[LORD KYLLACHY—But a negative servitude cannot give notice by possession.] In the present case notice was given on record. Where there was no reference to the lands for whose benefit a restriction was imposed all the then unfeued lands of the superior had the right to enforce it—*Governors of Muirhead College* v. *Millar*, May 29, 1901, 38 S.L.R. 835.

At advising—

LORD KYLLACHY—In this case I am, as I understand in common with both your Lordships, entirely satisfied with the judgment of the Dean of Guild. And I do not think that I could with advantage add anything to the very clear and able exposition both of the facts and law which we find in the note appended to his interlocutor.

I desire, however, to make one observation, which, in view of part of the argument lately submitted to us, it is perhaps right to make. The Dean of Guild has, it will be observed, decided the case upon a quite sufficient but perhaps in one view special ground, viz., that the National Heritable Property Association, Limited (the common authors of all the parties), possessing plainly a contractual right to enforce as against the appellants the building conditions expressed in their (the appellants) title, have by special assignation transmitted that contractual right to the respondents, doing so by express clauses contained in the several dispositions granted by them, which form the respondents' titles. So deciding it was not of course necessary for the Dean of Guild to decide or consider how far the result would have been the same if in place of special assignations the respondents had to rely simply on the force of their several dispositions—that is to say, on the alleged legal presumption that every disposition of heritage includes impliedly a disposition or assignation of all lesser rights which pertain to the disponer, or which he has the right to convey. On that question, which he describes as fair and arguable, the Dean of Guild has reserved his opinion; and I do not doubt that your Lordships in affirming his interlocutor will take the same course. At the same time, having regard to the argument which was as I have said lately submitted to us, I for myself should like to say this, that I fully appreciate the importance and force of that argument, and have fully in view that when the question reserved comes up—as it some day may—and has to be decided, it will be necessary to consider carefully the important views expressed in certain passages of Lord Watson's opinions in the cases of *Hislop* v. *MacRitchie*, 8 R. (H.L.) 103, and *Stevenson* v. *Steel Company of Scotland*, 1 F. (H.L.) 194, and also the passages in Stair and Erskine, viz., Stair, iii, 2, 1, and Erskine, ii, 7, 2, to which in the later case Lord Watson refers.

LORD STORMONTH DARLING and LORD LOW concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor—

"Dismiss the appeal and affirm the said interlocutor [of 18th May 1906]: Find in terms of the findings in the said interlocutor, and of new refuse the lining craved: Find the objectors Mrs Harrower and others (except the trustees of William Cumming) entitled to additional expenses, and remit the account thereof along with the expenses found due to them in the Dean of Guild Court, and the account of the expenses for which the objectors The National Heritable Association, Limited, were found liable to the petitioners in the said Court, to the Auditor to tax and report."

Counsel for the Petitioners (Appellants)—M'Lennan, K.C.—Hunter, K.C.—Ralston. Agent—John N. Rae, S.S.C.

Counsel for Objectors (Respondents)—Dean of Faculty (Campbell, K.C.)—D. Anderson. Agents—J. W. & J. Mackenzie, W.S.

Friday, July 20.

FIRST DIVISION.

BALMENACH-GLENLIVET DISTILLERY, LIMITED *v.* CROALL AND OTHERS.

Company—Reduction of Capital—Memorandum of Association—Reduction to Meet Losses Partially Laid on Shareholders Preferential by Memorandum—Power of Court to Confirm—Fair and Equitable Scheme—Companies Acts 1867 (30 *and* 31 *Vict. cap.* 131); 1877 (40 *and* 41 *Vict. cap.* 26).

The memorandum of association of a company provided that the capital should consist of 6000 preference shares and 6000 ordinary shares, all of £10 each, with power to increase or reduce the capital, and ("without prejudice to existing rights") to divide the shares into classes, and that the preference shares should be entitled to a cumulative preferential 5 per cent. dividend, and in the event of a winding-up to priority in repayment.

The company's business having greatly depreciated, resolutions were passed approving of a scheme for reduction of capital whereby the preference shares were to become £5, 10s. shares instead of £10 shares, and the ordinary shares £1 shares instead of £10 shares, thus making one-third of the loss fall on the preference shareholders. No alteration was made on the voting power of a share. The ordinary shares had been taken and were held by the vendors and their representatives, and they were still continuing to manage the business.

A petition for confirmation having been presented, a small number of preference shareholders opposed, on the ground (1) that it was *ultra vires* of the

Court to sanction a scheme, like the one proposed, inconsistent with the memorandum of association, and (2) that the scheme was not in character fair and equitable, such as should be confirmed.

