of the said Margaret Oliver, and the said Andrew Oliver, in expenses since the date of the Lord Ordinary's interlocutor; allow an account thereof to be lodged; and remit to the Auditor to tax and to report to Lord M'Laren in place of Lord Curriehill, with power to his Lordship to decern for the amount due, and to proceed further in the cause as may seem just."

Counsel for the Trustees and for the Macfarlanes—Gloag. Agents—Ronald & Ritchie, S.S.C.

Counsel for Mrs Oliver—Alison. Agent—John Gill, S.S.C.

Counsel for Mrs Oliver's Children—Low. Agent—D. Mackenzie, W.S.

Thursday, July 20.

FIRST DIVISION.

[Lord Adam, Ordinary.

HOGGAN AND OTHERS *v.* THE THARSIS SULPHUR AND COPPER COMPANY (LIMITED).

Public Company—Articles of Association—Payment of Dividends upon Subscribed or upon Paid-up Capital—Reduction of Capital—Companies Acts 1862 *and* 1867 (25 *and* 26 *Vict. c.* 88, *and* 30 *and* 31 *Vict. c.* 131).

By the articles of association of a limited company it was provided that the directors might declare "an interim dividend, and pay the same to members in proportion to the capital held by each," and further, that they might "receive from any member willing to advance the same the moneys due upon the shares held by him beyond the sum actually called for, and pay interest therefor, which interest shall be in lieu of dividends in respect of such advances." The original capital of the company was £300,000, but it had been increased by special resolution to £1,236,660, consisting partly of fully paid-up shares of £10 each, and partly of shares of £10 on which £7 had been paid. The company proposed to call up £1 upon the £7 shares, and to reduce its capital by striking off the remaining £2, making them £8 shares fully paid-up, and by issuing new shares at a high premium, and with the money thus obtained to extinguish the debenture debt. The Lords *held* that as the articles of association gave no interpretation of the word "capital," and were silent on the subject of dividends, these fell to be paid according to the general rule of common law upon paid-up and not upon nominal capital; that subscribed but uncalled capital was a liability upon the shareholder, and that if lent to the company, interest only, and not dividend, was payable upon it; that a scheme beneficial to the company as a whole, and carried out in conformity with the Companies Acts, could not be held as illegal because the interests of some shareholders were prejudiced by it; and that therefore the holders of the £7 shares were not entitled to demand that the unpaid capital on their shares should be called up before any debenture debt was incurred.

The Tharsis Sulphur and Copper Company (Limited), a joint-stock company limited by shares, and having its registered office in Glasgow, was incorporated under the Companies Act of 1862 on the 25th October 1866. Under the memorandum of association the nominal capital of the company was declared to be £300,000, divided into 30,000 shares of £10 each, with powers to increase. At a meeting held upon the 23d of October 1867 a resolution was passed authorising the directors to borrow money upon the security of debentures to be issued by the company, and £100,000 was accordingly raised in this way. Owing, however, to the increased operations of the company it became necessary for them to raise additional capital, and accordingly at a meeting held in October 1868 special resolutions were passed referring to the proposed increase of capital. The effect of these resolutions, which are quoted at length in the opinion of the Lord President, was that the capital of the company was increased from £300,000 to £1,000,000, which was divided into 100,000 shares of £10 each. When these shares were issued a certain number were fully paid-up, and on the others £7 of the £10 was paid-up. The shares of this capital, with additional shares subsequently issued as narrated below, stood thus on the 31st of January 1882 as regarded the amount paid on them: there were 91,896 £10 shares fully paid-up, and 31,100 £10 shares upon which £7 per share only had been called up.

On the 23d April 1874, at a general meeting, it was submitted by the directors that a further sum of £150,000 should be raised on debenture to meet the continued enlargement of the company's business, and this resolution was accordingly passed, and the amount thus authorised was borrowed on debenture.

The operations of the company continuing still further to increase, additional capital was raised in December 1878 for the purpose of acquiring the copper mines of Huelva. Special resolutions were passed at a meeting held upon the 24th of December 1878, and registered on the 8th of January 1879, the most important of which is as follows:—"3. That to enable the directors to pay out to the members of the said company of the copper mines of Huelva the value of their respective shares and interests therein, which has been fixed by the said treaty articles or agreement at the aggregate amount of £430,900 sterling, (1) the present share capital of this company be increased from £1,000,000 to £1,236,660, and that the amount of such increase, being £236,660 sterling, divided into 23,666 shares of £10 each, be deemed and issued as fully paid-up; and (2) the directors be and hereby are instructed and empowered to borrow upon debentures of this company, in addition to the sum of £250,000 already authorised to be borrowed by them, the further sum of £150,000, to be applied, along with £44,240 of ordinary funds of the company, in settlement of the balance of the said sum of £430,900." By these resolutions the capital of the company was increased from £1,000,000 to £1,236,660, at which amount it stood at the date of the action.

In the spring of 1881 certain shareholders,

holding £10 shares upon which £7 had been paid-up, brought it under the notice of the directors of the company that they intended to claim dividends upon their nominal, and not upon their paid-up capital, and they also contended that the £3 uncalled upon their shares should be called up instead of the company borrowing money upon debenture. To this application answer was made that the whole matter had been under the careful consideration of the directors, whose policy had been approved and ratified by the shareholders, and that it was impossible to reconsider the decision which had been arrived at.

Upon the 9th of November 1881 an extraordinary general meeting of the company was held, at which the following special resolutions were submitted and adopted:—"1. The company may from time to time by special resolution modify the conditions contained in the memorandum of association so as to reduce its capital to such an extent and in such a manner as may by such resolutions be then determined. 2. The company may from time to time by special resolution modify the conditions contained in the memorandum of association so as to subdivide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum of association."

Along with these resolutions there was also submitted to the meeting of 9th November a report by the directors, from which it appeared "that a proposal to call up £1 upon the £7 shares, and thereafter exchange them into fully paid-up shares, has met with general approval, and will be regarded as an equitable arrangement." By this call £31,000 would be raised, while the par value of the 8224 shares which this scheme would put into the hands of the directors will be £82,240, which sum, added to the then existing capital, would bring it up to £1,250,000, while from the high premium which these new shares would realise in the market it was proposed to clear off the debenture debt of the company.

