

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

the said shares, and paid for them by cheque for £250 on or about 4th April 1903. The statements contained in the said letters of 27th March and 4th April 1902, and in particular the following statements, were untrue and misleading, viz.—(1) It is stated therein that the capital of the company was to be £40,000 with about £26,000 debentures, and that the debentures had all been taken up at $4\frac{1}{2}$ per cent., whereas, while the capital of the company as incorporated is £40,000, the amount borrowed on mortgages is £36,000 at 5 per cent., and each of the two steamers has been mortgaged for that amount; and (2) it is stated that about £30,000 of the £40,000 of ordinary shares had been taken up, and that one of Mr Machan's friends had taken up £10,000 thereof, whereas only 29,000 shares had been taken up and as appears from the register of shareholders Mr Machan himself is the only person holding £10,000 of shares, and the next largest holder is one for £6000. The petitioner in applying for the shares in the said company relied upon the statements in the said letters as being accurate, and as making a full and true disclosure of material facts in connection with the said company. Neither the memorandum and articles of association of, nor any other document connected with, the company were exhibited to him. The said misrepresentations were misrepresentations of material consideration, and had the petitioner been aware of the true state of the facts he would not have applied for any shares. The misrepresentations were made by Machan on behalf of the company in the knowledge that they were untrue and misrepresented the true facts, or with gross recklessness, and with carelessness as to whether he stated the true position of the matter or not. The petitioner believed that the facts stated in the said letters were true, and he took his shares in that belief.

The petitioner maintained that, within the meaning of sec. 35 of the Companies Act 1862, his name was entered upon the register of the said company without sufficient cause, in respect that he was induced to take shares in the company by the misrepresentations before referred to in said letters, which contained the only prospectus issued by the promoter. Further, he averred that the prospectus contained in the said letters did not conform with the statutory requirements of section 10 of the Companies Act 1900, and the allotment of shares to the petitioner upon the basis thereof was void and of no effect. On each of these grounds he prayed the Court to pronounce an order to rectify the register by deleting his name therefrom.

Answers were lodged by the Dundee Steam Navigation Company, Limited, in which, while the letters set forth by the petitioner were admitted to have been written by Mr Machan, the averments of the petitioner as to misrepresentation were denied. The answers further stated—"That the banking company which had agreed to advance £26,000 to the company on mortgage debentures at $4\frac{1}{2}$ per cent. withdrew

from this arrangement, and that the said sum was advanced by another lender at 5 per cent., the market rate of interest having meantime increased. This was reported to the first meeting of the company, which was held on 30th March 1903. That it was provided by the articles of association of the company that the manager of the company, if it were necessary, should have power to borrow a further sum not exceeding £10,000 in addition to said sum of £26,000, and to mortgage the ships therefor. As the amount of capital subscribed, which at the date of the first meeting of the company on 30th March 1903 was £29,700, along with the said sum of £26,000, was short of the sum necessary to pay the price of said steamers by about £10,000, the builders agreed to allow said sum to remain as a temporary loan upon a mortgage on the vessels, and a mortgage was granted over the vessels for that sum. Explained further that the party who had promised support to the extent of £10,000 ordinary shares as mentioned in the letter of 4th April 1902 (and who subsequently advanced the sum of £26,000 in debentures), ultimately took £6000 only in shares. The petitioner's contentions are unfounded in fact and in law. The petitioner's name was properly entered in the register of the company. He was not induced to take shares in the company by any misrepresentation, and in particular he was not induced to take shares by any misrepresentation made by the company or by any agent of the company. The letters founded on are not a prospectus of the company. Further, the petitioner, having accepted the said allotment without objection in the circumstances above set forth, he is not now entitled to plead the discrepancies he now alleges between the statements in said letters and the amount of capital subscribed, or the rate of interest agreed by the company to be paid on said debentures, as a ground for rescinding the contract between him and the company.

Argued for the respondents—The petition was incompetent, in respect its object was to cancel the contract of the petitioner and take shares on the ground of misrepresentation. That object, in a case like the present, where there was a completed contract to take the shares followed by the contracting party going on the register and becoming a "member" of the company, could be attained only by an action of reduction of the contract. Procedure by petition for the rectification of the register of the company under section 35 of the Companies Act was intended merely as a summary mode of rectifying the register, and was not an appropriate method of trying the question at issue between the parties in this case. The word in section 35 was "may," so that it was a matter in each case for the discretion of the Court—*Sleigh & Mackirdly v. Glasgow and Transvaal Options Company, Limited*, January 19, 1904, 41 S.L.R. 218; *in re National and Provincial Marine Insurance Company, ex parte Parker*, 1867 (L.R.), 2 Ch. 685; *Stewart's Case*, 1866 (L.R.), 1 Ch. 574.

Argued for the petitioner—The cases shewed that there was no general rule excluding such a petition as the present, and the competency of the petition was a question of circumstances in each case. Thus in *Blakiston v. London and Scottish Banking and Discount Corporation, Limited*, January 24, 1894, 21 R. 417, 31 S.L.R. 342, proof was allowed of averments of misrepresentation, no technical error in the making up of the register being averred, also *per* Turner, L.J., in *Stewart, supra*, and opinions in *Colquhoun's Trustees v. British Linen Company*, June 2, 1900, 2 F. 945, 37 S.L.R. 732. In the present case the two material statements averred by the petitioner to be untrue and misleading, viz., the statement as to the amount of the debentures and the interest thereon, and the statement as to the £10,000 taken by a friend of Mr Machan, were practically admitted in the respondents' answers to be untrue in fact, so that the proof, if necessary at all, would be short and confined to a narrow point.

At advising—

LORD KINNEAR—I think the proper way of disposing of this case is to allow the parties a proof of their averments.

It is not necessary to consider the question, which has been so much discussed, as to the jurisdiction of the Court under section 35 of the Act to determine disputed

rights between shareholder and shareholder, because this petition is directed against the company and the company alone, and the whole question is whether the company was entitled to put the petitioner on the register.

I think the question whether a petition of this kind is the proper process for trying a case of this kind is one of circumstances and discretion; and if it appeared that there was any complication of equities, or that it was proposed to reduce any contract as against any person other than the company, it might very well be found expedient to leave the person aggrieved to his remedy by way of action. But in this case the question is a very short and narrow one, and I see nothing to prevent its being satisfactorily tried in this summary form. I therefore think that we should allow a proof.

LORD ADAM and LORD M'LAREN concurred.

The LORD PRESIDENT having been absent at the discussion gave no opinion.

The Court allowed a proof.

Counsel for the Petitioner—Shaw, K.C.—Graham Stewart. Agents—Davidson & Syme, W.S.

Counsel for the Respondents—Campbell, K.C.—Younger. Agents—Morton, Smart, Macdonald, & Prosser, W.S.