arts." We find therefore that in a modern statute passed for the purpose of taxation, where an exemption is intended to be given with reference to funds which are used in connection with any religious persuasion, that is specially provided in the statute, and that this provision is separate and distinct from what follows, viz :—"any charitable purpose." There seems to me to be in that statute a clear distinction drawn between the two—the words are "any purpose connected with any religious persuasion or for any charitable purpose." The latter words alone would not have been sufficient to cover and include the former, and I draw the same distinction in the statute with which we are dealing, and hold that "any charitable purpose" will not cover "any religious purpose," as the trustees here contend that it does.

On these grounds, and concurring in all that your Lordship has said, I think that the judgment of the Lord Ordinary should be adhered to.

Lord Adam—I concur in all your Lordships have said. It appears to me to be quite impossible to extend the term "charitable purposes" used in this Act so as to cover religious purposes, which is the nature of the expenditure here in question, and I have nothing to add.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Graham Murray—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defender and Respondent—Lord Adv. Macdonald—Sol.-Gen. Robertson—A. J. Young. Agent—The Solicitor of Inland Revenue.

Tuesday, June 5.

FIRST DIVISION.

THE PARTICK, HILLHEAD, AND MARYHILL GAS COMPANY AND ANOTHER.

Public Company—Preference Shares—Unpaid Dividends—Arrears of Dividend—Interest.

Preference shares in a joint stock company were issued under powers contained in the articles of association, which provided that at a general meeting of the company the capital might be increased by the creation of new shares, whether ordinary or preferential or special, on such terms and conditions as the meeting might determine. The special resolution creating the preference shares contained the following:—"These shares to be entitled to a perpetual dividend of five pounds ten shillings per centum per annum."

Held that if the profits in any year were insufficient to pay in full the dividends due to the preference shareholders, the arrears must be paid out of the profits of subsequent years, but that no interest was due upon the arrears."

The Partick, Hillhead, and Maryhill Gas Company (Limited) was incorporated under the Companies Acts 1862 and 1867 on the 2d May 1871. The original capital of the company was £50,000, but by resolution passed on 29th October 1872 the ordinary share capital was increased to £100,000, which was fully paid up.

Under article 6 of the company's articles of association power was given "on the recommendation of the directors and with the sanction of at least three-fifths of the votes of the shareholders, voting in person or by proxy at any general meeting of the company," to increase the capital of the company, "by the creation of new shares, whether ordinary or preferential or special, and on such terms and conditions as the meeting determine." In or about the month of August 1873 the directors resolved to recommend an issue of preferential shares, and at a special general meeting of the company, held on 22d August 1873, the following special resolution (afterwards duly confirmed) was passed:—"That, in terms of the recommendation of the directors, the capital of the company be, and is hereby increased by the sum of £30,000, to be issued in 6000 preference shares of £5 each, these shares to be entitled to a preferential dividend of five pounds ten shillings per centum per annum."

These preference shares were taken up, and from the time of their issue till June 1885 the dividend of 5½ per cent. was duly paid.

In 1886, however, the directors, in consequence of an investigation, discovered that there was a discrepancy between the quantity and value of the coal actually in hand and that shewn by the measurement and monthly records submitted by the manager, and at the balance of 30th June 1886 a sum of £10,789, 15s. 3d. was debited to revenue on account of deficiency of stocks. At the same time there was debited to revenue a sum of £939, 0s. 6d. of debts of previous years which had been treated as good, but were then ascertained to be irrecoverable. After charging these two sums there was a sum of £8667, 17s. 7d. at the debit of revenue, or in other words, as shown in the company's balance-sheet, the assets were short of the capital and liabilities by that amount, and no dividend was paid either to the ordinary or preference shareholders. Had these two sums not fallen to be debited there would have been a balance at the credit of the revenue account of £3060, 18s. 2d., which would have been more than sufficient to pay the dividend on the preference shares.

At the balance on 30th June 1887 there was a balance of profit on the year's working of £7725, 11s. 3½d., which was applied to the extent of £1000 as an addition to the depreciation fund, and to the extent of the balance in reduction of the balance of £8667, 17s. 7d. at the debit of the previous year, carrying forward a debit balance of £1942, 6s. 3½d. That is to say, as shown in the company's balance-sheet, the assets were short of the capital and liabilities by the last mentioned amount, and no dividends were paid either to the preference or ordinary shareholders.

The directors anticipated that at the close of the current year at 30th June 1888 there would be a sufficient sum at the credit of revenue account to pay off the above debit balance of £1942, 6s. 3½d., to pay the dividend for the current year on the preference shares, and possibly to pay a portion of the arrears of dividend on these shares, assuming these arrears to be due.

In these circumstances questions arose between

the company and the preference shareholders as to their respective rights, and a special case was accordingly presented for the opinion of the Court, to which the company were the parties of the first part, and Robert Taylor and another, as representing the preference shareholders, were parties of the second part.

