I might also point out that in (6) the Secretary of State has powers to make orders for extending the provisions of this section to other diseases and other processes, and to injuries due to the nature of any employment specified in the order not being injuries by accident, either without modification or subject to such modifications as may be contained in the order. That appears to show quite plainly that it never was intended to hold that for all purposes disablement was to be treated as an accident which alone was to give ground for a claim. It is not because of an accident that a claim is made under this section at all; it is because of an industrial disease which has been contracted in the employment.

LORD DUNDAS and LORD SALVESEN were not present, Lord Dundas being engaged in the Extra Division.

The Court answered the first question in the negative and the second question in the affirmative.

Counsel for the Appellants—Horne, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Moncrieff, K.C. — MacRobert. Agents — Simpson & Marwick, W.S.

Thursday, February 25.

FIRST DIVISION.

(SINGLE BILLS.)

CALDWELL & COMPANY, LIMITED, PETITIONERS.

Company—Reduction of Capital—Confirmation by Court—Discretion of Court—Matters Primarily Domestic and Commercial—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *secs.* 46, 50.

The Companies (Consolidation) Act 1908 enacts—Section 46—"(i) Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular . . . may . . . (*b*) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets. . . ." Section 50—The Court . . . may make an order confirming the resolution on such terms and conditions as it thinks fit."

A company having by valid special resolution resolved on a reduction of capital on the ground that capital of the company had been lost or was unrepresented by available assets, one of the shareholders lodged objections, stating that there had been no loss of capital, and that the proceeding would affect his interests. The alleged loss of capital was based entirely on the opinion of the directors of the company and was unsupported by evidence. The Court *confirmed* the reduction of capital, subject to provision being made for the protection of the interests of the objecting shareholder.

Observed per curiam—(1) "If a company has passed a valid special resolution reducing its capital the Court has, under section 50, an absolute discretion to confirm or to refuse to confirm the reduction, or to impose such terms and conditions on the company as it thinks fit. The only express statutory limitation is that certain measures must be taken for the protection of creditors if they have a title to object to the reduction in terms of section 49." (2) "I cannot find any trace in the statute of a suggestion that the Court ought to review the opinion of the company and of its directors in regard to a question which primarily at least is domestic and commercial. There may possibly be cases where it would be the duty of the Court to enter into such an inquiry, but they would be very exceptional."

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), enacts—Section 46—(*quoted supra in the rubric*). Section 50—"The Court, if satisfied, with respect to every creditor of the company who under this Act is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged, or has determined, or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit." Section 55—"In any case of reduction of share capital the Court may require the company to publish as the Court directs the reasons for reduction, or such other information in regard thereto as the Court may think expedient with a view to give proper information to the public, and, if the Court thinks fit, the causes which led to the reduction."

Caldwell & Company, Limited and Reduced, papermakers, Inverkeithing, *petitioners*, presented a petition to the First Division of the Court of Session craving the Court to make an order confirming a proposed reduction of their capital.

William Hay Caldwell, Morar, Inverness-shire, one of the shareholders in the company, *respondent*, lodged answers.

The *petition* set forth—"3. That the share capital of the company authorised by the memorandum is £50,000, divided into 50,000 shares of £1 each The whole of this capital has been issued and is fully paid. . . . 7. That on 24th May 1913 a fire took place in the works of the company which caused serious damage to the buildings, machinery, stock-in-trade, &c., and the stoppage of the works. The works are now in course of being reconstructed, but some months must elapse before they are in operation. 8. That at the time of the formation of the company the value placed upon goodwill was £20,257, 13s. 7d., but the same was reduced from time to time by sums applied out of the profits, so that at the close of the year to 28th September 1912 it amounted to £9163, 16s. 6d. A settlement has been made with the insurance company in respect of the fire loss for buildings, machinery, plant, stock,

and stores, and sums have been received in respect thereof as follows :—

Buildings	£10,253	8	11
Machinery	22,562	8	6
Electric light plant	607	11	3
Stock of paper	32,761	7	9
Stores	8,783	19	8
Extinguishing expenses	281	3	11
	£75,250	0	0

