The Court pronounced the following interlocutors:—

(1) *In the action at Boord & Son's instance* — "Recal said interlocutor: Find and declare, interdict, prohibit, and discharge in terms of the first and second conclusions of the summons: *Quoad ultra* dismiss the action, and decern. . . ."

(2) *In the action at Thom & Cameron's instance* — "Recal said interlocutor: Assoilzie the defenders from the whole conclusions of the action, and decern. . . ."

[Counsel for reclaimers moved for the certificate in terms of section 46 of the Trades Marks Act 1905, which was granted.]

Counsel for Boord & Son (Reclaimers)—Scott Dickson, K.C.—C. N. Johnston—Grainger Stewart. Agents—T. & W. A. M'Laren, S.S.C.

Counsel for Thom & Cameron (Respondents)—Solicitor-General (Ure, K.C.)—C. D. Murray. Agents—Cumming & Duff, S.S.C.

Thursday, July 18.

FIRST DIVISION.

HOWARD'S TRUSTEES *v.* HOWARD AND OTHERS.

Fee and Liferent—Rights of Fiar and 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 owning and operating various theatres had power to carry profits to a reserve fund "to meet contingencies or for equalising dividends." They issued a circular in which they stated that the reserve now reached £35,000, but as more than that had been spent on a new theatre they proposed that the reserve "should now take the more permanent form of additional capital, and they therefore propose that the capital . . . be increased, and that the sum of £35,000 at credit of reserve should be applied by the shareholders in payment of 7000 additional ordinary shares of £5." Many alterations in the articles of association were proposed, including some giving increased power to the directors to deal with the reserve fund, and notice of the necessary resolutions was given. The resolutions having been passed by the company, and also resolutions authorising the directors to issue and allot the 7000 new shares, which did not exhaust the whole increase of capital, and declaring a special dividend or bonus of £5 on each of the existing 7000 shares, the directors issued a second circular announcing the allotment and enclosing an allotment letter, and mentioning that the bonus had been declared and could be used for paying for the new shares, which they suggested it was in the interest of the allottee to take up. The bonus warrant was attached to the allotment letter. Trustees whose trust included shares in the company took up the new shares allotted to them and paid for them with the bonus.

Held, in a question between the liferenter and the fiars of the trust estate, that the bonus was part of the capital of the trust estate.

Gunnis's Trustees v. *Gunnis*, November 17, 1903, 6 F. 104, 41 S.L.R. 69, *followed*.

A special case was presented by (1) Michael Simons, merchant, Glasgow, and others, the trustees acting under the trust-disposition and settlement, dated 18th May 1891 and recorded 28th May 1895, of James Brown Howard, who died on 16th May 1895, *first parties;* (2) Mrs Sara Nathan or Howard, the testator's widow, to whom a liferent of the residue of the trust estate was given by the second purpose of the trust-disposition, *second party;* and (3) Stanley Hoban and others, to whom the fee of the residue of the trust estate was given by the third purpose of the trust-disposition, *third parties*.

The truster had been possessed of a large number of ordinary shares in Howard & Wyndham, Limited, which he was bound not to sell for seven years from the constitution of the company in 1895, and on 19th April 1904 his trustees still were possessed of 620 ordinary shares. The respective rights of the liferentrix, the second party, and the fiars, the third parties, in a bonus declared on those shares formed the matter in dispute.

The questions of law submitted to the Court were—"(1) Was the second party entitled to the said special dividend or bonus declared and paid by the said company on the ordinary shares held by the first parties for her in liferent? (2) If the first question be answered in the affirmative, is the second party now entitled to payment of (*a*) the proceeds of the said shares which were purchased with the said special dividend or bonus; or (*b*) the original amount of the said special dividend or bonus?"

Article 115 of the articles of association of Howard & Wyndham, Limited, provided—"115. Subject to the provisions of these presents the directors may, before recommending any dividend, set aside out of the profits of the company such sum as they may think proper as a reserve fund to meet contingencies or for equalising dividends."

On 29th February 1904 the directors of Howard & Wyndham, Limited, issued to the shareholders this circular—"The accounts of the company for the year ending 27th instant are now being made up with a view to the preparation of the annual balance-sheet, which will shortly be issued, and the directors expect that the result of the year's working will admit of the sum at the credit of reserve being increased to £35,000, which is equal in amount to the

ordinary share capital of the company presently issued. As the company has expended in connection with the new King's Theatre in Glasgow (which is practically completed) a sum larger than the amount of the reserve, the directors are of opinion and recommend that the reserve should now take the more permanent form of additional capital, and they therefore propose that the capital of the company should be increased, and that the sum of £35,000 at credit of reserve should be applied by the shareholders in payment of 7000 additional ordinary shares of £5 to be allotted to the holders of the existing ordinary shares.

