

Tuesday, January 19.

FIRST DIVISION.

SLEIGH AND MACKIRDY v. GLASGOW AND TRANSVAAL OPTIONS, LTD.

Company—Rectification of Register—Misrepresentation — Prospectus — Whether Document Prospectus—Liability of Company for Acts of Promoters—Companies Act 1900 (63 and 64 Vict. cap. 48), secs. 10 and 30.

In a petition under section 35 of the Companies Act 1862 for the rectification of the register of the G. company by the removal of his name from the list of shareholders, S. averred that he had applied for and obtained shares on the faith of a prospectus issued by the promoters before the company was formed; that this prospectus contained serious misrepresentations in fact, and did not comply with the requirements of section 10 of the Companies Act 1900. The document alleged by S. to be a prospectus was typewritten, and set forth that it was proposed to form a private company to acquire certain options in the Transvaal, the proposed capital, the names of gentlemen who had agreed to become directors, and the solicitors, bankers, and officers of the proposed company. It did not contain any direct invitation to apply for shares. About forty copies of this document were issued, mainly by the promoters to their friends, although a few were distributed by a canvasser employed by one of the promoters.

The Court, after a proof, *refused* the prayer of the petition, being of opinion (1) that the petitioner had failed to prove that he applied for shares on the faith of the alleged prospectus, or that the said document contained misrepresentations in fact; (2) that the document in question was not a prospectus within the meaning of section 30 of the Companies Act 1900, in respect that it did not contain an invitation to apply for shares, and was not issued to the public generally; (3) that a shareholder was not entitled to have his name removed from the register in respect of representations of the promoters prior to the incorporation of the company, unless the company was so identified with the promoters as to make their representations those of the company, or adopted their representations after its formation.

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

Opinion (per the Lord President and Lord M'Laren) that procedure by petition for the rectification of the register of a company under section 35 of the Companies Act 1862 was incompetent where the object of the application was

the cancellation of the contract to take shares on the ground of misrepresentations contained in the prospectus.

The Companies Act 1862 enacts (section 35) — “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 . . . 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 arise 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.” . . .

The Companies Act 1900 enacts (section 30) — “In this Act, unless the context otherwise require . . . the expression ‘prospectus’ means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company.”

Section 10 (1) — “Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state . . . (d) The minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share. . . . (m) Full particulars of the nature and extent of the interest (if any) of every director in the promotion of or in the property proposed to be acquired by the company, with a statement of all sums paid or agreed to be paid to him in cash or shares by any person, either to qualify him as a director or otherwise for services rendered by him in connection with the formation of the company.”

This was a petition presented on August 30th 1902 by Charles William Sleigh, factor, Blackwood Estates Office, Lesmahagow, under the provisions of section 35 of the Companies Act 1862 (quoted *supra*), praying (1) for the rectification of the register of a company known as the Glasgow and Transvaal Options, Limited, by removing therefrom the name of the petitioner as holder of 100 shares, (2) for due notice of such rectification to the Registrar of Joint-Stock Companies in Scotland, and (3) to direct the said company to pay to the petitioner the sum of £50, being the

sum paid by him as consideration for the said shares.

A similar petition was presented by William Augustus Scott Mackirdy of Birkwood, Lesmahagow, another shareholder. The averments in the two petitions were of a similar character, and they were heard together.