The company were also insured against loss of profits, and various sums have been and will be received in respect thereof. According to the balance-sheet of 27th September 1913 the value of the heritable properties and machinery, after deducting the amounts recoverable from the insurance company in respect thereof, stood at £42,317, 3s. 2d. 9. That the company have paid no dividend. The directors are satisfied that having regard to the effect upon the goodwill arising from the interruption caused by the fire, and the depreciated value of the buildings and machinery extant after the fire, the value of the said assets has decreased by not less than £12,500. 10. That accordingly, at an extraordinary general meeting of the company, duly convened and held within the registered office of the company at Inverkeithing on 3rd February 1914, the following special resolution was duly passed, and at a subsequent extraordinary general meeting, also duly convened and held within the said registered office on 18th February 1914, the same was duly confirmed, viz.—'That the capital of the company be reduced from £50,000, divided into 50,000 shares of £1 each, to £37,500, divided into 50,000 shares of 15s. each, and that such reduction be effected by cancelling capital which has been lost or is unrepresented by available assets to the extent of 5s. per share.' Certified copies of the minutes of the said meetings and certificates of the postage of the circulars convening the meetings are produced. 11. That the proposed reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital. The creditors of the company are not therefore affected by the proposed reduction."

The *answers, inter alia*, stated—"(Ans. 8) The assets and liabilities of the company, exclusive of the value of goodwill, are according as follows, namely :—

Assets.

Cash paid by insurance company	£75,250	0	0
Cash to be received from them, estimated at	15,000	0	0
Value of properties and machinery extant	61,000	0	0
Present stock of paper, say	4,000	0	0
Capital on shares not paid up	16,784	16	5
	£172,034	16	5

Liabilities.

Debts of firm of Messrs Caldwell & Company agreed to be paid by the company, and debts of the company not already paid out of profits	55,750	0	0
Share capital	50,000	0	0
	£105,750	0	0

Quoad ultra the petitioners' averments are denied. (Ans. 9) Admitted that the company have paid no dividend. *Quoad ultra* denied under reference to articles 7 and 8. (Ans. 10) The special resolution, the minutes of meeting, and certificates of postage of circulars, are referred to for their terms. Explained that the sole ground alleged in the said special resolution for the proposal to reduce the company's capital—namely, that capital has been lost or is unrepresented by available assets, is, as already stated, inconsistent with fact. The passing and subsequent confirming of said special resolution were accordingly unnecessary, incompetent, and *ultra vires*. Further explained that the proposed reduction of capital is, as is shown by the circular to shareholders convening the said meetings, a copy of which is herewith produced and referred to, a part of a large scheme to rearrange the existing capital of the company and to introduce new capital into it. The proposed reduction of capital and the proposed rearrangement of capital would work unfairly against the respondent (who does not consent thereto) in respect—(1) that reduction of capital followed by the issue of new capital would in effect distribute a certain share of present surplus assets of the company belonging to the respondent, in respect of his share-holding, to the persons who should take up the new shares without the respondent receiving a consideration therefor; and (2) that no provision is proposed to be made by the petitioners for the cancellation, with regard to any new shares to be taken up by the respondent under the proposed rearrangement scheme, of the restriction under which the respondent agreed to hold his existing shares when he consented to the insertion of article 103 in the articles of association. . . . (Ans. 12 and 13) The respondent respectfully submits that the prayer of the petition should be refused in respect (1) that the sole alleged ground for reducing capital, namely, that capital of the company has been lost or is unrepresented by available assets, is untrue; (2) that the passing and subsequent confirming of the said special resolution were, and that the proposal to reduce the capital of the company so long as there remains available capital not already fully paid up is unnecessary, incompetent, and *ultra vires*; (3) that the proposed reduction of capital involves a diminution in liability in respect of the existing unpaid share capital, and may affect creditors of the company; and (4) that the proposed reduction of capital would work unfairly against the respondent, who does not consent thereto, and that it is preliminary to a larger scheme of rearrangement of the capital of the company, which also would work unfairly against him, and to which he does not consent."

