

was anything in the age or appearance or conduct of this pursuer, a millworker, to make it evident that she required, or thought that she required, assistance. I cannot hold that the defenders were bound to do more than they admittedly did, namely, to provide for all the passengers means of egress from their train which are admittedly sufficient in case of the ordinary passenger, and to have in immediate and convenient readiness, if needed, additional assistance for those passengers who signified their need of such and their desire to have it. It seems to me that the sentence at the end of cond. 5, in which the pursuer sums up her case, is shown by her own averments to be a manifest *non sequitur*. It runs thus—"All these they failed to do, and the pursuer had thus no alternative except to descend unassisted from the carriage where it was." But her own averments show that she had an obvious alternative, namely, to ask for assistance from the defenders' servants, which it is not suggested they would have refused to give. It is not necessary to go further, but the case as presented by the pursuer strongly suggests that she did not ask for the assistance of the defenders' servants, because she did not think she needed any assistance from anybody. Other passengers descended from her carriage without any request for help from her, and it seems not improbable that if assistance had been proffered by the defenders' servants it would not have been accepted by her.

I therefore think that the Lord Ordinary has come to a right conclusion. But I think he stretches the case of *Neilson*, 1907, S.C. 272, 44 S.L.R. 235, too far, when, after referring to the speciality in that case, namely, that the pursuer averred that she was unaware that the train was past the platform and alighted under the impression that the train was opposite it, he adds—"As no such averment is made in this case, I think that case is an authority for dismissing the present action as irrelevant." But it is clear there may be other cases without that speciality where a relevant case could be made. Suppose, for instance, it had been said that the defenders had no servants within hail or signal of the pursuer, or that on asking the defenders' servants for assistance they refused to give it—in either of these cases I think there would have been a relevant averment of fault for inquiry.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Chree, K.C. — Wark. Agents—J. & J. Galletly, S.S.C.

Counsel for the Defenders and Respondents—Macmillan, K.C. — E. O. Inglis. Agent—James Watson, S.S.C.

HOUSE OF LORDS.

Thursday, February 10.

(Before Lord Atkinson, Lord Shaw, Lord Parker, and Lord Sumner.)

CALDWELL & COMPANY, LIMITED v. CALDWELL.

(In the Court of Session, February 25, 1915, 52 S.L.R. 450, and 1915 S.C. 527.)

Company—Reduction of Capital—Confirmation by Court—Discretion of Court—Inquiry into Reasons—Loss of Capital—Companies Consolidation Act 1908 (8 Edw. VII, cap. 69), secs. 46 and 50.

The House of Lords dismissed an appeal from an interlocutor which confirmed a resolution for reduction of the capital of a company proceeding on a statement that capital had been lost, although a reporter to whom the matter had been remitted thought no capital had in fact been lost and no evidence had been taken by the Court, the company having meanwhile again passed a resolution to reduce the capital, and having as required by the Court altered its articles of association to the satisfaction of the reporter with a view to protecting the interests of the dissentient shareholder.

This Case is reported *ante ut supra*.

The respondent William Hay Caldwell appealed to the House of Lords.

At delivering judgment—

LORD PARKER—[*Read by Lord Sumner*].—It was decided by this House in *Poole v. National Bank of China, Limited*, 1907 A.C. 229, that whenever a company having the necessary powers in that behalf has passed a special resolution for the reduction of capital the Court has jurisdiction to confirm such reduction. In cases where the rights of creditors are not affected—that is to say, when the proposed reduction does not involve either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital—the only relevant considerations are—(1) whether the Court ought to refuse its sanction out of regard to those members of the public who might subsequently become shareholders in the company, and (2) whether the reduction is fair and equitable as between the different classes of existing shareholders.

No alteration in this respect has been made by the Companies Consolidation Act 1908, the provisions of which are indeed open to less doubt than those of the Acts which it superseded.

It often happens that the special resolution for the reduction of a company's capital refers to the amount by which the capital is to be reduced as lost or unrepresented by available assets. In such cases I understand that since the decision of the case above referred to the practice of the courts in Scotland has been to dispense with proof of the facts referred to in the resolution,

provided at any rate that there is no reason to suspect the *bona fides* of the parties.