The material averments made by Sleigh were as follows:—"In or about the month of January or in the beginning of February 1902 there was projected and promoted in Glasgow a company for the purpose of acquiring blocks of mineral-bearing lands in the Transvaal. For the purpose of obtaining subscribers among the public for shares in the said proposed company, and as an offer to the public of shares for subscription or purchase, the promoters drew up and issued a prospectus in the following terms:—'*Glasgow and Transvaal Options, Limited.* — Mr David Fraser of Pretoria is now in this country for a short period, and is forming a company to handle about 100 Options in the Transvaal. Mr Fraser has been in South Africa for over forty years, and is well known there and much respected. The nominal capital of the company is to be the very small one of £15,000 with working capital of £5000. Mr Fraser is not taking any cash for the right to his options, but is accepting payment of 10,000 fully paid shares, thereby showing his absolute confidence in the scheme. The company will be a private one, and the following gentlemen have agreed to become directors:—Mr James Shaw, coal exporter, 57 Hope Street, Glasgow; Mr George Gray, solicitor, Edinburgh; Mr James M. Webster, merchant, Glasgow; Mr J. B. Dalzell, coalmaster, Larkhall; Mr David Fraser, Pretoria; Mr W. Keith Webster, accountant, Glasgow. The shares of this company should in a very short time become of very great value indeed. Messrs Lindsay, Meldrum, & Oatts are the solicitors, and the National Bank of Scotland, Crosshill Branch, will be the bankers in this country, and the Natal Bank, Pretoria, in South Africa. The registered offices of the company will be situated at 55 West Regent Street, Glasgow, and Mr W. Keith Webster, who has had a large experience in matters of this kind, will be the managing director. Before the company has been incorporated urgent demands have been made to obtain control over certain options, and arrangements are already being made to hand over certain properties.' Copies of the said prospectus, notice, or circular accompanied by forms of application for shares in the said company were widely circulated in Glasgow and the surrounding district both by post and by distribution from Mr Keith Webster's office at 55 West Regent Street. The promoters also distributed personally and by post numerous copies among people likely to take shares, accompanied by written or verbal invitations to the said persons to apply for shares. On or about 22nd February 1902 the petitioner received from the said Mr Dalzell a letter dated 21st February 1902

enclosing a copy of the said prospectus along with the prospectus of a company then in course of formation called the Glasgow Mexican Options, Limited. There were also enclosed forms of application for shares in the said companies. Relying upon the statements made in the said prospectus the petitioner on 26th February 1902 applied for 100 shares in the Glasgow and Transvaal Options, Limited, and sent his cheque for £12, 10s., being the sum payable on application for said shares. On 18th March 1902 there were allotted to him 100 shares in the said company, numbered 558 to 657 inclusive. Since the said date the petitioner has paid three further sums of £12, 10s. upon calls in the said shares, making in all a payment of £50. On 7th March 1902 the company was incorporated and registered under the Companies Acts 1862 to 1900 under the name of the Glasgow and Transvaal Options, Limited. The registered office of the company is the office of Mr Keith Webster at 55 West Regent Street, Glasgow. After the incorporation of the company the said prospectus was approved of and adopted by the company and was issued by the company to members of the public from the offices of the company, and by the directors on behalf of the company. The said directors, or one or more of them, acting on behalf of the company in making the said allotment of shares to the petitioner on 18th March were well aware that the petitioner had received a copy of the said prospectus, and that his application for shares was made upon the basis of the said prospectus. The petitioner has recently ascertained that several of the representations made in the said prospectus were inaccurate and untrue. In particular, the said prospectus represents, and it was intended to represent, that Mr Fraser was, at the date of the issuing of the prospectus, in possession of 'about 100 options in the Transvaal,' in return for a transfer of which by Mr Fraser to the company £10,000 was to be paid to Mr Fraser in shares of the company. In point of fact Mr Fraser had not acquired any such options at that time, and although he has not yet transferred any options to the company there has been issued to him by the directors a certificate for 10,000 of the company's shares. . . . Had the petitioner been aware that Mr Fraser was only in course of acquiring the said options, and that he was to receive 10,000 shares from the company for merely undertaking to acquire the said options within no fixed period, he would not have applied for shares in the said company. Upon receiving the said 10,000 shares Mr Fraser immediately transferred 5300 of them for nominal sums to the said J. M. Webster, James Shaw, W. K. Webster, George Gray, J. B. Dalzell, and others, the consideration for the said transfers in each case being ten shillings. It is believed and averred by the petitioner that the transfers of the said shares to the said parties formed part of their interest in the promotion of the company, and that they were granted

for services rendered in the said promotion. In violation of the Companies Act 1900, section 10, sub-section 1 (m), the said interest on the part of the said directors in the promotion of the company was not disclosed in the prospectus. Had the petitioner been aware of the said undisclosed interests on the part of the said directors he would not have applied for any shares. Further, in addition to the instances already given the provisions of the Companies Act 1900 were violated by the issue of the said prospectus in numerous other ways, and in particular attention is drawn to the fact that it has not been filed; (2) the probable amount of the preliminary expenses of the company is not stated in it; (3) the date of the contract with Mr Fraser, and the place where it may be inspected, are omitted from it; (4) the qualification of directors is not mentioned in it; (5) the minimum subscription upon which the directors might proceed to allotment was not stated in it."

There were other averments of misrepresentation and failure to comply with the requirements of section 10 of the Companies Act 1900, but these in the view taken by the Court it is unnecessary to detail.

