

at his own expense. In the case of *Smith v. Kippen*, 19th July 1860, 22 D. 1497, this was stated to be the law in unopposed cases. And if it is so in these cases, the Sheriff-substitute considers that the same rule should *a fortiori* hold where the defender has successfully stated a defence on other points."

The defender appealed to the Court of Session.
WATSON and KEIR for him.

MILLAR, Q.C., and W. A. BROWN in answer.

In the course of the discussion a letter was produced and founded on by the appellant, from which it appeared that the confirmation of Graham as executor had been within the knowledge of the pursuers' agent prior to his preparing the summons. On the other hand, it appeared from a correspondence produced by Macfarlan & Co. that, before the action was raised, they had repeatedly, but in vain, appealed to Graham for information as to the executry funds. The Court held that both parties were in the wrong. After knowledge of the confirmation, which must be taken to have been possessed by the pursuers' agent, he was entirely wrong in so drawing the summons as to infer personal liability for vitious intromission on the part of the executor who had been confirmed. The conclusion should have been merely against the executor confirmed. It was said by the respondents that such a style of summons was in use in practice in cases of this sort. If that was so, the sooner it was departed from the better, for the Court held it to be a bad practice. On the other hand, the fault of the respondent's agent did not justify the executor in entering upon litigation. A letter or an interview between the parties should have put matters right; and, besides, the executor was in fault in not communicating information to the respondents as to the executry funds. In these circumstances, neither party should be found entitled to expenses, either in the Sheriff or in the Supreme Court.

Agent for Appellant—W. Sime, S.S.C.

Agents for Respondents—Murray, Beith & Murray, W.S.

Wednesday, June 23.

CITY OF EDIN. BREWERY CO. (LIMITED)
v. DURHAM (GIBSON'S EXECUTOR).

Partnership—Joint-Stock Company—Variation between Prospectus and Memorandum of Association—Misrepresentation. The prospectus of a joint-stock company stated the capital at £50,000, with power to increase. The memorandum of association stated the capital at £50,000, with power to increase, *reduce*, or alter. *Held* that there was not such a difference between the prospectus and memorandum as to entitle a party who had applied for and obtained an allotment of shares shortly after the registration of the memorandum to have his name removed from the register of shareholders.

A party cannot escape liability as a shareholder merely because the prospectus exaggerated the position and prospects of the company.

In this action the pursuers sued for payment of the allotment money and the amount of the calls made in respect of certain shares held by the late Mr Gibson in the pursuers' company. In April 1866, before the pursuers' company was registered,

Mr Gibson applied for fifty shares, and that number of shares was allotted to him in terms of his application; but no allotment money was paid. When the first call was made, Mr Gibson declined to pay it, or have anything to do with the shares, because so very few shares of the pursuers' company had been subscribed for. Shortly thereafter Mr Gibson died, and subsequent calls were made and intimated either to the defender, who was Mr Gibson's executor, or his agents; but as the defender refused to make payment of the calls, this action was brought. Thereafter, a petition was presented by the defender to have the late Mr Gibson's name removed from the register of shareholders; and a proof was allowed. The Lord Ordinary, after considering the proof, decerned against the defender in terms of the conclusions of the summons. The defender reclaimed; and the petition at the defender's instance, and his reclaiming note, were discussed together.