Upon the 24th November 1881 the resolutions above quoted were confirmed, and at the same meeting the following among other resolutions were submitted, and passed unanimously—"*First*, That the capital of the company be reduced from £1,236,660, divided into 123,666 shares of £10 each (of which shares 91,896 have been fully paid-up, and upon 31,100 of which shares £7 per share only have been called and paid-up, and of which shares 670 still remain unissued), to £1,174,460, divided into 117,446 shares of £10 each, and that such reduction be effected by reducing the liability on each of the said 31,100 shares, after £1 per share shall have been called and paid-up thereupon, to the extent of £2 per share, and exchanging four paid-up shares of £10 each for five shares £8 paid of the said 31,100 shares. *Third*, That after the capital of the company shall have been reduced under the foresaid first resolution it shall be increased to £1,250,000, divided into 125,000 shares of £10 each, by the creation of 7554 new shares, and the issue of these, along with the 670 shares hitherto unissued, making together 8224 shares of £10 each, which shall be sold to such persons, and upon such terms and conditions, as the directors shall consider most conducive to the interests of the company. *Fourth*, That the funds to be realised from the call on the 31,100 shares, and from the issue and disposal of the 8224 shares, shall, as regards both capital and premium, be applied in paying off the debenture debt of the company, and all the profit accruing to the company shall be used for increasing the reserve fund, or otherwise, as the directors may consider most expedient."

These resolutions fell to be confirmed at a meeting which was held upon 9th December following, at which meeting the scheme proposed by the directors was challenged by certain shareholders, eight in number, who especially objected to the £10 shares being converted into £8 shares fully paid-up, and who together held 872 shares. The pursuers of the present action were among those who on that occasion signed a protest, and were holders in their own names of 60 £7 paid shares, and they also claimed 139 other shares of the same class which stood in the register in their father's name.

The company had applied to the Court under the 11th section of the Companies Act of 1867 for confirmation of the special resolutions as approved at the extraordinary general meeting of 9th December 1881.

It was in these circumstances that the pursuers brought the present action of reduction, in which they, *inter alia*, sought to have the resolutions passed upon the 9th November, and also those passed upon the 24th November 1881, reduced, and to have it declared that they were entitled to dividends in proportion to their amount of nominal capital, and further, that the directors were not entitled to borrow money on debenture to a greater extent than £100,000, which was the amount of the debenture debt at the time when the pursuers became shareholders of the company. The proportion of fully paid-up shares to those on which £7 had been paid was at 31st January 1882 as 91,896 to 31,100.

The pursuers pleaded, *inter alia*—"(1) Upon a just construction of the memorandum and articles of association, the pursuers are entitled to participate in all dividends in proportion to the nominal capital held by them, and irrespective of the amount paid-up thereon. (2) It was and is illegal and *ultra vires* of the defenders, by any special resolution, to infringe the rights of the pursuers, those being secured to them by a fundamental condition of the contract constituting the company. (3) The scheme of reduction of capital contained in the resolutions passed 24th November 1881 was and is illegal and *ultra vires* of the company, because it inverts the rights of one class of shareholders, is not authorised by the regulations of the company, and is not warranted by the provisions of the Companies Act 1867. (7) The issuing of the debentures mentioned in the summons while capital was uncalled was, in the circumstances stated, in violation of the constitution and regulations of the company, and the pursuers are entitled to have decree in terms of the conclusions thereanent."

"The defenders pleaded—"(4) The special resolutions challenged having been duly passed, and registered in accordance with the provisions of the Companies Acts 1862 and 1867, the reasons of reduction thereof ought to be repelled. (5) The debentures issued by the directors having been so issued by them in virtue of powers to that effect, lawfully conferred on them by the company, the

defenders should be assoilzied from the conclusions relating thereto. (6) The defenders should be assoilzied from the whole conclusions relative to dividends, in respect (1st) Of the terms of the original articles; (2d) Of the resolutions now sought to be reduced; and (3d) of the acquiescence and homologation and adoption on the part of the pursuer and his authors."

By minute dated 1st March 1882 John Hoggan junior and George Bradbury Hoggan were sisted as pursuers jointly with Andrew Hoggan junior, the original pursuer in the action, as the 139 shares claimed stood in their joint names.

By interlocutor of 1st June 1882 the Lord Ordinary assoilzied the defenders from the conclusions of the action and found them entitled to expenses. In a note which was added to the interlocutor the following passages occur, which express the views of the Lord Ordinary on the subject:—"The first question to be determined would appear to be, whether the pursuers are, under the existing memorandum and articles of association, entitled to dividend upon the amount of nominal capital held by them in the company, or whether they are entitled to dividend only on the amount of capital paid-up? I was referred to the *Oakbank* case (9 R. 198) as determining this point in favour of the pursuers. It appears to me, however, that there is a marked difference between the two cases. In the *Oakbank* case there was a clause in the articles of association expressly regulating the payment of dividends—by which I mean final dividends sanctioned by the company,—but in this case the memorandum and articles of association of the company are silent on the subject.

"When the memorandum and articles of association of a company do not expressly deal with the payment of dividends, and when you cannot gather from them any clear indication of a contrary intention, I am clearly of opinion that dividends ought to be paid in proportion to the amount of paid-up capital, and not according to the amount of nominal capital, held by a shareholder. But I think it is quite legitimate to consider the whole provisions of the memorandum and articles of association in order to see what was truly the intention of the contracting parties in that respect. The memorandum of association of this company is, as I have said, silent on the subject of the payment of dividends, but I was referred to two articles of the articles of association, and I think to two only, the 7th and the 75th—the former by the defenders, and the latter by the pursuers,—as throwing light on the intention of the parties on this subject. The 75th article provides that 'the directors may from time to time, and as often as they deem it expedient, declare and divide an interim dividend out of the profits of the company, and pay the same to the members in proportion to the capital held by each, without the necessity of calling a general meeting to obtain the sanction of the company.'

"It will be observed that this clause refers to the payment of interim dividends only, and if this question had related to interim dividends, I should have had no doubt, on the authority of the *Oakbank* case, that these must be paid in proportion to the amount of nominal capital held by a shareholder, and not in proportion to the paid-up capital; and in the absence of evidence of a contrary intention, it would be difficult, if not impossible, to avoid the conclusion that final dividends were to be paid in the same mode and manner and on the same principles as interim dividends.

