to fulfil the obligations of the lease it should be in the power of Gray's trustees to resume possession. They would then have been in a different position. They would have had the same powers and position as a landlord, for it is at the root of a landlord's peculiar right that he should have the power to resume possession. But Gray's trustees have reserved no such right. They are merely personal creditors with a right of relief, but with no power of resumption.

The Lords refused the note.

Counsel for Gray's Trustees—Jameson. Agents—J. L. Hill & Co., W.S.

Counsel for Respondents—D.-F. Kinnear, Q.C.—Graham Murray. Agents—J. & F. Anderson, W.S.

Friday, December 2.

FIRST DIVISION.

SPECIAL CASE—THE OAKBANK OIL COMPANY (LIMITED) *v.* CRUM.

Public Company—Articles of Association—Payment of Dividend where some Shares fully Paid-up and others not—Companies Acts 1862 *and* 1867 (25 *and* 26 *Vict. c.* 88, *and* 30 *and* 31 *Vict. c.* 131).

The articles of association of a limited public company provided that "the directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares." The articles also provided that the word "capital" should mean "the capital for the time being of the company," and the word "shares" the "shares into which the capital is divided." The capital consisted of 60,000 shares of £1 each. Two-thirds of these were fully paid up, but on the remainder 5s. per share only had been paid. *Held* that under the terms of the articles of association the dividends were to be paid in proportion to the nominal, and not in proportion to the paid-up, capital held by each member.

Opinions that it was in the power of the company, under the 24th section of the Companies Act of 1867, to alter its regulations by special resolution so as to provide that the dividends should be paid in proportion to the paid-up capital and not the nominal capital.

The Oakbank Oil Company (Limited)—a joint-stock company limited by shares, and having its registered office in Scotland—was incorporated, under the Companies Acts 1862 and 1867, on 2d March 1869. The nominal capital of the company, under its memorandum of association as registered, was declared to be £20,000, in 400 shares of £50 each. On 16th November 1869 this capital was, in terms of the articles of association, increased by the issue of new shares of the aggregate amount of £20,000, divided into 400 shares of £50 sterling each. Thereafter by special resolution, passed at an extraordinary general meeting on 21st February 1873, and confirmed at an extraordinary general meeting on 14th March 1873, it was, in accordance with section 21 of the Companies Act 1867, resolved that the capital of £40,000 should be divided into 40,000 shares of £1 each, which was accordingly done. The whole of the capital as thus constituted was fully paid up. But on 6th July 1875 a further issue of shares was made, of the aggregate amount of £20,000, divided into 20,000 shares of £1 each, and on these shares a call to the amount of 5s. per share only was made. The capital of the company therefore consisted at the date of the present proceedings of 40,000 shares of £1 each on which the full amount had been called up, and of 20,000 shares of £1 each on which 5s. per share had been called up.

By the 71st of the articles of association it was provided that "the directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares." And the interpretation clause defined the word "capital" to mean "the capital for the time being of the company," and the word "shares" as "the shares into which the capital is divided."

Both prior to the issue of shares in 1875, and since that issue, the company at each of its general meetings, on the report of the directors recommending a dividend to be paid, sanctioned by resolution the payment of dividend at the rate of so much per cent. on the paid-up capital, and dividends were declared and paid accordingly. The minutes of these meetings were in terms of which the following is a specimen:—"That a dividend be paid from the profits of the past year's working equal to seven and a-half per cent. per annum, free of income-tax, upon the paid-up capital of the company, at the rate of $3\frac{3}{4}$ per cent. payable on 15th July, and $4\frac{3}{4}$ per cent. payable on 16th December next, at the registered office of the company, 54 Miller Street, Glasgow,—which was carried unanimously." This practice continued down to and inclusive of the year 1880. Shortly thereafter H. Brown Crum purchased fifty shares of the 1875 issue, on which 5s. per share has been paid up, and prior to the meeting of the company, on 17th May 1881, he intimated to the directors that he intended to challenge the principle on which dividends had hitherto been allocated on the 5s. paid-up shares, and to maintain his right to have the dividend declared and paid on the whole shares of the company in proportion, not to the amount paid up on the different shares held by each member, but in proportion to the number of shares held by each member, irrespective of the question whether such shares were fully or only partially paid up. The directors intimated that they could not assent to these views, and that they intended to recommend to the general meeting of the company, to be held on 17th May 1881, payment of a dividend at the rate of $7\frac{1}{2}$ per cent. on the paid-up capital of the company. At that meeting accordingly the directors recommended, and the company in general meeting assembled unanimously passed a resolution in the usual terms, that a dividend of $7\frac{1}{2}$ per cent. on the paid-up capital of the company should be paid. Crum not having been at that time entered in the register as proprietor of his shares, was not entitled to take part in the proceedings of a meeting of shareholders, and accordingly he was not present and did not vote at the said meeting. It was, however, prior to the meeting agreed

