very clear proposition, and I therefore cannot agree with the Lord Ordinary. His view seems to be that from the moment a policy of insurance is taken out, the person who takes out the policy keeps it up not only for his own benefit, but for some possible donee at some future time, although such a donee should never be thought of or come into existence at all. That is an untenable proposition. I think, therefore, with your Lordship, and differing in that view from the Lord Ordinary, that this clause only applies where a policy is wholly or partly kept up by the donor after the date of the assignation. Now, in this particular case it is the fact that this policy, since the date of the assignation, has never been kept up by the donor at all; the whole premiums have been paid by the donee, and therefore the case does not fall within the section.

As to the latter part of the clause, the question how the proceeds of the policy are to be divided, where the premiums have been paid partly by the donor and partly by the donee, does not arise. If this matter had been open, I would rather have thought the clause did not apply to the case where the premiums were paid successively by one and by the other, but where both together mutually paid the premium. But that question does not arise here.

LORD KINNEAR—I concur.

LORD M'LAREN was absent at the hearing.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders.

Counsel for the Pursuer—Lord Advocate Balfour, Q.C.—A. J. Young. Agent—Solicitor of Inland Revenue.

Counsel for the Defenders—C. S. Dickson—A. M. Anderson. Agent—Wm. Gunn, S.S.C.

Wednesday, March 20.

FIRST DIVISION.

RATTRAY (LIQUIDATOR OF THE MILFORD HAVEN FISHING COMPANY, LIMITED) *v.* SMELLIE, &c.

Company—Liquidation—Memorandum of Association—Special Resolution Conferring Preference on Part of Original Capital—Ultra Vires—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 12.

The Companies Act 1862, sec. 12, enacts that "any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorised to do so by its regulations as originally framed or as altered by special resolution . . . as to increase its capital . . . or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up capital into stock, but, save as aforesaid . . . no alteration shall be made by any company in the conditions contained in its memorandum of association."

The memorandum of association of a company limited by shares provided that—"(5) The capital of the company is £12,500, divided into 625 preference shares of £10 each, bearing a cumulative preferential dividend of 6 per cent. per annum; and 625 ordinary shares of £10 each, with power to increase the same, and the share capital of the company (whether original or increased) may be divided into different classes, to be held on the terms prescribed by the articles of association of the company or by special resolution, and so that the respective classes of shares may have and be subject to such preferences, guarantees and restrictions (if any) as may be prescribed by articles and special resolution."

After a number of shares, both ordinary and preference, had been issued, a special resolution was passed and confirmed, by which it was provided—"That the present issue of 625 preference shares authorised by article 5 of the memorandum of association of the company shall be a first charge on the property of the company, and entitled to rank in respect of dividend as well as capital in priority to the ordinary shares of the company."

The company afterwards went into voluntary liquidation and after payment of creditors a sum remained for distribution among the shareholders which was insufficient to repay them their shares in full.

Held that the special resolution was invalid, (1) because it was inconsistent with the essential conditions of the memorandum, which provided by implication that the ultimate distribution of the original capital should be equal, and (2) because it was a violation of the contract made with the ordinary shareholders who had taken shares prior to its date.

Question whether the resolution could have received effect if it had been ratified by all the shareholders.

The Milford Haven Fishing Company, Limited, was incorporated under the Companies Acts in October 1891.

By the memorandum of association it was provided that—"(5) The capital of the company is £12,500, divided into 625 preference shares of £10 each, bearing a cumulative preferential dividend of 6 per cent. per annum and 625 ordinary shares of £10 each, with power to increase the same, and the share capital of the company (whether original or increased) may be divided into different classes, to be held on the terms prescribed by the articles of association of the company, or by special resolution, and so that the respective classes of shares may have and be subject to such preferences, guarantees, and restric-

tions (if any) as may be prescribed by articles and special resolution."

The articles of association adopted the regulations of Table A of the Companies Act 1862, with a few modifications, and contained no provisions as to the division of shares into different classes as contemplated in section 5 of the memorandum.

Under the memorandum so framed, 600 ordinary shares of £10 each, and 208 perference shares of £10 each, were allotted and were fully paid up.