"But the company say that the 7th article shows that it was the intention of the contracting parties that dividends should be paid on called-up capital only, still more clearly than the 75th article shows that they were to be paid on nominal capital.

"This article is in these terms:—'The directors may, if they think fit, receive from any member, willing to advance the same, all or any part of the moneys due upon the shares held by him beyond the sums actually called for; and upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company shall pay interest at such rate as the member paying such sum in advance and the directors may agree upon; which interest shall be in lieu of dividends in respect of such advance.' Now, it will be observed that this article deals directly with the matter of uncalled-up capital. It authorises the directors to take advances of such uncalled-up capital in anticipation of calls, and to pay interest thereon at such rate as may be agreed upon between them and the member so advancing; which interest is to be in lieu of dividends in respect of such advances. If it be, as the pursuers say, that a member of the company is entitled to dividend on uncalled-up capital, then what he would have to arrange with the directors on making an advance would not be interest in lieu of such dividend, but interest in addition to it; because, of course, he would not advance money to the directors unless he was to get such interest from them as he could get elsewhere for the use of the money. It is difficult to come to the conclusion that the parties could have intended, that where money was paid to the company in answer to a call, the shareholder was to receive a dividend only on the amount; but where money was advanced in anticipation of a call, the shareholder was to receive not only the dividend but interest also. It is absurd to suppose that the parties intended to empower the directors to pay interest for the use of money when they could have it without by simply calling it up. It appears to me that the article is intended to meet the case where the directors may not desire to increase the capital on which they have to pay dividend by calling up more capital, but at the same time require money for the purposes of the company.

"The article accordingly authorises them to take advances from members in anticipation of calls, at an agreed-on rate of interest, in lieu of dividend; but it provides that as soon as the call is made interest shall cease and dividend shall be paid. This is an advantage to the member on the one hand, because while he gets interest for his money, it relieves him from liability for future calls, while the advantage to the company on the other is sufficiently apparent.

"I am therefore of opinion that the 7th article of the articles of association clearly indicates that it was not the intention of the contracting parties that dividends should be paid in proportion to the amount of nominal capital held by a shareholder, and that it does so quite as clearly as the 75th section indicates an intention to the contrary, but there is this difference, that the 7th article is

dealing expressly with the matter of uncalled-up capital. . . . . .

"But it is said that the measures proposed by the company would operate so unjustly and unfairly towards the pursuers that the Court ought not to sanction them. Now, if the majority of a company propose to benefit themselves unjustly at the expense of a minority, the Court no doubt will interfere. But I do not think there is any case of that sort here. Assuming that the pursuers are by the existing articles of association entitled to payment of dividend in proportion to the amount of their nominal capital, the pursuers, and all other shareholders in their position, will be injuriously affected by the proposed alteration of the mode of paying dividend; but the Legislature has specially authorised a company to make payment of dividend in that mode, which no doubt they considered the most equitable mode, and I should have thought it a very delicate matter for the Court to interfere in such a case, although the change might fall hardly on particular classes of shareholders. But where the Court is called on to interfere, to prevent the exercise of statutory powers by the company, on the ground of manifest injustice to an individual or to a class of shareholders, then I think the whole circumstances of the case are to be considered. Now, the case we have to deal with is, not that the pursuers have all along been paid dividend in proportion to the amount of nominal capital held by them, or that the shares held by them had been bought and sold in the market on the footing that the uncalled-up portion was earning dividend, and was therefore (as it would have been in this case) worth three or four times its nominal value, and that it was now proposed unjustly to deprive the pursuers of all those advantages by the resolution of the company. But the case truly is, that the pursuers have never been paid dividend on the uncalled-up portion of their shares, and it has not hitherto been supposed that they had any right to be so paid; and it is not the fact that their shares had been bought and sold on that footing; but the object of the company is—in case it should be found that the regulations of the company are to be read in a way leading to results which the company never contemplated and never acted on—to enable them to continue to divide dividends as they have always been divided in this company, and to remedy what in that event they think would be an unjust way of dividing dividends—and I can see nothing unjust or inequitable in that. Assuming, however, that under the existing memorandum and articles of association the pursuers have not a right to dividend in proportion to the amount of their nominal capital, then they are not injured by the addition of a regulation to the articles of association giving effect to what has always been the practice of the company; and as regards the reduction of the shares from £10 to £8 shares, that is simply reducing the liability of the pursuers to that extent.

"But it is said by the pursuers that the company are not entitled to increase their capital, by the issue of new shares, before calling up all uncalled-up capital due on existing shares. By the 27th article of the articles of association the directors have, under the sanction of a special resolution of the company, power to increase its capital by the issue of new shares. I do not see, and I was not referred to, any article in the articles of association which limits them in the exercise of this power. It would appear, therefore, to be left to the discretion of the directors and of the company to determine when and in what manner additional capital shall be raised. But it is said by the pursuers that the company have been trading on the security of their uncalled-up capital, and that if more capital is required it is unfair and unjust not to call up their uncalled capital, so as to give them the benefit thence resulting, in place of giving it to the whole members of the company. It will be observed that the company have to some extent recognised the claims of the pursuers in this respect, because they have called up one-third of the uncalled-up capital. I was referred to no authority to the effect that a company is not entitled to issue new shares so long as any existing capital remained uncalled-up; and if, as I think, the company has the power, I see nothing in the circumstances of this case calling upon the Court to interfere with the discretion the company has exercised in that respect. Put into figures the result is this,—the pursuers propose that the £3 per share on the 31,100 shares shall be called up. That would give a sum of £93,300, which would be equivalent to 9330 new shares of £10 each, but as the company expect a premium on each new share of at least £40, the sum which the pursuers desire should be wholly appropriated to them and the other holders of £7 shares amounts to £373,200. On the other hand, the company propose to give the holders of £7 shares the benefit of one-third of this sum, viz., £124,400, and to give them the benefit of the other two-thirds, amounting to £248,800, along with the other shareholders of the company. It appears to me that by the proposal of the company the holders of the £7 shares will be sufficiently remunerated for any risk they may have run in consequence of the company having traded on the security of their uncalled-up capital, and that if the element of fairness is to be taken into consideration in judging of this matter, the proposal of the company is not liable to objection on that score. It will be observed that the sum proposed to be given to the holders of £7 shares is more than the amount of their uncalled-up-capital, £93,300.

