

mode be adopted of setting that forth, so as to bind the landlord and not make it a matter of good will merely.

The second group of cases consists of expired leases where the tenants continue to hold on tacit relocation. The only particulars in regard to these cases are to be found in the tenants' pass-books. Now here, except in the two cases I have referred to, where there are notes of the reduction, there is no evidence whatever of any intention or obligation on the part of Sir Robert Menzies to give the reduction referred to. I repeat that where a landlord wishes to get the apparent rent of his tenant reduced upon the valuation roll for the purposes of assessment he must take such proceedings as to put it beyond doubt that he is bound to give the reduction.

LORD WELLWOOD concurred.

The Court found that in the case of the leases Nos. 245 and 249 the reduction of rent ought to be given effect to in the valuation, and *quoad ultra* that the valuation was right.

Counsel for the Appellant—Dickson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondent—Low. Agent—Party.

COURT OF SESSION.

Tuesday, July 16.

SECOND DIVISION.

[Sheriff of Aberdeen.

SWEDISH MATCH COMPANY *v.* SEIVWRIGHT.

Company—Shares—Condition Appended to Letter of Application, "if Capital all Subscribed for"—Misrepresentation—Proof.

The prospectus of a company formed for the purpose of acquiring and carrying on certain match factories in Sweden set out—"Share capital, £100,000 in 20,000 shares of £5 each: First issue, £80,000 in 16,000 £5 shares." "In addition to the above shares £30,000 of six per cent. debentures, secured as a first charge upon the property and undertaking of the company,"—and further stated that the vendor of the factories was to be paid partly in cash and partly in shares. A party applied for 120 shares, appending to his letter of application the condition, "if capital all subscribed for," and paid the necessary deposit on application.

In an action by the company to enforce payment of the instalments due on the shares allotted to this party—*held* (1) that the "capital" to which the condition in his letter applied was the first issue of 16,000 shares, and (2) that the condition had been purified, as by the day of allotment 13,566 shares had been subscribed for by the public, and the company could allot the remainder to the vendor, who was bound to take them.

Opinion per Lord Rutherford Clark that a case of alleged misrepresentation by the

pursuers inducing the application for shares could not be inquired into, the defender not having been examined with regard thereto.

In November 1887 the prospectus of the Swedish Match Company (Limited) was advertised in the *Financial News*. The purpose of the company was to buy certain match-making factories in Sweden from a Mr Peterson, and work them as one concern. The prospectus set out, *inter alia*, as follows:—"The subscription lists will open on Saturday the 26th November, and will be closed on or before Tuesday the 29th, for London and country. THE SWEDISH MATCH COMPANY, (LIMITED). Incorporated under The Companies Acts, 1862 to 1883. Share Capital £100,000, in 20,000 shares of £5 each. First issue £80,000, in 16,000 £5 shares. 10s. on application, £1, 10s. on allotment, £1, 10s. in a month, and £1, 10s. in two months. In addition to the above shares, £30,000 OF SIX PER CENT. DEBENTURES, secured as a first charge upon the property and undertaking of the company, redeemable at par on the 1st November 1897, or earlier, at the option of the company, by payment of 5 per cent. premium, is offered for public subscription, payable as under:—£5 per cent. on application; and £95 per cent. on December 14th 1887. The debentures will be issued in any multiple of £10. Interest will run from the 1st November 1887, payable half-yearly, on the 1st May and the 1st November. The consideration to be paid by the company for the whole of the before-mentioned property together with good-will has been fixed by the vendor at £90,000, of which £55,000 is payable in cash, and the balance £35,000 in fully-paid shares, debentures, or cash, or partly in each, at the option of the directors, but the vendor desires to have allotted to him the largest possible number of shares, having regard to the rules of the Stock Exchange relating to quotations. This will leave for working capital, stock and extension of plant, £20,000.

On 28th November this advertisement appeared in the *Financial News*:—"In consequence of the numerous applications received in London alone the first day, it is decided to close the list this day for London, and to-morrow (Tuesday) for the country."

On 29th November John Seivwright, who resided in Aberdeen, sent in an application, through his brokers for 120 shares of £5 each on the usual form. To this letter of application were appended the words "if capital all subscribed for." A sum of £60 was paid as the deposit on application.

Upon the same day the company sent him a letter of allotment for 120 shares, and stating that the balance at that time was £180, payable before 7th December 1887.

Upon 3rd December, Seivwright wrote to the company this letter:—"Dear Sir,—Kindly note that I have received allotment letter for 120 shares in the Swedish Match Company, Limited. I saw the prospectus in *Financial News*, and desiring to invest £120, thought it was a likely good investment, and wired my brokers J. C. & C. W. Morice to apply for 120 shares, thinking they were £1 shares, as most limited companies are. Will you kindly ask your directors to alter this, correcting my mistake, as I have not £500 just now to invest. Let me know also if all the

shares and debentures were subscribed for by the public."

