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

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."

By section 1, sub-section 2, it is provided—"Before confirming any such alteration the court must be satisfied (*a*) That sufficient notice has been given to every holder of debentures or debenture stock of the company, and any persons or class of persons whose interests will in the opinion of the court be affected by the alteration; and (*b*) That with respect to every creditor who in the opinion of the court is entitled to object, and who signifies his objection in manner directed by the court, either his consent to the alteration has been obtained or his debt or claim has been discharged, or has determined, or has been secured to the satisfaction of the court."

By sub-sections (3), (4), and (5) it is provided—"(3) An order confirming any such alteration may be made on such terms and subject to such conditions as to the court seems fit, and the court may make such orders as to costs as it deems proper. (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 the 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."

The Scottish American Investment Comany, Limited, by whom this petition was presented, was incorporated and registered in the year 1873, and successfully carried on business since that time, having its registered office in Edinburgh. The capital of the company was £2,000,000, divided into 200,000 shares of £10 each, of which 170,000 shares had been issued, £2 having been paid up on each share issued. The company recently resolved to create 200,000 preference shares of £2 each, but this resolution was declared by the First Division of the Court of Session to be *ultra vires* of the company. [See *ante*, p. 419.]

The objects for which the company was established, as set forth in its memorandum of association, consisted mainly of the investment of money in the United States of America or the Dominion of Canada, or in any of the British Dependencies in North America, upon the security of real estate, or in the mortgages or bonds of any railway company, or in the purchase of Government stock of the United States, Canada, or the British Dependencies in North America. The directors found that their powers of investment were limited, and that from the changes that have taken place in financial arrangements in America, and from other causes, it was desirable in the interests of the company that its powers of investment should be considerably extended so as to include powers of investment in shares of various companies as well as in bonds and mortgages, and they desired to avail themselves of the powers of the recent Act to alter the memorandum of association so as to include such powers. They accordingly summoned an extraordinary general meeting of the company, and they issued to the shareholders a circular explaining their objects, and submitting the alterations which they proposed should be made on the memorandum of association. These alterations were unanimously approved of by special resolutions passed at meetings of the company held on the 11th December and 30th December 1890.

The effect of the proposed alterations on the first article of the memorandum of association was to extend the local area of its operations so as to include the United Kingdom of Great Britain and Ireland, as well as the North American States, and also to enlarge the character of the investments by including debentures, debenture stock, scrip, obligations, shares or stock of any railroad or other company of whatever kind registered or incorporated in the United Kingdom, or formed under the laws of any government, state, or provincial authority in North America, also to include the purchase of stock of the Government of the United Kingdom, as well as of the American States.

The directors had found that the method of doing business in America had very materially changed since the incorporation of the company, and that it was now very usual for companies, instead of issuing bonds and debentures as formerly, to create preference stock, which formed a first charge upon the property of the company, and thus occupied very much the same position as regards security as bonds or debentures issued under the old system. For that and other reasons the directors considered that the proposed extension of the powers of investment would enable them to carry on more efficiently, and probably also more economically, the business of the company, as well as to attain its main object by new and improved means.

While this article as proposed to be altered authorised the investment of money in the United States of America or Dominion of Canada, or any of the British Dependencies in North America, the subsequent part of the article refered to bonds, shares, &c., of any railroad or other company registered or incorporated in the United Kingdom,

or formed under the laws of any government, state, or provincial authority in North America, which was more extensive than the words of the earlier part of the section, and might have included Mexico, which was not intended.

The following additional objects for which the company should exist were proposed as sub-sections to article III. of the memorandum of association: — "(5) To make, draw, accept, endorse, issue, discount, and otherwise deal with promissory-notes, bills of exchange, and other mercantile instruments. (6) To borrow or raise money on the credit of the company, or by the issue or sale of any bonds, mortgages, debentures, or debenture stock of the company, or in any other manner, and in security thereof to pledge or mortgage the company's property, including uncalled capital and unpaid calls. (7) To invest the property of the company in the name of the company, or in that of trustees for the company; and such trustees may be either individuals or corporations, British, foreign, or colonial. (8) To undertake and execute the office of trustee, executor, receiver, agent, or liquidator, and to undertake and execute all kinds of trusts, either public or private, and to perform and carry out the various kinds of business incident to and connected therewith either gratuitously or otherwise. (9) To do all acts necessary for carrying on, in any foreign country or colony in which the company may do business, any act of the company necessary or expedient to be there carried on, and to exercise any of the powers of the company either alone or in conjunction with others. (10) To insure against loss in course of transmission, or to act as depositaries of coin, bullion, notes, bills, bonds, mortgages, share certificates, or other documents of value."

