

Counsel for the First and Fourth Parties—Burnet. Counsel for the Second and Third Parties—Guthrie. Agents—Murray, Beith, & Murray, W.S.

Saturday, January 30.

FIRST DIVISION.

BANKNOCK COAL COMPANY,
LIMITED, PETITIONERS.

Company—Reduction of Capital—Capital “lost or unrepresented by available assets”—Companies Act 1867 (40 and 41 Vict. cap. 26), secs. 3 and 4.

A company limited by shares had power under its articles of association, by special resolution, to reduce its capital; and it had also power to accept surrenders of its shares. The capital of the company was by the memorandum of association declared to be £25,000. Funds belonging to the company having been misappropriated by one of the officials to the amount of £2300, two of the shareholders agreed to the cancelling of 230 ordinary paid-up shares belonging to them, provided that the capital of the company should be correspondingly reduced. The company, accordingly, by a special resolution agreed to reduce the capital to £22,700, by cancelling these shares. No payment was made by the company in consideration of the surrender of the shares.

The company presented a petition praying the Court to confirm the proposed reduction, and to dispense with the use of the words “and reduced” after the company’s name. The petition was not opposed. The Court, after a remit for inquiry and report, granted the prayer of the petition.

The Banknock Coal Company, Limited, presented a petition craving the Court to pronounce an order confirming the reduction of the company’s capital, as resolved on by a special resolution of the company, passed on 18th September, and confirmed on 9th October 1896; to approve of a minute to be registered (under section 15 of the Companies Act 1867) by the Registrar of Joint Stock Companies; and to dispense with the addition of the words “and reduced” to the company’s name.

The Court on 28th November 1896 remitted to Mr C. B. Logan, W.S., to inquire and report as to the regularity of the proceedings, and the reasons for the proposed reduction of capital.

Mr Logan reported, *inter alia*, as follows—“The petitioners, the Banknock Coal Company, Limited, were incorporated on 5th July 1892, and registered as a company limited by shares under the Companies Acts 1862 to 1890, and their registered office is situated in Glasgow. The objects for which the company was formed were the leasing and working of the Banknock

colliery and coalfield, in the county of Stirling, and for other objects ancillary thereto, all as set forth in the memorandum of association of the company, and referred to on page 2 of the petition.

“By the said memorandum the capital of the company was declared to be £25,000, divided into 2000 ordinary shares of £10 each, and 500 preference shares of £10 each. Of this capital 1602 ordinary shares have been issued, 1054 of which are fully paid-up, and on the remaining 548 the sum of £6 each has been paid; 492 preference shares have also been issued, and are fully paid up. The remaining 398 ordinary and 8 preference shares are still unissued. By its articles of association (No. 58), the company has power from time to time by special resolution to reduce its capital.

“It is explained in the petition that funds of the company, amounting to £2300 have been misappropriated by an official of the company, and in order to recoup the company against loss, two of the shareholders of the company have, by minutes of agreement, agreed to the cancellation of, in all, 230 ordinary paid-up shares of the company belonging to them, provided that the capital of the company is reduced from £25,000 to £22,700.

“Accordingly, at extraordinary general meetings of the shareholders held at Glasgow on the 18th of September and 9th of October, both in the year 1896, the following special resolution was passed and confirmed, viz.—‘That the capital of the company be reduced from £25,000, divided into 2000 ordinary shares of £10 each, and 500 preference shares of £10 each, to £22,700, divided into 1770 ordinary shares of £10 each and 500 preference shares of £10 each; and that such reduction be effected—(a) by cancelling the 180 paid-up ordinary shares, numbered 821 to 1000 inclusive, as provided by the provisional agreement executed by and between Borthwick Watson residing at Ardfern, Falkirk, and Robert Galloway, residing at 6 Hermitage Gardens, Edinburgh, two of the directors acting on behalf of the company, of the first part, and William Murray, coalmaster, Glasgow, of the second part, dated 8th September 1896; (b) by cancelling the 50 paid-up ordinary shares, numbered 295 to 344 inclusive, as provided by the provisional agreement executed by and between the said Borthwick Watson and Robert Galloway, two of the directors acting on behalf of the company as aforesaid, of the first part, and David Halley, of West Newport, Fife, hacklemaker, of the second part, dated 7th and 8th September 1896.’