Upon 5th December the secretary of the company wrote that the directors had no power to alter the allotment, and that "all the shares were applied for and allotted." After some further correspondence Seivwright refused to pay the instalments due upon his shares, and the company raised an action to recover them in the Sheriff Court Aberdeen, &c.

The pursuers averred that as the defender had duly made an application for shares, and these had been allotted to him, he was liable to pay the calls.

The defender averred that when the allotment was made to him, the whole of the first issue of £80,000 had not been subscribed for, but only about £67,000, and that the condition in his letter of application had therefore not been complied with. Further, that "the directors of the pursuers' company, in full knowledge that the first issue of £80,000 was not fully applied for, wilfully and without cause circulated, or caused to be circulated prior to the closing of the lists, reports intended to convey the impression that the said first issue was more than fully applied for, on the faith of which reports the defender's application was made."

The defender pleaded—“(2) The application for shares in the pursuers' company having been made by the defender on the faith of statements made by or on behalf of the directors of the said company, which were false or were at least misrepresentations of matters material to the contract, the falsity of which they knew or ought to have known, the defender is entitled to repudiate said alleged allotment of shares following on said application, and to be assolizied from the conclusions of this action. (3) The defender's said application having been made conditional to the capital being all subscribed for, and this condition not having been fulfilled at the date of said alleged allotment to him, he is entitled to repudiate the said allotment, and to be assolizied from the conclusions of this action.”

The Sheriff-Substitute allowed a proof, which was taken in London on commission. The material facts brought out at the proof were these—That Mr Peterson, the vendor, had induced certain of his friends and clerks to apply for shares, amounting to over 2000, in their own names, but for which he was to find the money, which applications were withdrawn before allotment. On 29th November 1887 13,566 shares had been subscribed for by the public, and by resolution of that date these shares were allotted to the applicants. 2400 were also allotted in part payment to the vendor, but the number so allotted to him were not filled into the minute till considerably later. The remaining 34 shares were retained to meet inaccuracies. The advertisement was made in the *Financial News* by a Mr Humpage, as agent for the vendor in promoting the company. At its date applications had been lodged for 5262 shares, but of these 2695 had been lodged by the promoters, the vendor, and their friends, and were withdrawn the next day.

Upon 12th November 1888 the Sheriff-Substitute (DOVE WILSON) issued this interlocutor:—“Finds that the defender applied for shares in the pursuers' company upon the condition that the capital was all subscribed for: Finds that the

capital has not been all subscribed for; and therefore assolizies the defender from the conclusions of the action, and finds him entitled to expenses, &c.

“*Note.*—I have already dealt with the plea of the pursuers, to the effect that the condition attached to the defender's application was to be held as if it did not exist, and I now come to inquire what the meaning of the condition is. The pursuers treat it as if it meant that the shares were to be taken if the whole of the first issue was subscribed for. That is not what it says, and I can see no ground for so interpreting it. It says distinctly, ‘if capital all subscribed for,’ and the meaning of that is plain. It mattered little to the defender whether the capital was issued in one or half a dozen different issues, but it mattered a good deal to him whether the whole or only a part was taken up. If the whole were taken up it would not be necessary to call up the full amount of each share, whereas it might be if only part were taken up. In the prospectus the capital was distinctly stated at £100,000, and the condition in the application could have reference to nothing except that. It may be argued that the word ‘capital’ in the condition must be taken as equivalent to first issue, inasmuch as nothing else was being offered at the time for subscription. This argument is insufficient. The words ‘capital’ and ‘first issue’ are not equivalent, and the prospectus is silent as to when the second issue was to be made. It was free to the pursuers to deal with the defender's application as they pleased, and if they thought fit to entertain an application conditional upon all the capital being subscribed for, they must abide by the condition. Only £80,000 in round numbers has been subscribed for in place of the £100,000 mentioned in the prospectus. Plainly therefore, if I have rightly understood the condition, it has not been complied with.

“It is unnecessary for me to express an opinion upon the defence founded upon the alleged false statement contained in the pursuers' advertisement of 28th November 1887 in the *Financial News*. It appears to me, however, that there is a want of evidence to show that the statement was untrue. The statement in question bore that in consequence of numerous applications received in London for shares upon the first day of applying it had been decided to close the list at a particular time. It is so much matter of opinion what ‘numerous’ applications may mean that it is difficult to say that the applications were not numerous, even without entering upon the question whether some of the applications were not made on bad faith for the mere purpose of swelling the list.”

The pursuers appealed, and on 18th January 1889 the Sheriff (GUTHRIE SMITH) dismissed the appeal and affirmed the interlocutor.

