Thursday, October 19.

FIRST DIVISION.

THE PALACE BILLIARD ROOMS, LIMITED AND REDUCED, PETITIONERS.

Company—Reduction of Capital—Objecting Creditor—Contingent Claim—Claim for Rent under Unexpired Lease—Companies (Consolidation) Act 1908 (8 *Edw. VII, c.* 69), *sec.* 49, *sub-sec.* (3).

The Companies (Consolidation) Act 1908, sec. 49, enacts, sub-sec. (3)—"Where a creditor entered on the list whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount (that is to say): (i) If the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim; (ii) if the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court."

A company which was tenant of certain subjects under a lease presented a petition for confirmation of a resolution to reduce its capital. The proprietors of the subjects objected to the petition being granted until the company either consigned the rent for the remainder of the lease or granted security therefor.

Held that the company's liability for the rent under the lease, though a future, was not a contingent debt in the sense of sec. 49 (3) of the Companies (Consolidation) Act 1908, and that, as the company was unable to consign the future rent or grant security therefor, the petition must be dismissed.

On 30th March 1911 the Palace Billiard Rooms, Limited and Reduced, presented a petition under the Companies (Consolidation) Act 1908, and particularly sections 46 to 52 and 55 thereof, for confirmation of a resolution for reduction of capital.

Answers were lodged by the City Property Investment Trust Corporation, Limited, proprietors of the subjects occupied by the petitioners, who objected to the prayer of the petition being granted until they (the petitioners) either consigned the rent for the unexpired future of the lease, or granted security therefor.

The *facts* are stated in the report by Sir George M. Paul, C.S., to whom the petition and answers were remitted for inquiry.

The reporter stated—"The petitioning company was incorporated under the Companies Acts 1862 to 1898, on 8th June 1900. Its registered office is situated at 95 Hope Street, Glasgow.

"The main objects for which it was formed, as stated in clause 3 of the Memorandum of Association, were to provide a billiard-room or rooms, and to carry on therein the business of billiard-room keepers or proprietors, and bagatelle table keepers, to provide places of amusement, sport, and entertainment, and to carry on various other subsidiary businesses.

"By special resolution passed on 2nd, and confirmed on 23rd, November 1908, the company was declared to be a private company in the sense of the Companies Act 1907.

"The nominal capital of the company is £4000, divided into 4000 shares of £1 each. Of these 3429 have been issued, 3129 having been paid for in cash, and 300 allotted in terms of an agreement filed with the registrar. All the shares were fully paid.

"By article 94 of the articles of association the directors are authorised, before recommending any dividend, to set aside out of the profits of the company such sums as they think proper as a reserve fund to meet contingencies or for equalising dividends, or for repairing, improving, and maintaining any of the property of the company, and for such other purposes as the directors shall in their absolute discretion think conducive to the interests of the company.

"A reserve fund was accordingly accumulated out of the annual profits of the concern. As shown in the balance-sheet for the year ending 31st July 1908, it amounted at that date to £1779.

"By special resolution, passed and confirmed on said 2nd and 23rd November 1908 respectively, the company resolved to return to the shareholders, out of the reserve fund, the sum of 10s. per share in reduction of the amount paid up on each share, and the shareholders were repaid that amount accordingly—the reserve fund being utilised for that purpose to the extent of £1714, 10s., thus constituting the £1 shares as shares paid up to the extent of 10s. per share, and uncalled to the extent of 10s. per share.

"As the result of the above operation, the issued capital of the company, which originally consisted of 3429 fully paid shares of £1 each, now consists of 3429 shares of £1 each, whereof 10s. per share has been paid up.

"The company has power to reduce its capital.

"It is stated in the petition that the company acquired premises at No. 95 Hope Street, Glasgow, on a fifteen years' lease from Whitsunday 1900, from the City Property Investment Trust Corporation, Limited, 93 Hope Street, Glasgow, at a rent of £400 per annum for the first five years, £500 per annum for the second five years, and £600 per annum for the remaining period of the lease. The company also rented additional premises from the same landlords, on the same terms and conditions as in the principal lease, at a rent of £30 per annum. The latter premises, it is

stated, were fitted up at a cost of about £400.

"During the earlier years of its existence the company was very successful, but latterly its profits have been steadily diminishing. The dividends paid have been at the following rates—1902, 5 per cent.; 1903, 30 per cent.; 1904, 37½ per cent.; 1905, 37½ per cent.; 1906, 17½ per cent.; 1907, 15 per cent.; 1908, 10 per cent.; and 1909, 7½ per cent. No dividend has been paid for the year to 31st July 1910. An estimate of the profits for the current year lodged in process shows some improvement.