"The pursuers further maintain that it was *ultra vires* of the company to borrow money on debenture so long as any capital remained uncalled-up. I was referred to no authority in support of that proposition. It appears to me that the question whether the company should borrow money for the purposes of the company, or call up further capital, is a question as to the mode in which the company should be managed, and that it is therefore within their power to act in this matter as they think best for the company.—*Bryon* v. *Metropolitan Saloon Company*, 3 De G. and I. 123. On the whole case, therefore, I am of opinion that the defenders are entitled to be assoilzied from the conclusions of the action, with expenses.

"I was referred to the following cases—*Ashbury Railway Company* v. *Riche*, L.R., H. of L., 653; *Hutton* v. *Scarborough Hotel Company*, 2 Dr. and Sm. 521, 11 Jurist, N.S. 551; *Melhado* v. *Hamilton*, 28 Law Times, 578; *Harrison* v. *Mexican Railway Company*, 19 L.R., Eq. 358; *Taylor* v. *Chichester Railway Company*, 2 L.R., Ex. 356,

384; *Menier*, 9 Chancery Appeals, 350; *Somes*, 1 K. and I. 605."

Against this interlocutor the pursuer reclaimed, and argued — The questions to be considered in the present case are analogous to those raised in the *Oakbank* case. By section 75 of the articles of association the directors are to declare interim dividends "in proportion to the capital held by each" shareholder; this clearly implies nominal capital. It is the proposal to supersede this section, and substitute for it sections 17 and 18, in which dividends are expressly declared to be payable only on "the amount of paid-up capital," that the pursuer objects to. The pursuer does not ask both interest and dividend; by the arrangement sanctioned in article 7 the interest is fixed but the dividend fluctuates. As the unpaid portion of the capital is lying at three weeks' call, to substitute interest on it for dividends, as is proposed, would be to displace an existing right. Dividends should be paid according to nominal or subscribed capital when the articles of association are silent on the subject. Upon the second branch, as to the right to alter the articles of association—these articles have been altered in order to bring out the views of a majority of the company. If defenders have the right to delete article 75, they may alter the whole articles of association. By the scheme as proposed, one out of every five of the pursuers' £10 shares is taken from them and given to the public, and they are excluded to this extent from future dividends, and their interest in the company would thus be reduced by one-fifth. The whole of these resolutions must be accepted or rejected; as they were all submitted to the meeting at once, they must stand or fall together. The defenders maintain that the Legislature authorises three-fourths of their number by vote to reduce the capital of the company, and to put the balance so obtained into its coffers.—See section 51 Companies Act 1862, and section 24 Companies Act 1867. The same rule must govern surplus assets which govern dividends. By common law the rights of parties cannot be shifted by a majority, for the Court and the company are here dealing with vested interests. Object to this proposed scheme because it takes away shares from one set of shareholders, and not from any of the others; either what the company have done is not warranted by the first resolution, or that resolution is not warranted by statute. Where money is required for company purposes, the uncalled capital should first be exhausted before money is raised on debenture.

Authorities—Lindley on Partnership, i., 269, 797; *Somes* v. *Currie*, 1855, 1 Kay and Johnston, 605; *Ex parte Maude*, November 1870, L.R., 6 Ch. 51; *Hutton* v. *Scarborough Hotel Company*, 1865, 2 Dr. and Sm. Ch. 521, *aff.* 11 Eng. Jur. N.S. 551; *National Provincial Marine Insurance Company*, June 10, 1870, L.R. 5 Ch. 559; *Monro* v. *Edinburgh Cemetery Company*, February 5, 1851, 13 D. 595; *Hunter* v. *Carron Company*, December 15, 1865, 4 Macph. 216, *rev.* June 25, 1868, 6 Macph. 106; *Oakbank Oil Company* v. *Crum*, December 2, 1881, 19 S. L. R. 174.

Argued for the respondents—It is first to be considered whether under the articles as they existed prior to the special resolutions dividends fell to be paid upon nominal or upon paid-up capital. As a rule, in joint-stock companies, in the absence of special regulations, dividends should be paid upon the paid-up capital.—See Lindley, i. 679 and 797. Assuming that before the passing of these resolutions dividends ought to have been paid on the nominal capital, then under section 24 of the Companies Act of 1867 power was given to pass resolutions to alter the articles of association of the company; see also section 12 of Companies Act of 1862—dividends should be paid as common law directs. The important words of article 7 are "in lieu of dividend in respect of such advances." Upon the pursuers' hypothesis they are getting two things—first, a dividend for their liability; second, interest for their £3. The 7th and 75th are the two most important sections in the articles of association. If the pursuers' contention is right, these two articles are repugnant to and destroy each other; as to the alteration in the rules, that was done by the company *ob majorem cautelam*. Was it *ultra vires* of the company to alter these rules? Article 75 is qualified by sec. 50 of the Companies Act of 1862, and prevents this being a case of vested interests. Distinguish between the memorandum, which is the charter of the company, and cannot except in very few particulars be altered, and its articles of association; those can be altered by the company as easily as they can be made, by special resolution. This is a statutory corporation, and no analogy can be drawn between it and an ordinary partnership. Dividends are not referred to in the memorandum of association, but are left to the regulation of the company. It is said that this scheme is a fraud by the majority upon the minority, but if what is proposed is reasonable in itself, and allowed by the articles of association, then it is not a fraud. The uncalled capital was in reality a liability which might some day be enforced. The company was entitled to increase its capital, especially when so high a premium could be obtained for the new shares. What it is proposed to do is really for the benefit of the company as a whole.

Authorities — *Kirkstall Brewery Company*, March 1, 1877, 5 Ch. Div. 535; *Ashbury Carriage Company*, June 1875, L.R., H. of L., 7 E. and I. App. 653; *Menier* v. *Hooper Telegraph Works*, February 1874, 9 Ch. App. 350; Companies Acts 1862, 1867, 1877; memorandum and articles of association of the company, sections 7, 27, 29, and 75.

The Lords made avizandum.

