Feniscliffe Products Company were the richer by Hepburn's funds to the extent of the cheque, whether it was for £410 or £525.

Accordingly I think the evidence, although it might have been made much clearer, and ought to have been made clearer, as indeed the record ought to have been much more specific, has established now that as at the date when the arrestment was laid on, 4th February 1919, so far from Hepburn being due the Feniscliffe Products Company, the Feniscliffe Products Company were, on a balance, due something to him. If that is so, and is established as a matter of fact, as I hold it to be proved, agreeing with the Sheriff-Substitute, then I think the law applicable to the case is that stated in *Napier* and referred to by the Sheriff-Substitute, and that accordingly the arrestment is bad, and that the judgment appealed against ought to be affirmed.

LORD CULLEN—The evidence in the case is certainly not very clear, but as I read it it shows that at the date of arrestment there was in existence a debt due by the defenders to Hepburn which they subsequently admitted and paid to him in September 1919. If that be the right view, it does not seem to me to be material that at the date of the arrestment the debt had not been admitted by the defenders to be due by them. The absence of admission did not affect the existence of the debt. And we are not here dealing with a case which has to be decided upon its *primâ facie* aspects, but are deciding upon a proof of the actual facts. If the actual fact is that the said debt existed at the date of arrestment and exceeded the debt due by the arrestee, then I think the Sheriff-Substitute's conclusion is right that no indebtedness by the arrestee then existed, and that there could be no effective arrestment to found jurisdiction.

The LORD PRESIDENT and LORD SKERRINGTON were absent.

The Court adhered.

Counsel for the Pursuers (Appellants)—A. R. Brown. Agents—Alex. Morison & Company, W.S.

Counsel for the Defenders (Respondents) Wilson, K.C. — Maconochie. Agents — Norman Macpherson & Dunlop, S.S.C.

Saturday, February 21.

SECOND DIVISION.

PEEBLES HOTEL-HYDROPATHIC, LIMITED, PETITIONERS.

Company — Capital — Reorganisation of Share Capital—Reduction of Liability of Company to Shareholders—Procedure to Obtain Confirmatory Order—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 45.

Where a company by special resolution reorganised its share capital in such a manner that the liability of the company to the shareholders was reduced, but the nominal amount of the share capital was not reduced, *held* that the company had rightly adopted the procedure prescribed by section 45 of the Companies (Consolidation) Act 1908 in order to obtain confirmation of the reorganisation scheme.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) enacts—Section 45—"(1) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganise its share capital, whether by the consolidation of shares of different classes, or by the division of its shares into shares of different classes: Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all shareholders of the class. (2) Where an order is made under this section an office copy thereof shall be filed with the Registrar of Companies within seven days after the making of the order, or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed." Section 46—"(1) Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may (*a*) extinguish or reduce the liability of any of its shares in respect of share capital not paid up, or (*b*) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or (*c*) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company, and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly."

The Peebles Hotel-Hydropathic, Limited, Peebles, *petitioners*, presented a petition to the Court under section 45 of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) praying the Court to make an order confirming a special resolution which reorganised the share capital of the company.

The *petition* set forth—"That of this date, 13th June 1905, the company was registered under the Companies Acts 1862 to 1900 as a company limited by shares, and that its registered office is situated at the Hotel-Hydropathic, Peebles. That the objects for which the company was established were, *inter alia*—1. To acquire and take over the business, lands, and estate, property, assets, and liabilities of Albert Max Thiem, hotel proprietor, Glasgow and