The practice of the High Court of Justice in England has not been uniform. Some judges have dispensed altogether with such proof as not being essential to the exercise of the jurisdiction of the Court. Others have insisted on the production of some evidence on the point. My own practice was to insist on *prima facie* evidence of the existence of the state of facts referred to in the resolution. If no such *prima facie* evidence were forthcoming it might well be that the special resolution had been passed under the influence of some mistake or misrepresentation as to the true facts, and it would be unfair to the minority if not also to the majority of the shareholders to confirm a reduction voted under such circumstances. Further, inability to produce some such evidence might well suggest want of *bona fides* in the matter. If capital not really lost or unrepresented by available assets were cancelled, it might be possible thereafter, by some adjustment of the figures in the company's balance sheet, to carry the amount so cancelled to profit and loss account, and so indirectly return paid-up capital to shareholders, thus affecting the rights of creditors. I still think, therefore, that where the reduction of capital is based on the ground that capital has been lost or is unrepresented by available assets, it is, though not necessary, at any rate wise and prudent to insist on some evidence of the fact.

The resolution in the present case proposed a reduction of £12,500 in the company's capital, based on the fact that this amount of capital had been lost or was unrepresented by available assets. The company's last balance sheet, that of 27th September 1913, showed a surplus of assets over liabilities amounting to £1885 odd, but in such balance sheet the goodwill of the business was valued at £9163 odd. Moreover, the company's business had been recently brought to a standstill by an extensive fire, and it would be some time before its buildings and machinery would be restored to working order. Further, the buildings and machinery in question were brought into the balance sheet at values arrived at by deducting the amounts received under policies of fire insurance from the values at which they appeared in the last preceding balance sheet. Having regard to the effect of prolonged cessation of business upon the value, if any, of the goodwill, and to the fact that the amount of the actual loss by a fire is seldom, if ever, covered by the amounts recovered under policies of insurance, I think that there was strong *prima facie* evidence that at least £12,500 of the company's capital had been lost or was unrepresented by available assets, and the *bona fide* belief of the directors that this was so is not disputed. It appeared, however, that the company had after the fire made an attempt to raise fresh capital, and in connection with this attempt had obtained valuations of the buildings and machinery as they stood after the fire and before reinstatement.

By substituting the amounts of these valuations for the values of the buildings and machinery appearing in the balance sheet there would, even without allowing anything for goodwill, have been a balance of assets over liabilities—in other words, no capital would have been lost or be unrepresented by available assets. This was the view taken by Sir George Paul, to whom the matter was by the interlocutor of the 22nd May 1914 remitted for inquiry and report. I am not sure, however, that the view is a sound one. There is no evidence as to the instructions upon which the valuations were made or the method of valuation adopted. It is quite impossible to suppose that the valuations could have been made upon break-up prices, and half-destroyed buildings and machinery could not be used for any useful purpose without the outlay of money. What expenditure was contemplated as necessary to be incurred? Was it greater or less than the moneys received under the insurance policies? I cannot say, and it would take strong evidence to convince me that the balance sheet values were so absurdly underestimated that the value of what remained after the fire was really almost as great as the value which before the fire had been placed upon the whole. I should have asked for evidence on these points, and in default of its being produced I doubt whether I should have held that the *prima facie* case arising on the balance sheet had been displaced.

When the case was heard upon Sir George Paul's report, the Court appears to have been of opinion that though it had not been proved that no capital had been lost or was unrepresented by available assets, there was no *prima facie* case that any capital had been so lost or was so unrepresented.

Under these circumstances I think the more prudent course would have been to adjourn the hearing so as to give the shareholders an opportunity of reconsidering the matter and passing another special resolution with the real facts present to their minds.

The Court, however, holding that the matter was within their discretionary jurisdiction, and that (provided certain alterations for the appellant's protection were made in the articles of association) the proposed reduction was fair and equitable to all shareholders including the appellant, by their interlocutor of 25th February 1915 confirmed the reduction, but directed that it should not take effect until the articles of association had been altered in such manner as would, in the opinion of Sir George Paul, prevent the said reduction from unfairly affecting the interests of the appellant.

Since the last-mentioned interlocutor was made, and before the present appeal was presented to your Lordships, the precise respects in which the articles were to be altered for the appellant's protection were in due course determined by Sir George Paul and effected by special resolution of the company. Further, since the last-mentioned interlocutor and before this appeal to your Lordships, the company passed a special resolution that without prejudice to

the reduction of capital previously resolved on the capital of the company should be reduced in a similar manner, but without reference to any capital being lost or being unrepresented by available assets. At the same time they also passed an ordinary resolution, placing on record that the shareholders approved of the reduction as being right and proper in the circumstances of the company irrespective of any valuations which had been procured or produced in the application before the Court.