that the question as to the principle on which dividends ought to be declared and paid should be made the subject of a Special Case, and that Crum should not be prejudiced by not taking proceedings to interdict payment of the dividend.

This Special Case was accordingly presented, to which the company were the parties of the first part, and Crum the party of the second part.

The question submitted for the opinion and judgment of the Court was the following—"Whether the second party, as the holder of £1 shares on which only 5s. per share has been paid up, is entitled to claim that all dividends declared shall be declared in proportion to the number of shares held by members without regard to the amount paid up on said shares? Or whether it is within the powers of the directors to recommend, and of the company to sanction, a dividend payable to each shareholder in proportion to the amount paid up upon the shares held by him?"

The 71st of the company's articles above quoted was identical in its terms with the 72d regulation of Table A, Schedule I, appended to the Companies Act of 1862 (25 and 26 Vict. cap. 89); and the following other provisions of Acts of Parliament were referred to in argument:—

The Companies Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 17), sec. 123, enacted that "Previously to every ordinary meeting at which a dividend is intended to be declared the directors shall cause a scheme to be prepared, showing the profits, if any, of the company for the period current since the preceding ordinary meeting at which a dividend was declared, and apportioning the same, or so much thereof as they may consider applicable to the purposes of dividend among the shareholders, according to the shares held by them respectively, the amount paid thereon, and the periods during which the same may have been paid, and shall exhibit such scheme at such ordinary meeting, and at such meeting a dividend may be declared according to such scheme."

The Companies Act 1867 (30 and 31 Vict. cap. 131), sec. 24, provided that "Nothing contained in the Principal Act shall be deemed to prevent any company under that Act, if authorised by its regulations as originally framed or as altered by special resolution, from doing any one or more of the following things, namely, . . . (3) Paying dividend in proportion to the amount paid up on each share in cases where a larger amount is paid up on some shares than on others."

Argued for Crum—The dividends ought to be paid to members in proportion to the number of their shares, whether these shares were fully paid up or not. That was the natural construction of the 71st of the company's articles, and was confirmed by comparing the 72d of the regulations in Schedule I, Table A, of the Companies Act of 1862, with sub.-sec. 3 of sec. 24 of the Companies Act of 1867—See Buckley on the Companies Acts, 3d ed., p. 414—and also by comparing the 72d regulation with sec. 123 of the Companies Clauses Consolidation (Scotland) Act 1845. At all events, the 71st article, read along with the definitions of "capital" and "shares" in the articles of association, admitted of no other construction. There was no injustice in this result, for the company were trading on the credit of those members whose shares were not fully paid up. And in any case the company might alter the present state of matters, either by calling up the remaining 15s. per share or by passing a special resolution to pay the dividends according to the paid-up value of the shares.