elsewhere, but only so far as related to the Peebles Hydropathic and Hotel situated in the county of Peebles, and for that purpose to adopt, execute, and carry out with or without modification the agreement referred to in article 3 of the articles of association of the company. 2. To carry on the business of a hydropathic establishment, pension, recreative or curative institution in the county of Peebles or elsewhere, and also to carry on there or elsewhere the business of hotel, restaurant, café refreshment-room, and lodging-house keepers, licensed victuallers, wine, beer, and spirit merchants, purveyors, caterers for public amusements, coach, cab, and carriage proprietors, livery stable keepers, job masters, launderers, farmers, dairymen, poultry farmers, and gardeners. A copy of the memorandum and articles of association of the company is produced herewith and referred to. That after its incorporation the company carried on the business for which it was formed, and continued to do so until 9th January 1918, when the Admiralty, in exercise of its powers conferred by and acting under the Defence of the Realm Consolidation Act 1914, entered into possession of its premises at Peebles and converted them into a naval hospital. That the nominal capital of the company is £55,000 divided into 35,000 shares of £1 each, bearing a cumulative preferential dividend at the rate of 6 per centum per annum, and ranking in priority of payment of capital over the ordinary shares, and 20,000 ordinary shares of £1 each. That the whole of these shares, preference and ordinary, have been issued and are fully paid. That in June 1907 the company found it necessary to make extensive alterations on and additions to the buildings at Peebles comprising their establishment, and in order to raise the funds necessary for that purpose issued at the end of that year a series of 5 per cent. debentures, amounting in all to £10,000, redeemable on or before 31st December 1917. That these debentures have been redeemed to the extent of £6800, leaving a balance of £3200 still redeemable. That the Admiralty are still in possession of the company's premises, but intimation has been received that they are to cede possession on an early date. It is anticipated, however, that it will be many months before the company's claims for compensation will be adjusted and paid. That in the meantime funds are required to enable the company to undertake the work necessary for the restoration and re-establishment of their premises, to pay off the balance of the debentures, and to settle the claims of certain other creditors. That to obtain funds for these purposes it is proposed to reorganise the capital of the company. That the following resolution was duly passed on 10th November 1919, and duly confirmed as a special resolution on 28th November 1919 at extraordinary general meetings of the company duly convened, that is to say—'That the conditions contained in the memorandum of association of the company be modified, pursuant to the provisions of section 45 of the Companies (Consolidation) Act 1908, as to reorganise the company's share capital in manner following, viz.—(*Primo*) by consolidating as at the 1st day of December 1919 (*a*) the 35,000 6 per cent. cumulative preference shares of £1 each in the capital of the company authorised and issued prior to the said date, and numbered 1 to 35,000 both inclusive, and (*b*) the 20,000 ordinary shares of £1 each in the capital of the company authorised and issued prior to the said date, and numbered 35,001 to 55,000 both inclusive, into 55,000 ordinary shares of £1 each, all ranking equally as to dividends and return of capital; (*Secundo*) by cancelling as at the said date all preferences and special privileges attaching to the said 35,000 cumulative preference shares authorised and issued as aforesaid and discharging all arrears of dividend due thereon; and (*Tertio*) by dividing as at the said date the said 55,000 ordinary shares resulting from such consolidation into (*a*) 10,000 6 per cent. cumulative A preference shares of £1 each, to be numbered 1 to 10,000 both inclusive, having uncalled liability to the amount of £1 per share, which shall confer the rights hereinafter mentioned; (*b*) 35,000 7½ per cent. cumulative B preference shares of £1 each, which shall represent the said preference shares numbered 1 to 35,000 both inclusive, issued prior to the said date, and shall be credited as fully paid and confer the rights hereinafter mentioned, one of which shares shall be issued to the holders of the said 6 per cent. cumulative preference shares numbered 1 to 35,000 both inclusive, in exchange for each of the said 6 per cent. cumulative preference shares held by such holders; and (*c*) 40,000 ordinary shares of 5s. each, 20,000 of which shall be numbered 1 to 20,000 both inclusive, and shall be credited as fully paid, and shall represent the said 20,000 ordinary shares numbered 35,001 to 55,000 both inclusive, authorised and issued prior to the said date, and one of which shares shall be issued to the holders of the said ordinary shares numbered 35,001 to 55,000 both inclusive in exchange for each of the said ordinary shares held by such holders, and 20,000 of which shall be numbered 20,001 to 40,000 both inclusive, having uncalled liability to the amount of 5s. per share; which 6 per cent. cumulative A preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 6 per centum per annum on the amount paid up, or credited as paid up, from time to time thereon from the respective dates of payment or being credited, and shall rank both as regards dividend and return of capital in priority to all other shares of whatever class already created, or to be hereafter created, with the right to participate along with the ordinary shares in proportion to the amount paid up, or credited as paid up, respectively, thereon in the surplus profits of the company in any year after payment of the dividends of 6 per cent. and 7½ per cent. on the respective A and B preference shares, and 10 per cent on the ordinary shares so far as issued, but shall confer no right to any further participation in the profits or assets of the company, and which 7½ per cent. cumulative B preference shares shall confer the right to