Held (1) that confirmation of the scheme was *intra vires* of the Court—*British and American Trustee and Finance Corporation* v. *Couper* [1894], A.C. 399, *followed*; *Ashbury* v. *Watson*, L.R., 30 Ch. Div. 376, *distinguished*—and (2) that the scheme was fair and equitable and should be confirmed. *In re Allsopp & Sons, Limited*, July, 1903, 51 W.R. 644, *followed*.

Per Lord President—"I cannot read that case" (*British and American Trustee and Finance Corporation* v. *Couper*) "without coming to the conclusion that it really has settled, in a way that we must certainly follow, that, so far as the question of *intra vires* is concerned, there really is no limit to what the Court can do. They may confirm any resolution however much against any provision of the company it may be, provided always, of course, that that resolution is really for a reduction of capital, and subject also to this very great safeguard that the Court is not to do so unless it thinks that on the whole the new arrangement is a just and equitable arrangement."

On 28th October 1905 the Balmenach-Glenlivet Distillery Company, Limited, incorporated under the Companies Acts 1862 to 1893, presented a petition under the Companies Acts 1862 to 1900 and particularly the Companies Act 1867, sections 9 and 10, and 1877, sections 3 and 4, in which it craved the Court, *inter alia*, "to pronounce an order confirming the reduction of capital resolved on by the special resolution set forth in the petition, approving of the minute set forth in the petition, directing the registration of such confirmation order and minute by the Registrar of Joint Stock Companies, and . . . and dispense altogether with the words 'and reduced' as part of the name of the company . . . ." Answers were lodged by John Croall, 21 Broughton Street, Edinburgh, and others, holders of preference shares in the company of the *cumulo* value of £5890.

The company which was formed to take over the old established distillery, &c., business of John M'Gregor & Son was incorporated in February 1897. Its memorandum of association in clause 5 provided—"The capital of the company is one hundred and twenty thousand pounds sterling, divided into six thousand preference shares of ten pounds each, which shall be entitled to receive out of profits a cumulative preferential dividend of five per centum per annum (in the manner after stated), and six thousand ordinary shares of ten pounds each, held as fully paid up, with power to increase and reduce the capital, and (without prejudice to existing rights) to divide the shares for the time being into several classes, and to attach thereto respectively such preferential, deferred, or special rights, privileges, or conditions with regard to repayment of capital or payment of dividends, or both, or voting, as may be determined by or be in accordance with the regulations of the company; provided always that no shares having rights, privileges, or conditions of any kind, preferential to or *pari passu* with those of the said preference shares shall be created or issued unless said creation and issue shall have been previously agreed to by an extraordinary resolution of the holders of said preference shares, passed in terms of the articles of association. The preference shares shall rank on the net profits of the company (including any balance at the credit of profit and loss account brought forward from previous years, and any sum at the credit of reserve applicable for equalisation of dividend) for a dividend of 5 per centum per annum in preference to any dividend on the ordinary shares; and in the event of the net profits in any year not being sufficient to pay such dividend in full for that period, the shortcoming shall be made good out of the net profits of the subsequent year or years, such arrears of dividend being also paid in preference to any divdend on the ordinary shares. In the event of a winding-up of the company being followed by a distribution of its surplus assets among its members, such distribution shall be regulated as follows, viz.—*First*, in repaying to the holders of the preference shares mentioned in this memorandum, *pari passu*, and to the holders of any other issue of stock or shares having priority to the ordinary shares, *pari passu*, according to their respective priorities and privileges, the amount paid up thereon, and any arrears of dividend thereon; thereafter in repaying to the holders of the ordinary shares *pari passu* the amount paid thereon; and the residue (if any) shall be paid to the holders of ordinary shares."

The articles of association contained provisions in accordance with the above clause of the memorandum, and in particular clause 14 provided—"The company may from time to time, by special resolution, reduce its capital by paying off capital, or cancelling capital which has been lost, or is unrepresented by available assets, or reducing the liability on the shares or otherwise, as may seem expedient, and capital may be paid of upon the footing that it may be called up again or otherwise. The company may also subdivide or consolidate its shares, or any of them."

The petition stated, *inter alia*—"The whole share capital of the company was issued. The 6000 preference shares were offered for subscription at £11 per share (being £1 premium), and were allotted to members of the public and issued for cash. The whole ordinary shares were, in terms of the purchase agreement, issued to the vendors as fully paid up. On its formation the company took over the business of distillers, maltsters, merchants, and farmers, formerly carried on by the vendors at Balmenach Distillery as at 1st February 1897, and has since carried on business as distillers, maltsters, merchants, and farmers

at that distillery. The company does not carry on any other business. . . . . The reports and balance-sheets which have been submitted to the shareholders show that the net profits earned by the company since its formation have been:—

For the period from 1st February 1897 to 31st August 1898 . .	£11,754	1	4
For the year to 31st August 1899	7,111	0	1
do do 1900	8,185	16	2
do do 1901	6,680	18	9
do do 1902	5,685	6	5
do do 1903	2,299	9	0
do do 1904	2,150	16	4
	£43,867	8	1

. . . . . .

