interlocutor of 22nd February 1907 and decerned for payment by the defenders conjunctly and severally to the pursuer of the sum of £45 with interest.

Counsel for the Pursuer (Respondent)—The Dean of Faculty (Campbell, K.C.)—W. Æ. Mackintosh. Agents—Guild & Guild, W.S.

Counsel for the Defenders (Appellants)—The Solicitor-General (Ure, K.C.)—Cooper, K.C.—Grierson. Agent—James Watson, S.S.C.

Saturday, November 16.

SECOND DIVISION.

THE WALKER STEAM TRAWL FISHING COMPANY, LIMITED, PETITIONERS.

Company—Capital—Reduction of Capital—Confirmation—Readjustment of Capital not a Reduction—Competency—Companies Act 1867 (30 *and* 31 *Vict. cap.* 131), *sec.* 9—*Companies Act* 1877 (40 *and* 41 *Vict. cap.* 26), *sec.* 3.

The shareholders of a company which had power under its memorandum and articles of association to reduce its capital, unanimously passed alternative special resolutions, assented to by all its creditors—"(1) That the capital of the company be converted from 50,000 shares of the value of £1 each, whereof 12s. 6d. has been paid upon each share, a total of £31,250, into 50,000 shares also of the value of £1 each, upon 31,250 of which the full amount shall have been paid up, leaving 18,750 shares to be issued at the discretion of the directors for the time being, and that such conversion be effected by re-allocating the share capital among the shareholders, crediting to each shareholder one £1 share in respect of every pound sterling with which he or she is credited in the share capital account of the company . . . alternatively, (3) That the capital of the company be reduced from £50,000, divided into 50,000 shares of £1 each, on which 12s. 6d. each has been called and paid up, to £31,250, divided into 50,000 shares of 12s. 6d. each fully paid, and that such reduction be effected by extinguishing the liability in respect of uncalled capital on the said shares to the extent of 7s. 6d. per share." A petition was presented asking confirmation, preferably of the first alternative resolution.

The Court, *holding* that the first resolution was not a reduction of capital, *confirmed* the second resolution.

The Companies Act 1867 (30 and 31 Vict. cap. 131), sec. 9, enacts—"Any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital; but no such resolution for reducing the capital of any company shall come into operation until an order of the Court is registered by the registrar of joint-stock companies as is hereinafter mentioned."

The Companies Act 1877 (40 and 41 Vict. cap. 26), sec. 3, enacts—"The word 'capital,' as used in the Companies Act 1867, shall include paid-up capital; and the power to reduce capital conferred by that Act shall include a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company; and paid-up capital may be reduced either with or without extinguishing or reducing the liability (if any) remaining on the shares of the company, and to the extent to which such liability is not extinguished or reduced it shall be deemed to be preserved, notwithstanding anything contained in the Companies Act 1867."

The Walker Steam Trawl Fishing Company, Limited, a company limited by shares, incorporated on 29th November 1901 under the Companies Acts 1862-1900, and having its registered office at Commercial Road, Aberdeen, presented a petition to the Court for, *inter alia*, "an order confirming the reduction of capital resolved on by one or other of the special resolutions set forth in the petition."

The petition stated—"Clause fifth of the memorandum of association is in the following terms—'The capital of the company is £50,000, divided into 50,000 shares of £1 each, with power to increase or reduce the capital in conformity with the law in force at the time and with this memorandum and articles of association of the company, as originally framed or as duly and competently altered, and to attach to any additional capital such preferential, deferred, or special rights, privileges, or conditions as the company may determine.'

"By clause 52 of the articles of association it is provided that 'The company may by a special resolution reduce its capital by reducing the number or the value or both the number and the value of the shares into which it is divided, and may consolidate or subdivide its shares, and may cancel any shares that have not been taken or agreed to be taken by any person in the manner and with all or any of the incidents prescribed by the statute'; and by clause 148, that 'If the company shall be wound up, the surplus assets shall belong to the holders of the shares in proportion to the amount paid up or deemed to be paid up thereon, but this article shall be without prejudice to the rights of the holders of any shares to be issued on special terms.'