All the members of the company with the exception of the appellant voted in person or by proxy in favour of the special resolution, and the ordinary resolution was passed unanimously. These resolutions, in my opinion, entirely remove any possible objection to the course taken by the Court below, and I can only express my astonishment that under the circumstances the appellant was advised to appeal to your Lordships at all.

I think the appeal should be dismissed with costs, leaving the Court below to make such final order confirming the reduction as may be required.

LORD SUMNER—I agree with the judgment I have just read.

LORD ATKINSON—I have had the pleasure and advantage of reading the judgment of my noble and learned friend Lord Parker which has just been read, and I concur in it.

LORD SHAW—[*Read by Lord Atkinson*].—On 3rd February 1914 this company resolved to reduce its capital by £12,500. Unfortunately the special resolution contained these words, “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.” These words were unnecessary; they have led to protracted controversy; but being contained in the body of the resolution itself it is not surprising that the subject of capital being lost or unrepresented by available assets should have entered into the inquiry which was made.

In the present state of the law, if the Court, although not satisfied that capital has been lost or unrepresented either as or to the extent conceived by the company itself, be of opinion in regard to a proposed reduction of capital that (1) no creditors' interests would be prejudiced thereby, (2) no detriment would be produced to the investing public, or (3) the reduction would not act inequitably or unfairly among the shareholders, then, in my opinion, the Court is entirely free to sanction the reduction. Such reduction, apart from loss of assets, may be, in Lord Macnaghten's words in *Poole's* case, “a prudent and business-like matter,” and in any event it would be an act of domestic management by the company of its own affairs with which a court of law should not interfere.

This was, in my view, the state of the law prior to the Companies Act of 1908; by that statute (46-56) it is still so, and the language of section 46 does not leave any doubt of the power to reduce in any way—the case of a

loss or disappearance of capital being instanced—without prejudice to the generality of the power.

While accordingly the shape of the resolution may have brought about the inquiry into this question of loss of capital, the learned Judges of the Court below in no way accepted the view that the law or statute was subject to any other construction than that above expressed. Lord Skerrington explains this in his judgment, and I venture to concur in terms with his view, that “I cannot find any trace in the statute of a suggestion that the Court ought to review the opinion of the company and its directors in regard to a question which primarily at least is domestic and commercial.”

In Scotland the procedure upon such application is by way of remit to a “man of business,” that is, to a solicitor of standing. No one can doubt after perusing the exhaustive report of Sir George Paul that the matter has been thoroughly inquired into, and the fullest consideration has been given to every objection taken by the appellant and to every view of his rights which he put forward. There is therefore in Scotland no question of procedure such as that which has given rise to the variety alluded to in the opinion of my noble and learned friend Lord Parker.

In regard to the three points above mentioned, they stand as follows—(1) and (2) It is admitted that no creditors' rights suffer prejudice, and that (this is a “private” limited company) the reduction would involve no prejudice to the public. There remains only the third, viz., possible unfairness among the shareholders. The appellant is the only member of the company who suggests this, the others are all satisfied.

What Sir George Paul did was to suggest a certain alteration in the articles of association so as completely to safeguard the appellant's position. I am in no way convinced that anything of the kind was necessary. But the Court below acquiesced in the suggestion, and the thing has been done. This appeal to your Lordships' House accordingly appears to me to be without any justification.

The argument presented on the figures bearing upon the question whether the company had sustained in fact losses which would account for the £12,500 proposed to be written off, even if it were well founded, would not warrant the conclusion that the Court could not or should not sanction the reduction. But I am of opinion that it is not well founded. Having studied the documents, I take the view which the directors took. I think this reduction was in the interests of prudent and sound administration. The serious fire, with the loss and possible dislocation of trade, and the existence, notwithstanding this, of an item of goodwill of over £9000 under the head of “assets,” fully warranted in themselves a radical rectification such as the proposed reduction of capital may at least assist in effecting. I venture to agree with

the analysis of the finance made in Lord Parker's judgment.

I am of opinion that the appeal should be dismissed with costs.

Their Lordships dismissed the appeal.

Counsel for the Appellant—Clauson, K.C.—Smith Clark. Agents—J. & D. Smith Clark, W.S., Edinburgh—Murray, Hutchins, Stirling, & Company, London.