Having in view the changes which have taken place in the liquor trade since 1897, and the long depression which has existed and is continuing to exist, and the greater cost of production brought about by the difficulty and expense of so disposing of the distillery effluents as to avoid all cause of complaint by the riparian proprietors, the directors of the company, after careful consideration, came to be of opinion that the capital as stated in the balance-sheet as at 31st August 1904 was no longer fully represented by available assets, and that a considerable portion of the capital of the company had been permanently lost, and that it was advisable that the capital should be reduced so that the value of the assets as appearing in the books should be written down to a figure more nearly approximating to actual value. The directors obtained from Mr James Maitland, distillery architect and valuator, Tain, managing director of the Glenmorangie Distillery Company, Limited, a report on and valuation of the whole buildings, machinery, and plant belonging to the company. Mr Maitland in his report dated 7th April 1905, valued the business properties, including lands, buildings, machinery, plant, distiller's residence, excise officers' residences, brewers' and workmen's houses, offices, water pipes, farm steading, railway from distillery to Cromdale, drainage, wheel pit, mill lade, and tail drains at the sum of £28,000, and he reports that 'in the present depressed condition of the distillery industry, with immense stocks of whisky accumulated in duty free warehouses, and with distilleries capable of producing supplies far in excess of the demand, and consequently very keen competition for all orders, I am strongly of opinion that it would not be safe in present circumstances to calculate anything for goodwill, as it has now no marketable value.' In the balance-sheet at 31st August 1904 the distillery buildings, railway, machinery, plant, water rights, and goodwill are stated as of the value of £108,406, 18s. 9d., and there is entered an item, 'purification works, suspense account, expended during last year, £677, 9s. 1d.'; together making £109,084 7 10

Deducting therefrom Mr Maitland's valuation amounting to 28,000 0 0

Leaves a difference of £81,084 7 10

The directors are accordingly of opinion that under no circumstances that can be foreseen can the value of the distillery with machinery and plant be stated at a sum exceeding £28,084, 7s. 10d. The directors are satisfied that the other assets of the company are of the value stated in the balance sheet, and accordingly the petitioners believe that there has been a depreciation in the value of the company's assets to an extent considerably exceeding £81,000. In these circumstances the directors after careful consideration came to be of opinion that in order to put the capital of the company on a sound basis and to improve its position, a reasonable scheme, having regard to the legal rights of both classes of shareholders, would be to reduce the preference shares from £10 each to £5, 10s. each and the ordinary shares from £10 each to £1 each, and that the preference dividend for the period from 31st August 1904 to 31st August 1905 should be cancelled. Such reduction would reduce the amount of outstanding capital to the extent of £81,000, and that amount would be written off the book values of the distillery and other assets. The directors were further of opinion that in order to compensate the preference shareholders for the reduction it was fair and equitable that the preference shares in addition to being entitled to a cumulative preference dividend and to a preference as to repayment of capital in the event of a winding-up should also have conferred upon them a right to share rateably in any surplus profits and capital with the ordinary shareholders. Accordingly at an extraordinary general meeting of the company duly held . . . on 16th June 1905 the following resolution was passed by a majority of 8379, there having been 8653 votes given for the resolution and 274 against it:—'That the capital of the company be reduced from £120,000, divided into 6000 preference shares of £10 each and 6000 ordinary shares of £10 each, to £39,000, divided into 6000 preference shares of £5, 10s. each and 6000 ordinary shares of £1 each, and that such reduction be effected as follows—(1) by cancelling capital which has been lost or is unrepresented by available assets to the extent of £4, 10s. per share on each of the said 6000 preference shares and of £9 per share on each of the said 6000 ordinary shares, and (2) by reducing (*a*) the nominal amount of each of the said 6000 preference shares from £10 to £5, 10s., and (*b*) the nominal amount of each of the said 6000 ordinary shares from £10 to £1.'"

The petition further stated that at the said general meeting separate special resolutions dealing with the arrears of dividend on the preference shares, and giving effect by amendments in the articles of association to the alterations on the rights of the preference and ordinary shareholders, were submitted and carried by the same majorities; that at a separate meeting of the preference shareholders held on the same day a resolution consenting to the special resolutions and to the rights attached to the preference shares being abandoned or altered was carried by 2733 votes for to 1374 against, and that at an

extraordinary general meeting of the company held on 12th July 1905 the resolutions were confirmed by a majority of 7343, votes to the number of 8567 being for and 1224 against.

