Wednesday, February 25.

FIRST DIVISION.

RAMSBOTHAM *v.* THE SCOTTISH AMERICAN INVESTMENT COMPANY, LIMITED.

Public Company — Memorandum and Articles of Association -- Equality of Interest among Members — Preference Shares—Ultra vires.

The memorandum of a registered company provided—"The nominal capital of the company is £1,000,000, divided into 100,000 shares of £10 each."

The articles of association provided—"28. The original capital shall be one million pounds sterling, divided into one hundred thousand shares of ten pounds each; but the company, with the sanction of a general meeting of the members to be specially convened for that purpose, may from time to time increase such capital to any amount that may be determined by such meeting. 29. Such general meeting, or any subsequent general meeting, may determine the conditions on which such increase shall be made, the number and amount of the shares into which such increased capital shall be divided, and the time, mode, and terms at and according to which such last-mentioned shares shall be issued, and how the premium, if any, on such shares shall be applied, and all new shares so created shall be offered to the existing members in proportion to the existing shares held by them, or as near as may be." The capital was subsequently increased to £2,000,000.

The company passed this special resolution—"1. That the capital of the company be increased to £2,400,000 by the creation of 200,000 shares of £2 each, entitled to a fixed cumulative preferential dividend of 4½ per cent. per annum, but to no further or other participation in the profits of the company."

Held, on an objection by a shareholder, that as the memorandum and articles of association contemplated equality of interest among the shareholders, the increase of the capital by the creation of preference shares was *ultra vires* of the company, and the resolutions to that effect were invalid.

The Scottish American Investment Company, Limited, was incorporated under the Companies Acts, and was registered on 29th March 1873. Its registered office was in Edinburgh. The leading object of the company was the investment of money in the United States of America or Dominion of Canada, or any of the British Dependencies in North America, upon security as set forth in the memorandum of association. The fifth head of the said memorandum provided that "The nominal capital of the company was £1,000,000, divided into 100,000 shares of £10 each." The articles of association registered along with the said memorandum contained under the title "Capital and increase thereof," the following provisions:—"28. The original capital shall be one million pounds sterling, divided into one hundred thousand shares of ten pounds each; but the company, with the sanction of a general meeting of the members to be specially convened for that purpose, may from time to time increase such capital to any amount that may be determined by such meeting. 29. Such general meeting, or any subsequent general meeting, may determine the conditions on which such increase shall be made, the number and amount of the shares into which such increased capital shall be divided, and the time, mode, and terms at and according to which such last-mentioned shares shall be issued, and how the premium, if any, on such shares shall be applied, and all new shares so created shall be offered to the existing members in proportion to the existing shares held by them, or as near as may be."

At an extraordinary general meeting on 2nd March, and confirmed on 23rd March 1875, the capital of the company was increased to £2,000,000.

At an extraordinary general meeting of the company held on 11th December, confirmed at another meeting held on 30th December 1890, the following special resolutions were passed, *inter alia*—"I. That the capital of the company be increased to £2,400,000 by the creation of 200,000 shares of £2 each, entitled to a fixed cumulative preferential dividend of 4½ per cent. per annum, but to no further or other participation in the profits of the company. II. That the following changes be made in the memorandum and articles of association, viz.—(*a*) That article V. of the memorandum of association as altered by special resolution be deleted, and the following substituted in place thereof:—The nominal capital of the company is £2,400,000, divided into 200,000 preference shares of £2 each, entitled to a fixed cumulative preferential dividend of 4½ per cent. per annum, and into 200,000 ordinary shares of £10 each. Any shares when fully paid may be converted into stock by resolution of the shareholders in general meeting. That article 28 of the articles of association as altered by special resolution be deleted, and the following substituted in place thereof:—The capital of the company shall be £2,400,000 sterling, divided into 200,000 preference shares of £2 each, and into 200,000 ordinary shares of £10 each. The preference shares shall be entitled to a fixed preferential cumulative dividend at the rate of 4½ per cent. per annum, before any dividend is paid on the ordinary shares, and to priority in repayment of capital, but shall in no case be entitled to participate in surplus assets; and the company may (if it see fit) convert its shares, or any portion or class thereof, when fully paid, into stock: The company may further from time to time increase its capital to any amount that may be determined by the shareholders in general meeting."

