Candlemas preceding said term, in order that the same may be laboured and sown."

On 2d April 1868 Udny raised an action of removing against Esson in the Sheriff-court of Aberdeenshire, pleading that "the tack under which the defender possesses being for nineteen years or crops, commencing with that of 1850, his tenure under it expires with the crop or year of 1868, and he is, in terms thereof, bound to remove at Whitsunday of that year."

The Sheriff-substitute (THOMSON) found "that, in terms of the minute of agreement, No. 12 of process, the possession in question was let to the defender on the terms following—viz., for nineteen years from and after the term of Whitsunday 1850—'the crop of the year 1850 being the first grain crop under the tack,' and the first half-yearly payment of rent being due at Martinmas 1850: That, under and in terms of the regulations and conditions of the estate, article 9, section 1, referred to in the said minute of agreement, the defender was bound to remove as at Whitsunday of the last year of the lease: Finds that the possession in question at the time it was let consisted simply of a portion of land without houses or garden: Finds, as matter of law, that the defender was entitled under the said tack to reap nineteen crops only: That his first crop was that in the ground at Whitsunday 1850, and his last crop that in the ground at Whitsunday 1868: Finds that Whitsunday 1868 is the 'Whitsunday of the last year of the lease,' and that, except to the effect of reaping the crop of 1868, the defender was bound to remove from the farm at Whitsunday 1868: Therefore repels the defences: Decerns removing against the defender, in terms of the conclusions of the libel."

On appeal, the Sheriff (JAMESON) pronounced this interlocutor:—"Recals the interlocutor appealed from: Finds that, in terms of the minute of agreement, No. 8 of process, the commissioner for the late John Augustus Udny let to the defender's predecessors the croft or possession in question for the period of nineteen years from and after the term of Whitsunday 1850: Finds that the pursuer is not entitled to remove the defender from the said possession until that period expires —viz., at the term of Whitsunday 1869, therefore dismisses the action, and decerns: Finds the defender entitled to expenses of process.

"*Note.*—The minute of agreement contains this declaration—'The crop of the year 1850 being the first grain crop under this tack'—and it is this clause which has given rise to any uncertainty about the rights of parties. But although this provision may make it questionable whether the defender shall be entitled to an away-going crop, there is no ambiguity regarding the sense of the leading provision in the contract, which fixes the endurance at nineteen years. The defender cannot be removed from the subjects let until that period expire. The action was therefore premature."

The pursuer appealed.

FRASER and CRICHTON for appellant.

CLARK and KEIR for respondent.

The Court adhered to the judgment of the Sheriff, and dismissed the appeal.

Agent for Appellant—W. Skinner, W.S.

Agents for Respondent—Macdonald & Roger, S.S.C.

Thursday, June 17.

GRAHAM *v.* MACFARLAN & CO.

Executor — Confirmation — Vitious Intromission — Summons. Observations by the Court as to the proper style of concluding against an executor confirmed, for claims on the executry funds.

Macfarlan & Co. raised an action in the Sheriff-court of Argyllshire "against Duncan Graham, residing at Daltot, in the parish of North Knapdale, and county of Argyll, as executor-dative, *qua* next of kin of the late Mrs Janet Graham or M'Arthur, innkeeper, Tayvallich, in the said parish of North Knapdale, for having vitiously intromitted with the goods, gear, and effects of the said deceased Mrs Janet Graham or M'Arthur, or at least as representing her on one or other of the passive titles known in law," concluding for £100, 9s. 3d., for goods supplied to the deceased Mrs M'Arthur.

The defender put in the following minute of defence:—"(1) The defender is executor-dative of the late Mrs Janet Graham or M'Arthur, conform to testament-dative in his favour by the commissary of the county of Argyll, of date 5th August 1868, and is liable only for payment of the deceased's debts, *secundum vires inventarii*. He is not liable for her debts as a vitious intromitter, nor as representing her on a passive title. (2) The defender does not know what sum is due to the pursuers, but he does not dispute the amount of the account pursued for. The defender is willing to rank and pay the pursuers' claim rateably with those of the other creditors of the deceased, and the pursuers having adopted proceedings needlessly, are bound to constitute their claim at their own expense. (3) The defender is not liable for expenses. (4) The present summons being defective, the defender is entitled to the expense of this defence and subsequent procedure, if any."

A debate having taken place on the closed record, the Sheriff-substitute (HOME) pronounced the following interlocutor;—

"*Inverary, 30th January* 1869.—The Sheriff-substitute having heard parties' procurators, and made avizandum, in respect that it was not disputed that the late Mrs Janet Graham or M'Arthur was indebted to the pursuers in the sum of £100, 9s. 3d. sued for, and that the defender is her executor; assoilzies the said defender from the passive title or titles libelled on, but grants decree against him as executor, for the said sum of £100, 9s. 3d.; but, in respect this action was not raised against the defender only in his character of executor, but also as a vitious intromitter, although he had obtained confirmation as executor before this action was raised, and also in respect that the pursuer was bound to constitute his claim at his own expense, finds the defender entitled to his expenses; appoints an account thereof to be given in, and remits to the auditor to tax and report, and decerns.

"*Note.*—This case was argued before the Sheriff-substitute, not on the merits, but on the question of expenses. After the defender had been confirmed executor, this action was raised against him, alternatively as executor, or vitious intromitter. It seems to the Sheriff-substitute that the defender was entitled to object to decree going out against him as a vitious intromitter, and that therefore, on this ground, he would be entitled to his expenses. But besides this, it seems to the Sheriff-substitute that the pursuer was bound to constitute his debt

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 reclaimer, 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