

rejected by your Lordships really proceeds upon a misconception of the proper reading of the section.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Campbell, K.C.—Nicolson. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders and Respondents—Solicitor-General (Dundas, K.C.)—Dove Wilson. Agents—J. & J. Galletly, S.S.C.

Thursday, March 17.

FIRST DIVISION.

LYON'S TRUSTEES v. AITKEN AND OTHERS.

Trust—Church—Resolutive Condition in Trust-Disposition—Dissolution of Church—Congregation Ceasing to Belong to One Dissenting Body and being Admitted into Another.

A testator in his trust-disposition and settlement directed his trustees to set aside and invest in their names a specified sum, and after dividing such sum into thirty-five equal shares, to hold it for behoof of and pay the income to, *inter alia* (1) the minister of the United Original Secession Church at K. eight shares; (2) the minister and kirk-session of the United Original Secession Church at L. three shares; (3) the minister and kirk-session of the United Original Secession Church at B. three shares; and (4) the minister and kirk-session of the United Original Secession Church at K. one share. With regard to the shares so destined he directed that "should any of such churches cease to exist as a separate congregation and unite as a church with some other church, the income of the share destined to such church be applied for behoof of the united churches, or should any of the above-mentioned churches be dissolved without uniting as a church with any other church, such income should be applied for behoof of such of the other above-mentioned churches as may have continued in existence."

After the death of the testator the minister and majority of the congregation of the United Original Secession Church at K. severed their connection with that body, and were admitted into another dissenting body, but continued to worship in the same building. The minority of the congregation were unable to organise themselves as a separate congregation.

Held (1) that the congregation of the United Original Secession Church at K. had been dissolved "without uniting as a church with any other church," the term "church" being there used to denote congregation;

and therefore (2) that the resolute proviso in the settlement had come into effect, with the result that the shares of income destined to the minister and congregation of the United Original Secession Church at K. fell to the other congregations of that body mentioned in the settlement which continued in existence.

William Lyon, artist, Kirkintilloch, died on 20th March 1892 leaving a trust-disposition and settlement dated 27th October 1885, with relative codicils dated 24th January 1890 and 25th January 1892, under which he made over his whole means and estate to certain trustees.

In the fourth purpose of his trust-disposition and settlement the testator directed his trustees "to set aside and invest in their names the sum of £3500 sterling, or whatever less sum my estate may consist of, after carrying into effect the above directions; and after dividing such sum into thirty-five equal shares, to hold the same under the name of 'Lyon's Mortification' for behoof of the following persons, churches, institutions, societies, or schemes in the proportions following, paying over half-yearly at Whitsunday or Martinmas the income of the respective shares (after deducting the expenses of management) to the treasurers, secretaries, managers, or others of the said several churches, institutions, societies, or schemes:—(First) For behoof of the minister of the said United Original Secession Church, Kirkintilloch, eight shares of said mortification, the income thereof to be paid to himself towards his remuneration; (Secondly) for behoof of the schemes of the Synod of the United Original Secession Church in Scotland five shares of said mortification, the income thereof to be paid to the treasurer of said Synod, and apportioned by the Synod annually among the several schemes of said church as they may think most meet and advisable: Declaring that should the United Original Secession Church in Scotland at any future time unite with some other branch of the Christian Church, the income of said five shares shall be paid to the Treasurer of the Synod or supreme managing body, by whatever name called, of the united churches, to be applied for the benefit of the schemes of the united churches, the apportionment to be made annually by the said Synod or other supreme managing body; (Thirdly) For behoof of the minister and kirk-session of the said United Original Secession Church in Laurieston, Glasgow, three shares of said mortification, the income thereof to be applied towards the funds of said church; (Fourthly) For behoof of the minister and kirk-session of the said United Original Secession Church in Bridgeton, Glasgow, three shares of said mortification, the income thereof to be applied towards the funds of said church; (Fifthly) For behoof of the minister and kirk-session of the said United Original Secession Church in Kirkintilloch, one share of said mortification, the income thereof to be applied towards

