REPORTS OF CASES IN HOUSE OF LORDS AND PRIVY COUNCIL, WHICH, THOUGH NOT ORIGINATING IN SCOTLAND, DEAL WITH QUESTIONS OF INTEREST IN SCOTS LAW.

HOUSE OF LORDS.

Tuesday, May 28, 1907.

(Before the Lord Chancellor (Loreburn), Lords Macnaghten, Robertson, and Atkinson.)

POOLE AND OTHERS *v.* NATIONAL BANK OF CHINA.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Company—Reduction of Capital and Shares—Petition for Order Confirming Reduction—Jurisdiction—Conditions—Special Resolution—Companies Act 1867, *secs.* 9 *and foll.*

Wherever a company has passed a special resolution for reducing its capital the Court has jurisdiction to entertain a petition at the instance of the company, for an order confirming such reduction. There are no other conditions-precedent to such jurisdiction, and, in particular, it need not be proved that the capital which is to be cancelled is lost or unrepresented by available assets. The petition will be granted by the Court if the interests of creditors are properly safeguarded, and if the proposed reduction is a prudent and business like measure, not unfair to any shareholder, or detrimental to the public.

British and American Trustee and Finance Corporation v. *Couper* (1894), A.C. 399, *approved and followed; Anglo-French Exploration Company* (1902), 2 Ch. 845, *disapproved.*

Appeal from an order of the Court of Appeal (VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.), dated 6th April 1905, affirming the decision of FARWELL, J., dated the 3rd March 1905, granting the prayer of the petition of the respondent company to obtain confirmation of a special resolution reducing its capital from £1,000,000 divided into 750 shares of £1 each (founders' shares) and 99,925 shares of £10 each (ordinary shares) to £699,475 divided into 99,925 shares of £7 each. Such reduction was to be effected by writing off the whole amount paid, or credited as paid, on each of the 750 shares of £1 each, and cancelling those shares, and by writing off £3 per share, part of the sum of £8 per share, which had been paid or credited as paid on the 40,453 shares of £10 each which had been issued, and by reducing each of the 99,925 shares of £10 each to a share of £7.

The appellants were together holders of forty-four founders' shares of the company, and opposed the petition.

The company was incorporated in 1891 as a company limited by shares under the Companies Acts 1862 to 1890 by the registration of a memorandum, accompanied by articles of association. The objects for which the company was established were to establish and carry on the business of commercial trading and commission agents and of bankers and financial agents in the United Kingdom of Great Britain and Ireland, China, Japan, Borneo, the Empire of India, the British colonies, and other British dependencies in the East, America, and the Philippine Islands, and elsewhere, as might from time to time be determined, and other ancillary objects contained in the memorandum of association.

On the hearing of the petition the company stated that its financial position at the 31st Dec. 1903 was as follows:—

The capital paid up was £324,374; the capital reserve fund was 191,973 dollars; reserve fund accumulated out of net profits 175,533 dollars; undivided profits, 21,668 dollars—389,174 dollars; or at the exchange of 1s. 8d.—£32,431—total, £356,805. The assets of the bank (other than the Chinese Government gold bonds) amounted to 4,452,958 dollars; less the liabilities, 2,213,289 dollars—2,239,669, dollars; or at the exchange of 1s. 8d.—£186,639; Chinese Government gold bonds, £27,300—£213,939; showing a loss of capital to the amount of £142,866. It was proposed to write off this loss of £142,866 by appropriating the undivided profits at the 31st Dec. 1903, 21,668 dollars; capital reserve fund, 191,973 dollars; part of the profit reserve fund 35,443 dollars—249,084 dollars; or at the exchange of 1s. 8d.—£20,757; by writing off the whole amount paid on the founders' shares, £750; and £3 per share of the amount paid up on each of the 40,453 issued ordinary shares, £121,359—£122,109; total, £142,866. This would leave the paid-up capital represented by 40,453 shares of £7 each, £5 paid, £202,265; and the reserve fund would be reduced to 140,090 dollars—£11,674.

It was alleged by the company that the

retention of a reserve fund of at least £11,674 was necessary to support the credit of the company as a bank and to meet contingencies; but the appellants did not admit that such retention was necessary, and stated that in any case the founders' share capital could not be written off until the whole of the reserve fund had been exhausted.

