Friday, June 23.

FIRST DIVISION.

BLYTH'S TRUSTEES *v.* MILNE AND OTHERS.

Fee and Liferent—Rights of Fiar and of Liferenter—Company—Bonus Paid from Reserve Fund derived from Undivided Profits—Issue of Fresh Capital at Same Time as and of Like Amount to Bonus—Capital or Revenue.

The directors of a company had power to carry profits to a reserve fund, and to use such fund, which might be invested as they thought fit, for equalisation of dividends, contingencies, and at their discretion. They also had power to divide such reserve fund among the ordinary shareholders rateably from time to time, and they resolved, in the exercise thereof, to distribute a bonus out of the reserve fund, and at the same time to increase the company's capital by the issue of shares of an amount equal in value to that bonus. The two transactions were to be carried through simultaneously, and the circular announcing the directors' proposals pointed out that the bonus would just enable shareholders to pay for the new shares allotted to them, which they were asked to take up. The requisite resolutions were passed. Trustees holding shares in the company for beneficiaries in fee and liferent respectively, accepted the new shares allotted to them, and applied the bonus in payment thereof.

The liferentrix having claimed the bonus, *held* that the bonus was part of the revenue of the trust estate, and that the liferentrix had right to it. *Bouch* v. *Sproule*, June 13, 1887, 12 A.C. 385, and *Gunnis' Trustees* v. *Gunnis*, November 17, 1903, 6 F. 104, 41 S.L.R. 69, *distinguished.*

Process—Special Case—Statement of Facts.

Observed (*per* Lord Kinnear) that the statement of facts in a special case must be deemed to be exhaustive, and no inference of fact from the facts stated can be drawn.

In February 1904 Edward Lawrence Ireland Blyth, residing at Inchgarry, North Berwick, and others, the testamentary trustees of the late Edward Lawrence Ireland Blyth, C.E., who died on 22nd November 1902, held, as part of the trust estate, eight A shares and twelve B shares of the North British Rubber Company, Limited. These shares were held under the following provision of the trust-deed and settlement, which was dated 24th September and registered 1st December 1902, viz., "With regard to the residue of my means and estate . . . I direct my trustees, in the first place, to set apart out of such residue the shares of . . . and the North British Rubber Company, Limited, which shall belong to me at the date of my death, and to divide the said shares as hereinafter directed; and in the second place to divide the balance of the free residue of my estate remaining, after setting apart my shares in the said companies as aforesaid, into seven equal parts or shares, and my trustees shall hold or pay, convey, and make over my shares in the said companies, and said seven equal parts or shares of the balance of the free residue, as follows, *videlicet:* . . . (*Seventh*) My trustees shall set apart . . . and eight of said A shares and twelve of said B shares of the North British Rubber Company, Limited, and one of the said seven equal parts or shares of the balance of said residue (all of which are hereinafter referred to as the 'seventh share of residue'), and my trustees shall hold the same for the liferent use allenarly of my daughter Mrs Edith Louisa Blyth or Milne, and shall pay the free income thereof to her or for her behoof, and that as an alimentary provision only, which shall not be assignable by her or affectable by or for her debts or deeds or the diligence of her creditors; and on her death or on my death, in the event of her predeceasing me, my trustees shall hold the capital of one-fourth of said seventh share of residue for behoof of her daughter Olive Gwendoline Milne, in the event of her surviving the longest liver of her said mother and myself, and attaining the age of twenty-one years or marrying; . . . and my trustees shall pay, convey, and make over the capital of the remainder of said seventh share of residue (that is to say, three-fourth parts thereof), and also said one-fourth part thereof in the event of the failure of the said Olive Gwendoline Milne or her issue to take a vested interest therein, to the residuary legatee or legatees under the first, third, and fourth branches of the residuary purpose of these presents, in the following proportions." . . .