the funds of said church. . . . And with regard to the shares the income of which is destined to the minister of the said United Original Secession Church, Kirkintilloch, and for behoof of the said United Original Secession Churches in Laurieston and Bridgeton, Glasgow, and in Kirkintilloch, I direct my trustees that should any of such churches cease to exist as a separate congregation and unite as a church with some other church, the income of the shares destined to the minister of such church, or for behoof of the funds thereof, as the case may be, shall be applied by my trustees for behoof of the funds of the united churches, or should any of the above-mentioned churches be dissolved without uniting as a church with any other church, such income shall be applied by my trustees for behoof of such of the other churches above mentioned as may have continued in existence, in such proportions as my trustees may think best, and should all the above-mentioned churches be dissolved without uniting as churches with any other church, then such income be paid over by my trustees to the treasurer of the Synod of the said United Original Secession Church in Scotland, or in the event of their union with any other branch of the Church, to the treasurer of the Synod or supreme managing body of such Church, to be annually apportioned among the Schemes of said United Original Secession Church or the united churches, as the case may be, in the same manner as the five shares of said mortification above destined to the schemes of such Synod."

The testator during his life was a member and office-bearer of the United Original Secession Church at Kirkintilloch.

The Glasgow Presbytery of the United Original Secession Church consists of seven churches, three being the said churches in Kirkintilloch and Laurieston and Bridgeton, Glasgow, one in Main Street, Glasgow, one in Pollokshaws, one in Paisley, and one at Shottsburn, near Holytown, about ten miles from Glasgow. All the churches were in existence at the date of the testator's settlement, and still continue.

In the beginning of 1902 the Kirkintilloch congregation consisted of 223 members and 82 adherents, and the minister was the Rev. George R. Aitken. At a meeting of the Glasgow Presbytery of the said United Original Secession Church held in Glasgow on 7th January 1902 the Rev. Mr Aitken tendered his resignation of the pastoral charge of the Kirkintilloch congregation, on the ground, as stated in the minutes of meeting, of his being out of sympathy with the position and growing tendency of the Original Secession Church. He further explained, according to the minutes, that there was no principle of the church to which he was actually hostile, but that he found himself growingly indifferent to the cause of the Covenanted Reformation for which the church appeared. The Presbytery agreed that Mr Aitken's resignation should lie on the table for a month. Thereafter conferences were held between

the members of the Presbytery and the Kirkintilloch Session and congregation and Mr Aitken, which did not result in any alteration of the position. Accordingly, at a meeting of the same Presbytery, held in Glasgow on 11th February 1902, the Presbytery resolved to accept of the resignation of Mr Aitken, and declared the pastoral tie between him and the Kirkintilloch congregation dissolved from and after the 24th day of said month of February. Further, they declared that from that date Mr Aitken ceased his connection as a minister and member with the United Original Secession Church. At the same meeting of Presbytery the moderator was appointed to preach at Kirkintilloch on the first Sabbath of March, and at the close of public worship to declare the congregation vacant.

On 20th February 1902 the Kirkintilloch congregation met, after the usual notice, and by a majority of 64 to 10 decided to petition the United Free Presbytery of Glasgow for admission as a congregation of the United Free Church. The minority entered no protest against this decision.

The Glasgow Presbytery of the United Original Seceders at a meeting held on 27th February 1902, having learned of the step taken by the Kirkintilloch congregation, cancelled the appointment to preach the church vacant, and immediately thereafter the Clerk of the Presbytery, in accordance with instructions from the Presbytery given at their said meeting, intimated to the Rev. Mr Aitken that the pastoral tie between him and the Kirkintilloch congregation was dissolved, and that he was no longer a minister or member of the United Original Secession Church, and also sent an excerpt of the minute of 27th February to the preses of the congregation to be submitted to the office-bearers and members of the congregation that they might know the relation in which Mr Aitken then stood to the congregation.

The majority of the Kirkintilloch congregation proceeded to carry out the decision of the meeting held on 20th February, and on 4th March thereafter presented a petition to the United Free Church Presbytery of Glasgow praying to be received as a congregation of the United Free Church of Scotland. This petition was signed by 157 members and 81 adherents of the Kirkintilloch congregation, and commissioners from that body supported the petition.

