Friday, January 17.

SECOND DIVISION.

THE CITY PROPERTY INVESTMENT TRUST CORPORATION, LIMITED, PETITIONERS.

Company—Reduction of Capital—Depreciation in Stock Held by Investment Company—Alteration of Status of Shareholders—Ultra vires.

The Court will not confirm a reduction of the capital of a company unless satisfied that there has been a loss of capital.

An investment company incorporated under the Companies Acts presented a petition for confirmation of a reduction of capital on the ground that certain stock held by it had depreciated in value. The resolution for reduction of capital followed upon a statement showing a depreciation in the value of the said stock, as at 31st January 1895, of £10,533; but subsequently, and before the application was disposed of, there was a rise in the value of the stock, and the depreciation in November 1895 amounted only to £8113. The proposed reduction of capital was £8971. The Court *refused* the petition.

Question—Whether the resolution for the reduction of capital, which affected the status of the preference and deferred shareholders of the company, was *ultra vires*.

On 9th January 1890 the City Property Investment Trust Corporation was incorporated under the Companies Acts 1862 to 1886. The leading business of the company was that of investment in heritable and other property.

By article 5 of the memorandum of association the capital of the company was declared to be £230,000, divided into 20,000 preferred shares of £10 each, and 30,000 deferred or founders' shares of £1 each. The holders of preferred shares were declared to be entitled to a preferable dividend of £5 per cent. per annum out of the profits of each year, and to preferable repayment of their capital, in the event of a liquidation. Subject to these rights, the profits and assets of the company were declared to belong to the holders of deferred or founders' shares. It was further provided that the preferred shares, when fully paid up, should be converted by the directors into stock, and that the directors might, with the sanction of the shareholders, convert any paid-up shares into stock.

Among the objects of the company, as defined by the memorandum of association were the following (article 3):—"From time to time to create and issue the shares of capital, original, increased, or reduced, or any part thereof, as ordinary, preferred, guaranteed, deferred or founders' shares. From time to time to convert or subdivide the shares of capital into shares of different nominal amount, and also from time to time to convert the shares of capital or the stock of the company, in the event of shares being converted into stock, or any part of such shares or stock, into shares or stock of one class and with like privileges, or of several classes and with different privileges, and of the same or different amounts, and respectively with any fixed, fluctuating, contingent, preferential, perpetual, terminable, deferred, or other dividend or interest, and as regards shares subject to calls, subject to the payment of calls of such amounts and at such times as the company from time to time thinks fit; and in the case of shares and stock, with such rights in the distribution of and assets of the company, and with a special or without any right of voting, and subject to such other conditions and restrictions as may by the company in general meeting be from time to time determined."

The articles of association contained the following provisions:—"The company may at any time reduce its capital and subdivide or consolidate its shares in any manner permitted by law, and, when requisite, the directors may apply for the sanction of the Court to any such reduction."

On the formation of the company there were issued of its authorised capital 12,988 preferred shares of £10 each, afterwards converted into £129,880 preferred stock, and 24,771 deferred or founders' shares of £1 each fully paid, amounting together to £154,651. The remaining 7012 preferred and 5229 deferred shares were not issued. In pursuance of its objects, the company expended large sums in the purchase of heritable properties in Glasgow, and in particular, on its inception in 1890, it acquired the Blythswood Holm property, now known as The Central Chambers, at the price of £125,800, and it subsequently made great improvements thereon. In the last balance-sheet of the company for the financial year ending on 31st January 1895 the heritable properties owned by the company taken at their cost and the amount expended thereon to date were entered at £170,450, 4s. 10d. The company also, in exercise of its general powers of investment, invested large sums in various securities. The total amount of these at the date of the last balance-sheet was £78,312, 13s. 7d.

During the two years prior to 31st January 1895 certain of the investments held by the company showed considerable depreciation, and accordingly on 28th March 1895, at an extraordinary general meeting, the following resolution was passed as a special resolution, and was duly confirmed at another extraordinary general meeting held on 27th April 1895.

"The capital of the company shall be reduced from £154,651 to £145,679, 18s., and such reduction shall be effected by cancelling capital which has been lost or is not represented by available assets in manner following, that is to say:—The whole of the preferred stock, amounting to £129,880, and the whole of the deferred shares, amounting to £24,771, which together amount to said sum of £154,651, shall be

cancelled, and in lieu thereof there shall be created and issued ordinary stock to the amount of £145,679, 18s., and the same shall be apportioned amongst the holders of the preferred stock and deferred shares as follows:—(1) The holders of the present preferred stock shall receive of the ordinary stock 95 per cent. of their present holding; and (2) the holders of the present deferred shares shall receive of the ordinary stock 90 per cent. of their present holding." This resolution was opposed by holders of both preference and deferred shares.