“*Note.*—The defender in applying for shares made it a condition that he should not be bound to take them unless the ‘capital was all subscribed,’ and the first question in the case is, What is the meaning of the word ‘capital’ as used by him in his letter of application? The Sheriff-Substitute has read it ‘share capital,’ and if such is its meaning I should have thought that it could only relate to shares about to be issued, not the shares which the company was empowered to issue, but which they might never find it necessary to issue.

In other words, the application would mean—'If all the shares which you are now offering to the public are taken up, I am willing to take so many,' and as they all were taken up, the defence would fail. But in my opinion this is not the sense in which 'capital' is used in the documents which have now to be considered. The proposals contained in this prospectus in substance and effect amounted to this—The company were to buy certain match factories in Sweden for £90,000, payable £55,000 in cash, and £35,000 in shares. The shares to be first issued were only for £80,000, and as it would require £10,000 more to pay off the vendor, and £20,000 for working capital, or together £30,000, this was to be raised by debentures which were offered for public subscription in the same prospectus and along with the shares. Unless the promoters were able to raise the whole £110,000 by debentures and shares they would not be able to go on. When therefore the defender stipulated that the whole capital should be subscribed he must have meant both share and debenture capital, and it is in favour of this view, and also of his perfect *bona fides*, that in his letter of 3rd December 1887, acknowledging the letters of allotment, he desires to be informed if all the shares and 'debentures had been subscribed for by the public.' It is not disputed that this was not the case. The shares had been taken, but not all the debentures, and I therefore affirm the Sheriff-Substitute's judgment, although I am unable to agree with him in the grounds on which he has proceeded. The second point made was that the promoters induced the defender to subscribe by the publication of a statement to the effect that the applications for shares were so numerous as to compel them to close the lists for London. When this statement was made they had received application for 5300 shares, but of these 2695 had been lodged by the vendor, the promoters, and their friends, and were withdrawn the second day, so that they knew when the statement was made that considerably under 3000 *bona fide* applications had been received. It is a jury question whether that quantity could be accurately and honestly described as 'numerous,' and so numerous as to force them to curtail the offers previously made to the public when the total quantity offered for subscription was 16,000, or allowing his entire 7000 to the vendor, 9000 shares. In my opinion it could not, and on this ground also the defender is entitled to judgment."

The pursuers having appealed, the question was raised by the Court whether it could be taken that the advertisements in the *Financial News* had had any effect upon the mind of the defender in applying for shares, as he was not examined on the subject, and this minute was lodged for the pursuers and appellants—"YOUNGER, for the pursuers and appellants, stated that the pursuers admit that the defender saw the advertisement of the prospectus of the pursuers' company as contained in the *Financial News* of 28th November 1887, and sometime thereafter telegraphed his brokers in London to send in the application, No. 7 of process. They do not, however, admit that the defender was to any extent induced by the said advertisement to apply for the shares in question."

The appellants argued—The defender was liable to pay the calls on the shares he had

applied for, and which had been allotted to him. He had not been deceived by the advertisement in the *Financial News* as to the earlier closing of the lists of applications, which did not contain misrepresentations of the facts. It only showed that such a large number of shares had been subscribed for on the first day that it was probable the shares would be largely over subscribed. As regarded the stipulation in the letter of application, "if capital all subscribed," what was the capital which was to be subscribed for? It was plainly the issue which was being made, viz., the first issue of 16,000 shares, and it did not apply to the 4000 shares which were not issued for subscription at all, so that the view of the Sheriff-Substitute was wrong. The judgment of the Sheriff also was erroneous, because he had held that the £30,000 of debentures must have been subscribed for. But debentures were not capital. They really were a debt due by the company and a burden upon its capital. Taking it that the amount of capital to which the condition applied was the 16,000 shares first issued, the evidence showed that these shares had really been subscribed for at the date of allotment. £13,566 having been allotted to the public, and the balance having been practically allotted to the vendor. The defender was not entitled to read "by the public" into the condition appended to his letter of application. The vendor was bound to take the shares allotted to him as part payment for the transfer of his business. If they were not at once given to him, it was only to allow the transfer to be made.

The defender argued—It was not denied that the defender was entitled to annex the condition he did to his letter of application. The question was, what was the meaning of the word "capital" in that condition? There were three meanings in which the word could be taken—(1) The whole share capital of 20,000 shares, (2) the first issue of 16,000 shares along with the £30,000 debentures, (3) the first issue of the 16,000 shares. The real meaning to be attached to the word was the second of these, the first issue of 16,000 shares and the debentures. The debentures were mentioned in the prospectus, and were the working capital of the company. Nor was it proved that the debentures had been all taken up, and the condition was thus not fulfilled. Even supposing the condition was held to apply only to the 16,000 shares of the first issue, the condition had not been complied with, for it was proved that only 13,566 had been subscribed for by the public, and the condition plainly implied that they should be subscribed for by the public. The vendor, who was said to have got 2400 shares, could not be said to have subscribed for these. Further, he had not been allotted these shares at the necessary time, as the number of shares he was to get was not filled in till the agreement of 1st March was made. The defender was deceived into applying for shares by misrepresentations of the pursuers made in the advertisement of 28th November. It was not true that so large a number of applications had been received as to apprehend that the list would be too full. Considerably over 2000 of these shares were applied for by friends and clerks with small salaries in the promoter's, Mr Peterson's, office, and at his risk. Before allotment these pretended applicants had withdrawn their applications. The