At advising—

Lord President — The Tharsis Sulphur and Copper Company (Limited) was incorporated under the Companies Act of 1862. It is a joint-stock company limited by shares, was brought into existence in 1866, and carries on its business in various countries. By the memorandum of association the capital of the company was declared to be £300,000, divided into shares of £10 each, with powers to increase; and by the 27th article of association it is provided that "The directors may, with the sanction of a special resolution of the company, previously given in general meeting, increase its capital by the issue of new shares, such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, as the company in general meeting directs, or if no direction is given, as the directors

think expedient;" and article 29 says that "Any capital raised by the creation of new shares shall be considered as part of the original capital, and such new shares shall be subject to the same provisions with reference to the payment of calls, and the forfeiture of shares on non-payment of calls, and the conversion into stock or otherwise, as if they had been original shares." There are other articles to which I shall have to refer by-and-bye; meanwhile those I have quoted show sufficiently, I think, the constitution of the company. At a meeting held in October 1867 it was resolved, owing to the increased operations of the company, to make some addition to its capital, and accordingly various special resolutions were passed, among which were the following:—" 1. That the capital of this company shall be increased from its present amount of £300,000 to £1,000,000, divided into 100,000 shares of £10 each. 2. That the additional capital being £700,000, shall be used and employed as follows, viz.:—(1) £238,000 thereof in the acquiring and taking over by this company of the rights and properties of 'The British Metal Extracting Company,' 'The Tyne Metal Extracting Company,' 'The Staffordshire Copper Extracting Company,' and 'The Lancashire Metal Company,' (all limited); (2) £24,000 thereof in acquiring and taking over by this company of the patent and cinder rights of William Henderson of Glasgow, chemist, and others interested with him therein; (3) £60,000 thereof for recompensing this company and its present shareholders the difference in value between £300,000 the nominal amount, and £360,000 the real amount or value, of this company's original capital or stock, as agreed upon between this company and the proprietors of the several interests so to be acquired, in the treaty for the acquisition thereof; and (4) £378,000 thereof for defraying the cost of erecting and completing this company's railway now in progress between Tharsis and Huelva, and harbour connected therewith, and the other works required for the enlarged operations involved in the extension of the company." It is provided in the third resolution—"That the purchase prices of the several interests so to be acquired shall be paid for to the respective sellers in the stock of the company at par; and the several sellers shall in virtue thereof be offered, *pro rata* with the other shareholders of the Tharsis Company, the 31,100 new shares intended to be issued, and on the like terms and conditions as to payment of calls and otherwise." The additional capital of £700,000 was dealt with by the directors in the following manner, viz.:—

1. There was raised by the issue of additional £10 shares, the full amount of which was called up, these with the original shares forming the capital of £300,000, being the fully paid-up shares, ...	£382,300	0	0
2. There was raised by the issue of what is called the 31,100 'new shares,' being also £10 shares, but on each of which £7 only has been called up, .	217,700	0	0
3. There still remains of uncalled capital £3 per share on the said 31,100 new shares, amounting to and	93,300	0	0
4. There remains unissued to any extent 670 £10 shares, representing . . .	6,700	0	0
In all,	£700,000	0	0

Now, it seems that it was a number of the second class of shares which were acquired by the pursuers. The original pursuer Hoggan had only 60, but two of his brothers were sisted by minute, and together they appear to have had 199 of that class of shares—that is to say, £10 shares upon which only £7 has been called up. The capital of the company, which by the memorandum of association seems originally to have been £300,000 divided in 30,000 shares of £10 each, was by various special resolutions increased to £1,236,000, and the debenture debt stood at £366,500. Such was the condition of the company at the time when the proceedings complained of commenced. Now, let us see, in the first place, what the position of the pursuers really was. They were holders of a number of £10 shares upon which £7 had been paid-up, and the contention is that they are entitled to be paid dividends on the nominal value of these shares, and not upon the amount which has actually been paid-up—that is to say, though only £7 has been called up, they claim a dividend equal to what they would have received had the whole £10 been paid. In support of this contention reference was made to the case of the *Oakbank Oil Company*, which was recently decided in this Division of the Court. But it appears to me that the present case is essentially different from that of the *Oakbank Oil Company*. In that case there was one of the articles of association (the 72d) which expressly directed in what way and upon what capital dividends should be paid; and it was a combination of that article with a certain interpretation clause which left the Court as they thought no choice but to construe the 72d article of association as directing that dividends should be paid, not upon the paid-up capital, but upon the nominal capital of the company. In that case, also, there was another clause providing that the directors should take unpaid capital in advance and pay interest thereon. The present case, however, is very different; there is not in its articles of association anything corresponding to the 72d section of the Oakbank Company, nor is there anything which provides in what way or upon what capital dividends are to be paid. The case is thus left to be dealt with by the common law principle regulating the division of profits according to the ordinary law of partnership, and that undoubtedly leads to the conclusion that the proper division was according to the amount actually paid-up by each shareholder. This is a rule founded upon the plainest equity, and against which there is no authority whatever. As to the capital upon which these dividends are to be paid, the common law rule affirms that the dividends shall be proportioned to the amount of paid-up capital held by each shareholder. I am well aware that there is one of the articles of association of this company which deals with the matter of dividends somewhat indirectly. I refer to the 75th section, which is in these terms:—"The directors may from time to time, and as often as they deem it expedient, declare and divide an interim dividend out of the profits of the company, and pay the same to the members in proportion to the capital held by each, without the necessity of calling a general meeting to obtain the sanction of the company." Of course it is not suggested by anybody that the final dividend for the year is to be paid according to one principle, and the interim divi-