Replied for the company—The presumption was for payment of dividend in proportion to the amount paid up—Lindley on Partnership, i. pp. 679 and 797. That was the equitable rule, because though no doubt the company were trading on the credit of those who had not fully paid up, yet such members were amply compensated by the use of their money in the meanwhile, and ought not to receive interest twice over. If, however, the particular company's articles provided otherwise, of course equity must yield to the agreement which the partners had chosen to make. Did the company's articles so provide here? The 71st article when taken by itself was admittedly ambiguous. The other side contended that "number" was the word which ought to be understood; the company contended that "number and value" were the true words. Either construction was grammatical and in itself intelligible; the company's alone was equitable. The objecting shareholder, however, said that the 71st article must be read along with the interpretration clause. That was so. But the definitions in that clause were not so stringent as to leave no other possible construction of the 71st article than that contended for by the other party. The question was really left where it was — whether "number" only or "number and value" were the words to be supplied. As regards sec. 24 of the Act of 1867, the company also took advantage of it, for they said that the words "if authorised" meant "if not prohibited," and on the foregoing argument the company were not prohibited. Certainly the practice was admittedly in favour of their view—and practice was of importance—Lindley, vol. ii. p. 822. Lastly, it was doubtful whether the company had the power by a special resolution of so altering the constitution of the company as to pay dividends proportionally to the paid-up value of the shares if the articles did not already authorise it—*Hutton* v. *Scarborough Hotel Company*,—and at any rate the consent of the shareholders of 1875 was necessary. As to calling up the remaining 15s. per share, the directors might not need the money.

Authorities—*Hutton* v. *Scarborough Cliff Hotel Company (Limited)*, July 24, 1865, 2 Drewry & Smale 521, and April 25, 1865, 11 Eng. Jur. (N. S.) 551; *Somes* v. *Currie*, July 11, 1855, 1 Kay & Johns 605; *Ebbw Vale Steel Company*, January 15, 1876, L.R. 4 Chan. Div. 827; *ex parte Maude*, November 25, 1870, L.R. 6 Chan. 51; Lindley on Partnership, 4th ed. pp. 679, 797, 822; Buckley on the Companies Acts, 3d ed. p. 414.

After argument the Lords made avizandum.

At advising—

Lord President—The Oakbank Oil Company is a company limited by shares and registered under the Companies Acts 1862 and 1867. The capital of the company, as appears from the memorandum of association, was £20,000 in 400 shares of £50 each; and that capital was increased by a special resolution passed on the 16th of November 1869, by the addition of £20,000 more, also divided into 400 shares of

£50 each. The capital of the company thus became £40,000, and by a series of special resolutions passed in 1873 this capital was redistributed so to speak—that is to say, the shares were converted into shares of £1 each instead of £50, and from that date the company's capital consisted of £40,000 divided into 40,000 shares of £1 each. Then in 1875 there was another increase of capital made. A special resolution was passed at an extraordinary general meeting at that date, which empowered the directors to increase the capital by the issue of new shares, the aggregate amount of such issue to be £20,000, and to be divided into 20,000 shares of £1 sterling. And thus the capital became in all £60,000, divided into 60,000 shares of £1 each. But as regards the capital added on the 6th of July 1875, and the shares which represent that capital, there was only a call of 5s. a share made upon these. So that as regards £40,000 of the capital the shares are entirely paid up, but as regards £20,000 of the capital the shares held are called up only to the extent of 5s., leaving 15s. a share still to be called up. Now, the directors have proposed dividends from time to time, and these dividends have been sanctioned by the company, and they have been all made upon the footing of dividing the profits among the shareholders according to the amount of capital paid up by each shareholder. And until 1875 and subsequent years it did not matter in the least degree whether a dividend was made proportionate to the paid-up capital or to the nominal capital, because the whole nominal capital was paid up. But after these last shares were created in 1875, and 5s. only called up on them, making 15s. per share due by the shareholders, a question arose, and is brought under our consideration by this Special Case, whether the holders of the shares upon which 5s. only have been paid-up are entitled to participate in the dividends along with other shareholders according to the nominal amount of the capital represented by their shares, or according to the paid-up amount of the capital on their shares? Now, undoubtedly this is a question of very considerable novelty and importance. The amount involved is probably not very great, because it is plainly in the power of the company, if they think these last-created shareholders should not participate in the dividends to the full amount, to alter the regulations in that respect, and so for the future prevent what they think is an anomaly and an injustice. In the meantime the question for our consideration is whether under the provisions of the statute and of the articles of association these shareholders who hold an equal amount per share of the nominal capital of the company, but who have only been called upon to pay one-fourth part, are entitled to share fully and proportionally to the nominal capital represented by them in the dividends along with those whose shares are fully paid up.

