

In the ordinary case it would be impossible for a stranger to fish for trout against the will of the riparian proprietor without committing a trespass, and so the estate of the riparian proprietor in the channel of the stream and the adjacent banks carries with it a virtual exclusive right to the fishing. I need hardly say that there is no right of property in the trout which are found in a running stream, and which are free to migrate from one estate to another; it may be otherwise in the case of ponds and enclosed waters artificially stocked with fish. Now, in the not infrequent case of a road or right-of-way following the course of a stream, I should not, apart from the decisions, be able to come to the conclusion that a member of the public using the public way, and casting his rod across the stream for trout, was committing a trespass or invading a right. But the cases cited by the Lord Ordinary certainly establish the proposition that trout-fishing is in itself a subject of legal protection, and that the right of the riparian proprietor to the exclusive privilege of fishing does not depend altogether on his right to prevent trespassers from coming upon his lands. Indeed, it is impossible to read the opinions of the learned Judges who took part in those decisions without seeing that in their view a right to be on the bank of a stream, *e.g.*, in the exercise of a public right-of-way, is a strictly limited right, and that the defence that the fisherman was fishing from a standpoint where he had a right to be would not be a relevant answer to an application for interdict against fishing in private waters.

Now, if the point to which I have spoken be admitted or established, it appears to me that the claim of the defender Henry as one of the public must fail. His case is that the Spey is a navigable stream; that the right of navigation includes the lesser rights of fording, wading, or walking along the banks of the stream; and he contends that being lawfully on the stream or on the bank adjacent thereto, he may fish for trout without invading proprietary rights. But it is not disputed that the pursuer Mrs Grant is proprietrix of the channel of the Spey to the *medium filum ex adverso* of her lands as well as of the bank. She sued as a riparian proprietor. The circumstance that the public have a right of navigation in the Spey does not take away the rights of the riparian proprietors in relation to the stream, but only obliges the proprietors not to use their rights in such a way as to interfere with the uses of navigation. This point is made perfectly clear by the judgment of the House of Lords in *Orr Ewing & Company v. Colquhoun's Trustees*, 4 R. (H. of L.) 116. The defender was not fishing from a boat, but supposing he were, I think that a fisherman fishing from a boat could not defend himself against an interdict by pleading that the Spey is a navigable stream, and that he was entitled to have his boat on it. In principle, the fisherman in the case supposed would be in no better position than the angler using the riverside and fishing from it. There

is no authority for holding that the servitude and use of navigation carries any such accessory rights with it as are contended for. Such expressions of judicial opinion as we have on this subject are to the effect that a right of navigation in the case of a non-tidal river is a species of public way or a right *ejusdem generis*.

While, therefore, I am not prepared to say that trout-fishing is an heritable estate, or anything more than an incident of the use of property, I am satisfied that we could not sustain the defences in this case without going counter to the authorities which recognise the right of a riparian proprietor to preserve his fishings.

I shall not add anything on the distinction between tidal and non-tidal rivers, because in the case of tidal rivers it is evident that the Crown alone has the right to restrain the public from fishing if such right exists at all. It is not likely that the Crown would seek to interfere with the right claimed by the public to fish in tidal waters, but the question is not before us, and its solution obviously involves considerations which have no bearing on the right claimed in the name of the public to fish in the navigable part of the Spey.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer—Dickson—F. Cooper. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defender—Graham Murray, Q.C.—Crabb Watt. Agents—Douglas & Miller, W.S.

Tuesday, January 16.

SECOND DIVISION.

WEST END CAFE COMPANY, LIMITED
(AND REDUCED), PETITIONERS.

Company—Reduction of Capital by Purchase of Postponed Shares—Companies Act 1862 (25 and 26 Vict. c. 89), sec. 51—Companies Act 1867 (30 and 31 Vict. c. 131), sec. 9—Companies Act 1877 (40 and 41 Vict. c. 26), sec. 3.

A company whose shares were fully paid-up, and consisted of preference and postponed shares, took powers by special resolution "to reduce the capital in any manner authorised by the Companies Acts in force at the time." The company thereafter passed a special resolution to reduce its capital with the consent of the holder of the postponed shares—(1) by the cancellation, as being unrepresented by available assets, of two-fifths of the nominal value of the postponed shares; and (2) by paying off the remaining three-fifths as being in excess of the wants of the company. To do this they proposed to

borrow the sum required on the heritable property of the company. The company had no creditors except tradesmen, servants, and holders of bonds over the heritable property. Upon the petition to confirm the reduction being presented, the Court remitted to a man of business, who reported that the reduction would not diminish liability in respect of unpaid capital, or interfere with the rights of creditors, but stated that he was unable to find authority for the proposition that the loan proposed constituted excess of capital in terms of the Act, and that the Act permitted the payment of such excess to one class of shareholders only.