On 22nd May 1914 the Court, having heard counsel, repelled the second and third reasons stated in the answers for refusing the petition, and remitted to Sir George Paul, C.S., to inquire into the regularity of the procedure and the reasons for the proposed reduction of capital, and to report.

He *reported*—"The minute proposed to be registered is in proper form.

"As the proposed reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, no notice to creditors or other notice or intimation beyond what has been already given seems to be necessary.

"As the proceedings have been regular, and the reasons for the proposed reduction of capital appear to be sufficient, the reporter is of opinion that an order may be pronounced in terms of the prayer of the petition, and that the words 'and reduced' as an addition to the name of the company may be altogether dispensed with."

The respondent lodged a *note* in which he pointed out that the Court had not dealt with his reasons one and four for refusing the petition, and on 11th June 1914 the Court remitted anew to Sir George Paul, C.S., "to inquire—(1) whether the capital of the company has been lost or is unrepresented by available assets and should be cancelled; and (2) whether the cancellation of the same followed by the proposed rearrangement of the company is just and equitable, and will not work unfairly against the respondent."

The reporter *reported*—" . . . In contemplation of the formation of the company a preliminary agreement was entered into . . . The thirteenth clause is as follows:—'The said William Hay Caldwell shall have no right in virtue of his holding in the company to a seat on the board thereof or in any way to interfere in the management or control.' This restrictive condition is repeated in the 103rd clause of the articles of association. On the incorporation of the company the preliminary agreement with Mr Millar was adopted in all its clauses by the incorporated company, conform to an agreement which repeated its provisions verbatim. . . .

"The resolution and confirming resolution reducing the capital were respectively passed on 3rd and 18th February 1914.

"The latest balance sheet then existing was for the year of the fire, *i.e.* the year to 27th September 1913. It showed the following results:—

Assets.

Heritable properties		£12,961 12 5
Machinery, &c.		29,355 10 9
		£42,317 3 2
Deduct the amount of depreciation reserve account		10,843 18 6
		£31,473 4 8
Stock in trade		5,327 2 3
Outstanding accounts		2,204 10 11
Office furniture		55 5 3
Cash in hand		115 7 1
Sundries outstanding		245 1 3
Goodwill		9,163 16 6
Sum received from Insurance Company in respect of loss by fire		75,250 0 0
		£123,834 7 11

Liabilities.

Outstanding accounts	£2,290 16 9	
Bills payable	601 2 11	
Carry forward	£2,891 19 8	£123,834 7 11
Brought forw'd	£2,891 19 8	£123,834 7 11
Due Royal Bank of Scotland	29,496 1 3	
Due on loans	34,239 17 9	
Debts heritably secured	1,050 0 0	
Sundries outstanding	3,641 4 9	
Legal expenses	337 4 9	
Compensation to workmen, reserve account	292 1 5	
		71,948 9 7
		£51,885 18 4
Shareholders' capital		50,000 0 0
Representing in the balance sheet profit and loss account		£1,885 18 4

"But the values of the heritable properties, machinery, &c., in the balance sheet were mere book values, and did not necessarily represent actual values. It would seem more accurate to substitute the values of experts as contained in their valuations made by the instructions of the directors three months after the fire, for the book values shown on the assets side of the balance sheet as modified by the depreciation reserve fund. These valuations, it seemed to the reporter, would show the actual values as they then existed more accurately than the book values in the balance sheet. . . .

"Substituting then the values as brought out in the experts' valuations, and accepting the entries in the balance sheet which deal with ascertained figures, the following result is brought out:—

Assets.