dend according to another; therefore the argument presented to the Court by the pursuers is, that this article assumes that the dividends are to be paid according to the nominal capital held by each shareholder, and not according to the paid-up capital, and that is inferred from the use of the words "in proportion to the capital held by each." But capital in the ordinary case is a term which may mean either nominal or paid-up capital, and there is certainly nothing in this 75th article to determine in which of the two senses it is used. Nor is there, as there was in the *Oakbank* case, any interpretation clause to guide us to the meaning of the word. But the truth is that these words "in proportion to the capital held by each" are not words of much importance. As the object of the 75th article is not to direct in what proportions dividends are to be paid, but to give the directors a power to make, declare, and provide interim dividends out of the profits of the company, the words used are not taxative but demonstrative words, and are inserted for the purpose of completing the sentence. It therefore seems to me that it is quite impossible for us to put upon these words the construction for which the pursuers contend, and that being so, I think that we are bound to proceed in the interpretation of this article upon the assumption that the general rule applicable to the dividends of this company is the common law rule, *i.e.*, that the dividends shall be paid in proportion to the paid-up capital, and not according to the nominal capital held by each shareholder. But we have in this case, as we had in the *Oakbank* case, a provision enabling the directors, if they see fit, to accept advances of uncalled capital and to pay interest therefor. The 7th article which gives that power is in these terms:—"The directors may, if they think fit, receive from any member willing to advance the same, all or any part of the moneys due upon the shares held by him beyond the sums actually called for; and upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company shall pay interest at such rate as the member paying such sum in advance and the directors may agree upon, which interest shall be in lieu of dividends in respect of such advance." Now, it appears to me that there is nothing here which is in any way repugnant to what is contained in the other articles of association, but, on the contrary, that it is completely in harmony with them. This section was relied upon in the arguments of both sides—the pursuer maintaining that if the article had not been framed as it is then he would have been entitled both to interest and dividend, while it is urged on the other side that the words "in lieu of dividend in respect of such advance" are inserted to make sure that what is given is only as interest on a loan, and is not in any way to be regulated by profits. I therefore come to the conclusion that this case is essentially different from the case of the *Oakbank Oil Company*, and that the pursuers have entirely failed to make out that they have, under the memorandum and articles of association, any right to be paid dividends corresponding to their nominal or unpaid capital. This being so, it seems to follow that the objection stated to the first alteration made by the special resolutions falls to the ground, because they have no interest to question it. Now, these resolutions are in the following terms:—"17. The directors may from time to time, and as often as they deem it expedient, declare and divide an interim dividend out of the profits of the company, and pay the same to the members and holders of share-warrants, in proportion to the amount paid up on the share or shares held by each, without the necessity of calling a general meeting to obtain the sanction of the company. 18. No dividend shall be payable except in proportion to the number of shares held, and the amount paid up thereon, and except out of the profits arising from the business of the company." It appears to me that these alterations on the existing regulations only make more clear what I think was their true interpretation, and that they could do the pursuers' case no harm. But let us now consider whether there was anything unlawful in what the company proposed to do by these regulations. First of all there was a reduction of capital, and that was followed shortly after by an increase. Now, no doubt this may be viewed in the light of a financial trick for the purpose of attaining some definite end, and it is somewhat curious and startling that a company should propose in one and the same set of resolutions both to reduce and increase its capital; but further consideration of the matter entirely relieves me of any feeling of that kind, as it might be very expedient for a company to reduce one kind of capital and increase another. But the pursuer says that this has been done to his detriment, and on purpose to injure him. As for the purpose to injure, I see no evidence of that, though there might be in one sense of the word some injury to the pursuers of a kind of which they were not entitled to complain. If the resolutions adopted by the company were really in the interests of the company itself, and conducive to the prosperity of the company, I cannot affirm the proposition that everything that indirectly affects the interests of a particular class must necessarily be illegal. What the company here wished to do was to reduce their capital—this they proceeded to do under the 9th section of the Companies Act of 1867, which is in these terms:—"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." Now, what the company here did was to modify the conditions contained in their articles of association, and thereafter to reduce their capital. This they accomplished by means of certain special resolutions, and proceeding upon these they passed the extraordinary resolutions complained of, and which are as follows:—"*First*, That the capital of the company be reduced from £1,236,660, divided into 123,666 shares of £10 each (of which shares 91,896 have been fully paid-up, and upon 31,100 of which shares £7 per share only have been called and paid-up, and of which shares 670 still remain unissued), to £1,174,460, divided into 117,446 shares of £10 each, and that such reduction be

effected by reducing the liability on each of the said 31,100 shares, after £1 per share shall have been called and paid-up thereupon, to the extent of £2 per share, and exchanging four paid-up shares of £10 each for five shares £8 paid of the said 31,100 shares." It must be observed that not merely is this a reduction of capital, but also of certain of the shares of the company. Now, though sec. 9 of the Companies Act of 1867 does not sanction this, yet sec. 15 of the same Act does, for by it not only can the capital of the company be reduced, but also the division of capital into shares, and the amount of these shares. Now, the effect of these resolutions upon the pursuers is this—A call of £1 per share is made upon the £10 shares, of which £7 has already been paid-up, making in all £8 per share paid-up, and the capital of the company is reduced by striking off the remaining £2 of uncalled capital and making the shares of the company £8 shares fully paid-up. Formerly it was competent to reduce only the unpaid capital of a company, but by the Companies Act of 1867 that is changed; yet the unpaid capital is undoubtedly the proper capital to reduce, and the most easy and natural way to effect a reduction. The complaint of the pursuers is, that they can never have their interest in the company increased to £10, which they had expected. Now this was only an expectation; it was not a right, but it was a liability. If it could have been shown that some of these shareholders had been called upon to make payment of the balance of the £10, and that others had not, and that there had been any partiality in the matter, then there might have been some ground for complaint, but it appears that all have been dealt with alike. So that unless any right to have this £3 called up, can be shown to exist there is no ground for complaint here. This shows that as to the first part of this resolution no statutory or formal objection is pleadable by the pursuers. Now, the third and fourth heads of the resolution are as follows:—"*Third*, That after the capital of the company shall have been reduced, under the foresaid first resolution, it shall be increased to £1,250,000, divided into 125,000 shares of £10 each, by the creation of 7554 new shares; and the issue of these, along with the 670 shares hitherto unissued, making together 8224 shares of £10 each, which shall be sold to such persons, and upon such terms and conditions, as the directors shall consider most conducive to the interests of the company. *Fourth*, That the funds to be realised from the call on the 31,100 shares, and from the issue and disposal of the 8224 shares, shall, as regards both capital and premium, be applied in paying off the debenture debt of the company; and all the profit accruing to the company shall be used for increasing the reserve fund, or otherwise, as the directors may consider most expedient."