By a special resolution of the company, duly passed and confirmed at extraordinary general meetings held on the 3rd Sept. and the 24th Sept. 1904, this proposal was accepted.

A resolution was passed to the same effect at a separate meeting of the holders of the ordinary shares held on 3rd Sept. 1904. No meeting of the holders of the founder's shares of the company was held pursuant to art. 17 of the articles of association.

The reduction proposed to be effected did not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital.

At delivering judgment—

LORD CHANCELLOR (LOREBURN) — In this appeal your Lordships are asked to refuse your sanction to a resolution for the reduction of its capital which has been passed by the National Bank of China. The appellants represent a very small proportion of the holders of founders' shares. But if this resolution is in fact unfair even a few opponents will prevail. The only question is whether it is unfair, for the contention that it contravenes a bargain contained in the memorandum and articles of association cannot be made good; and it is no part of the business of a court of justice to determine the wisdom of a course adopted by a company in the management of its own affairs. I can see nothing that ought to induce your Lordships to interfere with the conclusion arrived at by Farwell, J. and by the Court of Appeal, and I am the more inclined to agree with them by the consideration that the appellants made no specific proposal in either of the Courts below, though they maintained here that the scheme for reduction might have been so modified as to preserve their interest without thwarting the policy of the company. The conduct of an opposing minority is not without its significance in considering such questions as are now before the House. Nor is it an indifferent matter from the same point of view that the appellants deferred their appeal to this House to the very last day, while the resolution sanctioned by the Court was in full operation and shares presumably changing hands on the footing of its validity. Apart, however, from these latter considerations, I think that this appeal should be dismissed.

LORD MACNAGHTEN—I quite agree with my noble and learned friend on the woolsack that this appeal must be dismissed. I venture to add a few observations, because there seems to be a growing tendency to narrow and restrict the power of reducing capital conferred by the Act of 1867 on companies limited by shares. That tendency is apparent, I think, in the judgment of the Court of Appeal in the present case, and particularly in the addition which that Court has made to the order pronounced by Farwell, J. The power conferred by the Act of 1867 is perfectly general. Any restriction upon it not authorised by the Act of 1867 or the Act of 1877 is calculated, I think, to lead to inconvenience and expense, and to hamper and embarrass companies in the conduct of their domestic affairs. The subject of reduction of capital was very fully considered by this House in 1894 in the case of *British and American Trustee and Finance Corporation* v. *Couper* (1894), A.C. 399. In that case Lord Herschell, L.C., after referring to the Acts of 1867 and 1877, said—"It will be observed that neither of these statutes prescribes the manner in which the reduction of capital is to be effected, nor is there 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." Later on, in dealing with the case before the House, he says—"The interests of creditors are not involved, and I think that it was the policy of the Legislature to intrust the prescribed majority of the shareholders with the decision whether there should be a reduction of capital, and if so, how it should be carried into effect." By way of caution he adds this observation—"There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar would be most narrowly scrutinised by the Court, and that no such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably. But this is quite a different thing from saying that the Court has no power to sanction it." Lord Watson takes the same view. His words are these—"Apart from the interest of creditors, the question whether each member shall have his share proportionately reduced, or whether some members shall retain their shares unreduced, the shares of others being extinguished upon their receiving a just equivalent, is a purely domestic matter, and it might be greatly for the advantage of the company that the latter alternative should be adopted." Speaking for myself, I see no reason to alter or modify what I said in that case. "Creditors," I observed, "are protected by express provisions. Their consent must be procured or their claims must be satisfied. The public, the shareholder, and every class of shareholders individually and collectively, are protected by the necessary publicity of the proceedings and by the discretion that is entrusted to the Court. Until confirmed by the Court the proposed reduction is not to take effect, though all the creditors have been satisfied. When it is confirmed the memorandum is to be altered in the prescribed manner, and the