1. Machinery as per Messrs Menzies and Thomson's valuation of 3rd September 1913		£42,000 0 0
2. Buildings as per Alexander Robertson's valuation of		9,690 0 0
Value of buildings and machinery after the fire before reinstatement		£51,690 0 0
3. Stock-in-trade		5,327 2 3
4. Outstanding accounts		2,204 10 11
5. Cash in hand		115 7 1
6. Sundries outstanding		245 1 3
7. Sum received from Insurance Company in respect of damage by fire		75,250 0 0
		£134,832 1 6

Liabilities.

1. Outstanding accounts	£2,290 16 9	
2. Bills payable	601 2 11	
3. Due Royal Bank of Scotland	29,496 1 3	
4. Due on loans	34,239 17 9	
5. Debts heritably secured	1,050 0 0	
6. Sundries outstanding	3,641 4 9	
7. Legal expenses	337 4 9	
8. Compensation to workmen, reserve account	292 1 5	
		71,948 9 7
Surplus		£62,883 11 11

"*Note.*—In bringing out the above result no value has been put down for goodwill,

which appears in the balance sheet as £9163, 16s. 6d.; nor for office furniture (£55, 5s. 3d.) as that was probably included in the expert's valuation of machinery, &c. . . .

"Assuming that in the present case your Lordships are not satisfied on the inquiry that capital has been lost or is not represented by available assets, the important point for consideration seems to be whether in such circumstances a special resolution bearing to be based on the ground that capital has been lost or is not so represented should be confirmed.

"The second branch of the remit directs the reporter to report 'whether the cancellation' of capital as proposed 'followed by the proposed rearrangement of the company is just and equitable and will not work unfairly against the respondent.'

"The company's desire seems to be to raise money for its business by means of an increase of capital, and to give up its present system of working on borrowed money. It has been advised that it should do so by an issue of 15s. shares, and that that would only be feasible if the existing shares were reduced by 5s. each to 15s. per share. Nothing beyond that is proposed.

"The company has power to increase capital not only under clause V of its memorandum but also under clause 7 of its articles, which empowers it 'by a special resolution to increase its capital by the issue of new shares, with or without preferred or deferred rights,' &c. Its proposed scheme of raising capital by an issue of new shares instead of by borrowing as heretofore seems unobjectionable, but it has been advised that an attempted issue of 15s. shares to rank *pari passu* with the original £1 shares would be unsuccessful, hence the necessity of reducing the value of the share from £1 to 15s. Having regard to recent decisions and the general terms on which reduction of capital is authorised by the Act of 1908, the reporter sees no reason why, assuming a corresponding re-arrangement of the assets side of the balance-sheet, as pointed out by Mr Justice Buckley, a special resolution for reduction based on such a ground and passed by the prescribed majority, or as in the present case unanimously, might not be confirmed by your Lordships on your being satisfied that it would not prejudicially affect any class or individual. It has been represented on behalf of the respondent that, notwithstanding these powers to increase capital conferred upon the company by the articles of association, certain of the shareholders are barred from voting in favour of the exercise of them by the terms of the agreements which form the contract with him. It seems to the reporter that there is no ground for that contention. The eighth article in each of the agreements bears that the 'price or consideration payable by the company shall be £50,000, and shall be payable by the allotment to the persons after mentioned of the shares after specified of the company (being the whole *initial* capital of the company),' &c. It seems, moreover, that the power to increase capital contained in the memorandum and articles must be read as incorporated in the agreements, wherein it is recited that the memorandum and articles had, 'with the privity of William Hay Caldwell, Caldwell & Company, Gordon Caldwell, and Francis Pasley Caldwell, been already prepared.'

"In a note for the reporter 'The respondent submits that the proposed scheme will work unfairly against him, in respect that he cannot claim of right to participate in the new issue of shares, and may under the articles of association (9 and 7) of the company be refused any allotment of the new issue.' Further, that 'Even in the event of the respondent's being allotted a proportion of the new issue, these new shares would apparently continue to be subject to the restrictive conditions which by the articles of association attach to the respondent's present holding. In respect of these new shares the respondent would have no vote, and if desirous of transferring the same he might have the registration of his transfer refused without any reason being stated therefor' (see art. 35). 'The said allotment of new shares to the respondent would thus be rendered practically useless.'