Now, these are the resolutions which provide for the increase of the capital of the company, and which indicate how after it is increased it is to be used. But it is maintained that there is ground of complaint here, because the profit arising from this transaction is given to the company as a whole, and not to the pursuers—having shares to create, and a high premium to obtain for them, is nothing to be given to those whose unpaid £2 have not been called up? Now, it is worthy of notice that the pursuers did not take any objection to this scheme when it was originally propounded upon the 24th November 1881, but when it came up for confirmation on the 9th December following some persons came forward and opposed it. A division was challenged, and eight persons voted against the scheme being carried out, and two of them signed a protest, and these two are pursuers here. The new light which they had got between the first and second meeting was the judgment in the *Oakbank* case, and therefore one might fairly conclude that had it not been for the hope thus raised these extraordinary resolutions would not have met with any opposition. I must say that in these circumstances I have not much sympathy with the pursuers, and as I can find no statutory objection to anything that has been done, I have come to the conclusion that the company must be assoilzied from this action of reduction. Such companies as this must, I think, be left to carry on their own affairs much in their own way, as they must understand their own financial concerns much better than a Court of Justice can do, and therefore unless a company transgresses the rules of the statute under which it is constituted I think that the Court should not interfere. No doubt there might be cases where, without any formal statutory objection being stated, it could be shown that a tyrannical majority were unscrupulously sacrificing the interests of a minority to promote their own ends, but there is nothing of that kind here.

With regard to the conclusion in the summons relating to the debenture debt, which is in these terms:—"It ought and should be found and declared, by decree foresaid, that the defenders were not entitled to borrow money on debenture to a greater amount than £100,000, which sum was borrowed previous to the issue of the shares held by the pursuer, and that so long as the whole of the capital held by the pursuer shall not have been called up; and also that upon payment of the existing debentures issued by the company becoming due, the same shall be paid off to the extent of £266,500 in the event of the said subscribed capital not having previously been wholly called up"—that proceeds on the idea that borrowing money upon debenture is doing damage to those whose uncalled capital is not made use of. The desire of the company is to have no debenture debt at all. So that the pursuers would require to show that their unpaid capital must be called up before any debentures could be issued to the public, which in my opinion they have completely failed to do. Now, this and all the other objections will, I think, be easiest disposed of by sustaining the company's scheme, which aims at having only one kind of share fully paid-up, and no debenture debt at all.

Lord Deas—The pursuers are holders of £10 shares of the Tharsis Sulphur & Copper Co., upon which £7 have been paid up. Now, I think that the case of the *Oakbank Oil Company*, which we decided recently, is quite different from the present case, for the interpretation clause there left us no choice whatever but to hold that the dividends fell to be paid upon the nominal or uncalled capital of the company. Here, however, there is nothing to guide us, nor do the articles of the company say how the dividend is o be paid at all. In these circumstances I agree

with your Lordship, that by the common law, which must rule this case, dividends should be paid upon the paid-up and not upon the nominal capital. Article 75, which refers to interim dividends, &c., about which so much was said, has in my opinion no application to the case, as it is a mere power to the directors to make a payment to account of final dividends. There is also here, as there was in the *Oakbank* case, a power given to the directors of the company to take advances from shareholders, and to make payment in the way of interest for these advances; but this circumstance does not, I think, help the pursuers' case. The decrease and subsequent increase of capital is a somewhat significant circumstance, but in reality it is the only mode of attaining the end in view. If it could have been shown that any unfair result had been obtained, or that any advantage had been gained by one set of shareholders over another, that would have been a very different matter, but it is not suggested that there is anything partial about the transaction—the shares have not been dealt with in one way to one set of shareholders, and in another way to another, for the effect as regards them all is the same.

The third point mentioned by your Lordship was the way in which the profit raised by the increase of capital was to be dealt with. It appears to me that no section of the shareholders can claim this profit as a right. A portion of it might have been given to the £7 shareholders, but the directors were under no obligation to give it. The whole transaction looks a little shuffling like at first sight, but when carefully considered it seems a fair enough and an effectual way of attaining the end in view, namely, the extinguishing of the debenture debt of the company.

On the whole subject I am disposed to concur with your Lordship in the conclusion at which you have arrived.

Lord Mure—I am of the same opinion. I think that the Lord Ordinary was right in distinguishing the present case from the case of the *Oakbank Oil Company;* and I also agree with him in thinking that no statutory objection can be taken to what the company in the present case has done, which in my opinion was quite within its discretion, and was not done for the purpose of damaging any particular section of shareholders. It seemed to me at first sight quite possible that a clever majority had outwitted the minority, but, on the contrary, it now appears that a large number of the £7 shareholders are quite in favour of what the majority proposed, and in these circumstances I think that the pursuers have quite failed to make out their case.

Lord Shand—The practical question in this case is, whether the directors' scheme, as adopted and approved of by the shareholders, is to receive effect? The company has at present a debenture debt of £366,500, and the method by which it is proposed to extinguish that debt is by calling up £1 upon the shares in question, which would produce £31,100; next to create new stock, and also to give off some which has hitherto remained unissued—which will produce £82,240; while the balance will be obtained by the very high premium which the new stock will realise in the market. Now, the advantage of such a scheme to the company as a whole is very obvious. It will be in a position to trade as a company which has no debenture debt, and the profits will fall to be divided entirely among the shareholders. The scheme was approved of by almost all the members of the company, and when confirmed at a subsequent meeting of the 418 members present only 8 members representing 72 shares dissented. Now, it is obvious that not only will the company as a whole be benefited by this scheme, but these very dissenting shareholders will also derive a proportional benefit, for their shares will be enhanced in value and there will be no debenture debt. But the contention of the pursuers is that they alone are entitled to the bonus, and that the company ought not to obtain any benefit from it, and they make their claim upon two grounds:—(1) That they are entitled to dividends on their nominal capital. (2) That they have a right to have their uncalled capital called up if the company requires funds, rather than that money should be borrowed on debenture. If the pursuers could make out the first of these propositions, they would certainly fortify their case upon the second point, for they might then say very fairly that, if by paying up £7 they have obtained an interest in the company worth £10, this benefit is not to be taken away from them by the vote of a majority. But I am satisfied that the first contention of the pursuers cannot stand. The Lord Ordinary thinks that by article 75 it was intended that interim dividends should be paid upon the nominal capital of the company, and not upon its paid-up capital. I cannot agree with the Lord Ordinary upon that point. I think that we get clear light upon what capital dividends are to be paid from article 7 as read by your Lordship, and I think it is quite plain that the words "which interest shall be in lieu of dividends in respect of such advances" are inserted to make it clear that interest and dividend are not to be paid upon these advances. So reading this article as meaning that the money upon which dividends are to be paid is paid up capital, I read article 75 as meaning that the dividends there referred to are to be paid in a similar way. I agree with your Lordships that the decision in the *Oakbank* case can have no bearing on the present question, for in that case there were clauses relating to dividends so clearly expressed that the Court was bound to give effect to them. But if the pursuers here have no right to dividends except upon paid-up capital, it is impossible that they can demand that they have the right to have their unpaid capital called up. They can only do this if they can successfully show that the company was bound if they required new capital to call up their money. The memorandum of association gives the company the power to increase its capital, and by the Companies Act of 1867 that capital can be reduced. These are the powers which are exercised under this scheme which the vast majority of the shareholders approve of. The only ground upon which it is maintained that the pursuers are entitled to have their uncalled capital called up is that they would have been liable to this extent if the company had not been a success; but that of itself will not give them the right. But the company here has considered the interests of the £7 shareholders by calling up £1, and it does not appear to me that the pursuers are entitled to