“By article 18 of its memorandum of association the company has power to accept surrenders of its shares. The surrender proposed in the present case is not in consideration of a payment in money or money’s worth by the company, and it appears not to be *ultra vires*, and is a transaction which may be competently carried out without the sanction of the Court. The company, however, desires to treat the surrendered shares as permanently extinguished, and unless the capital

of the company is formally reduced, the surrendered shares might be again issued, and they would still be part of the company's nominal capital, and would affect the nominal rate of dividend. It is this reduction of capital which your Lordships are asked to confirm.

"So far as I am aware, the only reported case at all similar to the present that has come before the Scottish Courts is that of *The West End Café Company, Limited* January 16, 1894, 21 R. 381, in which the Court confirmed a reduction of capital where certain shares had been purchased by the company and cancelled. Several petitions of a like nature, however, have come before the English Courts, and in the petition of *The Gatling Gun Limited*, 1st February 1890 (Law Reports, 43 Chan. Div. 628), in circumstances somewhat similar to those of the present case, Justice North sanctioned a reduction of capital following upon the surrender of shares to the company.

"In the present instance, the shares which have been surrendered are fully paid up, and as no further liability attaches to them their cancellation will not affect the rights and liabilities of the shareholders of the company *inter se*. By the 3rd section of the Companies Act 1877 it is declared that the word 'capital,' as used in the Companies Act 1867, shall include paid-up capital, and that 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.' The reduction of capital which the petitioners ask your Lordships to confirm appears to fall under this description, and the loss sustained by the company above referred to, and the subsequent surrender and cancellation of the shares, appear to me to warrant the reduction.

"It is provided by the 4th section of the Companies Act 1877 that where the reduction of capital 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 creditors of the company shall not, unless the Court otherwise direct, be entitled to object or required to consent to the reduction, and in that case the Court may dispense with the addition of the words 'and reduced' to the name of the company. In the present case the cancelled shares are fully paid up, and no repayment to the shareholders of paid-up capital is involved, and therefore, under the section above referred to, no objection on the part of creditors of the company is competent, and no consent by them is required. By your Lordships' interlocutor of 7th November 1896 the addition of the words 'and reduced' to the name of the company was dispensed with from that date, and until disposal of the petition; and I submit that it is a case for also dispensing with the words 'and reduced' after the disposal of the petition. . . . I have to report that the whole proceedings prior to and since the date of the presentation of the petition have been regular, and that there are

sufficient reasons to warrant the proposed reduction of capital, and that accordingly the prayer of the petition may be granted."

No opposition was made to the petition.

The petitioner, in addition to the cases referred to by the reporter, cited the case of *The British and American Trustee Corporation v. Couper*, 1894, App. Ca. 399.

The Court granted the prayer of the petition.

Counsel for the Petitioner—Lorimer.
Agent—R. Ainslie Brown, S.S.C.

Saturday, January 30.

FIRST DIVISION.

MARSHALL'S TRUSTEES, PETITIONERS.

Trust—Power to Sell—Prohibition by Trustee—Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), sec. 3.

By a codicil to his trust-disposition a truster directed his trustees as follows:—"As I consider that the value of property in B will improve, I direct and appoint my trustees to hold and retain the property known as K, belonging to me, and not sell or dispose of the same" before the truster's youngest son attained majority. The trust-disposition gave the trustees a general power to sell the trust-estate.

Held (Lord M'Laren *dub.*) that the Court had no power under section 3 of the Trusts Act 1867 to authorise the sale of the trust-estate dealt with by the codicil before the date fixed by the truster, however expedient such sale might be in the interest of the trust.

Mr John Marshall, coal merchant, Leith, executed a trust-disposition and settlement by which he disposed his whole estate to trustees for the purposes therein mentioned. He requested and authorised them to carry on for the benefit of the family the business of John Marshall & Company at Borrowstounness, with power, however, to wind up the business or sell their shares as they should see fit. The truster further conferred on the trustees power to continue to hold his investments as at his death or reinvest the same, to lease, sell, or dispose of all or any part of the trust-estate, all as therein specified.

By a codicil the truster provided—"Second, As I consider that the value of property in Borrowstounness will improve. I direct and appoint my trustees to hold and retain the property known as Kinglass Brewery, belonging to me, and not to sell or dispose of the same before the youngest of my sons by my present marriage attains twenty-one years of age."

Mr Marshall died on 1st January 1879, survived by nine children, and the trust was managed up to the present time by the