"It being the opinion of the directors that there is no likelihood of the uncalled capital of 10s. per share being now required, an extraordinary general meeting of the company was called and was held on 17th February 1911. At that meeting a resolution was duly passed to the effect that the capital should be reduced from £4000, divided into 4000 ordinary shares of £1 each, to £2000, divided into 4000 shares of 10s. each, and that such reduction should be effected by reducing the nominal amount of the shares from £1 to 10s. each, and by extinguishing the liability in respect of uncalled capital to the extent of 10s. per share. That resolution was duly confirmed at a subsequent extraordinary general meeting, held on 6th March 1911, and thus became a special resolution of the company. . . . .

"In their answers the respondents set forth, *inter alia*, that they are creditors of the petitioners, being proprietors of the premises occupied by them, that the petitioner's lease expires at Whitsunday 1915, and that the rent payable is £630 per annum. They also point out that on each of the 3429 shares in issue there is at present an uncalled liability of 10s., and that the proposed reduction of capital would involve the diminution of liability, in respect of uncalled share capital, to the extent of at least £1714, 10s., thereby prejudicially affecting their security for the rent of the premises. In these circumstances they object to the reduction being confirmed until the petitioners either consign, in name of the Accountant of Court, a sum sufficient to cover the rent of the premises up to the end of the lease, *i.e.*, Whitsunday 1915, or otherwise grant satisfactory security therefor."

After stating the contentions of parties the reporter proceeded—"While there seems to be some apparent force in these contentions, the express provision in the 49th section must be kept in view, viz., that where a creditor whose debt or claim has not been discharged does not consent, the Court may, if it thinks fit, dispense with such consent on the company securing payment of the debt or claim by appropriating, as the Court may direct, . . . if the amount is contingent or not ascertained —'an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.' With reference to that and the cases noted on the margin hereof—[*In re Telegraph Construction Company*, 10 Eq. 384; *Gooch* v. *London Banking Association*, 32 Ch.D. 41; *Elphinstone* v. *Monkland Iron Company*, 11 A.C. 332; *Oppenheimer* v. *British and Foreign Exchange and Investment Bank*, 6 Ch.D. 744]—Buckley observes, 'It would appear that when a company proposes to reduce its capital, a lessor is entitled to have a sum impounded to meet future rents.'

"As regards the security to be provided, that might either take the form of a satisfactory personal obligation by one or more of the directors or shareholders for payment of the full rents and fulfilment of the tenants' obligations till the termination of the lease, or the setting aside of such a sum by way of security as might be considered equitable in the circumstances. The whole of the reserve fund, which now amounts to £455, with any additions that may be made thereto, might be set apart and appropriated as a special security, together with such an additional sum as with the reserve fund might amount to two years' rents. The additional sum might either take the form of a setting aside of cash or cancellation of a smaller amount of uncalled capital. It has to be kept in view that the rents have been regularly paid, and that only four more full rents are payable."

Argued for petitioners—The respondents' claim was a contingent one in the sense of section 49 (3) (ii) of the Companies (Consolidation) Act 1908 (8 Edw. VII, c. 69)—the contingency being the non-payment of the rent in future. That being so the Court was entitled to dispense with their consent on such a valuation of their claim as would be made if the company were being wound up by the Court. In other words, the respondents were only entitled to a ranking for the fair value of their loss, viz., the difference between the rent under the lease and the rent they might reasonably be expected to get from another tenant—the lease being broken by the assumed insolvency—*In re Telegraph Construction Company* (1870), L.R., 10 Eq. 384; *Oppenheimer* v. *British and Foreign Exchange and Investment Bank* (1877), L.R., 6 Ch.D. 744; *in re Midland Coal, Coke, and Iron Company*, [1895] 1 Ch. 267. Reference was also made to rule 8 of the rules of 1909 for Reduction of Capital—*vide* Palmer's Company Law, (9th ed.) p. 572.

Argued for respondents—The respondents' claim, though future, was not a contingent one, for it was admitted. That being so the case fell under the first head of section 49 (3). The petitioners therefore were bound to consign the balance of rent due. What the petitioners sought was a privilege, and they were therefore bound to comply strictly with the requirements of the statute.