ask any more. With reference to the conclusion in the summons regarding the debentures, supposing that this matter was in the power of the shareholders, and looking forward to the possibility of future calls upon their shares, even that would not in my opinion give the pursuers the right they here demand; and on the whole case I concur with your Lordships in the opinions which have been expressed.

Their Lordships adhered, and on the motion of the respondents recalled the sist in the petition presented by the company for a confirmation order of the rules in question, and remitted to Mr Charles Logan, W.S., to inquire whether the interests of creditors would be prejudiced by the proposed proceeding.

Counsel for Pursuers — Robertson—Pearson. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Defenders—Mackintosh—Jameson. Agents—Webster, Will, & Ritchie, S.S.C.

Thursday, July 20.

FIRST DIVISION.

[Lord Fraser, Ordinary.

MONCREIFF *v.* DRYLIE AND OTHERS.

Succession — Legacy — Description of Legatee— "Second Cousin."

The term "second cousins" in a settlement *held* to include first cousins once removed.

A truster having provided an annuity to two first cousins, directed an annuity to be paid "to each of my second cousins other than H. B." H. B. was not related to her at all. In a subsequent part of her will she bequeathed a legacy to "J. S., one of my second cousins, . . . in addition to the annuity falling to him under these presents." J. S. was not a second cousin, but a first cousin once removed of the truster. The truster had certain second cousins in the strict sense who were also her first cousins once removed. *Held* that in construing the bequest of an annuity to each of the second cousins, first cousins once removed were entitled to be included.

Miss Margaret Drylie died at Portobello on 21st November 1879. She left a trust-disposition and settlement, of which the portions material to the present question were these:—The fourth purpose was—"I further appoint the said trustees and their foresaids to pay the following annuities to the following persons, viz., to my second cousin and servant Helen Bennet, during her life, an annuity of £25 sterling; to each of my cousins Jane Bennet and David Philip, during her or his life, an annuity of £20 sterling; and to each of my second cousins, other than the first above-named Helen Bennet, an annuity of £10 sterling." By the sixth purpose she left to "John Stoddart, spirit-retailer, Danderhall, one of my second cousins, and his spouse, each a legacy of £100 sterling, this being, as regards the said John Stoddart, in addition to the annuity of £10 sterling falling to him under these presents." By the eighth purpose she directed the residue and remainder of her estate, heritable and moveable, to be divided into two equal portions, one of which was to be given to the Edinburgh Royal Infirmary, and the other to be distributed among such of the Schemes of the Church of Scotland, and among those selected, in such proportions as the trustees should think fit. Miss Drylie left moveable property amounting in value to over £15,000.

The trustees having resigned, the Hon. F. J. Moncreiff, C.A., was appointed judicial factor on the estate. The main question for decision in the present multiplepoinding, which was raised by the judicial factor in consequence of the claims made upon him by various relatives claiming as "second cousins" the annuity of £10 left by the fourth purpose to the truster's second cousins, was whether the term "second cousin" in the settlement was to be interpreted in the strict sense of the term as meaning only persons descended from a common great-grandparent, and who were thus the children of persons who were first cousins to each other, or whether it was to be interpreted as including also first cousins once removed of the truster—that is, persons who were children of her first cousins, and were thus in a degree nearer to her in relationship. Neither of the persons whom the truster in the clauses of the deed which are quoted above designated "second cousins," viz., Helen Bennet and John Stoddart, were "second cousins" in the strict sense of the word. Helen Bennet was not related to her at all, and John Stoddart was her first cousin once removed.

Of the truster's relatives, two, Mrs Archibald and Mrs Somerville, were her "second cousins" in the strict sense by one side of their descent, and were also by the other side her first cousins once removed. These two persons were her only second cousins in the strict sense, In addition to the claims of these persons, nearly sixty persons, who were related to the truster as first cousins once removed, claimed to be entitled to take benefit under the clause in favour of "second cousins," contending that the expression as ordinarily used, and especially as used by the truster in giving a legacy to John Stoddart, included first cousins once removed. A number of persons also claimed to take benefit under the same clause who were "either first cousins twice removed, or second cousins once removed."

The Lord Ordinary (FRASER) found that the truster intended to include under the term "second cousins" first cousins once removed, and therefore first cousins once removed are entitled to legacies granted to second cousins."

He added this opinion:—"The question in this case is one as to the construction of a clause in the trust-disposition and settlement of Margaret Drylie which was duly framed by a man of business. The fourth purpose of the trust is as follows:—'*Fourthly,* I further appoint the said trustees and their foresaids to pay the following annuities to the following persons, viz., to my second cousin and servant Helen Bennet, during her life, an annuity of £25 sterling; to each of my cousins Jane Bennet and David Philip, during her or his life, an annuity of £20 sterling; and to each of my second cousins, other than the first above-named Helen Bennet, an annuity of £10 sterling; and to Mrs Adamson, residing at