On 6th February 1904 the directors of the North British Rubber Company, Limited, issued the following circular letter to the shareholders in the company:—"Gentlemen—Your directors find that there is at the credit of reserve fund an amount sufficient to permit them to distribute amongst the ordinary shareholders, in terms of the powers contained in the articles of association, a bonus of 50 per cent. to each shareholder on the amount of the shares held by him. They therefore propose that such bonus should be distributed, but as the company's business has in recent years greatly increased, and as further plant will have to be laid down, and additional buildings erected, to enable the company to deal with their increasing trade, principally in connection with the manufacture of motor tyres, it will be necessary to raise further capital. The directors propose that the capital of the company should be increased by the creation of 20,000 second preference shares of £12, 10s. each, and that debenture stock for £400,000 should be sanctioned. It is, however, necessary at present to issue only one-half of each class, viz., 10,000 of the second preference shares, and £200,000 of the debenture stock. The capital represented by the intended present issue of second preference shares will be £125,000,

and equals the total of the bonus of 50 per cent. on the ordinary capital. The bonus payable to each shareholder will therefore enable him to meet the price of the preference shares to be offered to him. It is proposed to ask the shareholders to apply for their *pro rata* proportion of these second preference shares simultaneously with the payment of the bonus. . . . Before the above proposals can be carried out, it will be necessary for the shareholders to pass a special resolution increasing the capital by the creation of the second preference shares, and a formal notice calling a meeting for the purpose accompanies this circular. As the debenture stock must be sanctioned by an extraordinary resolution, it is proposed that this extraordinary resolution should be passed at a later meeting, of which due notice will be given.—We are, your obedient servants, THE NORTH BRITISH RUBBER COMPANY, LIMITED—RAMSAY G. STEWART, *Manager.*"

The articles of association of the company provided, *inter alia*, as follows:—"112. The directors may, before paying or recommending any dividend, set aside out of the profits of the company (but subject to the sanction of the company in general meeting) such sum as they shall think proper as a reserve or sinking fund for equalisation of dividends and contingencies, and the directors shall have power to apply the said fund at their discretion, to all or any of the said purposes, or to such other purposes as they may deem necessary;" and "113. The directors may invest the sum so set apart as a reserve or sinking fund in such securities and investments as they may see fit, and may vary such securities and investments and dispose of all or any part thereof for the benefit of the company. They may from time to time divide such reserve fund among the ordinary shareholders rateably according to the amount paid up on their shares."

The requisite resolutions were duly passed, and on 6th April 1904 the directors issued another circular letter in the following terms:—"Dear Sir (or Madam)—The creation of 20,000 second preference shares of £12, 10s. each has now been sanctioned. The directors have resolved to distribute the bonus of 50 per cent from the reserve fund to the ordinary shareholders of the company, as intimated in the circular of the 6th of February last. In respect of your present holding of ..... 'A' ordinary shares, and ..... 'B' ordinary shares in the company, you are entitled to a bonus of £....., and a warrant for this will be posted to you on the 13th May next. The directors are prepared to accept applications for the 10,000 second preference shares now being issued, and you are entitled to an allotment of ..... shares. Be good enough to fill up, sign, and return the application form enclosed herewith. Payment for the second preference shares will be due on the 15th May 1904, when the warrants for the bonus dividend will also be payable. The application form must be returned to us complete by 2nd May next. Any shareholder failing to do so by that date will be held to have forfeited his right to any allotment of the second preference shares. THE NORTH BRITISH RUBBER COMPANY, LIMITED — WILLIAM FIRTH, *Secretary.*"

FORM OF APPLICATION.

"To the Directors of the North British
"Rubber Co., Ltd., Castle Mills, Fountain-
"bridge, Edinburgh.

"Gentlemen—In reply to your circular of 6th April 1904, I beg to apply for..... of the second preference shares of your company, and I request you to allot me that number of shares, and I hereby agree to accept the same, and to pay the price of £12, 10s. per share on the 15th day of May 1904, and I authorise you to register me as the holder of the said shares."

The notice of dividend and annexed warrant were in the following terms:—

"Edinburgh, 13th May 1904.