defenders knew that these were not *bona fide* applications, and therefore ought not to have counted them among the applications. If the pursuers had not in this way represented the company as a good one, the defender would not have applied for shares.

At advising—

LORD JUSTICE-CLERK—I regret that I cannot agree with the view that either of the Sheriffs has taken of this case. My view is that the capital to which alone reference is made by the defender in the stipulation affixed to his letter of application, “if capital all subscribed for,” applied to the capital of 16,000 shares of £5 each, which are equal to a sum of £80,000.

I cannot accept the view of the Sheriff-Substitute that the capital which he stipulated must be all subscribed for was not merely the amount of the shares which were then being offered to the public for subscription, and that the stipulation could not be carried out, unless the whole shares of the company had been subscribed for. I think the meaning plainly refers to the amount of capital then offered for subscription. Nor can I agree with the view of the Sheriff, who held that the word “capital” was meant to include not only the share capital, but also a large amount of debentures which were offered to the public. These debentures were not capital at all. Sometimes debentures may be talked of as forming part of the capital of the company, but it was not so here. The company merely received money from the public on these debentures in return for a fixed percentage of interest. We must deal with the case on the footing that the capital to which the defender’s stipulation in his letter referred was 16,000 shares, and if these were really subscribed for within the time fixed, then the condition was fulfilled, and the defender was bound by his application.

There is no doubt that 13,566 shares were subscribed for by the public before the day of allotment, and as regards the balance the only question is whether the 2400 allotted to the vendor must be held to be shares subscribed for or not. In my opinion they were shares which the company could allot to the vendor at that time. He was not in a position to insist that he should get them, as they might have paid him in cash if they had had the money, but he was bound to take them if they were allotted to him. I think that the pursuers are right in their contention, and that the defender is bound to make payment of the sum sued for.

LORD RUTHERFURD CLARK—I agree. I think that the case of misrepresentation fails utterly from the fact that the defender was not examined to prove there was misrepresentation. It is impossible to inquire into a case of alleged misrepresentation if the defender does not swear that he was deceived.

Then, I think, as to the meaning of the word “capital” there cannot be two opinions, and that the Sheriff is quite wrong.

But the letter of application was accompanied by a condition, and it is said that that condition was not fulfilled. The capital issued for subscription was 16,000 shares, and I think all the capital was subscribed for, because by the day of allotment the company were in a position to issue these

16,000 shares to persons under an obligation to take them. These persons were, first, members of the public who had applied for them in the ordinary way, and second, the vendor, who was bound to take the shares allotted to him. I think that the condition was fulfilled, and that the pursuers were entitled to issue the letter of allotment to the defender.

LORD LEE concurred.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

“Find in fact (1) that on 29th November 1887 the defender paid to the pursuers’ bankers £60, being ten shillings per share on 120 shares of £5 each in the pursuers’ company, and made application to the pursuers for an allotment to him of that number of shares in terms of letter of application by the defender of that date, No. 7 of process; (2) that at said date the amount of capital issued by the company was £80,000, in 16,000 shares of £5 each; (3) that it was a condition of the defender’s application that the said 16,000 shares should be subscribed for before allotment to him of the shares applied for; (4) that on 30th November 1887 120 shares were allotted by the pursuers to the defender; (5) that at the last-mentioned date said 16,000 shares were subscribed for, and the said condition was thereby purified; (6) that it is not proved that the defender was induced to apply for said shares by misrepresentations on the part of the pursuers; (7) that by his said letter of application the defender undertook to pay the further instalments upon his shares as follows, namely, £1, 10s. on allotment, £1, 10s. in a month, and £1, 10s. in two months: Find in law that the defender is liable in payment to the pursuers of said instalments, with interest from the dates when they respectively became payable: Therefore sustain the appeal: Recal the judgments of the Sheriff and Sheriff-Substitute appealed against: Ordain the defender to make payment to the pursuers of the sum of Five hundred and forty pounds, with interest as concluded for: Find the pursuers entitled to expenses,” &c.

Counsel for the Appellants—Jameson—Younger. Agent—John Bell, W.S.

Counsel for the Defender—Comrie Thomson—Watt. Agent—Andrew Urquhart, S.S.C.