This question really depends directly upon the construction of the 71st article of the articles of association, which, it must be observed, is precisely in the same words as the 72d section of Table A of the Act of 1862. A company in the position of this company, registered under the statutes, may either adopt Table A—indeed will be held to adopt it if does not reject it—or it may adopt it in whole or in part, or it may substitute different articles of association altogether from Table A. But, of course, if it adopts Table A or any part of it, then the question arising on the construction of the article will just be the same question that would arise on Table A if it were adopted *in toto*. Now, the provision in regard to the dividends in article 71 is this—"The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares." Prior to the statute of 1862 the regulations upon this subject were somewhat different; and if we go back to the Companies Clauses Act of 1845 we find a provision which is certainly in contrast with that with which we are dealing, because by the 123d section of the Companies Clauses Act of 1845 the provision is that the directors shall cause a scheme to be prepared showing the profits, if any, of the company for the period current since the preceding ordinary meeting, &c., and apportioning the same, or so much thereof as they may consider applicable, to the purposes of dividend among the shareholders, according to the shares held by them respectively, the amount paid thereon, and the periods during which the same may have been paid. The provision which we are dealing with is that the dividend is to be paid to the members in proportion to their shares, adopting the first part of the description in the former statute, "according to the shares held by them respectively," but omitting the words "the amount paid thereon." And the party here who is representing the last set of shareholders, who have paid only 5s. a pound, maintains with great force that this was done advisedly—that the intention was that dividends should be paid in proportion to the nominal capital represented by each share, and not in proportion to the paid-up capital represented by each share. That is an argument of considerable force, but still if it stood alone I am not quite sure that it would be at all conclusive of this question. We must examine a little more exactly what is the precise meaning of the words used in this 71st section.

Now, the interpretation clause of these articles is of importance in this connection, because it declares that the word "capital" shall mean the capital for the time being of the company, and the word "share" shall mean the shares into which the capital is divided. The capital of the company certainly means the nominal capital of the company, whether paid up or not, and therefore shares must be held to be the shares into which the nominal capital is divided. So that in this section 71 we have at least got this length, that the dividend is to be paid to the members in proportion to their shares of the nominal capital of the company. It was contended that the real meaning of the section is that the dividend is to be paid to the members in proportion to the number of shares held by them in the company, but that, I think, is not a sound construction. I do not think it refers to the number of shares. If that were so it might lead to the most extravagantly unjust results in some cases, because supposing that this company, in place of converting all their £50 shares into £1 shares, had kept up the old £50 shares and created £1 shares, then according to that view, reckoning by numbers merely, the holder of 10 £1 shares would have been entitled to as large a dividend as the holder of 10 £50 shares, and it is quite impossible to suppose that that can be the meaning intended.

But the section certainly does not seem to contemplate or refer to the fact as to how much is paid up on the shares. There is no trace of that in the section, and the literal meaning of the words, I think, when you take the interpretation clause along with this section, is that the dividend is to be paid to the members in proportion to their shares of the nominal capital of the company—that is to say, more properly speaking, in proportion to their shares of the capital of the company, which always means in these articles the nominal capital; and therefore upon that ground, although the question is certainly not unattended with difficulty, I am of opinion that the construction contended for by the holders of these new shares is the sound one. And after all there is no great injustice in the matter. In the first place, the holders of these shares are liable at any time upon very short notice to pay up the additional 15s., and therefore the company is to that extent trading upon the credit of these shareholders, just as it is trading upon the paid-up money of the other shareholders. And in the second place, it was quite within the power of the company, on the creation of such new shares as they made in 1875, to impose conditions upon these new shareholders to the effect that they should be paid only according to the amount of the paid-up capital. But that they have not done. They have left this section of the articles of regulation to take its legal effect according to its true construction; and I am not able to say that it will bear the construction that the dividend is to be paid to the members in proportion to the shares held by them and the amount paid thereon, taking the words of the Act of 1845. I am therefore for answering the questions in this Special Case to the effect that the second party, as the holder of £1 shares on which only 5s. per share has been paid up, is entitled to claim that all dividends declared shall be declared in proportion to the number of shares held by members, without regard to the amount paid up on said shares.