"To.....

Bonus dividend declared the 30th day of March 1904, free of income-tax, namely on ....'A' shares of £100 each, £
.....'B' shares of £25 ,, £

Amount as per warrant herewith sent - - - - - - £

Payable at the National Bank of Scotland, Limited, W. FIRTH, *Secretary.*

N. B.—This 'Notice of Dividend' to be retained by the Proprietor.

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"THE NORTH BRITISH RUBBER COMPANY, LIMITED.

Head Office, Castle Mills, Fountainbridge, Edinburgh, 13th May 1904.

Dividend declared 30th March 1904. Warrant No..... Proprietor.....

TO THE NATIONAL BANK OF SCOTLAND, LIMITED.

Pay to ..... or order the sum of ..... sterling, and charge to this Company.

NORTH BRITISH RUBBER, CO., LIMITED, R. G. STEWART, *Manager.*

£ : : W. FIRTH, *Secretary.*"

Mr Blyth's trustees applied for the new shares and paid for them with the bonus; and a question arose between them and the different beneficiaries as to whether the said bonus dividend fell to be paid over to the said Mrs Edith Louisa Blyth or Milne absolutely, or whether the new shares of the said company purchased by the trustees with the said bonus dividend should continue to be held by them for the liferent use only of the said Mrs Edith Louisa Blyth or Milne and for the other beneficiaries in fee.

For the settlement of the point a special case was presented to the Court. The parties to the case were (1) the said trustees; (2) the said Mrs Edith Louisa Blyth or Milne, and her husband Charles Milne, retired Captain R.N., for his interest; and (3) the said Olive Gwendoline Milne, daughter of the said Mrs Edith Louisa Blyth or Milne, and the other residuary legatees interested in the fee of the said share of the trust estate.

The first and third parties maintained that the said company, by issuing the new shares, appropriated its profits to capital;

or that at all events, in a question between the second and third parties, the said bonus was to be regarded as part of the capital of the testator's estate, being payable out of profits accumulated during his lifetime: and that in either case the said new shares fell to be held by the first parties for the liferent use of the said Mrs Edith Louisa Blyth or Milne, and in fee for the third parties. The second parties maintained that the said new shares were purchased by the first parties with cash, paid to them by the said company as a bonus out of profits accumulated by the said company, and actually distributed to the shareholders in cash, and that the said Mrs Edith Louisa Blyth or Milne was accordingly entitled, on a sound construction of the truster's trust-disposition and settlement, to have the said bonus dividend paid over to her, or otherwise to have the said new shares which were purchased with the said bonus dividend transferred to her absolutely.

The following questions of law were submitted for the opinion and judgment of the Court:—"(1) Was the said Mrs Edith Louisa Blyth or Milne entitled to the bonus dividend declared and paid by the North British Rubber Company on the shares held by the first parties for her in liferent? And (2) is she now entitled to have the new shares of said company which were purchased with the said bonus dividend transferred to her absolutely?"

Argued for the second parties—The reserve fund was deferred dividend not capital. The directors had power to utilise the fund for equalisation of dividends and contingencies and to use it at their discretion, but this did not cause the fund to become capital. There was also power given to the directors to make payments out of the fund as dividends, and for that reason the fund must be looked upon as revenue. The terms of the resolutions made it sufficiently clear that the directors were careful to keep entirely distinct the payment of the dividend and the issue of new capital. The case which contained the law governing these circumstances was *Bouch* v. *Sproule*, 1887, 12 App. Cas. 385. An option was open to the shareholders to accept cash or a part of the new issue, and the rule to be followed was that of *in re Malam* [1894], 3 Ch. 578, where the principle laid down in *Bouch* v. *Sproule, ut supra*, was applied. The case of *Cunliff's Trustees* v. *Cunliff*, November 30, 1900, 3 F. 202, 38 S.L.R. 134, was not in point, since there the company paid a dividend in their own shares, and in the case of *Gunnis' Trustees* v. *Gunnis*, November 17, 1903, 6 F. 104, 41 S.L.R. 69, the operation carried out by the company was also different (see the opinion of Lord Trayner). It could not be within the power of the trustees, by the mere exercise of their option, to alter the quality of the succession of a part of the trust estate. The shares fell to be dealt with as revenue. The first question of law was to be answered in the affirmative.