Sleigh stated his contention as follows:—"The petitioner contends that 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 (1) by misrepresentations in a prospectus issued by the company, or by the directors or one or more of them on behalf of the company, or by the promoters thereof; and (2) through the omission of material facts from the said prospectus amounting to misrepresentation. He further maintains that since the said prospectus does not conform with the statutory requirements, the allotment to him upon the basis of the said prospectus is void and of no effect."

Answers were lodged for the Glasgow and Transvaal Options, Limited, in which, besides a general denial of the averments of misrepresentation, they made the following statements with regard to the document of 6th February 1902 quoted above—"It is denied that said memo. is a prospectus or was ever intended to serve the purpose of a prospectus, nor was it used for the purpose of inviting or offering to the public shares in the said company. Mr Fraser asked the Messrs Webster to use their influence to obtain directors for the company of which he was the promoter, and the Messrs Webster introduced him to the gentlemen forming the present board. Said memo. was drawn up by Mr Fraser and Mr Keith Webster for the purpose of giving the directors a rough outline of Mr Fraser's proposals, and some typewritten copies of it were given to each of the directors. The directors had nothing to do either with the composition of this memo. or its distribution, and they at no time put it forward either to the petitioner or any other member of the public as a prospectus or as a document intended to serve the purposes of a prospectus. . . . Explained that the directors in order to further Mr Fraser's

scheme mentioned it to some of their friends and they became subscribers, but the memorandum before mentioned never was transformed into a prospectus. It never was adopted by the company or its directors, nor was it issued to the public by the company."

They submitted that the petition ought to be refused in respect—“(1) The petitioner's statements are irrelevant; (2) his allegations of misrepresentations are wholly unfounded in fact.”

Proof was allowed, and led before Lord Adam, and by him reported to the Court.

The import of the evidence, in so far as relating to the alleged misrepresentations to the reasons inducing Sleigh to apply for shares, and to the circulation of the document alleged to be a prospectus, is fully stated in the opinion of the Lord President, *infra*.

Argued for the petitioners—(1) The document here was a prospectus. It implied an invitation to take shares, and the evidence showed that it had been issued to members of the public, *i.e.*, to persons who were not private friends of the promoters—*Dringbier v. Wood* [1899], 1 Ch. 393, *per* Byrne, J., p. 403; *Burrows v. Matabele Gold Reef, &c., Co.* [1901], 2 Ch. 23. If so, it could not be questioned that it failed to conform to the requirements of section 10 of the 1900 Act. That gave persons who had taken shares on the faith of the prospectus a right to have their names removed from the register. (2) Even assuming that this document was not technically a prospectus in the sense of the Companies Act 1900, it was a representation on the faith of which the petitioners applied for shares. That representation, as the evidence showed, contained serious misstatements and concealment of material facts. It was no answer, in an action for rescission of the contract, to say that the applicant was referred to documents which would show the truth of the facts misstated in the original statement put before him—*Aaron's Reef, Limited, v. Twiss* [1896], A.C. 273. Nor was the petitioner bound to show the particular misstatement which induced him to take shares, if as a whole the representation was false—*Hallows v. Fernie*, 1868, L.R., 3 Ch. 467; *Greenwood v. Leather Shod Wheel Co.* [1900], 1 Ch. 421, *per* Lindley, M.R., at p. 434. The company was responsible for the act of the promoters, to the extent that it could not insist on retaining the shareholder on the register—*Karberg's Case* [1892], 3 Ch. 1; *Tamplin's Case, W.N.* (1892), 94, 146. These cases established the propositions (1) that if A sells to B in the knowledge that B contracts in reliance on misrepresentations made by C, B can rescind his contract with A; and (2) that where a prospectus is issued by the promoters and an application is made for shares prior to the incorporation of the company, the company in allotting shares is affected with knowledge of the prospectus. In *Lynde v. Anglo Italian Hemp Spinning Co.* [1896], 1 Ch. 178, the opposite result was arrived at, but there all that was averred was a verbal statement by a promoter who became

a director—*Derry v. Peck* [1887], 14 A.C. 337, and *M'Connell v. Wright* [1903], 1 Ch. 546, were also cited.