The Court *confirmed* the reduction, but required the company to continue to use the words "and reduced" for three months.

By section 9 of the Companies Act 1867 (30 and 31 Vict. cap. 131) it is enacted that "Any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed, or as altered by special resolution, as to reduce its capital; but no such resolution for reducing the capital of any company shall come into operation until an order of the Court is registered by the Registrar of Joint-Stock Companies, as is hereinafter mentioned."

By section 10 of the said Act it is enacted that "The company shall, after the date of the passing of any special resolution for reducing its capital, add to its name, until such date as the Court may fix, the words 'and reduced' as the last words to its name, and those words shall, until such date, be deemed to be part of the name of the company within the meaning of the principal Act."

By section 11 of the said Act it is enacted that "A company which has passed a special resolution for reducing its capital may apply to the Court by petition for an order confirming the reduction; and on the hearing of the petition the Court, if satisfied that with respect to every creditor of the company who under the provisions of this Act is entitled to object to the reduction, either his consent to the reduction has been obtained, or his debt or claim has been discharged or has determined, or has been secured as hereinafter provided, may make an order confirming the reduction on such terms and subject to such conditions as it deems fit."

By section 12 of the said Act it is enacted that "The expression 'the Court' shall in this Act mean the Court which has jurisdiction to make an order for winding-up the petitioning company; and the 81st and 83d sections of the principal Act shall be construed as if the term 'winding-up' in those sections included proceedings under this Act; and the Court may, in any proceedings under this Act, make such order as to costs as it deems fit."

By section 81 of The Companies Act 1862

(25 and 26 Vict. cap. 193) the expression "the Court" is defined as meaning, in all cases of companies registered in Scotland, the Court of Session in either Division thereof."

By section 15 of The Companies Act 1867 it is enacted that "the Registrar of Joint-Stock Companies, upon the production to him of an order of the Court confirming the reduction of the capital of a company, and the delivery to him of a copy of the order and of a minute (approved by the Court), showing with respect to the capital of the company as altered by the order the amount of such capital, the number of shares in which it is to be divided, and the amount of each share, shall register the order and minute, and on the registration the special resolution confirmed by the order so registered shall take effect. Notice of such registration shall be published in such manner as the Court may direct."

By section 3 of The Companies Act 1877 (40 and 41 Vict. cap. 26) it is enacted that "the word 'capital,' as used in the Companies Act 1867, shall include paid-up capital; and 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, or to pay off any capital which may be in excess of the wants of the company, and paid-up capital may be reduced either with or without extinguishing or reducing the liability (if any) remaining on the shares of the company, and to the extent to which such liability is not extinguished or reduced it shall be deemed to be preserved, notwithstanding anything contained in the Companies Act 1867."

On 7th March 1889 the West End Café Company, Limited, was incorporated as a Company limited by shares by the registration of a memorandum and articles of association under the Companies Acts 1862 to 1880. The objects for which the Company was formed were to acquire the tenement of houses No. 129 Princes Street, Edinburgh, and to carry on there the business of a temperance restaurant, and other purposes incidental thereto, and to establish or purchase and carry on any other business of a similar nature, with power to borrow money for these and other purposes, or to receive money on loan, deposit, or debenture, or other obligation or security. The capital of the Company was £11,224, in shares of £1 each. Of these 9224 were A or preference shares, and 2000 were B or postponed shares. There was a power to increase the capital from time to time as the Company or the directors might resolve, but subject to the rights of the holders of the B or postponed shares. Of the A shares only £7910 were subscribed. The B or postponed shares were originally allocated as a part payment for the heritable property and plant and the goodwill of the business to one of the former proprietors of the restaurant which the Company acquired. The total paid-up capital of the Company stands therefore at £9910.