"The restrictive conditions to which the respondent refers as attaching to his present holding are embodied in the agreements (clause 13) and in clauses 103 and 77 of the articles. '(103) Notwithstanding anything hereinbefore or hereinafter contained, William Hay Caldwell shall have no right, in virtue of his holding in the company, to a seat on the board thereof, or in any way to interfere with the management or control.' Clause 77, 'Subject to article 103, every member present in person shall on a show of hands have one vote,' &c.

"As regards the disposal of the shares of new capital, article 9 provides that, 'subject to any special direction of the company to the contrary, all new shares shall be offered to the shareholders in proportion to the number of existing shares held by each of them,' &c.; and article 7 provides that the new shares may be disposed of in such 'manner as the company by special resolution may direct, or, if no direction is given, as the directors may think expedient.'

"The reporter cannot believe that the company or the directors would refuse to give the respondent a proportional allotment of new shares as provided by clause 9. They might be prepared to give an undertaking to that effect. Nor can he believe that they would capriciously decline to register any reasonable transfer of the shares so allotted to him. A power to refuse to register transfers when a portion of the share capital is uncalled is not unusual. An unrestricted power, as in the present case, is less common, but it may be thought useful in order to keep off the register persons who in the opinion of the directors may be considered undesirable as shareholders. In the present case the clause has been in the articles since the beginning. It must be kept in view, moreover, that by special resolution passed on 25th August and confirmed 10th September 1908 the company was declared to be a private company in the sense of the Companies

Act of 1907, which enacted (section 37 (1)) that 'for the purposes of this Act the expression "private company" means a company which by its articles,' *inter alia*, '(*a*) restricts the right to transfer its shares, and (*b*) limits the number of its members (exclusive of persons who are in the employment of the company) to fifty.' The company's articles of association were accordingly altered by adding clauses, *inter alia*, declaring the company to be a private company, and providing that the number of its members (exclusive as above mentioned) should be limited to fifty, 'and no transfer which would increase such number of members beyond fifty shall be valid, and the directors shall refuse to recognise or register any transfer which would so increase such number.'

"As regards the restrictive conditions in clauses 103 and 77, these, as already mentioned, were imposed (as regards clause 103) in the agreements and (as regards both clauses) in the articles of association with the consent of Mr William Hay Caldwell and his legal adviser, and he must accept them as they stand, but as there seems to be a doubt whether, in view of the words of clause 77 of the articles when read along with clause 103, the respondent is or is not entitled to a vote, it may be that the company would be prepared to consider favourably a request by him that the words of 77 'subject to article 103,' and of 78 and 80 'subject as aforesaid' should be deleted.

"The respondent further submitted in his note that, assuming that his contention that capital had not been lost to be well founded, but that the reduction had been confirmed on other grounds, 'the proposed issue of new shares on the basis of the present capital being worth only 15s. in the £ would have the effect of distributing among the new shareholders one-fourth of the present total value of the respondent's present holding without his receiving any consideration therefor.' That, however, would not strike specially against the respondent, the other shareholders would be equally affected.

"In conclusion, the reporter begs to report that in his opinion (1) capital has not been lost or is not unrepresented by available assets; and (2) subject to his observations, if capital should on the ground of loss or on any other ground be cancelled to the extent proposed and should be followed by an issue of new capital as proposed, such an arrangement would not be unjust or inequitable and would not work unfairly against the respondent."