"To carry this proposal into effect it is intended that certain special resolutions should be passed, and we now enclose formal notice of an extraordinary general meeting of the company to be held on 15th March next, when these special resolutions will be submitted. A second extraordinary general meeting of the shareholders for the purpose of confirming them will subsequently be held, due notice being given to the shareholders. On the special resolutions becoming effectual it is intended to allot, *pro rata*, 7000 additional ordinary shares to the holders of the existing 7000 ordinary shares. The shareholders will be asked to declare a special dividend or bonus of £5 on each existing ordinary share, and this will be available for paying up the amount due on the share allotted.

"It will be observed that advantage is proposed to be taken of the present opportunity to make certain changes which are thought desirable in the articles of association of the company, and that in all a sum of £50,000 of new ordinary capital is intended to be created. The balance of the capital will not be issued meantime, but it will be available in the event of the company requiring the additional capital hereafter, and the expense of a fresh creation will thus be avoided.

"The articles of association may be seen at the company's office. — We are, Your obedient servants,

"CARTER, GREIG, & CO., *Secretaries.*"

The proposed alterations in the articles of association included these—(7) An addition to article 115 (*sup.*) of the words, "Or for paying special dividends or bonuses, or for any other purpose or purposes whatsoever that to the directors may seem proper; and the directors may at any time, and from time to time, apply for all or any of these purposes the whole or any part of the sum at any time standing at the credit of the reserve fund in the books of the company"; and (8) a new article, 115a, which was in these terms—"The company in general meeting may, in the year 1904 or subsequently, pass a resolution to the effect that a special dividend or bonus of £5 per share, free of income tax, be paid to the shareholders of the company holding the existing ordinary shares numbered 1 to 7000, payable on such date as may be fixed to those who may be registered as holders of such shares on a date to be specified in the resolution; and it shall be no objection to such resolution that it is passed at the meeting at which the resolution introducing this article into the articles of association was confirmed as a special resolution, provided that due notice of the intention to propose such first-mentioned resolution shall have been given prior to the confirmatory meeting aforesaid."

The special resolutions having been duly adopted and confirmed, and two further resolutions having been passed at the confirming meeting (*a*) authorising the directors to issue 7000 new ordinary shares of £5, at par, to the existing shareholders, and (*b*) declaring a special dividend or bonus of £5 per share on the existing shares, the directors issued a second circular dated 19th April 1904, in which, after mentioning the passing of the resolutions, the making of the allotment of the new shares, payment for which had to be made by 2nd May, and the enclosure of the allotment letter, they continued—"A special dividend or bonus of £5 on each of the existing ordinary shares has been declared by the shareholders, payable on 2nd May 1904, and a warrant for the amount of the bonus is attached to the allotment letter. This warrant can be made available for paying up the amount due on the shares allotted to you, and, if you desire it to be so applied, you are requested to sign it at the place marked 'signature of payee,' and return it with the allotment letter. In view of the price at which the existing ordinary shares stand in the market, you will, no doubt, regard it as your interest to take up the allotment. Any shares not taken up by 2nd May may be disposed of by the directors. It is intended, on the issue being completed, to make application to the Edinburgh Stock Exchange for a quotation for the new shares."

The allotment letter with the acceptance thereon and the bonus warrant attached had this note at the beginning—"In cases where the shareholder wishes the bonus warrant applied in paying up the new ordinary shares, the acceptance and the warrant should be signed by the shareholder and this sheet returned to the company in the enclosed envelope."

Argued for the first and third parties—The special dividend or bonus, or the shares allotted in consideration thereof, formed part of the capital of the trust estate, and fell to be held for the second party in liferent and the third parties in fee. The true meaning of the transaction by the directors was the creation of new capital—*Bouch* v. *Sproule*, (1887) L.R., 12 A.C. 385, especially Lord Watson; *Cunliff's Trustees* v. *Cunliff*, November 30, 1900, 3 F. 202, 38 S.L.R. 134; *Gunnis's Trustees* v. *Gunnis*, November 17, 1903, 6 F. 104, 41 S.L.R. 69. In *Blyth's Trustees* v. *Milne*, June 23, 1905, 7 F. 799, 42 S.L.R. 676, which was relied on by the second party, the circular-letter offering the shares was independent of the scheme for increasing the capital, while here the increase of capital was dependent on the success of the circular, for if no shareholder had taken up the shares the increase of capital would have fallen

through. On the second question, the second party in any event was only entitled to the nominal value, not the proceeds of the new shares. She had had nothing to do with the taking up of the shares.