Section 17 of the articles of association of the Company provided that, "The said

A or preference shares, so far as issued for the time, shall be entitled to a preferential cumulative dividend on the amount paid up thereon, at the rate of 5 per centum per annum, before any dividend is payable on the said sum of £2000 of B shares; but on the clear profit being sufficient, after providing to the satisfaction of the directors for depreciation and other contingencies, the said cumulative dividend, and a dividend at the same rate on the B or postponed shares, the whole of the said A and B shares shall be entitled to draw a dividend at the same rate, and the B shares shall in that event be entitled to participate rateably along with the A shares in the profits of the Company; provided always, that the directors shall be entitled to set aside a sum not exceeding £150 a-year out of the profits of the Company, after paying the 5 per cent. dividends to the A shareholders, before the B shareholders shall be entitled to any dividend, and that until a reserve fund shall be accumulated amounting to £1000. In the event of the capital of the Company being reduced by losses, the same shall be borne rateably by both classes of shares."

In 1893 from the balance-sheets of the company it appeared that, in the four completed years of its working, the company paid only an aggregate dividend of 7 per cent. on the A shares as issued, thus leaving a balance of 13 per cent. for those years still due to the holders of the A shares. It appeared also that no reserve fund has been accumulated, although a considerable sum had each year been written off for depreciation.

In these circumstances it appeared to the directors and certain of the shareholders that it would be desirable that the B shares should be acquired in the interests of the A shareholders. Negotiations were therefore entered into between the company and the sole holder of the B shares, with the result that a minute of agreement was entered into by which the holder of these shares agreed on certain conditions to give them up to the company for the sum of £1200. For carrying out this arrangement it was suggested that the capital of the company should be reduced in terms of the 9th section of the Act of 1867 as construed by the 3rd section of the Act 1877.

The articles of association of the company as originally framed did not contain a power to reduce capital, but at an extraordinary general meeting held on the 5th day of September 1893, the company, in pursuance of the powers conferred by the 9th section above referred to, unanimously passed a special resolution in terms of the 51st section of the Act of 1862 that the following article be added to the articles of association of the company, viz.—"That the company shall have power by special resolution to reduce its capital in any manner authorised by the Companies Acts in force at the time." This resolution was confirmed at another meeting of the company held on 21st September 1893.

The company having taken these steps to alter its articles of association so as to in-

clude the necessary power to reduce its capital, then unanimously passed (at the said meeting on 21st September 1893) a special resolution in the following terms, viz.—

"That the capital of the company be reduced from £11,224, divided into 9224 'A' or preference shares of £1 each, and 2000 B or postponed shares of £1 each, to 9244 'A' or preference shares of £1 each, and that the said reduction be, with the consent of the holder of the said 2000 'B' or postponed shares, effected—(1) by the cancelment as being unrepresented by available assets of 8s. per share of the said 2000 'B' or postponed shares; and (2) by paying off, as being in excess of the wants of the company, of 12s. per share of the said 2000 'B' or postponed shares." This special resolution was confirmed at another general meeting of the company held on 6th October 1893.

The minute which it was proposed to register in conformity with the 15th section of the Companies Act 1867 was in the following terms:—"The capital of the West End Cafe Company Limited is £9224 divided into 9224 'A' or preference shares of £1 each. At the date of registration of this minute 7910 of the said 9224 shares have been issued, and the sum of £1 is paid upon each of said 7910 shares."

Thereafter in October 1883 the West End Café Company, Limited (and Reduced) presented a petition to the Court "to pronounce an order confirming the reduction of capital as resolved on by the said special resolution of 21st September and 6th October 1893; to approve of the foresaid minute; and on the said order and minute being registered by the Registrar of Joint-Stock Companies, to direct notice thereof to be made once in each of the said *Edinburgh Gazette* and *Scotsman*; and to authorise the Company to discontinue the addition of the words 'and reduced' to the Company's name, either immediately or after such shortspace of time as may seem advisable."

After intimation, advertisement, and other formalities, the Court on 14th November 1893 remitted to W. Traquair junior, W.S., Edinburgh, to inquire and report as to the regularity of the proceedings, and the reasons for the proposed reduction of capital.

The report of Mr Traquair after setting out the facts of the case proceeded:—"It will be observed by your Lordships that the special resolution for reduction of capital above quoted proposes to deal with only one class of shares, viz., the B or postponed shares, allocating to it both the loss and the so-called excess of capital. The allocation by a company of the whole excess of its capital to one class of shares seems to your reporter an unusual proceeding, especially where the effect of so doing is to pay the apparent full market value for such shares. Your reporter has been informed that the money required to repay the holder of the B shares the so-called excess of capital is to be obtained by borrowing on the security of the heritable property of the company. This loan, however, it is said, will bear a less rate of

interest than the dividend which the holder of the B shares might be ultimately entitled to draw. But the 'A' shareholders appear satisfied of the expediency of the step, and the holder of the B shares acquiesces in it. The creditors of the company are either heritably secured, or are trade creditors whose debts have been incurred since the date of the petition, and are paid monthly. It is therefore maintained by the petitioners that no one has any interest to object to the proposed reduction.