Argued for the respondents—If this document was a prospectus in the sense of the 1900 Act, it was not disputed that it did not comply with the requirements of that Act. Even taking the case on that footing, the remedy was not rescission of the contract, but an action of damages against the persons who issued the prospectus—*Gover's Case* 1875, 1 Ch. Div. 182. But it was not a prospectus. The two points requisite to make a document a prospectus within the meaning of that Act were—under the definition given in section 30 (quoted *supra*)—that it should contain an invitation to apply for shares, and that it should be issued to the public. The present case satisfied neither condition. (2) On the facts there was no misrepresentation. At the most, certain statements were ambiguous, but where a document is ambiguous, and reference is given to the means of clearing up the ambiguity, no one is entitled to say that he contracted on the faith of the words taken in the sense which was not true, and claim therefore that he was entitled to the rescission of his contract—*Hallows v. Fernie*, 1868, L.R., 3 Ch. 467. If the petitioner relied on concealment, that would not justify rescission of the contract unless what was concealed made what was stated untrue, and unless the concealment was fraudulent—*Gillespie v. Russell*, February 28, 1856, 18 D. 677; *New Brunswick Co. v. Conybear*, 1862, 9 Clark, H.L.C., 711. Again, a person who applies for shares is bound to satisfy himself within a reasonable time of the contents of the articles and memorandum of association, and if he fails to do so he cannot afterwards claim rescission on the ground of misrepresentation by the promoters. Buckley, *Companies Act*, 8th ed., pp. 125-127—*Oakes v. Turquhand*, L.R., 2 H.L. 325; *Peel's Case*, L.R., 2 Ch. 674; *Lawrence's Case*, L.R. 2 Ch. 412; *Scholey v. Central Railway Co. of Venezuela*, L.R., 9 Eq. 266, note. (3) Even if there were misrepresentations by the promoters, that gave the shareholder no right to have his name removed from the register. *Karberg's Case* [1892], 3 Ch. 1, was not an authority for the propositions which the petitioner deduced from it. It was explained in Lindley on *Companies*, 6th ed., i., pp. 95, 96; Buckley, *Companies Acts*, 8th ed., p. 118; *Lord Lurgan's Case* [1902], 1 Ch. 707. If it was an authority for the petitioner's propositions, then it was not good law in Scotland. (4) The form of this application was incompetent. A petition under section 35 of the *Companies Act* 1862 (quoted *supra*) was only competent when the question raised was whether the person whose name was on the register had or had not agreed to take shares. Here that was not disputed—the question was whether he had a right to rescind his contract. That required an action of reduction.

At advising—

LORD PRESIDENT—This is a summary petition under section 35 of the *Companies Act* 1862, at the instance of Charles William Sleigh, in which he prays the Court to order the register of members of the Glasgow and Transvaal Options, Limited, to be rectified by removing from it his name as holder of 100 shares, and to direct that due notice of the rectification be given to the Registrar of Joint Stock Companies in Scotland, and also for an order upon the company to pay to him the sum of £50, being the amount which he paid as consideration for the shares, with interest, and to find the company liable to him in expenses.

Shortly stated, the ground of the application is that the petitioner was induced to take shares in the company by a document which he describes as a prospectus, which he alleges to have contained grave misrepresentations, and in which there were, as he alleges, serious omissions of things which the *Companies Act* of 1900 requires to be stated in a prospectus.

The following are the circumstances under which the question arises:—

The petitioner alleges that in January or February 1902 a company was promoted in Glasgow for the purpose of acquiring blocks of mineral-bearing lands in the Transvaal, or options entitling it to purchase or acquire such blocks of mineral-bearing lands; that the promoters of the company were six gentlemen therein named, and that they, for the purpose of obtaining subscriptions among the public for shares in the proposed company, and as an offer to the public of shares in it for subscription or purchase, issued a prospectus, notice, or circular in the terms therein mentioned.

This document was headed "Glasgow and Transvaal Options, Limited," and it bore that Mr David Fraser of Pretoria was in this country for a short period, and was forming a company to handle about one hundred options in the Transvaal; that Mr Fraser had been in South Africa for over forty years, and was well known there, and much respected; that the nominal capital of the company was to be the very small one of £15,000, with working capital of £5000; that Mr Fraser was not taking any cash for the right to his options, but was accepting payment of 10,000 fully-paid shares, thereby showing his absolute confidence in the scheme. The document further bore that the company would be a private one, and that the six gentlemen therein named had agreed to become directors. It also stated that the shares of the company should in a very short time become of very great value indeed, and it mentioned the names of the solicitors and bankers of the company, as also that its offices would be situated at 55 West Regent Street, Glasgow, and that Mr W. Keith Webster, who had a large experience in such matters, would be the managing director, and that before the company had been incorporated urgent demands had been made to obtain control over certain options, and that arrangements were already being made to hand over certain

properties. I have now mentioned the whole contents of the document.