Argued for the petitioners — The proposed reduction of capital should be given effect to being based on a valid special resolution of the company, backed by a three-fourths majority of the shareholders —Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), secs. 46, 50. The objections of the respondent were therefore immaterial, and he must adhere to his bargain with the company. On part 1 of the remit the reporter was not entitled to come to the conclusion to which he had come, which could only be justified on the valuation of expert valuers. The company could put their own valuation on their property. The reporter's opinion was not proof of the facts. On part 2 the report was irrelevant for the reason stated above. It was not for the Court to decide how a commercial business should be conducted. They could only inquire whether the proposed change was fair to shareholders and to the public, and whether in fact capital had been lost or was unrepresented by available assets—*Poole, &c.* v. *National Bank of China, Limited*, [1907] A.C. 229, Lord Macnaghten at 239; *in re Hoare & Company, Limited and Reduced*, [1904] 2 Ch. 208, Vaughan Williams, L.J., at 216. In England since the passing of the Act of 1908 it had been the practice for the Court to consider merely the position of creditors. It was perfectly legitimate for a company to recoup revenue out of capital — *Mills* v. *Northern Railway of Buenos Ayres Company*, [1870] 5 Ch. Ap. 621, Lord Hatherley, L.C., at 631. As regards sufficiency of notice to the shareholders the Court could always, if it liked, dispense with notice — sec. 9 of Act of 1908. At worst it was a mere irregularity in the petition, and did not involve readvertisement—*in re The Pavilion, Newcastle-on-Tyne, Limited and Reduced*, November 14, 1911, Weekly Notes 235.

Argued for the respondent — The resolution was *ab initio* null, because obtained from the shareholders on erroneous information—*Scottish Manitoba* v. *North-West Real Estate Company, Limited*, November 12, 1892, 20 R. 31, 30 S.L.R. 61. There was no instance of the Court granting such an application without cause shown. The case of *Poole, &c.* v. *National Bank of China, Limited* (*cit. sup.*) proceeded upon a proof in which Farwell, J., had held that the company had lost assets (pp. 233, 236). The objectors in that case held founders' shares which were admittedly worthless — Lord Macnaghten at 239. Moreover, the directors did not obtain their special resolution in respect of erroneous information, and there was no cancellation of any part of the objectors' shares. The case of *Poole* (*cit. sup.*) was therefore no authority for the proposition that it was unnecessary to prove loss of assets—Buckley on the Companies Acts (9th ed.), pp. 132-3, 136, 141; *City Property Investment Trust Corporation, Limited, Petitioners*, January 17, 1896, 23 R. 400, Lord Trayner at 405, 33 S.L.R. 309; Palmer's Company Precedents (11th ed.), Part I, pp. 1262, 1277. The *Louisiana and Southern States Real Estate Mortgage Company*, [1909] 2 Ch. 552, was the only case which might appear to support that proposition, and there the facts were different. The Court might ask for the reasons for the proposed reduction which the directors would be unable to give, and must be satisfied that it will not operate inequitably — sec. 55 of the Act of 1908; *in re Barrow Hæmatite Steel Company*, [1900] 2 Ch. 846, [1901] 2 Ch. 746. The proper course, therefore, was to remit back to the reporter to proceed *de novo*.

At advising—

LORD SKERRINGTON—On 11th June 1914

this Division of the Court remitted "to Sir George M. Paul to inquire (1) whether the capital of the company has been lost or is unrepresented by available assets and should be cancelled; and (2) whether the cancellation of the same followed by the proposed rearrangement of the company is just and equitable, and will not work unfairly against the respondent."

As one of the Judges responsible for this remit, I may explain that I did not understand that any of the Judges held the opinion that the subject-matter of the first head of the remit would, if it had stood by itself, have formed a relevant subject for inquiry. Speaking for myself, I thought it relevant only in so far as it bore upon the second head of the remit. In view of the exceptional position in which the respondent stands as compared with all the other shareholders of the company I thought it possible that he might suffer injustice if the existing shares, which are of the nominal value of £1, were written down to 15s. although they might actually be worth £1, and if following upon this reduction of capital new shares were to be issued of the nominal value of 15s. but which actually might be worth £1.