Argued for the first and third parties—The result of the company's dealings with their reserve fund did not depend upon the form of the transaction, but upon its substantial effect—*Bouch* v. *Sproule, ut supra*, and *Gunnis' Trustees* v. *Gunnis, ut supra*. The facts in *Gunnis' Trustees* were indistinguishable from the present case. The doctrine to be extracted from the former case was that where a company had not power to issue new capital, a dividend paid out of the reserve fund was capital, and goes to the fiar; where the company has such a power, the mere fact of making such a payment is inconclusive, and it must be deduced from the circumstances of each case whether it is intended to be an addition to capital or to revenue. In the present case the letters issued to the shareholders showed that in substance a conversion into capital had taken place. The case of *Gunnis Trustees* should be followed to secure the equitable result. The fact that the shareholders had an option of taking the bonus in cash did not vary the circumstance that the bonus was paid from a fund used by the company as capital, and that the object in distributing it was to increase the capital of the company.

At advising—

LORD PRESIDENT—This is a special case in which your Lordships are asked to determine whether the second or third parties are entitled to a certain sum of money amounting to £550, which arises out of certain operations connected with the North British Rubber Company. The question depends on the terms of the settlement of the late Mr Blyth, and the first parties to the case are his trustees. Mr Blyth's settlement need only be recited to a very limited extent in order to make clear the question which is now before the Court. He made what I may call a special trust of certain shares which were in his possession, and those shares included certain shares in the North British Rubber Company. He directed that the trustees should hold these shares and pay the free income of them as an alimentary provision to his daughter Mrs Milne, the second party, and that the capital of the shares should be held in certain proportions for certain other purposes, the third parties being the residuary legatees under the truster's settlement. Now in 1904, February 6—that is to say, after Mr Blyth's death, and when the trustees were vested in the shares—the North British Rubber Company issued a circular letter to their shareholders, and that circular letter forms part of the case. The circular letter begins by a statement that the directors of the North British Rubber Company "find that there is at the credit of the reserve fund an amount sufficient to permit them to distribute amongst the ordinary shareholders in terms of the powers contained in the articles of association a bonus of 50 per cent to each shareholder on account of the shares held by him." There is no question raised upon the directors' powers in doing so, and I do not think it well could have been raised, because in articles 112 and 113 of the articles of association of the com-

pany, which are also held part of the case, and therefore subject to your Lordship's consideration, there is provision for the establishment of a reserve fund, and there is provision that the directors may from time to time divide such fund among the ordinary shareholders rateably. I think it is quite clear, therefore, that while these directors were entitled to accumulate a reserve fund as they did out of undivided profits, they were not bound to keep it in that state, but they might if they liked divide it among the ordinary shareholders —in other words, divide the profits which up to this moment they had kept undivided. Now, reverting to the circular letter, the circular letter goes on to say, that although they propose to divide this bonus it is quite clear in the present state of the company that increased capital will be required, and accordingly they make the proposal to the shareholders to increase the capital of the company by the creation of 20,000 second preference shares of £12, 10s. each, and the creation of debenture stock of £400,000. They indicate at the same time that they do not propose to issue all that capital, but only a half of each class. They then point out that the capital proposed to be issued in preference shares will exactly equal in amount the sum which they propose to distribute by way of bonus, and that accordingly as they intend to offer this capital to the shareholders before offering it to anyone else, each shareholder will find himself by the receipt of his bonus in the position of being able to take up this capital if he so pleases. Of course these proposals as to new capital could not be carried out without special resolutions, and special resolutions were duly promulgated and passed. The final letter following upon this is a letter of 6th April 1904, and this letter, which is addressed to each shareholder individually, is in these terms — [*His Lordship read the letter of 6th April*].