It is further stated in the petition that the prospectus, notice, or circular just mentioned, accompanied by forms of applications for shares in the company, was widely circulated in Glasgow and the surrounding district, both by post and by distribution from Mr Keith Webster's office at 55 West Regent Street, and that the promoters also distributed personally and by post numerous copies of it amongst people likely to take shares, accompanied by written or verbal invitations to these people to apply for shares. Most, if not all of the alleged distribution of the document said to be a prospectus appears to have been prior to the formation of the company, so that it will not affect the company unless the company in some way adopted it after its formation. I understand the petitioner to contend that it did so, because, as he alleges, the circulation of the document said to be a prospectus was continued after the formation of the company—a point as to which the parties are in dispute. About forty copies appear to have been sent out, besides some distributed by individual directors. The document called by the petitioner a prospectus does not contain any invitation to take shares.

A memorandum and articles of association dated 20th February 1902 for the proposed company were prepared and printed by the promoters, and article 58 of the articles provided that the first directors of the company should be promoters who, as had already been intimated in the prospectus, had consented to become directors.

The petitioner also alleges that on or about 22nd February 1902 he received from Mr Dalzell a letter dated 21st February 1902 enclosing a copy of the prospectus, along with the prospectus of another company then in course of formation, accompanied by forms of application for shares in both companies, and intimating that Mr Dalzell would endeavour to obtain shares for the petitioner, and avers that, relying upon the statements made in the document which he describes as a prospectus, he on 23rd February 1902 applied for 100 shares in the Glasgow and Transvaal Options, Limited, and sent a cheque for £12, 10s., being the sum payable on application for the shares, as also that 100 shares in the company were allotted to him, and that he also paid three further sums of £12, 10s. in respect of calls upon the shares, the payments in all amounting to £50.

The Company was incorporated on 7th March 1892 and went to allotment on the 18th of that month, and it is stated in the petition that after the incorporation of the company the so-called prospectus was approved of and adopted by the company, and that it was issued by the company to members of the public from the offices of the company and by the directors on behalf of the company.

The petitioner also alleges that he has recently ascertained that several of the statements made in the prospectus were untrue, and in particular that it repre-

sents, and was intended to represent, that Mr Fraser was at the date of the issuing of it in possession of "about 100 options in the Transvaal," in return for a transfer of which by Mr Fraser to the company £10,000 was to be paid to Mr Fraser in shares of the company, while in point of fact Mr Fraser had not acquired any such options at that time.

The petitioner further says that the agreement between Mr Fraser and Mr David Kerr, as trustee for the company about to be incorporated, dated 11th February 1902, discloses a state of affairs materially different from that represented in the prospectus—the agreement describing Mr Fraser as in course of acquiring 100 options to purchase blocks of land, and providing that he should be entitled to claim 10,000 shares in the company in return for the mere undertaking to provide 100 options, while Mr Fraser's whole obligation, as appearing from the agreement, was to provide 100 options as and when they might be received by him. The petitioner says that if he had been aware that Mr Fraser was only in course of acquiring the options, and that he was to receive 10,000 shares of the company for merely undertaking to provide them, within no fixed period, he would not have applied for shares in the company.

The petitioner also avers that on receiving the 10,000 shares Mr Fraser transferred some of them to persons whom he names, and that the transfers form part of the interest of these persons in the promotion of the company, and were given to them for services rendered in that promotion, and that in violation of the provisions of the Company's Act 1900, section 10, subsection 1 (m), the interest on the part of the promoters of the company was not disclosed in the prospectus, and that if the petitioner had been aware of the undisclosed interests he would not have applied for any shares.

The petitioner makes a variety of further allegations setting forth what he represents as disconformities between the prospectus and the requirements of the Company's Act 1900, as also that it had been arranged to give certain salaries to the managing director in South Africa and to the managing director in this country, and that if he had been aware that such remuneration was to be given to the directors he would not have applied for shares. He also avers that in various other particulars the prospectus was disconform to the requirements of the Companies Act 1900, and makes what are in effect grave charges of fraud against the directors, and founding upon section 35 of the Companies Act 1862, he prays that the register of members of the company should be rectified by removing his name from it as holder of the 100 shares above mentioned.