The minute proposed to be registered was—"The capital of the Balmenach-Glenlivet Distillery, Limited, is £39,000, divided into 6000 preference shares of £5, 10s. each and 6000 ordinary shares of £1 each, all of which shares have been issued and are fully paid."

The answers, which did not deny that a reduction of capital was necessary, stated, *inter alia*:—"In both the memorandum and articles of association of the company it is specially provided that the preference shares are preferential both as regards dividend and capital, and in the prospectus issued to the public and on the faith of which the preference shares were applied for it is set forth that these shares are 'entitled to a cumulative dividend of 5 per cent. per annum preferential as regards both dividend and capital.' Said shares were issued at a premium of £1 per share, or in other words of 10 per cent. . . . The respondents do not admit that Mr Maitland's said valuation is at all adequate. Further, Mr Maitland has reported that the goodwill for which . . . . £68,800 or thereby was paid is now valueless. The respondents submit that the goodwill still possesses a substantial value and that Mr Maitland's valuation of £28,000 for the distillery, adjuncts, and goodwill is very greatly underestimated. . . . Under the resolutions which the Court are now asked to confirm it is proposed to throw one-third part of the alleged loss of capital on the preference shareholders and the remaining two-thirds thereof on the ordinary shareholders, whereas under the memorandum and articles of association the whole of the loss fell to be borne *primo loco* by the ordinary shareholders. It is further proposed that while in the original articles of association each class of shareholders has the same voting power according to the value of the shares held by them—that is to say, one vote for each £10 of capital—an ordinary shareholder holding only a £1 share shall in future have the same voting power as a preference shareholder holding a £5, 10s. share. The respondents accordingly crave the Court to refuse the prayer of the petition, because . . . (2) it is not proved and it is not the case that capital has been lost to the extent represented by the proposed reduction of capital; (3) the resolutions in question are incompetent as being in breach of the fundamental provisions of the memorandum and articles of association; and (4) the resolutions in question even if competent are inequitable and ought not to be confirmed by the Court."

It appeared that practically the whole of the ordinary shares still belonged to the M'Gregor family, the vendors, and that the directors were virtually their representatives.

The Court on 17th November 1905 remitted to Mr G. M. Paul, D.K.S., to inquire as to whether the proceedings had been regular and proper, and as to the reasons for the proposed reduction of capital, and to report.

Mr Paul in his report stated—". . . It seems impossible to ascertain with arithmetical certainty the precise amount of depreciation. A conclusion can only be reached on a consideration of the independent opinions of reliable experts formed, in a minor degree, on their estimate of the value of the properties as such, but mainly on the effect which what they imagine will be the future of the whisky trade will have upon the particular distillery. . . . It is clear that the share capital ought to be written down very considerably; it is the extent only of the reduction which is in question. It would be somewhat less than £75,000 if Mr Doig's valuation were accepted, £79,400 if Mr Spence's were accepted, and £81,000 if Mr Maitland's were accepted. The company has by large majorities passed a special resolution for reduction based on Mr Maitland's valuation, and the objection of the minorities was not to the amount of reduction. . . ."

The reporter discussed at length the question whether it was not *ultra vires* of the company to deal with the preference shares as proposed in view of the terms of the memorandum of association, on which point he referred to Buckley on Companies Acts, 8th ed., pp. 517, 616, 7th ed. p. 493; Palmer's Company Law, 5th ed., pp. 76, 77; *Floating Dock of St Thomas*, [1895] 1 Ch. 691; *London and New York Investment Corporation*, [1895] 2 Ch. 860; *British and American Trustee and Finance Corporation v. Couper*, [1894] A.C. 399; *Ashbury v. Watson*, L.R. 30 Ch. D. 376; Rawlins and Macnaghten on Companies, p. 478. He then went on to consider the scheme, assuming its competency, and stated:—"If the proposed alteration be not *ultra vires*, then, while the legal rights of shareholders ought not, in the general case, to be departed from, it may nevertheless be that the proposed scheme of reduction should be allowed if it forms part of a fair and equitable general arrangement for keeping the distillery alive as a going concern and avoiding liquidation. As matters stand, the profits of the last three years have fallen considerably short of the amount (£3000) required for payment of the dividends on the preference shares, and as these dividends are cumulative, the arrears must, unless something is done, speedily become a charge of considerable amount upon the profits of the company, with little prospect of such an increase, in the near future at least, as will be sufficient for clearing them off. The profits for the year to 31st August 1904, after allowing £1000 for depreciation, amounted to £1155, 2s. 4d. Those for the year to 31st August last, without making any allowance for depreciation, amounted to £1847, 12s. 1d. Moreover, the voting power attached to the ordinary shares being equal to that of the preference shareholders, and the ordinary shares being in the hands of a very few individuals closely connected with the management, and therefore readily available in full strength for voting purposes, the control