By special resolution of the company passed and confirmed at meetings of the company held on 1st and 16th March 1892, it was provided:—"That the present issue of 625 preference shares authorised by article 5 of the memorandum of association of the company shall be a first charge on the property of the company, and entitled to rank in respect of dividend as well as capital in priority to the ordinary shares of the company."

Thereafter 25 ordinary shares of £10 each, and 287 preference shares of £10 each, were allotted, issued, and fully paid up.

In July 1894 the company resolved to go into voluntary liquidation, and Mr Patrick Rattray, C.A. Glasgow was appointed liquidator. The liquidator realised the estate, and paid the creditors of the company. After this had been done there remained in his hands a sum of about £1000 for distribution among the shareholders.

Difficulties having arisen as to the rights of the different classes of shareholders in the distribution of the surplus assets, the liquidator, in December 1894, presented a petition to the Court under the 138th section of the Companies Act 1862, in which he set forth the facts given above, stated that no challenge of the special resolution of March 1892 had been made, and submitted the following questions for the determination of the Court—"(1) Was the said resolution of March 1892 valid to create a preference over capital in favour of (*a*) the whole preference shareholders; (*b*) the preference shareholders who acquired their shares subsequent to its date? (2) If the above question be answered wholly in the negative, have the preference shareholders who acquired their shares subsequent to the date of the said resolution any right otherwise arising to be paid out of the assets of the company in priority to the other shareholders? (3) In what proportions are the several shareholders entitled to rank upon the assets?"

Answers were lodged (1) by Thomas D. Smellie, a holder of preference shares acquired prior to the passing of the special resolution of March 1892, who claimed—(*a*) that the resolution of March 1892 was valid to create a preference over capital in favour of the whole preference shareholders, and the available assets ought to be divided among the whole preference shareholders in proportion to their shares; or (*b*) that said resolution was invalid *quoad omnes*, and the assets should be divided among all the shareholders in proportion to their shares; and (2) by W. D. Jones, a holder of preference shares acquired subsequent to the passing of the special resolution, who claimed—(*a*) that the said resolution was valid as regarded preference shares issued subsequent thereto, but was invalid as regarded preference shares issued prior thereto, and therefore that the available assets ought to be divided rateably amongst the whole shareholders who acquired preference shares subsequent to said date; or (*b*) that said resolution was valid, and the whole available assets ought to be divided among the whole preference shareholders in proportion to their shares.

The ordinary shareholders, who had acquired shares prior to the date of the special resolution, were represented by counsel, but no answers were lodged by them.

The Companies Act 1862 (25 and 26 Vict. cap. 89), sec. 8, enacts, that in the case of a company limited by shares "the memorandum of association shall contain . . . (5) the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount;" and section 12 enacts that "any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorised to do so by its regulations as originally framed, or as altered by special resolution . . . as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up capital into stock, but, save as aforesaid, . . . no alteration shall be made by any company on the conditions contained in its memorandum of association."

Argued for the ordinary shareholders—The special resolution was invalid, and gave no preference in the division of capital to the preference shareholders, whether they had acquired their shares before or after its date. The first part of clause 5 of the memorandum set forth the original capital of the company, and it only conferred upon the preference shares a preference as to dividend. The second part of the clause did not authorise any change to be made in the character of shares after they had been issued. The meaning of that part of the clause was that the original capital might be classified in the articles, and increased capital by special resolution. No authority was given to alter the character of shares after they had been offered to the public. The resolution was therefore a modification of the terms of the memorandum. But under the 12th section of the Companies Act 1862 there were three ways, and three ways alone, in which the conditions in the memorandum of association might be modified. The modification attempted to be made here was not one of these three. This memorandum was illegal if and in so far as it sought to reserve power to modify by special resolution its conditions in ways other than those contemplated by statute. The resolution innovated upon the essential conditions of the memorandum, and prejudiced those

who had taken shares on the faith of that memorandum. Whether this resolution could have been rendered valid by the consent of all the shareholders was immaterial, as there was no suggestion that such ratification had taken place. The case was ruled by those of *Hutton* v. *Scarborough Cliff Hotel Company, Limited*, 1865, 2 De Vewry & Smale, 514 and 521, and 4 De Gex Jones & Smith 672; *Ashbury* v. *Watson*, 1885, L.R., 30 C.D. 376; *Ramsbotham* v. *Scottish American Investment Company, Limited*, February 25, 1891, 18 R. 558. The only capital that could possibly have been affected by the special resolution would have been new capital issued after it had been passed. There had been no new capital issued here; the resolution was meant to affect the original capital and was quite invalid. Lord Herschell's opinion, relied on by the respondents, had not been accepted by other judges as sound—*cf. Union Plate Glass Company*, 1889, 42 C.D. 513, Justice Kay; *Railway Time Tables Publishing Company*, 1894, 10 Times L. R. 660, Justice Kekewich.