Shortly stated, the petitioner's grounds for seeking to have his name removed from the register of members of the company resolve into two, viz., (1) active misrepresentation of facts in the prospectus, and (2) omission from it of many items of informa-

tion which the Companies Act of 1900 requires that it should (if it was a prospectus in the sense of that Act) have contained. The petitioner submits that it is proved that persons to whom the alleged prospectus was sent were requested to place it before their friends, and that lawyers were asked to submit it to their clients, and that this was publication in the statutory sense. This the petitioner says satisfies the Act of 1900, which only requires (1) that the offer shall be to the public, and (2) that there shall be an invitation to take shares.

Answers to the petition were lodged by the Glasgow and Transvaal Options, Limited, in which they state the circumstances under which the company was according to them formed, and deny that the memorandum mentioned by the petitioner was a prospectus, or was ever intended to serve the purposes of a prospectus, or was used for the purpose of inviting the public to take shares in the company. They say that the memorandum was drawn up by Mr Fraser and Mr Keith Webster for the purpose of giving the directors a rough outline of Mr Fraser's proposals, and that some typewritten copies of it were given to each of the directors, but that the directors had nothing to do with the composition of it, or with any distribution which there may have been of it, and that they never put it forward, or authorised it to be put forward to the petitioner, or to any other member of the public, as a prospectus, or as a document intended to serve the purposes of a prospectus.

The respondents further allege that the directors were not promoters of the company, and that they had no interest in its promotion, the only promoter, according to them, having been Mr Fraser.

The first question which arises for decision is whether it has been established that the name of the petitioner was entered upon the register of the company without sufficient cause in the sense of section 35 of the Companies Act 1862, as unless this is established the present petition must fail.

The proceeding which it is provided shall be adopted under section 35 in Scotland is by summary petition in the Court of Session, implying that the grounds of the application are of such a character that they can speedily be either verified or disproved.

The jurisdiction conferred by section 35 for the rectification of a register has frequently been judicially considered, and I think that the result of the decisions is, that although section 35 has often been made use of for determining equities between alleged shareholders and the company, and sometimes also between members, or alleged members of the company, the Court may, if the case is one of difficulty and complication, decline to proceed under the section, and may refuse the application without prejudice to an action being brought. Lord Cairns in one case held that in such circumstances the Court had no authority to rectify the register under the section. While opinions have

been expressed on the subject by eminent Judges, and judgments which it is not easy to reconcile have been pronounced in regard to it, I am of opinion that the procedure contemplated by the section is inappropriate, if not inapplicable, to the complicated circumstances of such a case as the present, and that this would *per se* afford sufficient ground for dismissing the petition or refusing to grant the prayer of it.

But I consider, *separatim*, that if the petition is entertained and considered on its merits no sufficient ground has been established for granting the prayer of it.

The main argument submitted to us on the part of the petitioner was that the document alleged by him to be a prospectus is disconform to the requirements of the Companies Act 1900, and especially of sec. 10 of that Act, which makes very detailed and specific provisions as to the particulars to be stated in a prospectus, and it is certain that many of these requirements were not complied with in the document upon which the petitioner relies as being a prospectus, and indeed that it is not at all the kind of document contemplated by the Act of 1900 as a prospectus. In section 30 of the Act of 1900 it is declared, that unless the context otherwise requires, the expression "prospectus" means any prospectus notice, circular, advertisement, or other invitation offering to the public for subscription or purchase any shares or debentures of a company." Two main things are here required—(1) it must be an offer of shares, and (2) it must be an offer to the public, *i.e.*, to the public generally. To the petitioner's contention the respondent company replies that the document in question was not intended to be and is not a prospectus in the statutory sense, and that it merely contains information to persons who might be willing or desirous to take shares. Section 9 of the Act of 1900 plainly contemplates that a prospectus shall be issued to the public, and that the public shall be invited to apply for shares, while the document to which the present question relates was never (according to the respondents) so issued, but was merely sent by way of information to particular individuals. It is a short typewritten document not signed by anyone, and the proper inference which I think is to be drawn from its character and tenor, especially in view of the very detailed requirements of the Act of 1900, is that it was not intended to be a prospectus in the statutory sense or to be issued to the public. It bears that "the company will be a private one," and if the document in question had been a "prospectus" in the sense of the Act it would undoubtedly have been disconform to the Act of 1900, as it does not contain information which the statute requires to be given, *e.g.*, the remuneration to the directors, which was to amount to £1350 a-year.