Thereafter a petition was presented by the company for confirmation of the reduction of capital effected by the resolution.

Answers to the petition were lodged on behalf of shareholders of both classes. They maintained that the prayer of the petition should be refused on four grounds:—(1) that the proposed alteration on the *status* of the two classes of shareholders was incompetent; (2) that no sufficient reasons were averred or existed for such alterations; (3) that with regard to the proposed reduction of capital, it had not been ascertained that the company had suffered any loss on capital account; and (4) that in any event the method of writing down the capital was arbitrary and not founded on any intelligible principle.

From a report under a remit by the Court, it appeared that on 31st January 1895 the depreciation in value of the investments in question (which consisted of certain stocks held by the company) was £10,533, 0s. 6d., while on 1st November 1895 the stocks had increased in value so as to show a depreciation of only £8113, 12s. 6d., being less than the proposed reduction of capital, viz., £8971.

Argued for the petitioners—(1) *With regard to the proposed reduction of capital.*—Whether there had or had not been a loss was a matter not for the Court to determine but for the company. The question for the consideration of the Court was—Did the reduction operate unfairly (*a*) against the creditors of the company or the public, or (*b*) against the shareholders. The powers granted under the Companies Acts of 1867, secs. 9 and 11, and of 1877, secs. 3, 4, and 5, contemplated that it should be within the power of the company to operate reduction of its capital in any manner of way in which capital could be reduced. There were no limitations as to the manner in which the capital might be reduced as long as it was not unfair to either the creditors, the public, or the shareholders—*British and American Trustee and Finance Corporation* v. *Couper*, 1894, App. Cas. 399. (2) *With regard to the alteration in the status of the shareholders.*—There was a distinct provision in the memorandum of association for such an alteration. In the cases founded on against the petitioner, viz.,—*Hutton* v. *The Scarborough Cliff Hotel Company Limited*, 1865, 4 De G., J. and S. 672; *in re Financial Corporation* (*Holme's* case), 1867, L.R., 2 Ch. App. 714; *Ashbury* v. *Watson*, 1885, L.R., 30 Ch. D. 376; and *Liquidator of Milford Haven Shipping Company* v. *Jones*, March 20, 1895, 22 R. 577, there was no provision in the memorandum of association authorising the proposed alteration.

Argued for the respondent—(1) *With regard to the proposed reduction of capital.*—It had not been ascertained that the company had suffered any permanent loss on capital account. The value of the investments in question was increasing, and the loss through depreciation was not permanent and might be recovered. Besides, these investments were a very small portion of the capital of the company. The great bulk of it was invested in heritable property which had not been valued. There was a strong presumption that this heritable property had increased in value 10 or 15 per cent. since it was acquired in 1890. Further, the method adopted in writing down the capital did not proceed on any recognised or intelligible principle. (2) *With regard to the alteration in the status of the shareholders.*—The action of the company was incompetent. After shares were issued on certain conditions, it was *ultra vires* of the company to alter the conditions upon which the shareholders held these shares, without their consent—Opinion of Lord Cairns, L.-J., in *Financial Corporation* (*Holme's* case), *supra*, L.R., 2 Ch. App. p. 733; opinion of Lord Kinnear in *Liquidator of Milford Haven Shipping Company Limited*, *supra*, 22 R. 582.

At advising—

LORD TRAYNER—I have the greatest doubt whether it was within the competency of the petitioners to pass the resolution of which they ask our approval It seems to me that under the disguise of a reduction of capital the pursuers are seeking to reconstruct their company on a basis essentially different from that on which it was constituted. The resolution before us infringes the rights alike of the preference and deferred shareholders, and I am not surprised that it has not met with opposition from both defenders. It is enough, however, for the decision of the question now before us, to say that the petitioners have entirely failed to satisfy me that any capital has been lost, or that there is any good reason for sanctioning at present a reduction of that capital, and therefore I am for refusing the petition.

LORD JUSTICE-CLERK—That is the opinion of the Court.

LORD RUTHERFURD CLARK was absent.

The Court refused the petition.

Counsel for the Petitioner—Dickson—Younger. Agents—J. & J. Ross, W.S.

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