company as it were makes a new departure. With these safeguards, which certainly are not inconsiderable, the Act apparently leaves the company to determine the extent, the mode, and the incidence of the reduction, and the application or disposition of any capital moneys which the proposed reduction may set free." Such being the views expressed in this House, without any dissent or qualification, I was surprised to hear it argued by the learned counsel for the appellants that the Court has no jurisdiction to entertain a petition for the reduction of capital unless it be proved that the capital which the company proposes to cancel is lost or unrepresented by available assets. No doubt some countenance for that proposition may be found even in cases which have occurred since the decision of this House in *British and American Trustee and Finance Corporation* v. *Couper* (*ubi sup.*). In *Barrow Hæmatite Steel Company* (1900), 2 Ch. 846, where the scheme proposed was obviously unfair to the preference shareholders, and the petition was very properly dismissed, there are some expressions in the judgment of the learned judge who decided the case which, taken apart from the context, may seem to appear to support that contention. The decision of Buckley, J. in *Re Anglo-French Exploration Company* (1902), 2 Ch. 845, goes even further. His language, if correctly reported, seems to imply that because the Act of 1877 specifies certain cases, and declares that the power conferred by the Act of 1867 "includes" those specified, it is to be inferred that in all other cases the jurisdiction of the Court is excluded. If that is the meaning of what the learned Judge said, with all respect I am unable to agree with his view. The condition that gives jurisdiction is not proof of loss of capital, or proof that capital is unrepresented by available assets, or that capital is in excess of the wants of the company. The jurisdiction arises whenever the company seeking reduction has duly passed a special resolution to that effect. In the present case creditors are not concerned at all. The reduction does not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. The only questions therefore to be considered are these—(1) Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the company; and (2) is the reduction fair and equitable as between the different classes of shareholders? Now, the directors gave the shareholders the fullest information as to the reasons for the reduction and the causes which led them to propose it. All this is explained in the petition. It has not been suggested that the proposed reduction is open to any objection on public grounds. The question therefore must be this—Is it fair as between different classes of shareholders? The only objection put forward is made on the part of an insignificant number of holders of founders' shares. There are two individuals who hold five founders' shares each, and there is a public company holding thirty-four founders' shares. The directors in their circular to the shareholders stated that these shares were of no commercial value. That is not denied. It is proposed to pay the dissentient shareholders the par value of their shares out of profits, and to extinguish the founders' shares because their continued existence would render it difficult, if not impossible, for the company to raise further capital. The dissentient shareholders do not demand, and never have demanded, better pecuniary terms, but they insist on retaining their holdings, which in all reasonable probability can never bring any profit to them and may be detrimental to the company. I think that Farwell, J., was quite right in disregarding their opposition. The learned Judges of the Court of Appeal did not dissent from his view, but there was some expression of doubt and hesitation. There were two other points raised before the Court of Appeal which the Court evidently thought of some importance. Although the order of Farwell, J., was affirmed, the learned Judges of the Court of Appeal do not seem to have been quite satisfied that the reduction proposed was in all respects proper, because they doubted whether it was exactly commensurate with the loss actually proved. Is that material in such a case as this, when the interests of the public are not concerned? So far as loss is actually proved, the case is one of those cases specially mentioned in the Act of 1877. So far as the reduction goes beyond the actual loss it is within the general power conferred by the Act of 1867. I can see no objection to it if it is a prudent and business like measure, not unfair to any shareholder, and not detrimental to the public. Then there was another point which the Court of Appeal took into consideration, rather unnecessarily as I venture to think. The company had established a fund out of surplus profits which they called "profit reserve fund." Part of it the company had resolved to use for the purpose of making good loss of capital. The rest, some £11,000, they proposed to retain. The petition states that the retention of a reserve fund of at least the amount proposed to be retained was necessary to support the credit of the company as a bank. I must say that I should have thought that some reserve was an obvious necessity. It was, of course, quite proper for the petitioners to state all the circumstances of the case frankly and fully, but still this was a purely domestic matter altogether outside the province of the Court. The Court of Appeal was not quite satisfied about the propriety of retaining in hand any part of the reserve fund. But the proposal was allowed to pass on the company giving an undertaking, which is embodied in the order, that no part of the sum retained out of the profit reserve fund should be applied otherwise than for capital purposes. As the company offered this undertaking I do not propose to your Lordships that it should be omitted, though I do

not quite understand what the undertaking means or how long it is intended to last. But I must say, speaking for myself, that I do not think that this addition to the order ought to be treated as a precedent in any other case. With these observations, I concur in the motion which has been proposed. The appeal must be dismissed with costs.