If I be right in thinking that the document is not a prospectus within the meaning of the Companies Act 1900 the main objection of the petitioner will fall to the ground.

I am, however, *separatim*, of opinion that upon the evidence adduced it is not established that the petitioner applied for the shares which he holds in reliance upon anything contained in the so-called prospectus. He was a friend of Mr Dalzell; he seems to have frequently travelled with him by train; and I think the proper inference from the evidence is that he (the petitioner) became a shareholder in consequence of the information which he received from Mr Dalzell. The so-called prospectus, as has been already mentioned, was not printed, but consisted of a short page of typewriting, and it appears, as already stated, that about forty (or perhaps a larger number) of copies of it were sent from the office, the intention, however, being that the company should be substantially a private one. It seems to have been used in three ways—given (1) to personal friends, (2) to one or two solicitors, who were also friends, and (3) to Martin, who got a few copies and left them with four people, none of whom took shares. What Martin thus did seems to have been done without authority.

Another allegation made by the petitioner is that the statements upon which he alleges that he relied in applying for shares were false, in respect that the promoters never had any options, and he (as I understand) contends that an option is in effect a right of property in certain heritable or real estate, while according to the evidence, as well as to the natural meaning of the word, it is merely a right to call for or demand a conveyance of a certain property or right at or within a specified time and subject to specified conditions. Mr Keith Webster in his evidence defined an option as “an offer of a definite property at a definite price, open for a definite time,” and he stated that about sixty copies of the paper of information alleged by the petitioner to be a prospectus were typed in his office, but that it was not considered in any way to be a prospectus, as it was intended that the company should be a private one. He further states that it was never intended to send the typewritten document to investors generally, or to the public, and that in fact it was never issued to the public at all.

I may add that it appears to me that an applicant for shares is bound within a reasonable time to acquaint himself with the memorandum and articles of association of a company in which he applies for and takes shares, and that if he fails to do this he cannot after a material lapse of time complain that the company turns out to be not exactly what he expected.

It seems to me that the petitioner and others who took shares in the company relied on Mr Dalzell's verbal statements, directly or indirectly communicated to them, rather than upon anything contained in the document alleged by the petitioner to be a prospectus, or upon the memorandum and articles of association.

For these reasons I am of opinion that even assuming this petition to have been competently and rightly presented under

section 35 of the Act of 1862, the case fails upon the merits, and that the prayer of the petition should be refused.

LORD ADAM concurred.

LORD M'LAREN—There are so many answers to this petition that it is a little difficult to make a selection, but there are two that appear to me to be decisive. The first is that this is not a process for trying a question as to the validity of an alleged contract to take shares, and which is impeached on the ground of misrepresentation. The case intended to be tried under a summary application is the question whether the person whose name is on the register of shareholders has agreed to become an original allottee or a transferee of shares in the company. But there can be no doubt that the petitioners in both these cases had applied for shares, and shares were allotted to them, and their names were put in the register in due form. But then they say that they were induced to take those shares by erroneous representations contained in a paper which they call a prospectus. Now, it appears to me that whatever difficulties there may have been as to the scope and extent of the jurisdiction conferred on the Court by petition, it was not intended to enable the Court to deal with what would properly be the subject of an action of reduction of the contract to take shares. I, however, should be unwilling to dispose of the case on this ground, because it ought to have been taken at an earlier stage of the case, and it might perhaps have naturally led to a dismissal of the action without proof. But then I think the second ground for rejecting the application is, that while it may be clear enough that the gentlemen who are complaining were induced to take the shares by reliance upon statements put before them in the paper in question, it is not proved that the company, or anyone for whom the company is responsible, was a party to the representation. To begin with, the paper which is called a prospectus was circulated before the company was formed, and the applications made in reliance on it were sent in to the promoters or the provisional directors of the company with a view to those applicants becoming original allottees. That might not be decisive if it could be shown that the company, or its directors who managed its affairs, were so identified with the promoters who had obtained contracts by false representations that these representations must be held to be the act of the company. That certainly has not been proved in the present case, and therefore I am of opinion that the action must fail, because in order to void a contract on the ground of representation the representation must be that of the other contracting party, or someone for whom he is responsible. To take shares because you get advice from your stockbroker would be no reason for setting aside the contract, and in the present case the fact that the shares were got upon the advice of an agent or solicitor who circulated a document appears to be only the

slenderest basis for an action of this kind. But I am quite ready to agree with your Lordship in holding that if you go to the substance of the case nothing serious in the nature of misrepresentation has been proved, and that on the contrary these promoters were in possession of what, in the somewhat loose language of the money market, is called options to various mineral fields in South Africa answering to the description in the prospectus.