of the company by the ordinary shareholders is virtually absolute, and no scheme of reduction proposed by the preference shareholders having for its object the cancelling of the whole of the ordinary share capital would have any chance of being carried with the requisite majority. If so minded, the ordinary shareholders might make a voluntary winding-up or a voluntary scheme for reconstruction impossible, and they might give much trouble in case of an attempt on the part of the others to have the company wound up under a compulsory order. Even in a winding-up a sale of the concern might, in the present depressed state of the industry, be impossible or only possible at a considerable sacrifice. The reporter understands that distilleries which have only been a comparatively short time in existence are practically unsaleable. In respect of its name a purchaser might be found for Balmenach, but, on the other hand, the uncertainty as to the future of the pollution difficulty, added to the depression in the trade, would have a prejudicial effect. Therefore an arrangement calculated to keep the company alive as a going concern, although involving (for a consideration) a departure from the legal rights of the shareholders, might nevertheless be one which, on the terms proposed, should be accepted as fair and equitable in the circumstances."

In connection with the proposed cancelling of the preference dividend for the year August 1904 to August 1905, reference was made to *Oban & Aultmore Glenlivet Distilleries, Limited*, July 15, 1903, 5 F. 1140, 40 S.L.R. 817. Assuming the competency and fairness of the scheme the reporter said—"If your Lordships shall be pleased to confirm the special resolution for reduction of the company's capital, the reporter begs respectfully to submit for consideration whether it should not be made a condition that, in view of the changed circumstances, the articles of association should be altered in some respects. Section 11 of the Act of 1867 enacts that the Court may make the confirmation order 'on such terms and subject to such conditions as it deems fit.' Article 70 of the articles of association provides as follows:—'On a show of hands every member shall have one vote only. In case of a poll he shall have one vote for every share, whether preference or ordinary, held by him.' So long as all the shares had the same nominal value, the provision of a vote for every share was fair towards all the shareholders. But if the proposed reduction receives effect, and article 70 above quoted remains unaltered, there will be 6000 ordinary shares of £1 each, and the like number of preference shares of £5, 10s. each, and the holder of a number of £1 shares will have as many votes as the holder of a like number of £5, 10s. shares. The holders of the ordinary capital, with a stake of £6000 in the concern, will have equal voting power, and therefore equal powers in the management of the affairs of the company, with the holders of the preference capital, whose stake in the concern is £33,000. It seems to the reporter that article 70 should be altered so as to give the two classes of shareholders respectively voting rights corresponding to the amount of capital which, when the reduction takes effect, will belong to each class. Mr Justice Kekewich (*Pinkney Steamship Company*, (1892) 3 Ch. 125), who had occasion to consider this point, directed the petition to stand over to give the company the opportunity of altering its articles. Failing its doing so he intimated that he would dismiss the petition. In a previous case (*Continental Union Gas Company*, 7 T.L.R. 476) Mr Justice Chitty had dismissed the petition because the proposed reduction would bring about this inequality of voting power. Subsequently to both these cases Mr Justice Romer (*James Colmer, Limited*, (1897) 1 Ch. 524) held that this was not necessarily a fatal objection, but that in a proper case the Court had power to confirm notwithstanding that voting powers were affected. The case was, however, a special one. The articles of association empowered the holders of any one class of shares by a specified majority to consent on behalf of all the holders of shares of that class to (among other things) any scheme for the reduction of capital affecting prejudicially such class of shares. Meetings of shareholders were accordingly held consenting to the proposed scheme of reduction. Mr Justice Romer was much influenced by these specialities . . ."

Argued for petitioners—The case of the *British and American Trustee and Finance Corporation* v. *Couper*, [1894] A.C. 399, and that of *in re Credit Assurance and Guarantee Corporation, Limited*, [1902] 2 Ch. 601, supported the view that it was competent for the Court to confirm the proposed scheme. It was within the power of the Court to confirm although changes in the position of different classes of shareholders were brought about—*British and American, &c., Corporation* (*ut sup.*); Palmer's Company Law (5th ed.), pp. 66-7, and cases there cited; *in re Welsbach Incandescent Gas Light Company, Limited*, [1904] 1 Ch. 87; *in re Allsopp & Sons, Limited*, July 1903, 51 W. R. 644. The memorandum (clause 5) gave power to the company to reduce the capital and also to divide the shares into classes with such privileges as it liked. The power so conferred was not derogated from by the provisions relative to repayment on a winding-up. These provisions only referred to a winding-up, and that being so the present case fell within the rule of *Welsbach* (*ut sup.*). No doubt the preference shareholders were to be considered, but the Court had power to alter their position provided the alteration was as slight as possible, and the transaction as a whole was fair and equitable—Palmer's Company Law (5th ed.), p. 77. The proposal was fair and equitable, as it was impossible to reduce the ordinary shares more without abolishing them, in which case the management of the company would also go.