As regards the first head of the remit the reporter has reported that "capital has not been lost or is not unrepresented by available assets." The reporter has, in my opinion, attached undue weight to certain valuations obtained by the directors, and I am not prepared to hold it proved as a fact that capital has not been lost to the amount mentioned in the petition or is not unrepresented by available assets. On the other hand the report makes it clear that while no one impeaches the good faith of the company and of its directors when they say that capital to a certain amount has been lost or is unrepresented, they have failed to produce even *prima facie* evidence in support of their opinion. Indeed such evidence as has been produced to the reporter is all the other way. I refer to the balance-sheet and to the valuations, both of which are later in date than the fire which partially destroyed the buildings and caused a stoppage of the works. It follows that in considering the second question which was remitted to the reporter one must proceed upon the assumption that notwithstanding the opinion of the company and its directors to the contrary the shares in question may really be worth £1, and that no capital may have been lost or be unrepresented. Proceeding upon this assumption the reporter suggests that the company or its directors should give the respondent an undertaking that he will receive a proportional allotment of the new shares. I doubt whether such an undertaking would secure the respondent, and I think that his right to receive such an allotment should be secured by an amendment of the 9th clause of the articles of association. The reporter further states that he does not believe that the directors would capriciously decline to register any reasonable transfer by the respondent of the shares so allotted to him. I see no justification for such a suggestion on the part of the respondent. Lastly, the reporter suggests certain amendments of clauses 77, 78, and 80 of the articles. I agree with him as to this, and I also think that the parties should consider whether the last eleven words of the 103rd clause ought not to be deleted on the ground that they are unintelligible and may lead to trouble. These amendments ought to be adjusted at the sight of the reporter, who will hear both parties in regard to them. We have already had three discussions in this case, and if the respondent insists upon a fourth discussion he will probably be found liable in the expense thereby occasioned.

In view of the argument submitted by the respondent's counsel in regard to the meaning and effect of sections 46-56 of the Companies (Consolidation) Act 1908 (8 Edw. VII cap. 69), which deal with the reduction of share capital, I think it right to state my opinion on this point. If a company has passed a valid special resolution reducing its capital the Court has, under section 50, an absolute discretion to confirm or to refuse to confirm the reduction, or to impose such terms and conditions upon the company as it thinks fit. The only express statutory limitation is that certain measures must be taken for the protection of creditors if they have a title to object to the reduction in terms of section 49. It is, however, implied in section 55 that the Court should consider whether the proposed reduction may prejudice the interests of the public, and should also consider the reasons for the proposed reduction. Section 46 gives by way of illustration two examples of a good reason for reducing capital, viz., where capital has been lost or is unrepresented by available assets, and where the paid-up share capital is in excess of the wants of the company. In each of these cases, however, the question is regarded by the statute as one which is to be disposed of by the company as the ground for passing or rejecting a special resolution. I cannot find any trace in the statute of a suggestion that the Court ought to review the opinion of the company and of its directors in regard to a question which primarily at least is domestic and commercial. There may possibly be cases where it would be the duty of the Court to enter into such an inquiry, but they would be very exceptional. Counsel for the respondent argued that it was the duty of the petitioners not merely to adduce *prima facie* evidence which would satisfy the reporter, but also to prove affirmatively by the evidence of valuers and others that capital had been lost. This argument, though logical, is in my opinion a *reductio ad absurdum* of the respondent's contention. The case would have been very different if it had been relevantly averred that the company and its directors did not in fact believe that capital had been lost or was unrepresented, or if it had been averred that an attempt was being made to use a statutory power for some oblique and illegitimate purpose. In any such case as I have figured the company would have either no reason or a bad reason for wishing to reduce its capital.