Argued for the second party—The special dividend or bonus was income of the trust estate to which the second party was entitled. She did not now ask for the proceeds of the new shares, but only for the bonus itself. The transaction was the declaration of a dividend, and the case resembled *Blyth's Trustees, cit. sup.* Here, as there, the company was divested and cash could be obtained. The true test was, was there any *nexus* or fettering condition attached to the bonus. There was none. The amount of the whole increase of capital did not correspond with the amount of the bonus distributed. It was left in the option of the shareholders, not of the directors, to appropriate the bonus to the payment for new shares. The cases cited were distinguished and did not apply—*Cunliff's Trustees* v. *Cunliff, ut supra*, was merely an allotment of new shares. In *Gunnis's Trustees* v. *Gunnis, ut supra*, the fund distributed had been previously treated as capital (Lord Trayner at p. 110), as was also the case in *Bouch* v. *Sproule, ut supra* (Lord Herschell at p. 399). This case was ruled by *Blyth's Trustees* v. *Milne, ut supra;* and *in re Malam*, [1894] 3 Ch. 578—and the new shares should be attributed to revenue.

At advising—

Lord President—The question here is whether the liferenter or the fiars should get a certain payment of a bonus of £5 on each of 620 ordinary shares of the company of Howard & Wyndham which were held by the trustees in the settlement of Mr James Brown Howard. Your Lordships had occasion very recently in the case of *Blyth*, 7 F. 799, to examine the law on this matter, and I think it would be useless to repeat what was there said, because I understand all your Lordships agree that the law as laid down there was correct. But the difficulty always comes in the application of that law to the precise facts of each case, and I think I had occasion in *Blyth's* case to point out that no one case could be held to rule another, though of course cases might be cited as types of the different class of facts to which the law became applicable, taking them as types and nothing more. The whole question here is, whether this case falls within the type of *Blyth's* case, where we held the dividend was properly dividend, and was therefore given to the liferenter, or whether it falls within the type of *Gunnis's* case, 6 F. 104, where the Second Division held that it was not dividend but fell to the fiars.

I think Lord Herschell made the remark in the case of *Bouch*, L.R., 12 A.C. 385, that it was necessary to look both to the form and substance. I try therefore to look at both, and I find that the matter begins thus. The directors of the company sent out a letter to the shareholders in which they say that the sum at the credit of reserve is now increased to £35,000. And then they go on to say—"As the company has expended in connection with the new King's Theatre in Glasgow (which is practically completed) a sum larger than the amount of the reserve, the directors are of opinion and recommend that the reserve should now take the more permanent form of additional capital." Now, that is as plain as words can put it, that here what the directors meant by the phrase "dividend" is a distribution of capital and not of revenue, and for this very good reason, that really they had not the money to distribute as dividend. They had got £35,000 at the credit of reserve, but at the same time had spent more than £35,000 in erecting a new theatre, and they said, "We want to keep this as capital, and propose that our reserve fund should assume the form of capital." More than that, I do not think myself that at that moment the directors could have divided the £35,000 as dividend, because in the condition that the articles of association stood in at that moment the reserve fund was controlled by article 115, which was this—". . . (*quotes supra*) . . ." I think that, standing that article without any alteration on it, they could not have divided the whole of the reserve fund as bonus, because you could not call it an equalising dividend, and it is not to meet contingencies, and the directors must have felt that in doing what they next proceeded to do. They altered that article by special resolution by adding the following words—"or for paying special dividends or bonuses." What they did after that first letter was, that they then proceeded to create new capital and to offer that new capital to the shareholders, and also to declare a special dividend bonus in terms of that addition to article 115, and to declare it at such an amount that each shareholder by getting the dividend bonus would have exactly enough money to pay for the new share. It is perfectly true that that was done in such a way that, if a shareholder had taken up his dividend warrant he might have got money for it without applying it to the purchase of the new shares, and he might have transferred his letter of allotment to somebody else. But the substance of the transaction was, I think, clear, and that was that the distribution was not as dividend but as division of capital, though the precise way in which it was done was by dividend warrant. I therefore think that the design was on the same lines as in *Gunnis's* case, 6 F. 104, that the distribution was of part of the capital, and so the question of law falls to be answered by saying that the second party is not entitled to the special dividend or bonus. That supersedes the second question.