Lord Mure—The question which we are called upon to answer is, whether under the 71st section of the articles of association of this company the second party is entitled, as a holder of shares on which only five shillings per share have been paid up, in a question with parties who are holders of shares on which twenty shillings in the pound have been paid up, to a dividend upon each of his shares, notwithstanding they are not paid up, equivalent to what is paid upon the shares on which the whole amount has been paid up? The practice of the company, as stated and admitted in the Case, appears to have been to pay dividends under arrangement by which the amount of the dividend was regulated by the amount of the sum paid up on the shares. That is a conceded fact in the case, and it is stated most distinctly that that practice has existed ever since the company was formed. In these circumstances the second party has raised the question under the 71st article of the articles of association, maintaining that he is entitled to dividend in proportion to the number of his shares, without regard to the amount paid up on them. That claim is resisted as inequitable, and as founded on too strict a construction of the articles of association; and it was maintained that the practice which has existed and been acquiesced in by the company for so long entitled the directors of the company to continue to act as they have been doing. Now, I am not able to take this view of the 71st article. It does seem *prima facie* an inequitable claim—and I think some of the English authorities quoted so described it—that a man who has paid only five shillings per share should get as large a dividend as one who has paid £1 per share. But when I read the 71st article in connection with the 72d clause of Table A of the Act, I am not able to put on it a different construction from that arrived at by your Lordship.

The words of the 71st article are quite distinct, that the directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares. These are the exact words of the 72d regulation under Schedule A of the Act of 1862. But then we have this definition of what a share is—that the word "capital" shall mean the capital for the time being of the company, and the word "share" shall mean the shares into which the capital is divided. Now, I cannot read the 71st section and that interpretation clause in any other sense than that the amount of dividend is to be paid in proportion to the shares without regard to what the amount may be that has been paid up on the shares. Your Lordship has referred to the Act of 1845 as containing a different provision, viz., that the dividend is to be paid according to the amount of the paid-up capital; but the omission of these words in the Act of 1862 appears to me to show that the Legislature took a different view when the Act of 1862 was framed from what they did when the Act of 1845 was framed; and although the 24th section of the Amendment Act of 1867 is in some respects difficult to understand, it appears to me that sub-section 3 of that Act almost necessarily implies that the Legislature when they framed that section understood the 72d regulation of Schedule A of the Act of 1862 to bear the interpretation which your Lordship now puts upon the 71st section of the articles, because there is an express provision that nothing contained in the principal Act shall be deemed to prevent any company under that Act, if authorised by its regulations as originally framed or as altered by special resolutions, from doing any one or more of the following things; and the 3d subdivision is, "from paying dividends in proportion to the amount paid up on each share in cases where a larger amount is paid up on some shares than on others." Now, that seems to me to imply that it was necessary to give companies the power of paying dividends in that way, which was not authorised by the Act of 1862; and unfortunately this company when they passed their resolutions about increasing their capital did not make any provision in regard to the payment of dividend in proportion to the amount paid up on the shares. I see nothing to prevent them now from passing such a resolution, in terms of the power given them by the Act of 1867, as would obviate the whole difficulty; but on the question raised in this case I agree with your Lordship that the second party is entitled to prevail.

Lord Shand—This case unquestionably raises a point of very general importance, and it is sur-

prising that it has not occurred sooner, seeing that we are now dealing practically with the table annexed to the Act of 1862. But having considered the question, I have arrived at the opinion expressed by your Lordships.