a fixed cumulative preferential dividend at the rate of 7½ per centum per annum on the amount credited as paid up thereon from the date of being so credited, and shall rank both as regards dividend and return of capital immediately after the said 6 per cent. cumulative A preference shares, and in priority to all other shares of whatever class in the capital of the company, but shall confer no right to any further participation in the profits or assets of the company; and that accordingly clause 5 of said memorandum of association shall be altered so as to read as follows—'5. The share capital of the company is £55,000 divided into 10,000 6 per cent. cumulative A preference shares of £1 each, 35,000 7½ per cent. cumulative B preference shares of £1 each, and 40,000 ordinary shares of 5s. each. The said 6 per cent. cumulative A preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 6 per centum per annum on the amount paid up or credited as paid up from time to time thereon from the respective dates of payment or being credited, and shall rank both as regards dividend and return of capital in priority to all other shares of whatever class already created or to be hereinafter created, with the right to participate along with the ordinary shares in proportion to the amount paid up or credited as paid up respectively thereon in the surplus profits of the company in any year after payment of the dividends of 6 per cent. and 7½ per cent. on the respective preference shares and 10 per cent. on the ordinary shares issued at the time, but shall confer no right to any further participation in the profits or assets of the company, and which 7½ per cent. cumulative B preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 7½ per centum per annum on the amount credited as paid up thereon from the date of being so credited, and shall rank both as regards dividend and return of capital immediately after the said 6 per cent. cumulative preference shares, and in priority to all other shares of whatever class in the capital of the company, but shall confer no right to any further participation in the profits or assets of the company. Any increased capital of the company may be divided into several classes with such preferential, deferred, qualified, or special rights, privileges, or conditions attached thereto as may be determined by or in accordance with the articles of association of the company for the time being, but no such further increased capital shall as regards either dividend or capital rank preferably or *pari passu* in the profits or distribution of assets to or with the said above mentioned A and B preference shares, or either of them, unless with the sanction of a resolution passed by a majority of not less than three-fourths of the holders of such A and B preference shares respectively as may be affected in person or by proxy and entitled to vote at a meeting of the holders of such A or B preference shares, of which notice specifying the intention to propose such resolution has been duly given, and at which the holders of not less than one-third of such A or B preference shares issued at the time and affected shall be present personally or represented by proxy, and any of the rights of the holders of the above-mentioned A and B preference shares may be altered, varied, modified, or abrogated with the like sanction but not otherwise.' That at separate meetings of the preference and ordinary shareholders of the company, duly convened and held of this date, 10th November 1919, a resolution in the same terms as the special resolution referred to was passed by a majority in the number of the said preference and ordinary shareholders respectively holding three-fourths of the share capital of each class. Such resolution was confirmed in the same manner as a special resolution of the company is required to be confirmed at subsequent separate meetings of the preference and ordinary shareholders of the company duly convened and held of this date, 28th November 1919, and that a copy of the said resolution has been filed with the Registrar of Joint Stock Companies in terms of the Companies (Consolidation) Act 1908, sec. 70. That copies of the notices calling the said meetings, with certificates of posting appended, and certified copies of the minutes of said meetings are herewith produced. That it will be greatly for the benefit of the company that the proposed reorganisation of capital should be carried out. That this petition is presented under section 45 of the Companies (Consolidation) Act 1908, and that it is not intended to serve the same upon any person."