LORDS ROBERTSON and ATKINSON concurred.

Appeal dismissed.

Counsel for Appellants—Eve, K.C.—Jenkins, K.C.—Whinney. Agents—Slaughter & May, Solicitors.

Counsel for Respondents—Upjohn, K.C.—Kirby. Agents—Paines, Bly, & Huxtable, Solicitors.

HOUSE OF LORDS.

Wednesday, May 29, 1907.

(Before the Lord Chancellor (Loreburn), Lords Ashbourne, Macnaghten, Robertson, and Atkinson.)

MERSEY DOCKS AND HARBOUR BOARD *v.* OWNERS OF STEAMSHIP "MARPESSA."

Ship — Collision — Damage — Measure — Demurrage—Dredger Unable to Dredge for Nine Days—House of Lords and Questions of Amount of Damages.

A dredger, the property of a harbour board, was run down and damaged through the fault of a steamer. For nine days she was unable to dredge, and the harbour board were unable to obtain another dredger to do her work. *Held* that the owners of the steamer were liable to pay to the board, under the head of demurrage, a sum representing the ordinary cost of maintaining and working the dredger for nine days, with an allowance for depreciation.

The House of Lords, in dealing with questions as to the amount of damages, is not in the habit of interfering with the decision of the Court below, unless it is clear that a wrong principle has been adopted for ascertaining the damage. It will not correct minute mistakes.

Appeal from a judgment of the Court of Appeal (COLLINS, M.R., ROMER and COZENS-HARDY, L.JJ.), who had affirmed a judgment of SIR J. GORELL BARNES.

The facts appear sufficiently from the opinion of the Lord Chancellor (LOREBURN) *infra.*

LORD CHANCELLOR (LOREBURN) — The only question raised on this appeal is whether the damages awarded to the appellants are rightly measured. It was a case of collision, in which the steamship "Marpessa" ran down the said pump dredger "G. B. Crow," and disabled her for nine days. This dredger is used by the Mersey Docks and Harbour Board in the necessary work of dredging the bar outside Liverpool. She earns nothing in money and costs a good deal, but she does indispensable service in clearing away the sand. Negligence on the part of the steamship "Marpessa being admitted, the case came before the registrar to ascertain damages. No dispute was raised by defendants as to any of the items claimed except one—viz., the claim for demurrage for nine days at £104 per day, afterwards reduced to £102. The registrar found that £35 per day sufficed, and his report was confirmed by the President and also by the Court of Appeal. I need hardly say that your Lordships are not likely to interfere unless it is made clear that a wrong principle was adopted for the ascertainment of these damages. Now, until the case of "*The Greta Holme*," [1897] A.C. 596, the view appears to have prevailed that no damages beyond the actual loss in repairs, loss of wages, and so forth, could be recovered where an injured vessel made no money for its owners and merely rendered services in dredging. That case corrected the error, and decided that in such case general damages might be recovered as well as the cost of procuring another vessel to do the work; but it did not, and could not, lay down a rule of universal application for the ascertainment of the damages in each particular case. For the damages depend upon the facts and upon the actual loss sustained by the owner, which will vary in different cases. It seems to me that the loss sustained in the present case under the claim of demurrage is the value of the work which would have been done by the dredger during those days, had she not been disabled. So many tons of sand would have been removed, which it is the duty and interest of the plaintiffs to remove, and by reason of the defendants' negligence they were not removed. If the plaintiffs had hired another vessel to do this work they could have recovered the cost of doing it. They have not done so, no other vessel being available at so short a notice, and, perhaps, not being available at all; for the construction is peculiar. Failing that evidence, the plaintiffs were entitled to put their case in another way. They might say the cost to us of maintaining and working this dredger, while it is working, amounts to so much per day, and its depreciation daily amounts to so much more. We take the total daily sum which it costs us as a fair measure of the value of its daily services to us. Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation. In fact the plaintiffs put in a mixed claim, made up mainly on the basis of what the dredger's services cost them; but they added an item for owners' profit, which was appropriate enough if they had paid it to the owner of a vessel which they hired, but had no place in a claim based on the cost to themselves of the services rendered