The option of this trust to acquire the preference shares was exercised by the trustees, who filled up that application for allotment, and accordingly got an allotment of shares, for which the sum of £550 was due. They of course got a warrant or cheque for £550. The two transactions squared each other, and they took the shares. The second party to the case says she is entitled to the £550, being the bonus dividend declared, whereas the third parties to the case contend that that is not so, because this was truly merely a distribution of capital, and that being so, the second party has no right to receive part of the capital of this estate. Now, there have been several such questions in cases like this, and we have had a very satisfactory statement of authority from the bar and a discussion upon the same. I do not think it at all necessary to go into the whole series of cases, because at this time of day I do not think there is any doubt as to the doctrine of law that is to be applied to such cases. I think everybody has been content, including the tribunal of highest resort—the House of Lords—everybody has been content with the passage in the judgment of Lord Justice Fry given originally in the case of *Bouch* v. *Sproule*, which went to the House of Lords. The passage of Lord Justice Fry, which is quoted with approbation by Lord Herschell in *Bouch* v. *Sproule* (1887, L.R., 12 App. Cas. 397), is in these terms—"When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either to distribute its profits as dividends or convert them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholders as capital or appropriated as an increase to the capital stock of the concern enures to the benefit of all who are interested in the capital." The only point really lies in the application of that doctrine of law to the facts of each particular case. I think it is apparent that necessarily each case must stand upon its own facts, and that, although it is very right and proper to cite other cases in order to pick out the circumstances which the judges determining these cases may have thought led to the preponderance being on one side or the other, still in one sense no one case is an authority for another. I say that because there was an attempt to say that this case was ruled by the case of *Gunnis' Trustees*, 6 F. 104. I do not think any case can really be ruled by the facts of another case, although there may be such similarity as may involve the same train of reasoning in the second case as in the first. I believe that is precisely the way Lord Herschell puts it in that very case of *Bouch* v. *Sproule*, which, being a House of Lords case, must be the leading case in that branch of the law. After that passage I have read, Lord Herschell, having commented upon the earlier cases, puts the question thus, on page 398—"I now come to the question whether the company did in the present case distribute the accumulated profits as dividend, or convert them into capital. And here I find myself constrained to differ from the conclusion at which the Court below arrived. I think we must look both at the substance and form of the transaction. It is to be observed in the first place that the amount of that portion of the new capital created which was to be paid up was exactly equal to the amount of the profits to be distributed. And it was obviously contemplated, and was, I think certain, that no money would in fact pass from the company to the shareholders, but that the entire sum would remain in their hands as paid-up capital." I think that is a statement of an issue of fact which will always arise in each case and on which the whole matter must be determined. Now, he makes another observation which I think very pertinent. He says—"We must look both at the substance and the form of the

transaction," and I think that is so, because it is just one of that class of cases where it may very often be that the form really determines the substance. It is quite clear of course that there is such a thing as substance behind an independent form. No company could really return its capital to its shareholders merely by calling it dividend. But on the other hand if there is a sum of money, as there was here, which it was quite *intra vires* of the company to use as dividend, or to use for the purpose of creating new capital, then it may very well be that the form will determine what is the true substance of the transaction, which might be either the one or the other. Accordingly, I do not think it particularly material to very narrowly scrutinise or still less to criticise results that may have been come to in other cases, to find whether one would have exactly agreed with them or not. But the point is to find what has happened in this case. Now, I confess that in this case I have come to the conclusion that here the company truly did make payment of a dividend. In the first place they say so, and in the next place there is this great testing point in this case, that not only did they have the money, but they gave the money in a way in which you had to go through no process whatever in order to get the cash by the ordinary way in which modern payments are made, namely, by going to a banker and getting a sum of money in exchange for an absolutely negotiable document, because nobody gives money in cash and bags of gold now-a-days. I think it is there where you have a contrast with what was done in the case of *Bouch* v. *Sproule*. In the case of *Bouch* v. *Sproule* it might have been that a shareholder would have said, "I do not want new shares," but unless he had actually cut off his nose to spite his face the only way in which he could have got the value of his shares would have been to have taken the shares and then have sold them in the market, where they would have had a recognised value. I do not go upon that particularly, but I go upon the fact as determined by the learned judges that what was really done in *Bouch* v. *Sproule* was the creation of new capital and not the payment of dividend at all. Now, when I look at what was done here I am driven to the conclusion that what was done was the giving of a dividend, because in the circular letter of 6th April not only are you told that a warrant will be posted to you on 13th May, but you are invited to apply for shares. If you do not apply for shares all that will happen to you will be that you will have forfeited any right to get shares. Accordingly, upon the question which is a pure question of fact and upon the documents submitted to us I have come clearly to be of opinion that this company did, as matter of fact, pay a dividend in cash as it was entitled to do, and that being so, upon the doctrine laid down by Lord Justice Fry, I think the second party is entitled to prevail.