Argued for the respondent Smellie—(1) The special resolution should receive effect. The case of *Ashbury* was not in point. No alteration of the memorandum of association in breach of the provisions of section 12 of the Act was attempted to be made. Clause 5 of the memorandum specially provided that the share capital of the company was to be held subject to such preferences as might be prescribed by the articles of association or by special resolution. This provision, in terms, applied to capital both original and increased, and if the original shares could be classified by special resolution, it must have been contemplated that the classification might take place after some of the shares had been issued, for there could be no special resolution until there were shareholders. No objection could be made to the validity of clause 5, and the ordinary shareholders had taken their shares in the knowledge that an additional preference might subsequently be conferred upon the preference shareholders. The resolution was therefore valid. The preference conferred belonged to those who held preference shares before the resolution as well as to those who acquired such shares afterwards. The whole "present issue," namely, the presently existing issue, was affected. If the company could issue new preference shares with additional preference attaching to the capital as well as to the dividend, there was no reason why they should not attach the additional preference to the old shares. In both cases the existing ordinary shareholders were similarly affected. (2) Even if the resolution was not valid in itself, the arrangement having got the consent of the shareholders was valid *inter se*. It in no way affected any creditors — See Lord Herschell's opinion in *Ooregum Gold Mining Company of India* v. *Roper*, L.R., App. Cas. 1892, p. 143.; *British and American Trustee and Financial Incorporation* v. *Cooper*, L.R. 1894, App. Cas. 399, *per* Lord Macnaghten, p. 416; *Quebrada Land and Copper Company*, 1889, L.R., 40 C.D. 363, *per* Justice North. (3) If the resolution was invalid, it was invalid as regarded these preference shareholders who had taken their shares subsequent to the resolution as well as the others.

Argued for the respondent Jones—The special resolution was valid but it only affected "the present issue," namely, the shares presently to be issued after the passing of the resolution—*Bangor Slate Company*, 1875, L.R., 20 Eq. 59. In any case, those who acquired shares after the resolution had only to share with the other preference shareholders, and not with the ordinary shareholders.

At advising—

LORD KINNEAR—The question is whether the resolutions of the 1st and 16th March are valid; and the objection to their validity is that they alter the rights of shareholders as fixed by the conditions of the memorandum of association. The 5th condition of the memorandum is that "the capital of the company is £12,500 divided into 625 preference shares of £10 each, bearing a cumulative preferential dividend of 6 per cent. per annum, and 625 ordinary shares of £10 each, with power to increase the same, and the share capital of the company (whether original or increased) may be divided into different classes to be held on the terms prescribed by the articles of association of the company or by special resolution, and so that the respective classes of shares may have and be subject to such preferences, guarantees, and restrictions (if any) as may be prescribed by articles of association and special resolution."

It does not appear to me that there can be any question as to the meaning or legal effect of the first clause of this provision. The capital has been divided into ordinary and preference shares, but the only preference allowed is a priority in the receipt of dividends. There is no provision for any priority in the distribution of the surplus assets on the winding-up of the company; and in the absence of such a provision I take it to be clear in law that the owners of preference shares are entitled only to share the profits to the extent specified, in priority to the other shareholders, but that, when the company is wound up and the right to share profits comes to an end, the surplus assets must be distributed in proportion to the partners' shares of the capital, as in the case of any other partnership.