"Your reporter is of opinion that the proceedings have been regular. He further finds that there is no diminution of liability in respect of unpaid capital or interference with the rights of creditors.

"Your reporter has not been able to find a case similar to the present, nor have the agents for the petitioners been able to refer him to any. If, however, your Lordships are satisfied that a loan such as is proposed can be held to constitute excess of capital in terms of the Act, and that the Act permits the payment of such excess of capital to one class of shareholders only, then it appears to your reporter that the prayer of the petition may be granted.

"The petitioners pray that the addition of the words 'and reduced' to the company's name be dispensed with.

"By section 4 of the Companies Acts 1877, the Court, if it thinks it expedient, may dispense altogether with the addition of the words 'and reduced.' In the present case the reporter is respectfully of opinion that the Court may so dispense with these words.

"On the question of the competency of the petition, as before mentioned, being settled by your Lordships in the affirmative, your reporter is of opinion that an order in the following terms may be pronounced by the Court:—"The Lords having resumed consideration of the petition, along with the report by Mr William Traquair junior, approve of said report; confirm the reduction of capital as resolved on by special resolution of the 21st September and 6th October 1893; approve of the minute set forth in the petition; dispense with the addition of the words 'and reduced' to the company's name; and appoint notice of the registration of this order and of the said minute to be made by advertisement once in the *Edinburgh Gazette* and the *Scotsman* newspaper,—and decern."

After hearing counsel on the petition and report, the Court pronounced an interlocutor in the terms suggested by the reporter, except that they required the petitioners to continue the addition of the words "and reduced" to their title till the end of March 1894.

Counsel for the Petitioners—Lorimer.
Agents—Philip, Laing, & Company, S.S.C.

Tuesday, January 16.

FIRST DIVISION.

MACPHERSON AND ANOTHER.

Succession—Bequest—Absolute or in Trust—Joint or Several—Vesting.

A testatrix made a bequest "to C. M. for the benefit of herself and her sister J. M., both daughters of A. M." It was explained that J. M. was of weak mind, and entirely dependent on others for ordinary personal comforts.

Held that the bequest vested absolutely at the death of the testatrix in the two sisters to the extent of one-half each, but that C. was trustee for the administration of her sister's share.

Miss Robina Young, who died 13th March 1893, left a holograph will dated 30th June 1872, which contained, *inter alia*, the following bequest:—"Also I give and bequeath to Catharine Alexandrina Macpherson, for the benefit of herself and of her sister Jane Macpherson, both daughters of the aforesaid Agnes Young or Macpherson, all the cash moneys, securities for money, books, wardrobe, and all the rest, remainder, and residue of my estate which I may be possessed of at the time of my decease." The testatrix nominated Alexander Ronaldson as trustee and executor of this last will and testament.

A special case was presented by Miss Catharine Alexandrina Macpherson of the 1st part, and the *curator bonis* of Mrs Jane Macpherson of the 2nd part, in which it was explained that "Miss Jane Macpherson has been all her life rather weak mentally, and quite incapable of doing anything to earn a means of subsistence for herself, while she has always been entirely dependent on those with whom she has resided for ordinary personal comfort. This was well known to the testatrix, the said Robina Young, who was also aware that at the date of her will there was no *curator bonis* appointed to and acting for her said niece." A *curator bonis* had been appointed to Miss Jane Macpherson in 1886, and when Miss Young made her will her means were very moderate, but that she had died leaving about £18,000.

The questions submitted for the opinion of the Court were as follows:—" (1) Whether under the foresaid bequest in the will of Miss Robina Young, the subjects and residue of her estate thereby bequeathed belong absolutely to Miss Katherine Alexandrina Macpherson, she having the discretion of applying them, in so far as she may find to be necessary, for behoof of her sister, without any interference on the part of third parties? or, (2) Whether Miss Katherine Alexandrina Macpherson and Miss Jane Macpherson are each entitled to one-half of the said bequest absolutely, Miss Jane Macpherson's half being retained by her sister Miss Katherine Alexandrina Macpherson during their joint lives, as trustee for her, and to be administered by her for