Lord Kinnear—I am of the same opinion. Of the cases cited, that of *Gunnis* comes nearest to the present, although the rule we are to follow is laid down with the highest authority in the case of *Blyth*. I agree that the so-called bonus dividend in

question must be treated as capital for the reasons your Lordship has stated. It was not any part of the intention of the directors, or of the shareholders who assented to the scheme proposed by the directors, to distribute the reserve fund as money available for the payment of dividend or bonus, and it was quite impossible that anything of the kind could have been done, both because the articles of the company as they stood would not have allowed it, and also because the money no longer existed so as to be divisible in that form. The money had been spent in acquiring a new theatre in Glasgow, and the whole purpose of the operations proposed by the directors and assented to by the company appears to me to have been simply this—to state the accounts so as to record in the most convenient form operations that had been already carried out, and to define the interests of the shareholders in the result. The good faith of the transaction between the company and the shareholders appears to me to have been that the shareholders on obtaining these dividend warrants were to apply for allotment of the new shares. It is quite true that any individual shareholder might, if he thought fit, have done otherwise and turned his dividend warrant into money. But, in the first place, that was not the true intent of the transaction as between the shareholders and the company, and, in the second place, it is apparent on the face of the circular-letter issued by the directors that they had throughout a well-justified confidence in the action of the directors, because it was for their "interest to take up the allotment." The trustees accordingly did take up the allotment, and I think nobody disputes that in doing so they were acting prudently in the administration of their trust. I quite agree that they were dealing with the capital of the trust estate, and that the new shares form part of the capital and no part of the income.

LORD PRESIDENT—LORD DUNDAS desires me to say that he concurs in this judgment.

The Court answered the first question in the case in the negative, and found that the second question was superseded.

Counsel for the First and Third Parties—D. Anderson. Agents—Lockhart Thomson & Stevenson, W.S.

Counsel for the Second Party—W. T. Watson. Agent—Robert Stewart, S.S.C.

Wednesday, July 18.

FIRST DIVISION.

[Sheriff Court at Dundee.

MITCHELL AND OTHERS *v.* WHITTON.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *sub-sec.* 2 (*c*)—"*Serious and Wilful Misconduct*"—*Question of Fact or Law—Breach of a Statutory Regulation—Driving Cart without having Hold of Reins—General Turnpike Act* (1 *and* 2 *Will. IV, c.* 43), *sec.* 97.

A farm servant in charge of a horse and cart was fatally injured through the horse suddenly bolting and the cart being upset. At the time of the accident the deceased, who was driving the cart along a public road, was not holding the reins, having tied them, within reach, to the upper left ring of the breeching. The Sheriff-Substitute "found in fact" that the deceased had not been guilty of serious and wilful misconduct and awarded compensation.

In an appeal *held* (1) that the question was one of fact and not subject to review, and (2) assuming review to be competent, that the deceased had not been guilty of serious and wilful misconduct in the sense of section 1, subsection 2 (*c*), of the Workmen's Compensation Act 1897.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1, sub-section 2 (*c*), enacts—"If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed."

The General Turnpike Act (1 and 2 Will. IV, cap. 43), section 97, incorporated in the Roads and Bridges (Scotland) Act (41 and 42 Vict. cap. 51), section 123, provides—"If the driver of any cart . . . on any turnpike road shall ride on the shafts, or in or on any other part of such carriage, without having and holding reins attached to each side of the bridle of each beast of draught drawing such cart, . . . such driver shall for every such offence forfeit and pay a sum not exceeding five pounds over and above the damages occasioned thereby."

In an arbitration under the Workmen's Compensation Acts 1897 and 1900, between James Whitton, farmer, Easter Jordanstone, Meigle, and Waterybutts, Barry, and Mrs Mary Lyall or Mitchell, Waterybutts, Barry, widow of the late William Mitchell, farm servant there, and others, claimants, the Sheriff-Substitute (CAMPBELL SMITH) awarded compensation, and at the request of Whitton stated a case for appeal.

The case stated—"That on 14th January 1907 the husband of the senior respondent, and the father of her children, when working as a farm servant in the employment of the appellant on the farm of Waterybutts, of which the appellant is tenant, and in charge of a horse and cart belonging to him, was so severely injured that he died in consequence of and within four hours after