CLARK and TRAYNER, for the claimer, argued—The defender resists payment here, and prays to have Mr Gibson's name removed from the register, on the ground that Mr Gibson never applied for shares in the pursuers' company as now constituted. Mr Gibson applied for shares on the faith of the prospectus of the company, which set forth that a large capital was necessary for the successful working of such a company; that the capital of the proposed company was to be £50,000, "with power to increase;" whereas the articles and memorandum of association stated the nominal capital of £50,000, with power to increase, *reduce*, or alter; that the reserved power to reduce the capital enabled the company to make their capital a sum so small that success was hopeless, and was such a condition as would have deterred Mr Gibson from applying for shares if he had been aware of it. The prospectus set forth no intention or reserved power to reduce the capital, and the insertion of such condition or power in the articles and memorandum of association was a material variation between them; and such material variation was sufficient to entitle Mr Gibson (and the defender as his executor) to decline the shares, and to have his name removed from the register. *Stewart's case* (Law Rep.,) 1 Ch. App. 574; *Kisch's case* (L. R.,) 2 Eng. and Ir. App. 99; *Ship's case* (L. R.) 3 Eng. and Ir. App. 343. The prospectus farther set forth that a great number of persons in the trade had become shareholders; and this statement induced Mr Gibson to apply for shares, and he relied on the truth of that statement in making his application. That statement was untrue, and was known to the pursuers to be so when they made it; out of fifty-one shareholders there were only ten connected with the "trade," and this misrepresentation was of itself sufficient ground to warrant Mr Gibson in declining the shares, and to support his application for the removal of his name from the register.—*Smith's case* (L. R.) 2 Ch. App. 604, and 4 Eng. and Ir. App. 64. *Kisch's case supra*.

Solicitor-General (YOUNG) and MUNRO for respondents—The alleged variation was quite immaterial. The variation in the cases quoted was of a very different kind from that founded on here. Generally speaking, in these cases the variation was one which extended by the articles and memorandum of association the object of the company, and the risk of the shareholder. Here there was nothing in the articles of association at variance with the prospectus. The reserved power to reduce the capital was no more a reason

for declining the shares in question than would the reduction of the capital by mercantile losses be a ground for resisting liability for the debts of the company. On the ground of misrepresentation, the counsel for the respondent were stopped by the Court.

At advising—

LORD PRESIDENT—The City of Edinburgh Brewery Co. Limited was formed in the year 1866. The prospectus was published in the beginning of the year, and the late Mr Gibson (who is represented here by the defender as his executor) applied for 50 shares by letter dated the 20th April 1866. These shares were allotted to him, and his name was duly entered on the register on the 8th May, the Memorandum of Association having been registered and the company thereby incorporated on the 3d of the same month.

By letter of the 8th May, the secretary of the company intimated to Mr Gibson the allotment of the 50 shares, and requested him to pay 10s. deposit on each share to the Union Bank before the 24th. This request not having been attended to, the secretary again wrote to Mr Gibson on the 30th June, requesting him to pay the deposit money. Mr Gibson then consulted his agents as to his liability to take the shares unless the whole or nearly the whole shares of the company were taken up; but he made no answer to the Secretary's letter.

On 12th March 1867 the secretary intimated to Mr Gibson a call of £2 per share, payable on Monday the 4th of April. This letter Mr Gibson handed to his agents, and thereafter died on the 18th April 1867. In the meantime, his agents had written to the secretary, stating that the reason for Mr Gibson not taking up the shares was, that he had been informed that the company was in abeyance. This was not the fact.

The only reason that Mr Gibson ever suggested during his lifetime for not paying the calls on his shares was, that the nominal capital of the company had not been taken up to nearly the full extent, the fact being, that out of 5000 shares of £50 each only 1600 shares had been subscribed for and allotted, and the names of the holders entered in the register. But this was obviously not a good reason for Mr Gibson refusing to perform his obligations as a partner; it might be a good reason for the partners who had actually subscribed for shares seriously considering their position and resolving to wind-up; but none of them was entitled to desert the others and be free from liability. All were entitled to equal consideration. It was not indeed urged in the argument that any available defence against this action for calls can be founded on this consideration.

But the defender maintains that Mr Gibson was and he is entitled to be relieved from all liability as a partner on two grounds:—(1) that the company, as constituted by the articles of association and memorandum of association, was essentially different from the company proposed by the prospectus; and (2) that Mr Gibson was induced to take the shares by fraudulent representations contained in the prospectus.

As regards the first of these defences, the defender contends that it was an essential element in the constitution of the company, as described in the prospectus, that the capital should be not less than £50,000, so large a capital being necessary to carry on such a business in competition with individual energy, and that the prospectus contem-

plated a possible increase of the capital above £50,000, but no diminution in any event—while the articles of association and the memorandum give power to the company either to increase or diminish the capital as may be found most expedient from time to time. This, it is said, makes the company eventually incorporated an essentially different company from that proposed in the prospectus.