The minority of the Kirkintilloch congregation, after the lapse of one month, were called together by the Glasgow Presbytery of the United Original Secession Church, and thereafter continued for several weeks to meet for worship in the Temperance Hall, Kirkintilloch. They were invited by the said Presbytery to organise themselves as a small congregation in Kirkintilloch of the United Original Secession Church, but after several conferences were held the minority declared their inability to maintain the ordinances necessary for the purpose, and the proposal was abandoned.

The Glasgow Presbytery of the United

Free Church appointed a committee to meet and confer with the petitioning members of the Kirkintilloch congregation, and a report having been made in favour of granting the petition, the Presbytery at their meeting on 1st April 1902 resolved to receive the petitioners as a congregation of the United Free Church, but to defer the formal reception till after the meeting of the General Assembly, in order that minister and congregation might be received at the same time. In May 1902 the said General Assembly sanctioned the admission of Mr Aitken as a minister of that body. Accordingly, at Kirkintilloch on 18th June following the Glasgow Presbytery of the United Free Church formally admitted the Rev. Mr Aitken to the status of a minister of the United Free Church, and also the congregation as a congregation of the United Free Church, the congregation to be thenceforth known as South Kirkintilloch. At the same time Mr Aitken signed the formula and was formally inducted to the pastorate of the congregation, and the reappointment was made of the former elders and managers.

The congregation, with the Rev. Mr Aitken as their minister, continue to use and occupy the church buildings used and occupied by them when a congregation of the United Original Secession Church, the property of such buildings being regarded by the minister and congregation as belonging to them, on the ground that the title was held for behoof of the congregation, and free from any condition of continuing in connection with the United Original Seceders.

Questions having arisen in these circumstances as to the parties having right to the income of the shares of the Lyon's mortification given to the minister and to the minister and kirk-session of the United Original Secession Church, Kirkintilloch, a special case, in which the foregoing facts were narrated, was presented to the Court.

The parties to the special case were (1) the testamentary trustees of the said William Lyon; (2) the minister and certain members of the United Original Secession Church, Bridgeton, Glasgow, and the minister and certain members of the United Original Secession Church, Laurieston, Glasgow; (3) the Rev. George Aitken, minister of the South Kirkintilloch United Free Church; and (4) the elders and managers of the South Kirkintilloch United Free Church congregation, for and on behalf of said congregation.

The questions of law for the opinion of the Court were—"Does the income accruing on the shares of the Lyon's mortification given to the minister and to the minister and kirk-session of the United Original Secession Church of Kirkintilloch fall to be paid to the parties of the second part, in such proportions as the first parties think best? or, are the parties of the third and fourth part entitled thereto?"

The second parties maintained that the United Original Secession Church at Kirk-

intilloch had ceased to exist as a separate congregation, and had not united with some other church in the sense of the resolute proviso at the end of the fourth purpose of the testator's settlement, but on the contrary had dissolved without uniting with any other church, and therefore claimed that the income of the shares in dispute fell to be paid to or for behoof of the United Original Secession churches in Laurieston and Bridgeton, Glasgow (*i.e.*, the second portion), in such proportions as the first parties thought best.

The third and fourth parties maintained that in referring to the junction of the church at Kirkintilloch with another church he used the word "church" in the sense of "congregation," that the church at Kirkintilloch had not ceased to exist as a separate congregation nor united with any other congregation, nor had it been dissolved without uniting as a church with some other church within the meaning of the fourth purpose of the settlement, but had preserved its identity as a congregation in every way, although it had separated from the United Original Secession body and been received into another Presbyterian body, *viz.*, the United Free Church. They claimed that the income of the shares in dispute should continue to be paid to them.

Argued for the second parties—Throughout the settlement the testator clearly favoured the Original Secession Church, and in purpose four of the settlement he intended to restrict the benefit of his bequest to that church and congregations belonging to it as long as it had a separate existence. He contemplated in the fourth purpose and provided for the "union" of that church with another "branch of the Christian Church." What had happened here, however, was a defection of a certain number of members from the Original Secession Church, with the result that the Original Secession Church at Kirkintilloch had been dissolved. A large proportion of the former members of that church had gone over to the United Free Church, but they were not the church or congregation favoured by the testator.