I confess I should willingly have supported the resolution of the directors to divide the profits according to the amount paid up on each share, if the resolution had been in my opinion within the authority of the articles of association; for though it has been truly enough represented that if those shareholders who have paid only 5s. on their shares are to receive profits only on the amount paid up, they are practically getting no return for the risk they run, and for the fact that the business of the company is being carried on upon their credit, still I think there is a stronger equity in the view that a shareholder who has paid only 5s. on his share, and has had the other 15s. per share in his pocket for use either by way of trading or drawing interest upon it, has an undue advantage over the other shareholders in the matter of dividends. But I do not think these are considerations which legitimately enter into this question, which after all is one of the construction of the articles of association. Now, reading the 71st article in full—that is to say, incorporating in it the words which we find in the interpretation clause as to the meaning of the word "shares," the article reads in this way—"The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to the shares belonging to them into which the capital is divided." I think the plain literal meaning of these words is that you are to look to the proportion of the nominal capital stock which each shareholder holds, and divide the profits accordingly, in proportion to the shares which the partners respectively hold in the nominal capital stock of the company. It was suggested in the argument that the expression "the shares into which the capital stock is divided" was elliptical; and at one time it was suggested for the party (Mr Brown Crum) that these words were to be read as meaning in proportion to the number of each partner's shares. That, however, would obviously be incorrect, for the reason explained by your Lordship, that there might be shares of very different value—shares on which £50 had been paid up, and others on which £1 or less had been paid up. If the words of the articles were to be read as meaning in proportion to the number of their shares, dividends of equal amount would be payable in the case supposed. I see nothing in the language to lead to a result so inequitable and unjust. On the other hand, it was contended that the words ought to be read as "in proportion to the number and value of their shares," or in proportion to the number and the amount paid up on their shares. But there again it appears to me that there is an interpolation of words which we have no warrant for interpolating, which would make all the difference in the meaning of the article. And therefore, taking that article according to its reasonable and ordinary meaning, it appears to me that we are shut up to the conclusion that the profits must be divided in proportion to the shares of the nominal capital—that is, that the shareholder's proportion of that nominal capital stock shall be the measure of his right to profits.

I should so hold if we had the statute of 1862 alone to deal with. But I agree with Lord Mure in thinking that considerable light upon this question is to be obtained from the terms of the subsequent Act of 1867. Between these dates—I think in 1865—in the cases relating to the Scarborough Cliff Hotel Company—there had been important questions raised as to the powers of directors to deal with capital, particularly in creating preference stock and the like, and attention was drawn to the very stringent effect of the provisions in the Act of 1862 as preventing any alteration upon fundamental conditions of the copartnery; and I cannot doubt that in the view of the Legislature the provisions of that Act, or of the table annexed to it, as to the matter of dividends, were regarded as fundamental. And accordingly as Table A provided in the very terms of article 71 of this contract of copartnery, it was thought right to relax the provision therein contained, and give the directors of the company power to meet what might produce injustice if they were tied literally down to these terms. That is the only explanation I can give of section 24 of the later Act, which provides that nothing contained in the principal Act shall be deemed to prevent any company under that Act, if authorised by its regulations as originally framed or as altered by special resolution, from paying dividends in proportion to the amount paid up on each share in cases where a larger amount is paid up on some shares than on others. That statute seems to me to proceed on the assumption that under Table A of the earlier Act dividends could not be paid in proportion to the amount paid up on each share in cases where a larger amount was paid on some shares than on others, but that dividends must be paid in proportion to the holding of the nominal stock of the company, and for the purpose of enabling companies to arrange otherwise it appears to me that this section was passed. So far as we can see without having had any argument upon it, it seems to have this important effect, that it leaves a company such as the Oakbank Oil Company, constituted as it now is, the power, if they think fit, by an extraordinary resolution, of altering the system of dividend which this decision of the Court will enforce. It will be for the parties to consider whether they think that in the administration of the company there should be such an alteration, and all I shall now say is that *prima facie* it appears to me that it is within the power of the company under section 24 of the later statute to make such an alteration.

Lord Deas was absent.

The Lords answered the question in favour of the second party.

Counsel for the Company (First Parties)—D.-F. Kinnear, Q.C.—Murray. Agents—Smith & Mason, S.S.C.

Counsel for H. B. Crum (Second Party)—Solicitor-General (Asher)—J. P. B. Robertson. Agents—J. & J. Ross, W.S.