The company presented this petition for an order of confirmation of their proposed alterations, and on 4th February 1891 their Lordships of the First Division remitted to Mr Charles B. Logan, W.S., to inquire and report as to the regularity of the proceedings, and the reasons for the proposed alteration of memorandum of association. Mr Logan, after narrating the original position of the company as above stated, and explaining the effect of the proposed alterations, reported, *inter alia*—"I would suggest that in the second part of the first article instead of the words 'any government, state, or provincial authority in North America,' the words should be made to correspond with the first part of the article, and should be 'the United States of America or Dominion of Canada, or any of the British Dependencies in North America.'"

With regard to the proposed sub-section 8 of art. III., Mr Logan reported—"This sub-section introduces a new kind of business not necessarily connected with the ordinary business of the company, but it has been explained to me by the managing director that particularly in connection with their American business it is often necessary to appoint a trustee to hold securities for debentures or bonds issued by companies, and that it might be both convenient and profitable for the company to be in a position to act as such trustee. The terms of the proposed sub-section go much further than this by authorising the company to act as executor, receiver, or liquidator, and to undertake all kinds of trusts; and it is submitted that these fall under the provisions of the Act of 1890 as being 'businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company.' . . . The alterations proposed to be made on the memorandum of association are important, and tend to extend considerably the objects and business of the company; but it appears to me that they may all be held to fall under one or other of the heads above quoted from the statute, and if such powers are to be obtained, the alterations are required in order to enable the company to carry them out. It is entirely within your Lordships' discretion to confirm the alterations proposed, and as this is, I understand, the first petition that has been presented under the Act, I have some diffidence in expressing my views as to the expediency of sanctioning these alterations. On the whole, however, I venture to submit that the proposed alterations are such as may receive your Lordships' approval as falling within the terms and the intention of the Act. I have examined the proceedings, and have to report that they have been carried out with due regularity. The meetings at which the special resolutions were passed and confirmed were properly summoned and conducted, and the matter was fully brought under the notice of all the shareholders by the issue of the circular before referred to. The statute provides (sec. 2) that 'Before confirming any such alteration the Court must be satisfied (*a*) that sufficient notice has been given to every holder of debenture or debenture stock of the company, and any persons or class of persons whose interest will, in the opinion of the Court, be affected by the alteration;' and also (sec. 4) that 'the Court shall, in exercising its discretion under the Act, have regard to the rights and interests of the members of the company, or any class of members, as well as to the rights and interests of the creditors.' It is explained in the petition—and I have verified the statement—that there are terminable debentures of the company to the amount of £1,165,496, 5s. 4d. held by 1190 debenture-holders, and also debts on deposit amounting to £34,643, 4s. 2d. due to five depositors. The debentures are all repayable within five years, and the deposits mature not later than 26th May 1891. The extension of the objects of the company might be considered by the debenture-holders as affecting their position, and it is right that due notice should be given to them. Your Lordships, of this date (January 6, 1891), after, as I am informed, full consideration of the point, appointed the petition to be advertised twice at an interval of eight days in the *Edinburgh Gazette* and *Scotsman*, and the *Glasgow Herald* and London *Times*, and

allowed the holders of debentures and the creditors of the company to lodge objections within fourteen days from the date of the last advertisement. The advertisements, in which the proposed alterations on the memorandum of association are distinctly set forth, have been made as ordered, the last having been on 19th January 1891, and the time allowed has elapsed without any objections being lodged."

The Court, giving effect to the amendments suggested by Mr Logan, confirmed the alterations of the memorandum of association with respect to the objects of the company passed on 11th and 30th December 1890, and directed that a certified copy of the present order, along with a printed copy of the memorandum of association as altered, should be delivered by the company to the Registrar of Joint-Stock Companies in Scotland within fifteen days from the date thereof, in terms of section 2 of 53 and 54 Vict. cap. 62, Companies (Memorandum of Associations) Act 1890.