LORD ADAM—I perfectly agree with what your Lordship has said upon the law of this case, and I also agree that the case depends upon what view you take of the facts, and of what the company actually did and wished to do in the matter. Now, the question arises very simply. It arises on the will of the late Mr Blyth, who directed his trustees to hold these shares of the North British Rubber Company for a certain party in liferent and for the third parties in fee. It appears that the sum of £550 was paid by the Rubber Company to the trustees under the will, and the question, and the only question, raised in this case is—is it to be treated as dividend; and if so, there is no question of the second party's right to it; or is it to be treated as having been a payment of capital, in which case there is equally no doubt that the third party should prevail. It is obvious that this company had been very successful, and they desired to increase their capital to a large extent; the mode in which they proposed to carry that out is very clearly set forth in the case. As your Lordship has said, the proposals of the directors of the company are clearly set out in the circular letter of 6th February 1904. They begin that letter by saying that there is at the credit of the reserve fund an amount sufficient to permit them to distribute among the ordinary shareholders a bonus of 50 per cent. They then say that it is proposed to increase the capital, and they give the reason why. They state how that is to be done. They propose that the capital of the company should be increased by the creation of 20,000 second preference shares of £12, 10s. each, and by £400,000 of debenture stock; and then they say, it is, however, necessary at present to issue only one-half of each class. Now, the question arises about this issue of 10,000 preference shares. It is said that the capital represented by the intended present issue of second preference shares will be £125,000, and equals the total of the bonus of 50 per cent on the ordinary capital. They then say—"The bonus payable to each shareholder will therefore enable him to meet the price of the preference shares to be offered to him. It is proposed to ask the shareholders to apply for their *pro rata* proportion of these second preference shares simultaneously with the payment of the bonus." There is no doubt therefore as to the company desiring to increase their capital, and as to the mode in which they proposed to carry that out. In carrying it out they passed the requisite resolutions setting out the conditions on which such shares should be issued. That was not the creation of fully paid-up shares, which was a mode in which they might have increased their capital if they had thought that the best way. But that was not the way they took. The way they took was this. They had the undisputed right to pay a dividend out of the reserved fund, and they took £125,000 for that purpose, and so having increased their capital by the creation of £125,000 of shares, they send out a circular letter informing the shareholders of this,