The next question is whether the equality of rights, except in so far as regards dividends, which is contemplated by the first clause, is qualified by the second clause, which provides that the share capital is to be held on the terms prescribed by the articles of association or by special resolution. The construction of this second clause may not be so obvious as that of the first, but I cannot say that I have any serious doubt as to its meaning. The terms upon which the shares are to be held must be fixed once for all when the shares are issued. The provision therefore enables the company to prescribe the conditions on which the shares that are offered to the public are

to be held; but it does not, in my opinion, enable them to vary the terms on which shares have been offered and accepted, as these may have been fixed at the date of issue. Now, it appears that the articles of association contain no provision for the division of shares into different classes, and therefore all the shares that were issued prior to the resolutions in question were offered and accepted on the terms specified in the memorandum. This is further made clear by the prospectus and the printed forms of application which were issued to intending shareholders. In both of these documents it is set forth that the capital is divided into 625 preference shares of £10 each, and 625 ordinary shares of £10 each. The meaning of that statement is not doubtful. Any person who applied for shares on these conditions, and who had read the memorandum of association, was certiorated that, if the company should increase its capital, it might confer further or different rights upon the new shareholders; but it was equally certain that under the then existing regulations of the company, as expressed in the memorandum and in the articles of association, the original 1250 shares must be held on the conditions prescribed in the memorandum, and set forth in the prospectus, by which 625 preference shareholders would be entitled in the division of profits to a preferential dividend of 6 per cent, but to no other preference, and all the shareholders would be entitled, upon a winding-up, to an equal distribution of the surplus assets, in proportion to their contribution to the capital. Now, these being the terms upon which the shares offered by that prospectus to the public were taken, the question is whether these conditions can be altered by the resolutions of the 1st and 16th March. What the company proposed to do by these resolutions was to provide "that the present issue of 625 preference shares authorised by article 5 of the memorandum of association of the company shall be a first charge on the property of the company, and entitled to rank in respect of dividend as well as capital, in priority to the ordinary shares of the company." Now, when that resolution was passed, 600 ordinary shares of £10 each had been taken up, and 208 preference shares of £10 each had been allotted; and the ordinary shares had been taken upon the express condition that the holders of these shares should be entitled, in the event of a winding-up, to an equal distribution of the assets of the company along with the 208 shareholders who had already got their preference shares, and the 417 to whom such shares might afterwards be allotted. The resolution is that, notwithstanding the conditions upon which the ordinary shareholders had already accepted their shares, both the 208 existing preference shares, and all the remaining preference shareholders, whose interests might be created until the original number of 625 should be made up, should be allowed a preference not only in sharing profits but also in the ultimate division of capital. I think that resolution was invalid and ineffectual, both because it is against the contract already made with the existing shareholders, for the Company could have no more right to deprive the ordinary shareholders of their equality of distribution than to deprive the preference shareholders of their priority in dividend, and also because it is inconsistent with the conditions of the memorandum, which provide by implication that the ultimate distribution of assets shall be equal, just as clearly as they provide in express terms that there shall be a certain priority of dividend. I think further, on the authority of the cases of *Hutton* v. *The Scarborough Hotel Company*, and *Ashbury* v. *Watson*, that those provisions of the memorandum as to a preferential dividend on the one hand, and the equal distribution of the surplus assets on the other hand, were essential conditions within the meaning of the 12th section of the Act of 1862, and therefore that the resolutions of 1st and 16th March are *ultra vires* and ineffectual. Assuming that they might have been ratified by all the members of the company, there is in my opinion no evidence of such ratification.

In my opinion, therefore, we ought to answer the first question put to us in the negative, and the second question also in the negative. The third question, which is—"In what proportions are the several shareholders entitled to rank upon the assets?"—ought in my opinion to be answered in terms of the 133d section of the Statute of 1862, that the surplus assets must be divided among all the shareholders according to their rights and interests in the company, that is to say that they must be divided in proportion to the shares held by each, irrespective of any question of preferences amongst the shareholders *inter se*.

LORD ADAM and LORD M'LAREN concurred.

The LORD PRESIDENT was absent.

The Court pronounced the following interlocutor:—

"Answer the 1st and 2nd questions in the petition in the negative; and as regards the 3rd question, find that the assets of the company fall to be divided among the shareholders of the company without distinction, according to the number of shares held by them respectively."

Counsel for the Liquidator—Younger.

Counsel for the Ordinary Shareholders, who acquired shares prior to the special resolution—Younger.

Counsel for the Respondent, Smellie—A. O. M. Mackenzie.

Counsel for the Respondent, Jones—Guy.

Agents—J. & J. Ross, W.S.