On 16th January 1920 the Court remitted to William Smith, Esq., W.S., to inquire into and report upon the facts and circumstances set forth in the petition and upon the regularity of the proceedings, and on 16th February 1920 Mr Smith *reported* as follows:—"This is a petition presented for confirmation of reorganisation of capital under section 45 of the Companies (Consolidation) Act 1908. The peculiarity of the case is that the reorganisation involves reduction of paid-up capital; and the reporter is respectfully of opinion that the proceedings have been irregular as not complying with the requirements of sections 46 to 55 of the Act as regards confirmation of such reduction. The company was registered in Scotland in 1905, and is limited by shares. The objects of the company, which were mainly to acquire and carry on the well-known Hotel-Hydropathic Establishment at Peebles, are correctly set forth in the petition. It appears that in 1918 the Admiralty took over the premises, converted them into a naval hospital, and still occupy them, but are to cede possession on an early date. The company now finds that it requires to raise additional capital to pay off the balance of certain debentures and other debts and to restore the premises for the purpose of its business. To obtain funds necessary for these purposes a sum of £15,000 is required, and the company proposes to reorganise its capital by an elaborate scheme which it now asks the Court to approve of by a petition under section 45 of the Act, requiring only intimation on the walls and

in the minute book—*Ashanti Development*, 1911, 27 T.L.R. 498. Perhaps the simplest way to explain what is proposed is to show your Lordships how the capital stands at present and how it will stand after the reorganisation.

At present.

	Nominal Capital.	Paid up Capital.
35,000 6 per cent. preference shares, £1 each, fully paid . . .	£35,000	£35,000
20,000 ordinary shares, £1 each, fully paid	20,000	20,000
	£55,000	£55,000

In future.

10,000 6 per cent. A preference shares, £1 each	£10,000	£ ...
35,000 7½ per cent. B preference shares, £1 each, fully paid . .	35,000	35,000
40,000 ordinary 5s. each (20,000 of which fully paid) . . .	10,000	5,000
	£55,000	£40,000