and say that the directors had resolved to distribute a bonus as mentioned, and that the warrant would be posted on 13th May next. That is the history so far of this matter relating to the bonus. From the notice in the dividend warrant sent out on 13th May it is stated that the dividend was declared on 30th March, and following that out they passed the requisite resolutions declaring a dividend of 50 per cent on the share capital. Now, *ex facie* of that proceeding that appears to me to be a declaration—a perfectly valid declaration—of a dividend of 50 per cent. per share. There is no question of their power to do so, because as your Lordship pointed out they have special power to pay a dividend out of the reserve fund if they so pleased. That was not a bogus arrangement, because it is perfectly clear that having declared a bonus payable on 13th May 1904, they sent the amount of the bonus due to each shareholder of the company who was entitled to it. They sent to each of them and made actual payment of the bonus to each of the shareholders. It humbly appears to me that unless there is something to render that proceeding invalid or to show that that proceeding should not be carried out, that that is a declaration of a bonus. Now, what is said is that that should not be. It is said that the directors intended to increase their capital. There is no doubt that is so. I have no doubt by making payment of the bonus and payment of the allotted shares simultaneous that they hoped and expected that the shareholders would consent and agree to take up the allotted shares. But the question occurs to me, where is there anything illegal in that—where is there anything to render it invalid. The shareholders were perfectly free to do as they liked in that matter—they had the matter in their own hands. They might have gone to the bank next day and got the money in exchange for the dividend warrant. There was no obligation upon them to take the shares. It is perfectly true that they got notice in the circular letter of 6th April that the directors proposed to increase the capital, and they enclosed an application form, and they told them that the application must be returned by 2nd May next. That was before the dividend was actually paid. What were the consequences if they refused to take up the application? Not that they were not to get the dividend, but that they would be held to have forfeited any right to an allotment. There is nothing in that that I can see to render the thing invalid. I agree with your Lordship that each case must turn upon its own facts, and looking to the actual facts in this case, and to what the directors did, I see no reason to suppose that this was not a valid declaration of dividend. The directors might have increased their capital by the issue of fully paid-up shares, but for good reasons of their own they did not take that course. Possibly they thought that a number of shareholders might think they had shares enough. However that may be, I see nothing in the course they took to make the declaration of the dividend not a valid one. For these reasons I agree with your Lordship, and I think the question should be answered accordingly.

LORD KINNEAR—I have had some difficulty in this case, because I think if we could look at all the probabilities there might be a great deal of force in Mr Blackburn's argument that the substance of this transaction was intended to be, and was, to convert the undivided profits into paid-up capital upon newly created shares. But then we are not only not at liberty to speculate upon the probabilities, which is always a hazardous process, but I think we are precluded by the form of process adopted by the parties even from drawing inferences of fact from the facts stated by the parties themselves, because this question is before us in the form of a special case, and by statute that is competent only when the parties interested in the question of law are agreed upon the facts and dispute only upon the law. And accordingly we are in the habit of taking, and I think we are bound to take, the statement of facts upon which the parties are agreed, not only as an exact and accurate statement but as an exhaustive statement of all the facts which by the contract of parties are to be deemed to be relevant, and are to be taken into account in the consideration of the question of law. Now, upon the question of law which arises in the case, I think the principle must be taken as finally decided in the words which your Lordship in the chair quoted from Lord Justice Fry, because the learned Judge's statement of principle has been cited and approved by the House of Lords in the case of *Bouch* v. *Sproule*. And it comes to this, that when a testator directs that part of his estate shall remain as shares or stocks in a company which has power either to distribute its profits as dividend or to convert them into capital, and the company validly exercises this power, such exercise of power by the company is binding upon all persons interested in it, and consequently what is paid as dividend by the company goes to the liferenter, and what is appropriated as increased capital goes to the persons interested in the capital. That is the doctrine of law upon which the question put to us must be decided. The only further question of law which might be raised upon that statement, and was raised by Mr Blackburn, was whether that doctrine could apply to profits accumulated during the lifetime of the testator, and therefore accumulated before the liferent interest created by his will had begun. But then I think that difficulty is met by Lord Watson in the case of *Bouch* v. *Sproule*. He says that the rule must obtain whether the profits with which the company is dealing belong to the current year, or have been previously reserved for the purposes of the company's business. The question therefore between the parties appears to me to resolve, the moment the law has been ascertained, as I think it is by this authoritative statement, into a mere question of fact. Whether the accumulated pro-