Counsel for Petitioners—J. C. Lorimer. Agents—Menzies, Black, & Menzies, W.S.

Friday, February 27.

SECOND DIVISION.

[Exchequer Cause.

WAITE *v.* M'INTOSH.

Exchequer—7 and 8 Geo. IV. c. 53, sec. 68—Proceedings "Null and Void"—Conviction Standing Unquashed by Court of Competent Jurisdiction.

The Act 7 and 8 Geo. IV. c. 53, sec. 68, provides that it shall not be lawful for a justice of the peace employed in the collection of the revenue to act as a justice in matters relating to the revenue, and if he so act, "all proceedings . . . are . . . declared to be utterly null and void to all intents and purposes."

A person was convicted before two Justices of the Peace of selling spirits without a licence, and fined. It was afterwards discovered that one of the Justices was disqualified under said statute. The fine was returned, and the accused again brought before two Justices, by whom, after proof of the disqualification of the Justice who had previously sat, the accused was tried, convicted, and fined. He appealed to Quarter Sessions, who at his request stated a case to the Court of Exchequer.

Held that the Justices at the second trial had not jurisdiction to set aside the previous conviction, and were not at liberty to disregard it.

On 19th June 1890 Robert M'Intosh, grocer, Whitehilloch, Cabrach, Aberdeenshire, was, on complaint at the instance of William Waite, officer of Inland Revenue, Huntly, convicted at Huntly by James Lawson and Adam Dunbar, Esquires, two of Her Majesty's Justices of the Peace for the county of Aberdeen, of contravening the Act of Parliament 6 Geo. IV. cap. 81, as altered or amended by the Act 16 and 17 Vict. cap. 67, and the Inland Revenue Act 1880, in respect that on two separate occasions he had sold spirits without a licence, and he was adjudged to forfeit and pay the sum of £25 of modified penalty, with execution by imprisonment for three months.

Robert M'Intosh having paid the penalty imposed, lodged, two days after, on 21st June, an appeal to the next General Quarter Sessions of the Peace for the county, but said appeal was subsequently withdrawn as after mentioned.

It was proved at the proceedings after mentioned that Adam Dunbar, one of the Justices who heard the complaint, was at the time a person employed to collect certain duties of Excise by means of Excise licences, and therefore disqualified from so acting as a Justice in said complaint. Accordingly the penalty imposed by the conviction of 19th June 1890, viz., £25, was repaid on the 4th day of July 1890.

On 15th July 1890 Robert M'Intosh appeared at Huntly before James Lawson and George Park Wilson, Esquires, two of Her Majesty's Justices of the Peace for the county of Aberdeen, to answer to a new complaint, hereafter called the second complaint, at the instance of William Waite, containing precisely the same charges as those contained in the first complaint. Along with the second complaint William Waite presented to the Justices a minute, setting forth, *inter alia*, that Adam Dunbar was at the time of the hearing of the first complaint a person employed to collect certain duties of Excise by means of Excise licences; that as such a person was disqualified from acting as a Justice in said complaint, and having acted as a Justice therein, all the proceedings under the complaint were by the Statute 7 and 8 Geo. IV. cap. 53, sec. 68, "declared to be utterly null and void to all intents and purposes;" and that the previous proceedings being utterly null and void, the proceedings under the new complaint were rendered necessary. The minute further set forth that the fine of £25 had been repaid, and there was produced to the Court the receipt of said Robert M'Intosh for said repayment.

At the hearing of the second complaint on 15th July 1890 M'Intosh pleaded in bar of trial—"(1) That Mr Lawson was disqualified, as he sat at the former trial; (2) that the complaint was incompetent, on the ground that the respondent had already been tried and convicted of the offences libelled, and had paid the penalty, and that the case was under appeal; and (3) that the respondent did not admit Mr Dunbar's disqualification."

The Justices, on proof of Mr Dunbar's disqualification, and after the examination of witnesses for the prosecution and witnesses for the defence, repelled the objec-