Argued for the third and fourth parties—The testator, though he had a preference for the Original Secession Church, did not confine his benefactions to that church, and he contemplated that it might unite with another church. The testator used "church" with a secondary meaning, familiar in Scotland, *viz.*, as denoting a body of worshippers meeting in a particular building with the same minister and office-bearers. The congregation was really the unit to which the bequest was made. This congregation had maintained its identity, meeting in the same building and having the same minister and office-bearers. It had never ceased to exist as a congregation, and though it did not now adhere to Original Secession principles, adherence to such principles was not an essential condition of its continuing to take benefit under the will. Therefore the resolute proviso in purpose four of the settlement had not come into operation.

LORD ADAM—The question in this case is whether the United Original Secession Church in Kirkintilloch has ceased to exist as a separate congregation without uniting with any other church, or whether it still exists as a separate congregation.

The truster, the late William Lyon, directed his trustees to set aside and invest in their names the sum of £3500 sterling or whatever less sum his estate might consist of; after carrying into effect certain directions, and after dividing such sums into thirty-five equal shares, to hold the same under the name of "Lyon's Mortification" for behoof, *inter alia*, of (First) the Minister of the United Original Secession Church, Kirkintilloch, eight shares of said mortification, the income thereof to be paid to himself towards his remuneration; (Second) the schemes of the Synod of the United Original Secession Church in Scotland five shares of said mortification; (Third) the Minister and Kirk-Session of the United Original Secession Church in Laurieston, Glasgow, three shares of said mortification, the income thereof to be applied towards the funds of said church; (Fourth) the Minister and Kirk-Session of the United Original Secession Church in Bridgeton, Glasgow, three shares of said mortification, the income thereof to be applied towards the funds of said church; and (Fifth) the Minister and Kirk-Session of the said United Original Secession Church in Kirkintilloch one share of said mortification, the income thereof to be applied towards the funds of said church. And with regard to the shares the income of which was destined to the Minister of the said United Original Secession Church, Kirkintilloch, and for behoof of the said United Original Secession Churches in Laurieston and Bridgeton, Glasgow, and in Kirkintilloch, he directed his trustees that should any of such churches cease to exist as a separate congregation and unite as a church with some other church, the income of the shares destined to the minister of such church, or for behoof of the funds thereof, as the case might be, should be applied by his trustees for behoof of the funds of the united churches, or should any of the above mentioned churches be dissolved without uniting as a church with any other church, such income should be applied by his trustees for behoof of such of the other churches above mentioned as might have continued in existence, in such proportions as his trustees might think best.

The facts which raise the question are these:—It appears that in the beginning of 1902 the Reverend Mr Aitken was the minister of the United Original Secession Church in Kirkintilloch, which consisted of 223 members and 32 adherents. At a meeting of the Presbytery of the United Original Secession Church held in Glasgow on 7th January 1902 Mr Aitken tendered his resignation of the pastoral charge of the Kirkintilloch Congregation. At a subsequent meeting the presbytery accepted Mr Aitken's resignation, declared the pastoral

tie between him and the Kirkintilloch Congregation dissolved from and after the 24th February, and declared that from that date Mr Aitken ceased his connection as a minister or member with the United Original Secession Church, and this resolution was on 27th February intimated to Mr Aitken by the presbytery.

It would appear, therefore, that after that date Kirkintilloch Congregation was without a minister.

It further appears that at a meeting held on 20th February 1902 the congregation resolved, by a majority of 64 to 10, to petition the United Free Presbytery of Glasgow for admission as a congregation of the United Free Church.

As regards the minority of the congregation, it is stated that they have been unable to organise themselves as a separate congregation in Kirkintilloch of the United Original Secession Church.

As regards the majority of the congregation—on 4th March they presented a petition to the United Free Church Presbytery of Glasgow to be received as a congregation of that church.

After a variety of procedure, which it is unnecessary to detail, the result was that in June 1902 the Glasgow Presbytery of the United Free Church formally admitted the Rev. Mr Aitken to the status of a minister of the United Free Church, and also the congregation as a congregation of that church to be thereafter known as South Kirkintilloch. At the same time Mr Aitken signed the formula and was formally inducted to the pastorate of the congregation, and the former elders and managers were reappointed.