fits in question have been paid as dividend, or whether they have been converted into paid-up capital upon newly created shares—upon that question of fact I have come to agree with your Lordships, for the reasons which have been already stated, and which I do not think it necessary to repeat. I only observe what appears to me to be conclusive on the one side, and that is that the company did pay in money, or in what is equivalent to money, the £550 now in question as dividend upon existing shares. They issued to the shareholders a dividend warrant in perfectly clear and explicit terms, which is equivalent to a cheque, which could have been taken to the bank, and upon which the money must have been recovered. All that is equivalent to paying a dividend in money. It appears to me, therefore, that it is established by the agreement of parties as to the facts that the company did in fact pay this sum of £550 as dividend. Now, the argument upon the other side came to this, that notwithstanding that payment it must be held that in substance the transaction was the conversion of the profits into capital upon two main grounds. In the first place, Mr Blackburn said these accumulated profits were *de facto* part of the floating capital of the company, because they were used as part of the capital from the time when the profits were first reserved for the purposes of the company's business. Secondly, he said that it was known to the company, and was apparently found in fact, that no shareholder would refuse his shares and prefer to take the money as dividend, and in point of fact probably no shareholder did. Now, these are considerations of fact which might or might not have weight if we were balancing equally well proved facts against one another, but the observation I make upon them is, that they are not to be found in the special case. They are statements of fact only, and I decline to draw from what is stated any inference to the effect that the undivided profits were used as part of the floating capital of the company. That may or may not be, but it is a matter of fact, which, if either of the parties intended to found upon it, it was necessary to put to the other party and obtain his agreement to its being stated. Therefore I think we must exclude from consideration all argument based upon inferences of fact which are not to be found in the special case itself. We know nothing except what is set forth in explicit terms by the parties themselves. From what is so set forth I can gather nothing except that this £550 in dispute was paid as dividend, and therefore it belongs to the party having interest in the dividend accruing to the shareholders, and not to the party interested in the capital stock of the company.

LORD M'LAREN was absent.

The Court answered the first question of law in the affirmative and the second in the negative.

Counsel for the First and Third Parties—Blackburn. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Second Party—Clyde, K.C.—Macmillan. Agents—Graham, Johnston, & Fleming, W.S.

Thursday, June 29.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

PARISH COUNCIL OF GREENOCK *v.* PARISH COUNCIL OF GOVAN COMBINATION.

Poor — Settlement — Illegitimate Minor Pubes — Mother of Illegitimate Child Acquiring Derivative Settlement through Marriage.

The derivative settlement of the mother of an illegitimate child, acquired by her marriage subsequent to the child's birth, does not enure to the child after attaining puberty.

An illegitimate child was born in the parish of A. Subsequent to the child's birth its mother married and acquired through her husband a derivative settlement in the parish of B. While the child was in pupilarity its mother died, and after it had attained puberty it became chargeable. *Held* that the settlement of the pauper was in the parish of A.

Poor — School — Blind and Deaf Mute — Whether Maintenance in Blind Asylum has Effect of Pauperising Child—Education of Blind and Deaf Mute Children (Scotland) Act 1890 (53 *and* 54 *Vict. cap.* 43), *sec.* 7 (1).

The Education of Blind and Deaf Mute Children (Scotland) Act 1890 (53 and 54 Vict. cap. 43) provides for the education of blind and deaf mute children out of the school fund of the parish in which the parent of such a child resides, and enacts as follows:—section 7 (1)—"The parent of a blind or deaf mute child shall not, by reason of any payment made under this Act in respect of the child, be deprived of any franchise, right, or privilege, or be subject to any disability or disqualification."

Held that the maintenance of a child in a blind asylum by a school board in terms of the above Act had not the effect of pauperising the child.

This was an action raised in the Sheriff Court at Glasgow by the Parish Council of the parish of Greenock against the Parish Council of the Govan Combination.

The pursuers sought to obtain relief from the defenders in respect of advances made on behalf of a pauper named Andrew M'Ilwraith M'Alpine in the following circumstances, set forth in a joint minute for the parties, whereby it was admitted—"(1) That Andrew M'Ilwraith M'Alpine