At advising—

LORD PRESIDENT—This is a petition at the instance of the Palace Billiard Rooms, Limited, to confirm a resolution to reduce the capital, and we have a report from Sir George Paul. Only one point arises for your Lordships' consideration. The

company propose to reduce their capital by one-half, and in doing so to put an end to a 10s. liability which there is at present upon their shares.

Now answers have been lodged by a company who are landlords of property which the petitioning company have got on lease. The petitioning company was formed for the purpose of keeping billiard rooms, and it is quite evident from the figures in the petition that, for some reason or another, billiards as a business is upon the wane. While a few years ago they paid very large dividends, they have lately paid nothing at all. At the same time they are at this moment perfectly solvent. The compearing landlords object to this diminution of capital unless their rent is secured for the terms which are still to come, which are, I think, five or six half-yearly terms.

Counsel for the petitioning company laid some stress upon the fact that it was really owing only to the action of the company themselves that they were in the present position, because in the days of their prosperity they returned half of the capital —the shares having been originally fully paid-up shares—they returned half the capital to the shareholders, and put the company into the position in which it is now, of having an uncalled liability of 10s. per share. That is an appeal *ad misericordiam*, and I am afraid it is one that we cannot take any notice of. We are bound to take things as they are, and the landlords are entitled to the advantage of things as they are.

The whole question comes to be a very short one, and depends upon section 49 of the Companies (Consolidation) Act 1908. That section provides for an application of this sort being intimated to creditors, and it provides by sub-section 3—"Where a creditor entered on the list whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor."

Now that is what we are asked to do. The Court is asked to grant the privilege of dispensing with the consent of a person who does not wish to consent—"on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount." Now it seems to me that that is quite absolute. The Court can only do it "on the company securing payment of his debt or claim by appropriating the following amount," and then come two alternatives—"(1) If the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim; (2) if the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then the amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court."

Now the first question that has to be determined is, Which of these two alternatives does this matter fall under. I confess I cannot come to any conclusion but one. I think that this is a case where the company does admit the full amount of the debt or claim. They do not say that the rent will not be due at the terms when they come, and consequently I think the matter falls within the first sub-section. I do not think it can be held to fall within the second sub-section. It does not fall under the first part, because the company does not "not admit," and it cannot fall under the second part because in my view it is not a contingent debt. It is a perfectly certain debt, a future debt but not a contingent debt.

Accordingly I do not think there is any alternative left to us—that is to say, we can dispense with the respondents' consent only if we appropriate a sum which will secure the full amount of the debt. Of course, inasmuch as the debt is future, the sum will not necessarily be precisely the sum which will eventually be payable, because by ordinary rules there must be a rebate for what is equivalent to a present payment. But I come to the conclusion that unless the company are in a position to offer some security which will be equivalent to a security for the full amount of the debt when it becomes payable we should not dispense with the consent.

LORD KINNEAR—I agree.

LORD JOHNSTON—I experienced some difficulty in this matter, partly because the case was the first, so far as I am aware, that has occurred in this Court where in a question of reduction of capital a creditor's interest has been involved, but more particularly from the phraseology of a number of cases in the English Courts directly or indirectly bearing on this matter. I refer to the distinction between admission to claim and admission to proof, and to the use of the qualifying term "contingent" in, as it seemed to me, a different sense from that which it would receive here. But I find that the same difficulty occurred to Vice-Chancellor Hall in the case of *Oppenheimer* v. *British and Foreign Exchange and Investment Bank* (6 Ch. D. 744), and the learned Vice-Chancellor explains the situation in such a way as to remove the difficulty.

As regards the application of the statute, I entirely agree with what your Lordship has said.

The respondents' title on the statute to object is undeniably complete. On your Lordship's interpretation, which I accept, he is entitled as a condition of his consent to require that an appropriation be made to the full amount of his debt or claim.

But this appropriation does not involve immediate payment, but only the necessary payment by appropriating, as the Court may direct, the necessary sum. What the Court directed in the *Telegraph Construction Company's* case, L.R., 10 Eq. 384, under the Acts of 1862 and 1867 (and I do not find that there was any difference in their language from that of the Act of 1908), was to order the full amount of the claim to be

paid into Court with liberty to either party to apply—by which I understand liberty to the creditor to apply—for payment *pro tanto* if the company did not meet its obligations at any term, and for the company to apply to have the fund released *pro tanto* if it did meet its obligations term by term. In the analogous case—*Oppenheimer*, *supra*—of a shareholders' liquidation, the lessor's interest for future rent was protected in a similar manner by setting aside the whole amount of his future claims to run the risk of sub-lessee's failure. *Gooch's* case L.R., 32 Ch. D. 41, is in the same direction. The company here must, I think, submit to appropriation on similar terms if they want to reduce their capital as proposed.