The general effect of the change is this—The present preference shareholders retain the same amount of nominal and paid-up capital raised from 6 per cent to 7½, but they are to allow £10,000 of A preference 6 per cent. shares to rank before them, while the ordinary shareholders in addition to this consent to have their nominal (which is likewise their paid-up) capital reduced from £20,000 to £5000 (to rank *pari passu* with another £5000). It appears to your reporter that that is reduction of capital requiring the procedure prescribed by sections 46 to 55 of the Act. It may be said at once to clear the situation that there seems no objection to the scheme proposed if properly carried out, and that the whole procedure up to the point of coming into Court is in order. The necessary meetings have been properly called and regularly conducted. Strictly regarded the minute should have referred to more than section 45, and the resolution of the company should have been delayed till after the confirmation by the preferred and ordinary shareholders respectively, but these do not seem to be matters of importance—*Graphite Oils Company, Limited*, 20th May 1919 (Second Division), unreported. It should also be stated that the process is regular—intimation has been made on the walls and in the minute book as ordered, the *inducie* have expired, and no answers have been lodged. The special resolution which your Lordships are asked to confirm is in these terms, leaving out superfluous words—'That the conditions in the memorandum . . . be modified . . . pursuant to . . . section 45 of the Companies (Consolidation) Act 1908, so as to reorganise the company's share capital in manner following, viz.—(*Primo*) by consolidating . . . (*a*) the 35,000 6 per cent. cumulative preference shares . . . and (*b*) the 20,000 ordinary shares . . . into 55,000 ordinary shares of £1 each, all ranking equally as to dividends and return of capital; (*secundo*) by cancelling . . . all preferences and special privileges attaching to the 35,000 cumulative preference shares . . . and discharging all arrears of dividend due thereon.' (So far this is reorganisation. Then the special resolution proceeds)—'And (*tertio*) by dividing . . . the said 55,000 ordinary shares resulting from such consolidation into. . . .' (Not £55,000 paid-up capital as at present, but £40,000 paid-up capital and £15,000 unissued capital made up as follows:)—'(*a*) 10,000 6 per cent. cumulative A preference shares of £1 each . . . having uncalled liability to the amount of £1 per share, . . . (*b*) 35,000 7½ per cent. B preference shares of £1 each which shall represent the said preference shares . . . and shall be credited as fully paid, . . . and (*c*) 40,000 ordinary shares of 5s. each, 20,000 of which shall . . . be credited as fully paid . . . and shall represent the said 20,000 ordinary shares, . . . and one of which shares shall be issued to the holders of the said ordinary shares . . . in exchange for each of the said ordinary shares held by such holders' (that is to say, a £1 fully-paid share is to be exchanged for a 5s. fully-paid share), 'and 20,000 of which shall be numbered . . . having uncalled liability to the amount of 5s. per share . . .' The special resolution in conclusion goes on to describe in detail how the preferences as regards capital and income are arranged. The only peculiarity here is that the A preference 6 per cent. shares have a right to participate with the ordinary shares in any year after the latter receive a dividend of 10 per cent. In the result the present preference shareholders forfeit their claim to arrears of dividend, and the ordinary shareholders consent to the reduction of their shares from £20,000 to £5000. The new capital, none of which is at present issued or subscribed (and none of which may ever exist), consists of £10,000 A preference shares bearing 6 per cent. interest and £5000 ordinary shares, in all £15,000. There are undoubtedly cases excepted in the Act where reduction of capital may take place without the necessity of adopting the procedure prescribed by sections 46 to 55; examples will be found in section 40, dealing with the case of returned accumulated profits in reduction of paid-up capital, and in section 41 dealing with reduction of nominal capital by the cancellation of unsubscribed shares; this company may cancel every share of the £15,000 without applying to the Court for confirmation—a reorganisation scheme may thus be used as a mere disguise or pretence—but the case of the reduction, as here, of paid-up capital seems to be one specially contemplated by section 46 and particularly subsection (*b*) thereof. This company has power by its articles to reduce capital. Section 46 is in these terms—'. . . [*quoted supra*] . . .' The section of the Act alone founded on is in these terms—'. . . [*section 45, quoted supra*] . . .' The 'share capital' referred to in this section when applied to this company would seem to mean the fully paid-up shares of different classes (forming its present share capital) in their entirety and therefore without reduction. (For example of English practice see *Palace Hotel, Limited*, (1912) 2 Ch. 438.) The absence from the section of the protection for debenture holders and other creditors of section 49, and of the provision for intimation to the registrar of the exact position of capital as determined by the Court's order of section 51 would appear to afford ground for thinking that a case of the kind under consideration was

not contemplated. If the reporter's view is correct the petition will require to be refused or amended. In the event, however, of your Lordships holding section 45 to be applicable and sufficient of itself and the proceedings to have been regular, an order in the following or similar terms may be pronounced:—The Lords having resumed consideration of the petition and proceedings with the report of William Smith, W.S., No. of process, and heard counsel, Approve of said report: Confirm the reorganisation of capital resolved on by special resolution passed on 10th and confirmed on 28th, both days of November 1919: Direct the registration of a certified copy of this order by the Registrar of Joint-stock Companies in Scotland within seven days from the date hereof, and decern."

Argued for the petitioners—The capital of the company was not reduced. It was merely the liability of the company to the shareholders that was reduced. Accordingly there was no reduction of share capital within the meaning of section 46 of the Companies Consolidation Act 1908 (8 Edw. VII, cap. 69), and the petitioners had rightly adopted the procedure prescribed by section 45 of the Act. *Walker Steam Trawl Fishing Company, Limited*, 1908 S.C. 123, 45 S.L.R. 111, *per* Lord Low at 1908 S.C. 126, 45 S.L.R. 113, and Buckley, Companies Acts (9th ed.), p. 35, were referred to.