I entertain no doubt that if the business of a company should be described in the prospectus as being of one distinctive character, and the business ultimately fixed by the memorandum of a clearly different character, the person who has been induced on the faith of the prospectus to take shares will, as soon as he discovers the variance, be entitled to have his name removed from the register, because the company of which he undertook to become a partner is not the company of which he has been made a partner by the insertion of his name in the register. And the same would hold if the extent of the business undertaken by the company as incorporated were greatly in excess of what was proposed by the prospectus, though of the same kind. But, in the absence of fraud, it may be greatly doubted whether the applicant for shares is not bound to make himself acquainted with the terms of the memorandum of association as soon as it is registered, and whether, if he allows his name to be put on the register after this, he is not bound by the terms of the memorandum.

In the present case, however, it is unnecessary to consider that question; for it is, I think, quite clear that the difference between the prospectus and the memorandum is not such as to entitle the defender to the relief he seeks. The power to diminish the capital of the company neither changes the character of the business nor exposes the partners to any indefinite extension of the business or of the risk; it is nothing else than a power (very prudently as it seems to me) reserved to the company to limit the extent of the capital if they find that they cannot advantageously employ the whole of it in the business of the company.

The defence founded on allegations of fraudulent representations in the prospectus stands in a different position. If this can be established, there can be no doubt that the defender is entitled to be liberated from his obligations as a partner, provided he can show that these representations induced him to take the shares, and that they were material to the risk he was thereby undertaking, and either that they were false, with the knowledge of the partners, or were made by the promoters in ignorance of whether they were false or true.

But here, again, the facts as proved are quite insufficient to let in the application of this rule. The false representation is said to be contained in this paragraph of the prospectus—"The company affords peculiar advantages to parties in the trade becoming shareholders. Their having a direct interest in the company, by being purchasers and shareholders, need not be enlarged on. Already a large number of gentlemen in the trade and others have become shareholders. It is by no means expected that shareholders will merely consist of parties in the trade, as the shares will prove highly remunerative as an investment to those desirous of obtaining a good return for capital." The number of gentlemen in the trade (*i.e.*, in the trade either of brewers or of the customers of brewers) seems to have been about 10 or 12 out of 55 at the time the register was made up. The gentlemen in the

trade were thus about 20 per cent. of the whole existing shareholders, and if this proportion or anything like it had been maintained in giving off the remainder of the 5000 shares, it could hardly be said that there was not a large proportion of the shareholders engaged in the trade. What the proportion was at the time the prospectus was framed and issued has not been shown; but, assuming it to be substantially the same, it seems out of the question to hold this to be a fraudulent representation in any relevant or available sense of the term. The law will not allow persons who have become partners in such a company to escape from liability merely on account of some high colouring or grandiloquence in a statement of the prospectus, which is substantially true.

In conclusion, I must observe that the two defences now relied on by Mr Gibson's executor are maintained by him in very unfavourable circumstances, seeing that they were never suggested by that gentleman himself during his life, though he was obviously very anxious to be quit of the shares and all liability connected with them.

But the defences are untenable on their own merits, and therefore I am for adhering to the Lord Ordinary's Interlocutor.

LORD DEAS concurred.

LORD ARDMILLAN—The question of alleged variation between the prospectus and the articles, and the question of an alleged false statement in the prospectus, must be kept distinct. Both points have been argued, and on both I have formed an opinion. In the first of these questions the defender, who seeks to escape from the company, abides by the prospectus, but complains of a deviation or variation from the prospectus, made to his or his constituent's prejudice by the company in framing the memorandum and articles. In the second of these questions, the defender alleges that the prospectus itself is false and fraudulent. (*Reads arts. 10 and 12 of Revised Statement.*) There is *no fraud* alleged, or even suggested, in regard to the variation complained of. It is manifest that the *fact* of a diminished capital cannot of itself liberate shareholders. That may happen from many causes; and the provisions for diminution of capital by vote of the shareholders cannot of itself operate that liberation which actual diminution of capital would not operate. There was here no increase of risk, no extended or varied field of operation, no new enterprise,—none of the elements which were sustained sufficient variations in the English cases quoted. There was here only a provision to meet a contingent emergency—a provision not even acted on—but authorising what was not unusual or unreasonable, and might have been expedient as a financial arrangement, and leading to a result which might have happened without the provision, and which would not have liberated the shareholders.