Counsel for the Respondents—Macmillan, K.C.—Wilton. Agents—Davidson & Syme, W.S., Edinburgh—Faithfull & Owen, London.

COURT OF SESSION.

Tuesday, January 11.

SECOND DIVISION.

[Sheriff Court at Oban.]

M'LEAN v. MACBRAYNE LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1)—Arising Out of and in the Course of the Employment—Seaman Returning to Ship.

A seaman who was employed on a motor ship, which was pulled up on a slip on the island of Kerrera, opposite Oban, for the purpose of its annual overhaul, was allowed with the rest of the crew to leave work at 5:30 p.m., either sleeping on board or in Oban at their option. While bringing back to the ship from Oban, about 10 p.m. one night, another member of the crew in a small boat, which did not belong to the ship, he was drowned by the overturning of the boat. *Held* that the accident did not arise out of his employment.

In an arbitration in the Sheriff Court at Oban under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), in which Sarah M'Coll or M'Lean, widow, Tobermory, mother of the deceased John M'Lean, late seaman on board the motor ship "Lochinvar," dependant of the said John M'Lean, respondent, claimed compensation from David Macbrayne, Limited, shipowners, Oban, appellants, the Sheriff-Substitute (WALLACE) found the respondent entitled to compensation, and at the request of the appellants stated a Case for appeal.

The Case stated—"The said deceased John M'Lean was a seaman on board the motor ship 'Lochinvar,' belonging to the appellants, and on or about 18th June 1914, by an accident, met his death by drowning. The accident happened while the 'Lochinvar' was undergoing her annual overhaul at the island of Kerrera, and while the said John M'Lean was conveying another deck hand of the said ship named John Cameron from the shore at Oban to the vessel, about 11 o'clock p.m., the boat in use by the said John M'Lean upset or swamped, and the occupants falling into the sea the said John

M'Lean was drowned. The accident happened in the sea channel between the north-west end of Oban Esplanade and the slip on the opposite island of Kerrera, belonging to John Munro Limited, on which the 'Lochinvar' was drawn up.

"I found the following facts admitted or proved:—1. The respondent is a widow, and resides at 57 Main Street, Tobermory, and the appellants are shipowners carrying on and having a place of business at the North Pier, Oban. 2. The deceased John M'Lean, who was a seaman on board the appellants' motor ship 'Lochinvar,' was a son of the respondent. 3. At the date of the accident after referred to the 'Lochinvar' was hauled up on Munro's slip in the island of Kerrera undergoing an annual overhaul. She went on said slip on 15th June 1914, and remained there till 19th June following. 4. Said slip forms part of a piece of ground about 8 acres in extent occupied by Messrs John Munro Limited, Oban, and is surrounded on three sides by private ground, through which there is no road or right of access to the slip. 5. While the 'Lochinvar' was on the slip the crew were employed in painting and cleaning her, their working hours being from 7 in the morning till 5:30 in the evening. 6. The majority of the crew resided in Tobermory, and while engaged in regular passenger service the 'Lochinvar' remained overnight at that port. When she did so the crew were free either to sleep on board or to go to their own homes. The said deceased John M'Lean commonly but not invariably slept on board. 7. While the 'Lochinvar' was on the slip at Kerrera the crew were free to spend their evenings after 5:30 as they pleased, and while there was no obligation on them to sleep on board accommodation as usual was provided for them, which they were free to occupy or not as they pleased. 8. Both while on passenger service and while on Munro's slip the crew of the 'Lochinvar' had to provide and cook their own food and to provide their own bedding and blankets. 9. It was an implied condition of their contract of service that while the 'Lochinvar' was on Munro's slip the crew were free to go to Oban after 5:30 in the evening, either to purchase provisions or for such other purpose as they pleased, and to return either that evening or at any other time so long as they turned up at work by seven o'clock the next morning. 10. During the time of her overhaul the boats of the 'Lochinvar' remained on her davits. They were therefore not in use to convey members of the crew from the island to Oban, and the crew were expected to make their own arrangements for their conveyance to and from Oban. 11. The 'Despatch,' a small steam launch belonging to John Munro Limited, was used for the purpose of conveying Messrs Munro's workmen from the island to Oban where they resided, and in the course of the day usually made several trips for that purpose. The workmen were always conveyed from Oban to the island at 6:45 in the morning, work beginning for them at 7, and *vice versa* at 5:30 in the evening, when they stopped work for the day. 12. By the courtesy of Messrs Munro