Effect was given to this resolution by an alteration in the memorandum of association.

Samuel Henry Ramsbotham, M.D., Leeds, a shareholder in the company, objected to the creation and issue of preference shares as *ultra vires* of the company and the directors.

The directors followed up the resolution above referred to by resolving to offer £170,000 of the said preference £2 shares to the shareholders of the company in proportion to their present holdings, and Dr Ramsbotham threatened to interdict the issue of the said preference shares.

The present special case was accordingly presented by (1) Dr Ramsbotham, and (2) the company, in which the question submitted for the determination of the Court was as follows—"Whether the increase of the capital of the Scottish American Investment Company, Limited, by the creation of 200,000 shares of £2 each, entitled to a fixed preferential cumulative dividend at the rate of 4½ per cent. per annum before any dividend is paid on the ordinary shares, and to priority in repayment of capital, but with no right to participate in surplus assets, is within the powers of the company, and whether the special resolutions of December 1890, so far as they purport to increase the capital by the creation of such shares, are valid?"

Argued for the second party—The memorandum and articles of association contemplated the increase of the capital of the company, and intending shareholders got due notice that this might be done by the language of article 29, which provided that a general meeting was to determine the "conditions" upon which this increase was to be made. What the company had here done was quite within the powers conferred on them by their memorandum and articles of association and the Companies Act 1862, sec. 12—*Harrison* v. *Mexican Railway Company*, L.R., 19 Eq. 358; *South Durham Brewery Company*, L.R., 31 Ch. Div. 261; *Hutton* v. *Scarborough Cliff Hotel Company*, 2 Drury & Smail, 514 and 521; *Ashbury* v. *Watson*, L.R., 30 Ch. Div. 376; Companies Act 1862 (25 and 26 Vict. cap. 89), sec. 12.

Argued for the first party—There was nothing in the memorandum or articles of association which entitled the company to create preference shares, or to destroy that equality of interest which existed among all the shareholders. The essence of the contract was equality, and it was that which the resolution complained of proposed to take away. The resolution was *ultra vires* and illegal. Authorities *supra*.

At advising—

LORD PRESIDENT—The fifth head of the memorandum of association provides that "the nominal capital of the company is £1,000,000 divided into 100,000 shares of £10." Now, this suggests an equality of interest among the shareholders, and I can find nothing in the articles of association which were contemporaneous with the memorandum which in any way detracts from that equality of interest.

The 28th article provides that "The company, with the sanction of a general meeting of the members to be specially convened for that purpose, may from time to time increase such capital to any amount that may be determined by such meeting." Such a provision is precisely within the memorandum of association, and imports nothing like a variation of that equality of interest among the shareholders to which I have just referred. But the next article No. 29, is in these terms—"Such general meeting, or any subsequent general meeting, may determine the conditions on which such increase shall be made, the number and amount of the shares into which such increased capital shall be divided, and the time, mode, and terms at and according to which such last-mentioned shares shall be issued, and how the premium, if any, on such shares shall be applied, and all new shares so created shall be offered to the existing members in proportion to the existing shares held by them, or as near as may be." Now, it is said that the import of this article is, that a general meeting called in terms thereof can fix the conditions upon which an increase of the capital of the company can be made; and that such a meeting can also determine that the new stock so created shall in the matter of dividends be entitled to a preference over the old.

I do not so read this article, and I do not think that this is the meaning which is to be attached to the word "conditions" which we find in it. This word suggests the limitation of a right, and indicates something of the nature of a stipulation under which the right is to be granted. Nor can I see anything in this 29th article to suggest that the word "conditions" which occurs in it is used in any other than its ordinary meaning. The company at this specially convened general meeting are empowered to determine the time, the mode, and the terms upon which the newly created shares are to be issued and to be paid for; but to import into the word "conditions" anything of the nature of a privilege, or to suggest that the newly created shares are to be entitled to any priority over the other shares in the matter of dividends, is a reading of this 29th article which I am not prepared to adopt.