Mr Gibson, whom the defender represents, received the allotment of shares on his own application, and got due notice of the allotment, and did not refuse or repudiate it. He failed to pay the 10s. a share due on allotment, and when asked for payment he resisted, on grounds which were untenable, and are not now pressed, and he did not state any of the objections now urged. I think it is settled, even by the decisions to which we have been referred, that in the absence of fraud, and in the absence of any real variation of project

or increase of risk, a person receiving allotments without objection cannot escape from liability on the first ground here stated.

The next question relates to the alleged falsehood of the prospectus. I am of opinion in regard to this plea also, that, as Mr Gibson had notice of the allotment for which he had applied, and as he did not repudiate nor state the objections now urged, the defender representing him cannot succeed in this action in respect of any mere inaccuracy in the prospectus, or of any mere exaggeration and high colouring in the sanguine and attractive painting of the anticipated advantages and the encouraging prospects of the company. Exaggeration is common, and is indeed to be expected in such a matter, and the language of a prospectus is always received with some qualification. Unless something of the character of fraud or wilful falsehood has been instructed, I do not think that the defender can succeed on this plea; and I see no ground whatever for imputing fraud or wilful falsehood.

If ten or eleven gentlemen in the trade had really become shareholders, and others not in the trade, to the number of thirty-five or forty, had become shareholders, I cannot think that the statement that "a number of gentlemen, &c.," is either false or fraudulent. I am not satisfied that, on fair construction of the prospectus, it is otherwise than substantially true, and, at all events, I cannot say it is wilfully false. There is no evidence of fraud, and I cannot infer fraud from the statement itself. I shall only add that I concur in the opinion of the Lord Ordinary.

LORD KINLOCH—The only question now before us for decision is, whether the late Mr Gibson became legally a partner of the Edinburgh Brewery Company; or, whether the insertion of his name in the register of shareholders was a wrongful act, to be now rectified by the Court. There is no question before the Court as to whether he, or his trustee in his room, be entitled to have the company dissolved, or declared incapable of carrying on business, on any ground not affecting Mr Gibson's individual case, but the interest of all the shareholders equally.

The objection taken to the inclusion of Mr Gibson amongst the shareholders is an alleged discrepancy between the prospectus of the company and the memorandum of association, which, with the articles of association to which it refers, constitutes the contract of copartnership.

I can entertain no doubt of the general principle that an essential discrepancy between the prospectus of the company—on the faith of which shares are taken—and the contract of copartnership by which the company is actually constituted, will entitle the party who purchases shares on the faith of the prospectus, to be entirely freed of the name and obligations of a partner. Nor will it be necessary to effect this result that a case of fraud should be established. The simple and sufficient ground is, that he contracted for one thing and is tendered another; he agreed to become partner in one description of company—he is sought to be made partner in another and entirely different.

But if no such discrepancy exist, it will not void his agreement to become a partner that the articles of association contain a number of regulations for the administration of the company, of which no special and detailed notice is given in the prospectus. From the nature of the case,

the prospectus is of the most general character. Every company of the kind must have special regulations for its management; and unless they are of some very exceptional and anomalous character, such as to be beyond the possible contemplation of the engaging shareholders, the circumstance of their being inserted in the articles of association will not, in the general case, infer any fatal variance from the prospectus.