LORD MACKENZIE was absent.

Counsel for the petitioners having stated that they (the petitioners) were not in a position either to consign the rent for the remainder of the lease or to find security therefor, the Court dismissed the petition.

Counsel for Petitioners—Cooper, K.C.—Wilton. Agents—William Douglas, S.S.C.

Counsel for Respondents—Horne, K.C.—Dykes. Agents—J. & J. Ross, W.S.

Thursday, October 19.

FIRST DIVISION.

VANS DUNLOP'S TRUSTEES *v.* FERGUSSON POLLOK AND OTHERS.

Trust—Appropriation of Investments to Particular Legacies—Right to Appreciation—Power of Trustees to Sever Interests of Beneficiaries.

A testator directed his trustees, failing the opening of another succession by a certain date, to hold a legacy of £7000 for behoof of his brother-in-law in liferent and his issue in fee. He left the residue of his estate to the University of Edinburgh. The trustees were authorised to retain such of his stocks and shares as they might think proper, and to divide them among the various legatees, or otherwise appropriate them for the purposes of the trust. On the date specified (the succession referred to not having opened), A, the sole accepting trustee, set aside a sum of £7000, which he invested for behoof of himself in liferent and his children in fee. He paid over the residue to the residuary legatee. On A's death certain of the investments were found to have appreciated in value to a considerable extent.

Held that the appreciation in value fell to A's issue, for whom the sums had been so set apart, and not to the residuary legatee.

Observations (*per* the Lord President) as to the power of trustees to sever the interests of beneficiaries.

On July 19, 1910, Thomas Skene Esson, W.S., Edinburgh, and another, the trustees acting under the trust-disposition and settlement of the late Dr Andrew Vans Dunlop, sometime surgeon in the East India Company's service, and thereafter residing in Edinburgh, *first parties;* Jane Dunlop Fergusson Pollok, Pollok Castle, Renfrewshire, and others, children of the late William Fergusson Pollok, of Pollok Castle aforesaid, *second parties;* and the University Court of the University of Edinburgh, *third party*, presented a Special Case in which they craved the Court to determine whether the appreciation in value of certain of the trust investments which had been set apart for behoof of the second parties fell to be paid over to them or to the third party as residuary legatee.

The *facts* as given by the Lord President in his opinion were as follows:—"This is a Special Case presented for the disposal of a question which has arisen in the administration of the estate of the late Dr Andrew Vans Dunlop, who left a settlement by which he made various bequests. In particular, by the eleventh purpose of his trust-disposition and settlement, he provided that in case the wife of his brother-in-law, Mrs Fergusson, did not succeed to certain estates before his death or before the 1st January 1883, he left to his brother-in-law the sum of £5000 sterling 'in liferent to be held by my trustees in Europe for his liferent use allenarly and for his lawful issue in such proportions as he, and failing him, as his said wife, may direct and appoint, in fee.' That £5000 was subsequently increased by an additional £2000 being added to it. Mrs Fergusson did not succeed to Pollok estates before the death of Dr Vans Dunlop or before 1st January 1883. Dr Vans Dunlop died on 27th February 1880. After various other provisions, there was a residuary bequest by which the trustees were bound to pay over the whole residue estate to the University of Edinburgh.

"Now when the 1st January 1883 passed, the trustees set aside a sum of £7000, and they invested it in a certain way to meet the legacy which they were told to hold for Mr Fergusson in liferent and for his children in fee. They have held that investment ever since. The liferenter has now died, and the investment has appreciated in value.

"In 1883, the trust purposes being generally fulfilled, the trustees made over the whole residue, retaining merely a small sum of £400 to meet some calls which were possible upon some shares which were held by the testator, and a small sum of £183 to meet eventual expenses; and they paid the whole residue as it existed to the University of Edinburgh, and they got a receipt and discharge from their commissioner.

"The special bequest of £7000 being now free to be given to the fiars, the liferenter being dead, the University have put in a claim for the value of the appreciation which has taken place upon the investment held."

Dr Vans Dunlop's settlement, after conferring power on his trustees to invest the