The Court, which consisted of the LORD JUSTICE-CLERK, LORD DUNDAS, and LORD GUTHRIE, without delivering opinions, pronounced an interlocutor confirming the special resolution set forth in the petition.

Counsel for the Petitioners—Sandeman, K.C. — Black. Agents — Macpherson & Mackay, W.S.

Wednesday, March 3.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

THOMAS STEVENSON & SONS *v.* ROBERT MAULE & SON.

Contract—Hire of Services—Delectus Personæ—Lifting, Removing, Beating, and Relaying of Ordinary Carpet.

A firm of drapers contracted with a firm of upholsterers to lift, remove, beat, and relay an ordinary carpet used in the business premises of the former. The contract was not in writing, and the only express restriction was that the upholsterers should not clean the carpet by the vacuum process. The carpet ceased to be insured when it left the drapers' premises. The upholsterers did not beat the carpet themselves, but, without notice to the drapers, sub-contracted with a third party to do that. The carpet was accidentally destroyed by fire while in the premises of the third party. In an action by the drapers against the upholsterers, *held* (*dis.* Lord Skerrington, *sus.* Lord Ormidale) that the contract being one for ordinary labour, with no express exclusion of sub-contracting, the upholsterers were not in breach of contract in sub-contracting, and having used reasonable care in performance of the contract, including the choice of a sub-contractor, were not liable to the pursuers for the value of the carpet.

Thomas Stevenson & Sons, fancy drapers and silk mercers, 76 Princes Street, Edinburgh, *pursuers*, brought an action against Robert Maule & Son, drapers, carpet, and upholstery warehousemen, removal contractors, and general furnishers, 145-149 Princes Street, and 1 and 5 Hope Street, Edinburgh, *defenders*, concluding for declarator that the defenders were bound to compensate the pursuers for the value of a carpet, entrusted by the pursuers to the defenders for the purpose of being beaten, which had been destroyed by fire.

The pursuers *pleaded*—"1. The defenders having contracted with the pursuers as condescended on, and having without the authority or consent of the pursuers given over the custody of the carpet to a third party in whose premises it was destroyed by fire, the pursuers are entitled to decree of declarator in terms of the conclusion of the summons. 2. Alternatively, the defenders having negligently handed over the pursuers' carpet to be housed in the unsafe premises of an agent selected by them, are liable for its loss, and the pursuers are entitled to declarator in terms of the conclusions of the summons. 3. Alternatively, the pursuers' carpet having been destroyed through the negligence of the defenders' agent, for whom they are responsible, the pursuers are entitled to declarator as craved."

The defenders pleaded, *inter alia*—"1. The averments of the pursuers being irrelevant and insufficient to support the conclusions of the summons, the action ought to be dismissed. 2. The carpet in question having been destroyed without negligence on the part of the defenders, and without any negligence on the part of their sublessor or for which they are responsible, the defenders are entitled to decree of absolvitor."

On 30th December 1919, after a proof before answer, the Lord Ordinary (ORMIDALE) repelled the pursuers' pleas-in-law and assoilzied the defenders.

Opinion (from which the *facts* of the case appear)—"The carpet whose value is sued for in this action was lifted on Thursday 15th August. It was taken to Mr Orr's carpet beating works on Friday. A start was made to clean it on Saturday. It would have been finished on Monday, but it was destroyed on Sunday by a fire which broke out in Mr Orr's premises.

"The contract between the pursuers and defenders was a verbal one—that the defenders should send for and lift the carpet, take it away, beat it, and thereafter relay it.

"No inquiry was made by the pursuers as to the method followed by the defenders of beating the carpets entrusted to them. The only positive instruction given was