In the present case, I think that no essential discrepancy exists between the prospectus and articles of association. The company was established for the purpose of brewing ale and beer in Edinburgh or its vicinity. So the prospectus bears. The articles of association do not transform it into a company for spinning cotton, or building vessels, or manufacturing wine, or brewing on any but the purest principles; nor do they change or extend the proposed locality of the company. The capital of the company is stated in the prospectus as £50,000, "with power to increase;" so it is stated in the articles of association. The objection is, that in one of the regulations for the management of the company, power is reserved to the company to reduce, if it seem expedient, the aggregate amount of capital, and to divide it into shares of larger or lesser amount. This is just one of those not infrequent regulations for the administration of such a company, very important to have in potential exercise, with a view, were there no other, to its financial guidance and prosperity. I consider its insertion in the articles to be no breach of the good faith of the prospectus. The argument of the defender has proceeded throughout on the fallacy of supposing that, whilst the prospectus sets forth a certain amount of capital, the articles of association set forth a reduced amount as fixed and absolute. But nothing of the kind occurs. The capital is maintained the same. The reduction is potential only. All that is done is to reserve to the company the power to reduce the aggregate amount, and to make the nominal shares larger or lesser; a power to be exercised by the voice of the shareholders, including Mr Gibson himself. I conceive that nothing is to be found here warranting a repudiation of the name and liability of a shareholder.

On only one other point was the alleged misleading said to exist. The prospectus set forth; "already a large number of gentlemen in the trade and others have become shareholders." It was contended that this was untrue in point of fact. The defender, as I conceive, has failed to prove that, in any sound sense, it was so.

I am of opinion that the Lord Ordinary's interlocutor should be affirmed.

Agents for Pursuer—Ferguson & Junner, W.S.
Agents for Defender—Murray & Hunt, W.S.

Wednesday, June 23.

SECOND DIVISION.

JAMES AIKEN JUN. *v.* ELLIOT.

Partnership—Company Debt—Admission by Individual Partner. Held (dub. LORD COWAN), that when an individual partner of a company admits a company debt, he is liable to be proceeded against in respect of such debt without the necessity of constituting by decree against the company.

This was an appeal from the Sheriff-court of Aberdeenshire in an action in which the appellant was convened for an alleged company debt of Aitken, Catto, & Co., of which the appellant was a partner along with two other parties. The other partners denied that the debt was a company debt; but the appellant, who had contracted it, admitted that it was so.

The Sheriff-substitute (COMRIE THOMSON), in respect of that admission, decerned against the appellant.

The Sheriff (JAMESON) adhered. He added the following note:—"The action was properly brought against the company, and the individual partners thereof, for the price of a share of a barque alleged to have been purchased by them. Two of the defenders, John Catto and Robert Catto, denied that there had been any purchase by the company. The appellant, however, candidly admitted that the debt in question was a company debt. Had he not done so, his plea would have been good, that it was incumbent on the pursuer to constitute his claim against the company before he could obtain a decree against him. His admission supersedes the necessity of such constitution against him, and he cannot insist upon the pursuer carrying on a litigation with the copartners merely to facilitate his relief. He must take his own course for that object. This result is not inconsistent with the doctrine founded on by the appellant, and stated in 2 Bell Comm., p. 619."

The appellant now appealed.

CLARK and ASHER, for him, pleaded that decree could not be given against an individual partner for a company debt, unless the decree in question was preceded or accompanied by a decree against the company as a company.

WATSON and THOMS in answer.

The Court adhered to the judgment of the Sheriffs. Their Lordships (*dub.* Lord Cowan) held that the rule that a company debt must be first constituted against the company was superseded in a question with an individual partner where that partner admitted the debt as due by the company. In a question with a partner so admitting, the debt was constituted against the company, and he, as a partner, was liable for the whole of it. If the appellant's view were adopted, the result would be that any one recalcitrant member of a company might prevent a creditor for an indefinite period from getting decree for a debt which all the other partners admitted.

The Sheriff-substitute's judgment in this case was dated 12th March 1869; that of the Sheriff was dated 14th April; and the appeal was brought into this Court on 18th May.

Agents for the Appellant—Henry & Shiress, S.S.C.

Agent for the Respondent—W. G. Roy, S.S.C.

Thursday, June 24.

FIRST DIVISION.

PERRENS & HARRISON *v.* BORRON & LITTLE.

Arbitration—Award exhausting the reference—Reservation of part of claim. Where a claim competent to one of the parties in a submission was not stated, but on the contrary was reserved by him, and the other party did not object, plea that the award (which contained a