It is obvious that the truster uses the word "Church" in two different senses in his settlement. Thus, for instance, when he speaks of the United Original Secession Church in Scotland uniting with some other branch of the Christian Church, he is using the word "Church" as including all the individual congregations belonging to that body. But when he speaks of the United Original Secession Church in Kirkintilloch or in Bridgeton he is using the word in a limited sense as applying to the particular congregations worshipping in these localities.

That the United Original Secession Church in Kirkintilloch has been dissolved as a congregation of the United Original Secession Church is quite clear. Its former minister is now a minister of the United Free Church, the majority is now a congregation of that church, and the minority has dispersed itself. The question is not whether the congregation still exists somewhere or in some other connection, but whether it exists as the congregation of the United Original Secession Church in Kirkintilloch, and that it certainly does not. Neither has the congregation united with any other church in the sense in which that word is here used in the settlement, for it is clearly used in the limited sense of a congregation. But what the majority of the congregation has done is not to unite itself with any other con-

gregation, but to merge itself in the United Free Church. If that be so, then the income of the shares destined to the Minister of the Original United Secession Church in Kirkintilloch, and for behoof of that church, is directed to be applied for behoof of such of the other churches mentioned in the settlement as may have continued in existence in such proportions as the trustees may think best. The churches therein mentioned which have continued in existence are the churches in Laurieston and Bridgeton. I therefore think that the first question should be answered in the affirmative and the second in the negative.

LORD M'LAREN and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court answered the first question in the affirmative and the second question in the negative.

Counsel for the First and Second Parties—H. Johnston, K.C.—Hunter. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Third and Fourth Parties—Campbell, K.C.—Wark. Agents—J. & J. Galletly, S.S.C.

Thursday, March 17.

FIRST DIVISION.

GOWANS v. DUNDEE STEAM NAVIGATION COMPANY, LIMITED.

Process—Company—Petition for Rectification of Register—Rectification on Ground of Misrepresentation—Companies Act 1862 (25 and 26 Vict. c. 89), sec. 35.

In a petition, under section 35 of the Companies Act 1862, for the rectification of the register of a company by the removal therefrom of the name of the petitioner, it was objected that procedure by petition was incompetent in respect that the object of the application was the cancellation of the contract between the company and the petitioner on the ground of misrepresentation.

Held that the question being solely whether the company was entitled to put the petitioner on the register, and not involving any complication of equities or the reduction of any contract as against any person other than the company, might competently be tried in the petition, and proof *allowed*.

Observed that the question whether a petition under sec. 35 is the proper process for trying a case of this kind is one of circumstances and discretion.

The Companies Act 1862 (25 and 26 Vict. c. 89), sec. 35, enacts as follows:—"If the name of any person is without sufficient cause entered in or omitted from the register of members 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 Courts 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 proceeding 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 member or alleged member 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." . . .

This was a petition presented by William Gowans, tweed merchant, 111 Union Street, Glasgow, under section 35 of the Companies Act 1862 (quoted *supra*) praying the Court to order the register of the members of the Dundee Steam Navigation Company, Limited, to be rectified by removing therefrom the name of the petitioner as holder of 250 shares, and to direct due notice of such rectification to be given to the Registrar of Joint Stock Companies in Scotland, and to direct the said company to pay to the petitioner the sum of £250, being the sum paid by him as consideration for said shares, with interest.

The petitioner averred that in March 1902 William Nicoll Machan, shipowner, 1 King William Dock, Dundee, was the sole promoter of a company for the purpose of acquiring and working ten steamships ordered by him and then in course of construction. The petitioner set forth certain letters, dated March 27 and April 4, 1902, alleged to have been written by Mr Machan as the promoter of the said company, to the petitioner for the purpose of offering shares in the said company for subscription to the petitioner, and with a view to inducing the petitioner to apply for shares. On April 14, 1902, the petitioner, relying on the statements contained in those letters, applied for 250 ordinary shares.

The petitioner further averred as follows:—"On 7th January 1903 the company was incorporated as a limited company under the Companies Acts 1862 to 1900, under the name of the Dundee Steam Navigation Company, Limited. Mr Machan was by the articles of association appointed manager. By the articles the entire conduct of the management and business of the company was entrusted to the manager, there being no provision for the appointment of directors. On 19th March 1903 the petitioner received a letter of allotment of