Argued for respondents—The proposed scheme was incompetent. It interfered with the right of the preference shareholders as declared in the memorandum—Companies Act 1862, sections 12 and 50. The proposed application of the assets on dissolution of the company was contrary to clause 5 of the memorandum. Tacking on a reduction of capital did not alter the fact that the course proposed was incompetent — *Liquidator of Milford Haven Fishing Company, Limited* v. *Jones*, March 20, 1895, 22 R. 577, 32 S.L.R. 449; *City Property Investment Trust Corporation, Limited* v. *Thorburn*, January 17, 1896, 23 R. 400, 33 S.L.R. 309; *Ashbury* v. *Watson*, July 23, 1885, L.R., 30 C. D. 376. The petitioners proposed to cut down the amount out of the company's income which the preference shareholders were entitled to, to about one-half, for they were at present entitled to £3000, *i.e.*, 5 per cent. on £60,000. Such alteration was inconsistent with the memorandum. In the event of a winding-up the rights of the respondents would be very prejudicially affected. The preference shareholders would only receive out of what was available about one-half of what they would at present. The ordinary shareholders were unduly benefitted at the expense of the respondents. The loss ought to fall on the ordinary shareholders—*In re Floating Dock Company of St Thomas, Limited*, [1895] 1 Ch. 691; *In re London and New York Investment Corporation*, [1895] 2 Ch. 860; Buckley on Companies Acts (8th ed.), p. 616; Companies Act 1867, section 9. The memorandum provided that the preference shareholders were to be paid in full on the company ceasing, and that before any of the other shareholders got anything. The powers given to alter the memorandum did not apply to that right, which was saved from the power to modify under the term "existing rights." The memorandum was not a "flexible" one, such as the memorandum in *Allsopp* (*ut sup.*) and *Welsbach* (*ut sup.*). That being so, no change could be made on the relative right of the preference and ordinary shareholders. Apart, however, from its legality the proposed reduction was most inequitable. It was proposed to cut down the preference shares by £4, 10s. a share, and there were no circumstances to justify such a proceeding. Further, it was proposed to permit an ordinary shareholder holding only a £1 share to have the same voting power as a preference shareholder holding a £5, 10s. share. The Court would not sanction a reduction if the transaction were, as here, inequitable—*In re Barrow Hæmatite Steel Company*, [1900] 2 Ch. 846.

At advising—

LORD PRESIDENT—This is a petition at the instance of the Balmenach-Glenlivet Distillery Company, Limited, asking the Court, under the powers given in the Companies Act, to confirm certain resolutions of the company by which they have resolved to reduce their capital. We have had a very full and very clear report from Mr Paul, to whom the petition was remitted. Several points are raised in that report, but the argument before your Lordships turned upon one point and one point alone; and in order to explain that point it is necessary that I should very briefly indicate what has been the fate of this company.

The company was formed to take over an old established distillery of high character, and it was formed at the time when, as a matter of common knowledge, the Scottish Highland whisky trade was in an exceedingly flourishing condition. This flourishing condition, for reasons which I need not particularise, has not continued. It is equally common knowledge that the state of the trade is very different now from what it was when this company was formed. The result has been that the company has not maintained the course of prosperity which it had at its inception, and it is perfectly evident that there is no likelihood at all of its being in the near future, if indeed ever, able to pay an adequate return on the nominal capital of the company. Now, the nominal capital of the company was divided into two sets of shares, preference shares and ordinary shares, the preference shares having preferential rights as regards cumulative dividends and also as regards capital. The ordinary shares were held by the vendors of the business, and the holders of the ordinary shares represented the practical working staff of the business. There has been an investigation, and the result of that investigation as set forth in Mr Paul's report shows, and I think shows very clearly, that the capital of the company is to a very large extent gone. It is gone for two reasons; it is gone because in one sense it never existed. That is to say, I think it is clearly shown that the valuation at which the business was taken over by the company was too high. But it has also gone, because undoubtedly the effect of the diminishing trade has been that the goodwill of this business represents nothing like what it represented before. Under these circumstances the company went through the appropriate steps, and they came to a resolution by which a large amount of capital was to be written off, and their scheme, passed by considerable majorities, by which this amount of capital was to be written off, was a scheme by which one third of the loss was to be written off the preference shares, and two thirds of the loss was to be written of the ordinary shares.