From what I have already observed, it is clear I think that neither the memorandum nor articles of association of this company entitle them to create preference shares. But what is it that this company has done? At a general meeting held upon 11th December 1890 certain resolutions were passed, which were confirmed at another meeting held upon the 30th December following, and among them was one to the following effect—"That the capital of the company be increased to £2,400,000 by the creation of 200,000 shares of £2 each entitled to a fixed cumulative preferential dividend of 4½ per cent. per annum, but to no further or other participation in the profits of the company."

Now, I consider such a resolution entirely *ultra vires* of the company and illegal, and I am therefore for answering the question in the negative.

LORD ADAM—In the case of a limited company there are certain matters which are required by statute to be set forth explicitly in the memorandum and articles of association, and when so set forth they can only be altered to a very limited extent. In the present case the memorandum provides by its 5th head that the nominal capital of the company is to be £1,000,000, divided into 100,000 shares of £10 each. Now this provision may be modified, but only in the limited manner set out in section 12 of the statute of 1862.

Had the question which we are here asked to determine occurred for the first time in the present case I should have entertained the greatest doubts as to the competency of the application, but looking to the decisions in the English authorities to which we were referred, there can be no doubt that the memorandum and articles of association are to be read together, and that they limit and define the powers of the company.

In the present case the 5th head of the memorandum of association provides, on a reasonable construction of the language, for an equality of interest among the shareholders both as regards their shares and their dividends, and this necessary implication is not easily to be displaced.

If we turn to the articles of association, and especially to article 29, to which we have been specially referred, we can find nothing which can in any way affect this equality of interest. I have, therefore, come to the same conclusion as your Lordship that the resolution of December 1890 with reference to the creation of preference shares was *ultra vires* of the company, and therefore illegal.

LORD M'LAREN and LORD KINNEAR concurred.

The Court answered the question in the negative.

Counsel for the First Party—Dundas. Agents — Crombie, Bell, & Bannerman, W.S.

Counsel for the Second Party—Lorimer. Agents—Menzies, Black, & Menzies, W.S.

Wednesday, February 25.

FIRST DIVISION.

THE SCOTTISH AMERICAN INVESTMENT COMPANY LIMITED, PETITIONERS.

Public Company—Alteration of Memorandum of Association — Companies (Memorandum of Association) Act 1890 (53 *and* 54 *Vict. cap.* 62)—*Confirmation by Court.*

The Act 53 and 54 Vict. c. 62, sec. 1, sub-sec. 1, provides, *inter alia*, that "Subject to the provisions of this Act, a company registered under the Companies Acts 1862-1886, may by special resolution alter the provisions of its memorandum of association or deed of settlement with respect to the objects of the company so far as may be required for any of the purposes hereinafter specified . . . but in no case shall any such alteration take effect until confirmed on petition by the Court, which has jurisdiction to make an order for winding-up the property. . . . (4) The Court shall, in exercising its discretion under this Act, have regard to the rights and interests of the members of the company, or of any class of these members, as well as to the rights and interests of its creditors . . . (5) The Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company, if it appears that the alteration is required in order to enable the company (*a*) To carry on its business more economically or more efficiently; or (*b*) To attain its main purpose by new or improved means; or (*c*) To enlarge or change the local area of its operations; or (*d*) To carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company; or (*e*) To restrict or abandon any of the objects specified in the memorandum of association or deed of settlement."

A registered company by special resolution petitioned for confirmation of proposed alterations in the objects of the company with a view (1) to enlarge the company's powers of investment; and (2) to authorise certain lines of financial business not embraced in the memorandum of association.

The Court, on a report that the proposed alterations fell within the terms and intention of the Act, that the proceedings had been carried out with all regularity, and that due notice had been given to all concerned, *pronounced* an order of confirmation.

By the Companies (Memorandum of Association) Act 1890 (53 and 54 Vict. cap. 62), section 1, sub-section 1, it is, *inter alia*, provided that "Subject to the provisions of this Act a company registered under the