"The whole of the original share capital was issued as ordinary shares, and 12s. 6d. has been paid up on each share. Since its incorporation the company has been uniformly prosperous. For the first two years the dividends were at the rate of 7½ and 5 per cent. respectively on the subscribed capital, and during the last three years

uniform dividends at the rate of 10 per cent. have been declared and paid, and that after ample allowance has been made for depreciation on the company's property. The company finds that the capital subscribed is as much as it can profitably make use of for many years to come, and its financial position is such that there is no necessity for retaining the liability of 7s. 6d. attaching to each share, which liability has the effect of unduly depressing the selling value of the company's shares. The company desires, however, to retain the denomination of its shares at £1 sterling each, which is the reason for resolutions numbers one and two and for the first minute hereinafter specified.

"Accordingly an extraordinary general meeting of the company was held in Aberdeen on 27th April 1907, at which the following resolutions were unanimously passed:—(1) . . . [*quoted supra in rubric*] . . . (2) That in order to carry out the re-allocation of the share capital among the shareholders the directors of the company be authorised to receive from Mr Andrew Walker, Commercial Road, Aberdeen, such amount as may be required to pay the shareholders any fraction of a pound sterling with which they may be credited in the share capital account of the company, and that the said Andrew Walker receives the resultant remaining shares at par value equivalent to the amount so paid by him. Alternatively (3) . . . [*quoted supra in rubric*]. . . .

"At an extraordinary general meeting held on 13th May 1907 these resolutions were unanimously confirmed as special resolutions of the company.

"The company has no debentures or debenture stock. . . . . [*The petition then set forth the company's liabilities, the creditors in which gave assent, and its assets, which were ample.*] . . . .

"The minute proposed to be registered is as follows:—The capital of the Walker Steam Trawl Fishing Company, Limited, is £50,000 divided into 50,000 shares of £1 each, of which 31,250 shares have been issued and are fully paid up, leaving 18,750 shares still to be issued; or alternatively, the capital of the Walker Steam Trawl Fishing Company, Limited, is £31,250, divided into 50,000 shares of 12s. 6d. each, all of which shares have been issued and are fully paid up."

On 19th July the Court remitted to Mr W. C. L. Winchester, W.S., to inquire and report whether the power prayed for should be granted.

On 9th October 1907 Mr Winchester, *inter alia*, reported — '' . . . "Section 3 of the Act of 1877 enumerates the modes of reducing capital, and applies to capital whether paid up, subscribed, or unissued, and embraces (1) cancelling lost capital; (2) cancelling capital unrepresented by available assets; (3) paying off capital in excess of the wants of the company; (4) cancelling issued but unpaid capital; and (5) cancelling unissued shares.

"Sir Henry Burton Buckley, in his work on the Law and Practice under the Companies Acts (8th ed., p. 615), observes that neither the Act of 1867 nor that of 1877 prescribes the manner in which the reduction of capital is to be affected. Nor is there, he adds, any limitation of the power of the Court to confirm the reduction except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid, or secured—*British Finance Corporation* v. *Couper*, [1894] A.C. 399-403. The power of reduction is general, and extends to every possible mode of reducing capital—*Phœbe Gold Company*, 1909, W.N. 182. Subject to the confirmation by the Court, which is required, and which is the safeguard of the minority, the question is a domestic one for the decision of the majority, and the Act leaves the Court to determine the extent, the mode, and the incidence of the reduction, and the application of any capital moneys which the reduction may set free.

"The observations made and the cases referred to in Buckley, and those which have been decided in the Scotch Courts, all appear to deal with applications for the "*reduction* of capital" in one form or other.

"The conclusion I have formed is that the first resolution printed in this petition cannot be confirmed by the Court as a "reduction of capital" under either the Act of 1867 or that of 1877. The resolution in question purports to be "a conversion" or "re-allocation" of the share capital, and I do not think it can in any sense be held to be "a reduction of capital" within the meaning of the Acts founded on by the petitioners.

"I have found nothing in the Acts nor in the authorities which would warrant me in suggesting that such a resolution is competent as "a reduction of capital," but as the petitioners are anxious that the first resolution should be confirmed, I have thought it right, in the absence as far as I can find of any direct authority, to report the matter to your Lordships.

"The second or alternative resolution clearly imports a reduction of capital, and is authorised by the regulations of the company as originally framed, and it is competent under sections 9 to 19 of the Act of 1867. The petitioners ask for confirmation of one or other of the special resolutions, and I beg respectfully to suggest that, should your Lordships hold the first resolution to be incompetent, the second or alternative resolution may be confirmed. . . .'