Now, the practical point that has been raised before your Lordships is this. It was argued by counsel for a certain minority of the preference shareholders, who appeared before your Lordships, that it was not really *intra vires* of the Court to sanction such a scheme, because to do so would be to go contrary to the memorandum of association. There is no doubt, of course, that the memorandum of the company here contemplated that there should be, and should remain, these preference shares, taking priority not only in the dividend but in the capital over the ordinary shares, and the argument put before your Lordships was

that anything inconsistent with that was *ultra vires* of the Court to confirm. The authority on which the learned counsel relied was *Ashbury* v. *Watson*, L.R. 30 Ch. D. 376. It is sufficient to say that *Ashbury* v. *Watson*, though a very good authority on the proposition that a company cannot by resolution alter its memorandum, was not a case which had to do with reduction of capital at all, and accordingly I think that *Ashbury* v. *Watson* has nothing to do with the question here. The real authority on the matter is, I think, the case in which the last word has been said—the *British and American Finance Corporation* v. *Couper*, decided in the House of Lords, and reported in [1894] Appeal Cases, 399. I cannot read that case without coming to the conclusion that it really has settled in a way that we must certainly follow, that, so far as the question of *intra vires* is concerned, there really is no limit to what the Court can do. They may confirm any resolution, however much against any provision of the company it may be, provided always, of course, that that resolution is really for a reduction of capital, and subject also to this very great safeguard, that the Court is not to do so unless it thinks that on the whole the new arrangement is a just and equitable arrangement. If what was proposed to be done by a company was, under cover of a so-called reduction of capital, really to change the rights of the shareholders in a way inconsistent with the memorandum, I do not think the Court in that case could say on the whole that it was a just and equitable arrangement, and accordingly any attempt of that sort would be struck at. But, assuming that the new arrangement is a just and equitable one, I am bound to say the result of that case is that there could remain no question of *ultra vires*, but that anything is open for the Court's sanction, and after all the case itself is about as good an instance of a thorough interference with the memorandum as could well be. What was done in that case was to sweep a certain set of shareholders out of existence—and I say a set of shareholders, not a class in the sense of holders of a certain class of shares, such as, for instance, cutting out the first one or two classes of preference shareholders or ordinary shareholders as the case might be—but it was simply taking certain shareholders who were called the American shareholders, but who in reality were only the individual holders of shares from No. 1 to No. so and so, and sweeping them out of existence. Now it cannot be doubted that when you had, as there, a memorandum in which it is said that the shares should consist of so many preference shares and so many ordinary shares, it was clearly meant that all these shares—be they preference or be they ordinary—should remain on equal terms *inter se*, and there could have been nothing more grossly against the memorandum than to take the holders of the shares from 1 to 100 and say to them "We will buy your shares and you must go out," and to say to the holders of shares from 100 to 200 "You on the other hand may stay." And yet that was what was practically done in that case. The matter is put in a single sentence by Lord Macnaghten in his judgment, when after going through the various safeguards there are in the provisions of the Act he goes on to say this—"With these safeguards the Act apparently leaves the company to determine the extent, the mode and the incidence of the reduction." Now it all turns upon that word "incidence," because the question which is raised here—the question whether you are entitled to extinguish any preference shares while you leave ordinary shares still alive—is really a question as to the incidence of the reduction. I have therefore come to the conclusion that on this branch of the argument the objectors have entirely failed and that there is no question that this transaction was *intra vires*.

But, of course, in all I have said I have hitherto assumed that the transaction is a just and equitable transaction, and we must be satisfied of that before we give our sanction to it. Now I am not wishing to throw the slightest doubt upon the view that in ordinary circumstances where there is a preference on capital in liquidation in favour of one set of shares against another, and where capital is lost, you should make the loss fall first of all on those who come last in the liquidation. But there are obviously cases where a desolating logic would defeat itself, and I am bound to say I think this is one of them. As I have already said, the ordinary shareholders here represent the managing persons of the company, and it is not in human nature to suppose that if by arrangement the ordinary shareholders were wiped out of existence they would go on working to make the company prosperous for the preference shareholders. And that, of course, must be the view of those who brought this about, for after all the majority of the preference shareholders want this thing. I need scarcely remind your Lordships that it is not the Court that want it; it is only the Court seeing if they ought to give their confirmation to the scheme the company itself proposes. I have come to the conclusion that the arrangement proposed is a just and equitable one as being in the true interests of the shareholders of the company and as being the only thing that stands between them and utter ruin. Accordingly I think we should be quite right in doing here what seems to have been done in almost exactly the same terms in the case of *Allsopp* (51 Weekly Reporter, p. 644). Mr Cooper had to admit the similarity of *Allsopp's* case but strove to draw a distinction by saying the cases were not in the same position, for it did not appear from the report that the provisions in question in *Allsopp's* case were in the memorandum. I took the opportunity when in England to obtain a memorandum of *Allsopps*, and I found that that was so. I mean that though the report does not show it the provisions in *Allsopp's* case were provisions in the articles and not in the memorandum.