In addition to protecting the rights of creditors and of the public the Court must be satisfied that the proposed reduction does not prejudice the rights of the shareholders as a whole or of any individual shareholder. I have already referred to what seems to me to be necessary in order to protect the respondent. I am bound to say, however, that the notice to the shareholders calling the meeting to consider the proposed resolution for reduction of capital is open to criticism. It would, I think, have been better if the directors had reminded the shareholders of the fact that the balance-sheet did not show that any capital had been lost, and if they had informed the shareholders that valuations had been obtained which, if accurate, pointed to the same result. It would then have been apparent on the face of the notice that the shareholders were being asked to proceed purely upon the opinion of the directors —a course which seems to me to be neither unusual nor unreasonable for a shareholder to adopt. Any shareholder who had doubts as to the propriety of reducing the capital could then have attended the meeting and asked the chairman for further information, though probably he would have been told that the matter was one in regard to which it was inexpedient to state details, and that the shareholders must trust to their directors. While I think that the information given to the shareholders as a whole was too scanty, I have come to the conclusion that it would not be a sound exercise of judicial discretion to compel the company to initiate new proceedings. On the contrary, I am satisfied that no injustice will be done to the respondent or anyone if the proposed reduction of capital is confirmed, subject to the conditions above referred to.

I accordingly advise your Lordships to confirm the reduction of capital and to approve of the minute set forth in the petition, but to declare that said confirmation and approval shall not take effect unless and until the petitioners shall by special resolution have altered the articles of association in such manner as will in the opinion of the reporter prevent the said reduction and proposed re-arrangement of capital from unfairly affecting the interests of the respondent.

LORD JOHNSTON—The one point which I felt in the course of the discussion to be clear was that the notice which initiated this proceeding was improperly misleading, because as far as I could see at the time that it was issued the only independent opinion or information which the directors had in their pockets showed something totally different from the facts represented in that notice. I was therefore disposed in the course of the discussion to think that this particular application should not be granted, but that while the petition might be sisted to allow of other proceedings being initiated by the company, short of such proceedings we should not give the sanction craved. But I have only come into this case at the eleventh hour. I did not hear the original discussions, and I feel therefore that I should acquiesce, as I readily do, in the course which your Lordships propose to take, because you have much more thorough knowledge of the situation which has been created before us.

LORD PRESIDENT—I agree in the opinion of Lord Skerrington, which I have had an opportunity of reading. We shall therefore pronounce an interlocutor in the terms suggested by his Lordship.

LORD MACKENZIE was not present at the hearing.

The Court pronounced this interlocutor—

". . . Confirm the reduction of capital resolved on by the special resolution passed on 3rd and confirmed on 18th February 1914, mentioned in the petition: Approve of the minute set forth in the petition . . .: Declaring, however, that said confirmation and approval shall not take effect unless and until the petitioners shall by special resolution have altered the articles of association in such manner as will in the opinion of the reporter prevent the said reduction and proposed re-arrangement of capital from unfairly affecting the interests of the . . . respondent; and remit of new the proceedings to Sir George M. Paul accordingly, with powers, and to report. . . ."

Counsel for the Petitioners—Clyde, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Counsel for the Respondent — Murray, K.C.—Smith Clark. Agents—J. & D. Smith Clark, W.S.

Friday, February 26.

EXTRA DIVISION.

(Before Lord Dundas, Lord Mackenzie, and Lord Cullen.)

DAMPSKIBSSELSKABET SVENDBORG *v.* LOVE & STEWART, LIMITED.

Ship—Charter-Party—Demurrage—Discharge with Customary Steamship Dispatch according to Custom of Port—Strike at Charterers' Yard.

A charter-party provided that a steamer should proceed to one of several ports and there discharge a cargo of pit-props with customary steamship dispatch and according to the custom of the port; time for discharging should not count during the continuance of a strike or lock-out of any class of workmen essential to the discharge of the cargo; a strike or lock-out of shippers and/or receivers' men only should not exonerate the charterers from any demurrage for which they might be liable under the charter if by the use of reasonable diligence they could have obtained other suitable labour.

The customary method of discharge of pit-props at the port was proved to be into railway waggons at the