Argued for the petitioners — The object of confirmation was to protect creditors or a minority of shareholders. The company unanimously desired the first resolution to be confirmed. They preferred to have £1 shares rather than 12s. 6d. shares. The creditors had also consented to the reduction. It made no difference to anyone outside the company which resolution was confirmed. There was no limit to the way a reduction could be carried out. The first resolution was a reduction of capital, for it was a

reduction of available capital. Reference was made to *in re Phœbe Gold Mining Company*, 1900, Weekly Notes 182.

LORD STORMONTH DARLING—In this case we have the benefit of a very careful report by Mr Winchester, and we have also had the advantage of a fair and candid statement by Mr Morton. He says that the shareholders would prefer to have the first alternative resolution confirmed. But the reporter is of opinion that we ought not to confirm the first alternative resolution, and that we ought to confirm the second, which has this at least to be said for it, that it is literally and plainly a resolution for "reduction of capital." I agree with Mr Winchester. He does not say that any existing creditor will be prejudiced by the one proposal more than the other. But he says that a resolution to "convert" and "reallocate capital" is not in terms or in reality a proposal to "reduce" capital. Therefore the first alternative resolution is not strictly within the words of the statute. Mr Morton says that he has searched for and has failed to find any case which would be a precedent for doing what he asks the Court to do here. In the absence of such a case I think the safer course will be to walk by the strict words of the statute and confirm the second alternative resolution.

LORD LOW—I concur, but with considerable regret. I recognise, however, that the first of the alternative resolutions, although for practical purposes it amounts to very much the same thing as the second, does not in fact reduce the capital, which is the only matter which the statute empowers the Court to deal with.

LORD ARDWALL—I concur. I am of opinion that no reasons of expediency can justify the Court in departing by a hair's-breadth from the provisions of the statutes under which alone they have jurisdiction to make alterations in the capital of a company that has been incorporated under the Companies Acts.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor—

"The Lords having resumed consideration of the petition and proceedings, together with the report by Mr W. G. L. Winchester, Approve of said report; of new settle the list of creditors entitled to object to the proposed reduction of capital: Find that they have all consented to the proposed reduction of capital: Confirm the reduction of capital resolved on by the alternative resolution set forth in the petition: Approve of the minute alternatively set forth in the petition: Direct the registration of this confirmation order and of the said minute by the Registrar of Joint Stock Companies, and on this order and the said minute being registered as aforesaid, direct notice of such registration to be given by advertisement once in the *Edinburgh Gazette*; and dispense altogether with the words 'and reduced' as part of the name of the company; and decern."

Counsel for the Petitioners — Morton. Agent—John N. Rae, S.S.C.

Saturday, November 16.

EXTRA DIVISION.

(Before Lords M'Laren, Pearson, and Ardwall.)

[Lord Salvesen, Ordinary.

WHITEHOUSE *v.* R. & W. PICKETT.

Innkeeper—Liability beyond £30—Negligence — Onus Probandi — Deposit Expressly for Safe Custody—Innkeepers' Liability Act 1863 (26 *and* 27 *Vict. cap.* 41).

A commercial traveller in the employment of a manufacturing jeweller, on arriving at an hotel, which he was in use to visit, was met by the "boots" of the hotel, who received from him his sample bag and placed it in the office (which was also the bar) of the hotel. This office was the safest place in the hotel for the custody of the bag, the safe not being large enough, and by a notice exhibited in the hotel the proprietors (who also managed the hotel) intimated that they would not be responsible for valuables left in bedrooms, but would take charge of them in this office. The "boots" knew that the bag was used for the purpose of carrying jewellery, but he was not on this occasion informed that it did contain jewellery, and he placed it in the office without any request or instruction from the traveller, and without being apprised that the bag was to be treated as deposited for safe custody. The proprietors of the hotel were not told that the bag had been placed in the office until after its disappearance. On the evening of the day of his arrival the traveller asked for his bag in order to take it to his bedroom, when it was found that his bag was gone and that a bag of similar appearance had been left in its place. Admittedly the circumstances pointed to the bag having been stolen by professional thieves, but there was no evidence as to how or when it had been taken.

In an action by the traveller's employer against the hotel proprietors for the value of the bag and its contents, *held* that they were not liable in more than the sum of £30, in respect (1) that the *onus* of proving that the loss had occurred through the wilful act, default, or neglect of the innkeeper or his servant, under section 1 (1), of the Innkeepers' Liability Act 1863, was on the pursuer, and that he had failed to discharge the *onus*, the circumstance that the door of the office