But for the reasons I have stated I do not think that makes any difference, and accordingly although *Allsopps* is not an authority on the legal part of the question, at the same time I think it is a good authority as to what is a just and equitable arrangement, and that it is a case which is a safe one to follow.

On the whole matter I am of opinion that this resolution ought to be confirmed.

[Counsel here referred to the question of voting power.]

I do not propose to touch that, because I think the proposal is equitable. I do not share the views of the reporter there. It merely leaves the shareholders as a whole exactly as they were in the old days with regard to voting power, though their capital interest in the company will now be different.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court granted the prayer of the petition.

Counsel for the Petitioners—Younger, K.C.—Hunter, K.C.—Lyon Mackenzie. Agents—Fletcher & Baillie, W.S.

Counsel for the Respondents—Cooper, K.C.—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Friday, July 20.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

BILE BEAN MANUFACTURING COMPANY *v.* DAVIDSON.

Trade Name—Misrepresentation—Fraud—False Statements in Advertising—Fraud whereby Trade Established Disentitling to Protection of Trade Name.

A company established a large business for certain pills, called "Bile Beans," by extensive advertising through which ran the story that the pills were compounded, with other ingredients, of a vegetable substance of marvellous health-giving properties which had been long known and used by the natives of Australia but only recently, after great research, discovered by C. F., a scientist. The labels and wrappers of the pill-boxes did not contain distinct references to this discovery, but the pills were called C. F.'s. The company having raised an action of interdict for the protection of the "trade name" of the pills it was proved that the story was a fabrication, the pills being compounded of ingredients known to all chemists.

Held that the false and fraudulent misrepresentations of the complainers, by which they had built up their business and were deceiving the public, disentitled them to have that business protected by the Court.

Process—Equitable Remedy—Fraud—Protection of Trade Name—Fraud by Complainers Seeking an Equitable Remedy not Pleaded on Record but Disclosed at Proof.

In an action of interdict for the protection of a trade name, where in the proof it was disclosed, though not pleaded on record, that the business had been established by a fraud on the public, the Lord Ordinary (Ardwall), the point having been taken by counsel but without amendment, proceeded to dispose of the case on this ground, and his judgment was subsequently sustained by the Division.

Trade Name—"Passing Off"—Name Descriptive or Fancy?—Secondary Meaning of Words Used—"Bile Beans"—Right to Exclusive Use of Trade Name because of Association in Mind of Public—Sufficiently Distinguishing—Interdict.

In 1899 a company started to sell pills in the United Kingdom. The pills were sold in boxes on which were labels bearing, *inter alia*, the words "Charles Forde's Bile Beans for Biliousness." In 1904 one Davidson began to sell liver pills in boxes on which were labels bearing, *inter alia*, the words "Davidson's Bile Beans." His pill-boxes differed from the company's in size and price, and the colouring, printing, and general appearance of the respective labels were different. The company raised an action to interdict him from selling as bile beans pills not made or supplied by them.

The words "Bile Beans" had formed part of a trade-mark taken out in this country by J. F. Smith & Company, of St Louis, U.S.A., in 1887, who, however, did not appear to have sold any of their bile beans in this country, and the complainers had in 1902 obtained an assignment of this trade-mark. Since 1887, in America, the word "bean" had been applied to oviform pills, and appeared in drug catalogues, but pills of that shape were not in common use in England. In certain of their advertisements the complainers referred to bile beans as "a title given to express exactly what the preparation is, a Bean for the Bile."

Opinions (*per* the Lord Justice-Clerk, and Lords Kyllachy and Stormonth Darling affirming the Lord Ordinary, Ardwall) that complainers had failed to prove that "Bile Beans" was a "fancy name" of their invention.

Opinions (*per* Lord Justice-Clerk and Lord Kyllachy, affirming the Lord Ordinary, Ardwall) (1) that the complainers had failed to prove that the term "Bile Beans" was so associated in the public mind with their pills that they were entitled to the exclusive use of the term, and (2) if that were to be held otherwise, that they had failed to prove that the respondent's pills had not been sufficiently distinguished.

Opinion of Lord Low on these matters *reserved.*