LORD KINNEAR concurred.

The Court, both in Sleigh's and MacKirdy's cases, refused the prayer of the petitions.

Counsel for the Petitioners—Ure, K.C.—Readman—Horne. Agents—Drummond & Reid, W.S.

Counsel for the Respondents—The Lord Advocate (Dickson, K.C.)—C. N. Johnston, K.C.—T. B. Morison. Agent—Thomas Henderson, W.S.

Friday January 15.

SECOND DIVISION.

[Lord Low, Ordinary.]

MACINTYRE *v.* GRIMOND.

Succession — Trust — Uncertainty—“Such Charitable or Religious Institutions and Societies as my Trustees may Select.”

A testator by his trust-disposition and settlement directed his trustees, in events which happened, to divide a portion of the residue of his estate “to and among such charitable or religious institutions and societies as my trustees or the survivors or survivor of them may select, and in such proportion to each or any as they may fix.” *Held* (aff. judgment of Lord Low—*diss.* Lord Moncreiff) that the bequest was valid.

Alexander Dick Grimond, merchant and manufacturer in Dundee, died on 29th January 1903 leaving a trust-disposition and settlement whereby he directed his trustees, with regard to one-third of the residue of his estate, as follows:—“They shall divide, pay, and convey the same to and among such charitable or religious institutions and societies as I may direct, and in such proportions to each or any as I may fix by any writing, whether holograph or tested, or under my hand, and failing thereof in whole or in part, then as regards such whole or such part not disposed of by me to and among such charitable or religious institutions and societies as my trustees or the survivors or survivor of them may select, and in such proportions to each or any as they may fix.”

Mr Grimond left no directions as to the particular charitable or religious institutions and societies amongst which the said one-third equal part or share of residue should be divided, nor did he fix by any

writing, whether holograph or tested or under his hand, the proportions in which such institutions and societies should benefit from his said bequest.

The present action was raised by Mrs Margaret Isabella Grimond or Macintyre and another, two of the next-of-kin of the deceased Mr Grimond, against his trustees, for declarator that the above bequest in favour of charitable or religious institutions was void and ineffectual, and that the portion of residue referred to fell into intestacy.

The pursuers pleaded — “(1) The direction and appointment as to the application of the one-third equal part or share of the residue of his estate to and among such charitable or religious institutions and societies as his trustees or the survivors or survivor of them may select, and in such proportions to each or any as they may fix, contained in the trust-disposition and settlement of the said Alexander Dick Grimond, being invalid on the ground of vagueness and uncertainty, the said one-third equal part or share falls to be dealt with as intestate moveable succession and to be paid over to the pursuers to the extent of their shares on equal division among the whole next-of-kin, as being two of the next-of-kin of the deceased.”

The defenders pleaded—“(2) The testator's directions regarding the one-third share of residue in question being valid and effectual, the defenders should be assolizied with expenses.”

On 31st October 1903 the Lord Ordinary (Low) assolizied the defenders.

Opinion. — “The deceased Alexander Dick Grimond directed his testamentary trustees (to whom he conveyed his whole means and estate) to ‘divide, pay, and convey’ one-third of the residue of his estate ‘to and among such charitable or religious institutions and societies’ as he might direct, and in such proportions to each or any as he might fix by any writing, whether holograph or tested or under his hand, and failing thereof to and among ‘such charitable or religious institutions and societies’ as his trustees might select, and in such proportions to each or any as they might fix.

“Mr Grimond left no writing in regard to the institutions and societies which he desired to benefit, and the question raised in this case is, whether the direction to his trustees to apply the fund to such charitable or religious institutions and societies as they might select constitutes a valid testamentary direction to which effect can be given?”

“It is not disputed that the words ‘charitable or religious institutions and societies’ must be read disjunctively, and that it would be in the power of the trustees to apply the fund wholly to religious institutions and societies, and the question is whether that is not a description of the object of the bequest which is too vague and general to be the subject of a valid bequest.

“It is necessary to determine, in the first place, whether a bequest to religious