite agree with Lord Adam and Lord M'Laren that it is an extremely inconvenient and inappropriate form of process for trying the questions which are raised between these parties. I think the defender is well entitled to say—"If my apparent right is to be challenged upon such grounds as are brought out in argument, and not only those set forth in the petition, it ought to be done by an action in the ordinary form." I quite agree also that since it may turn out as the result of such an action that rectification of the register may be neces-

sary, it is not desirable to throw out the present petition altogether.

LORD PRESIDENT—I concur, and would merely add that I understand that in keeping alive the application for the contingencies which Lord Kinnear has referred to, we are not expressing any opinion as to the relevancy of the statements in the petition. It is merely that a ministerial act may require to be done by the Court—namely, to rectify the register, and accordingly it is not convenient that another petition should be presented with that end. We will sist the petition *in hoc statu*, reserving the question of expenses.

The Court sisted the petition.

Counsel for the Petitioners—Ure—Cook. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents — C. S. Dickson — M'Lennan. Agent — Murray Lawson, S.S.C.

Tuesday, November 14.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

DUFF *v.* PIRIE.

Arbitration — Gratuitous Reference — Demand by Arbiter for Remuneration—Reduction—Personal Bar.

An arbiter who had accepted a gratuitous reference intimated to the parties that an award was signed and in the hands of the clerk, and requested them to pay him a fee of £300 before uplifting it.

In an action by one of the parties for reduction of the award on the ground that the arbiter had acted corruptly in demanding remuneration, *held* that the pursuer was barred from challenging the award on this ground, in respect that he had paid his share of the fee without objection, and had taken part in subsequent proceedings before the arbiter.

Observations by Lord Kyllachy, concurred in by the Lord President, as to the impropriety of an arbiter who had accepted a gratuitous reference, demanding a fee towards the close of the proceedings.

Arbitration — Contract — Pleadings before Arbiter—Award—Reduction—Ultra fines compromissi—Personal Bar.

A specification of works for the construction of a harbour contained detailed schedules of the works to be executed, but provided that contractors were bound to satisfy themselves of the accuracy of these before tendering, and that no claim should be allowed though they were found to be inaccurate. In a reference to the arbiter named in the specification, the contractor claimed for the expense of rock excavation beyond the scheduled quantity. The employer opposed this claim, on the ground that after the date of the contract negotiations had taken place between him and the contractor as to the amount of the rock excavation; that he had agreed to lessen the length of deepening required by the contract, and that the contractor had then definitely accepted the scheduled quantity as correct.

In an action by the employer for reduction of an award issued by the arbiter, on the ground that he had given effect to a claim by the contractor for the expense of rock excavation beyond the scheduled amount, *held* that the employer, having rested his case before the arbiter on an alleged separate agreement with the contractor, was barred from pleading that the arbiter's claim was excluded by the contract.

Arbitration—Interim Award.

Observations by Lord Kyllachy as to the kind of case in which the Court will entertain objections to interim awards.

Arbitration—Contract—References—Award—Reduction—Ultra fines compromissi.

A contract for the construction of harbour works contained a clause of reference submitting to the arbiter therein named all disputes as to the rights and obligations of either party under the contract, or any matter in any way connected therewith. In the course of the contract the employer, in virtue of powers given him by the contract, required the contractor to perform some extra blasting operations not specified in the contract. The contractor subsequently alleged that these operations had caused an accumulation of silt on the surface of rock which he was required by the contract to excavate, and he declined to proceed with the work of excavation unless the employer would pay for the removal of the silt. The employer having refused to do so, the dispute was referred to the arbiter, who ordained the contractor to proceed with the work of excavation on the silt being removed, and ordained the employer to remove the silt, failing which the contractor should not be bound to excavate the rock.

In an action by the employer to reduce the award on the ground that the arbiter had exceeded his powers in ordaining him to execute works, *held* that the arbiter had not acted *ultra vires*, in respect that the order on the employer was not obligatory, but was merely imposed as a condition which the employer had to fulfil before he could enforce the order upon the contractor to proceed with the work of excavation.

In September 1888 a contract for the construction of certain harbour works was concluded between Thomas Duff Gordon Duff of Hopeman, in the county of Elgin,