The first parties maintained that the dividend on the preference shares was not cumulative, and that no charge in respect of arrears of preference dividend or interest thereon fell to be made upon the revenue of the current or future years. The second parties, on the other hand, maintained that the future free revenue of the company, after paying off the above debit balance of £1942, 6s. 3½d., should be applied in the first place in payment of the arrears of dividends for the years 1885-6 and 1886-7 on the preference shares, with interest at the rate of 5½ per cent. (or alternatively at the rate of 5 per cent.) on each dividend from the 2d day of October in each year (when the same would in ordinary course have been paid) till paid, and in the second place in payment of the dividends on the preference shares for the current and following years, with interest from the time the same fell due till paid.

The articles of association of the company in the branch relating to the application of earnings provided as follows:—

"18. All the earnings of the company, including all their receipts properly carried to the account of revenue, shall every year be applied as follows:—

1st. In payment of all taxes, rates, and rents, and other preferable charges payable in respect of the company's landed property or works, and all arrears, if any, thereof.

2nd. In payment of all management, working, and other current expenses of the company, and all arrears, if any, thereof.

3rd. In payments to the reserved fund and the depreciation fund.

4th. In payment to the preferential shareholders, if any, of their dividends, according to their respective priority.

5th. In payment of a dividend on the ordinary shares."

The following questions were submitted to the Court:—"(1) Is the dividend on the preference shares cumulative, and does the dividend not paid in the years 1885-86 and 1886-87, or either of them, fall to be carried forward as a first charge on the free revenue of the year 1887-88 and future years? or is the dividend on the preference shares for any one year chargeable only upon the free revenue of that year? (2) Is interest due on arrears of preference dividend, and if so, at what rate?"

Argued for the second parties—The mere circumstance that in any one year profits were not earned by the company sufficient for the payment of the preference shareholders did not deprive them of the right to have their arrears of interest paid up when the company again earned profits. If the rights of the preference shareholders terminated at the end of each year, then, as the interests of the two classes of shareholders clashed, and as the preference shareholders were largely in the minority, their interests might be crushed out and they themselves outvoted in any given year, no dividend paid upon their shares, and their rights defeated. The only statute which dealt with preference shares was the Companies Clauses Act of 1863 (26 and 27 Vict. cap. 118), secs. 13 to 16. No doubt the provisions of this statute were against the present contention of the second parties, but the statute was quite against the common law, and as the statute was not incorporated with the articles of association of this company, the common law rule must prevail. Interest also should be allowed on the arrears—*Henry* v. *Great Northern Railway Co.*, 1857, 1 De Gex & Jones, 606; *Webb* v. *Earle*, July 23, 1875, L.R., 20 Eq. 556; *Corry* v. *Londonderry Railway Co.*, Dec. 11, 1860, 29 Bevan, 263.

Argued for the first parties—No doubt the general effect of the authorities cited by the second parties was against the contention of the first parties, who maintained that no arrears of unpaid preferential dividend could be claimed as a charge on the profits of succeeding years. The words "preferential dividends" made use of in the English authorities were equivocal, and for their true meaning the memorandum and circulars of each company had to be examined. On examining the articles of association of the present company, and especially the parts relating to the application of earnings, while it was expressly provided that as regarded all taxes, rents, expenses of management, etc., any arrears of these were to be met by the earnings of the year; yet, when the articles went on to provide for the payment from earnings of dividends on the preference and ordinary stock, no provision was made for the payment of any arrears of these dividends from the earnings of the year. The articles of association of this company were therefore against the present claim. In any event, interest on the arrears should not be allowed as there was no fault.

At advising—

Lord President—The second parties to this special case are preference shareholders in the company, and the shares which they hold were created in August 1873 in respect of a report by the directors of the company. The creation of these preference shares is thus recorded—"That, in terms of the recommendation of the directors, the capital of the company be, and is hereby increased by the sum of £30,000, to be issued in 6000 perference shares of £5 each, these shares to be entitled to a preferential dividend of five pounds ten shillings per centum per annum." An intimation relative to these preference shares was then forwarded to the shareholders of the company, the shares were duly taken up, and they remain to the present time part of the capital stock of the company.

Up to 1886 there seems to have been no difficulty in paying the full dividend upon these preference shares, but that year was a somewhat unfortunate one for the company, for although the accounts showed an apparent balance of £3060 in its favour, this balance was more than extinguished in consequence of its being devoted to meet certain losses which were properly debited to revenue account. The result of this was, that there was no profit to divide, and no dividend available for the preference shareholders. The same unfortunate circumstances occurred in the following year. Now, however, the company has recovered itself, any losses

that have taken place have been provided for, and a profit is expected upon the transactions of the year.

In this state of the facts the question which we have to determine is, whether or not the preferential shareholders who during these two years received no dividends, have thereby lost the right to the money which they would have received if the company had been in more flourishing circumstances. Profits are now being earned, and these preference shareholders maintain that they are entitled to be paid their unpaid arrears; while on the other hand it is urged that these dividends not having been paid from want of funds at the time when they fell due, any claim for them now cannot be entertained.

The question I think is a very simple one. It has been settled by authority, and settled in a way which to my mind is both plain and just. The difference between a preferential and an ordinary shareholder is just this, the one is to be paid in preference to the other. Given profits then, the preferential shareholder is settled with in the first place, and if anything remains, that goes to the ordinary shareholders. Neither are, strictly speaking, creditors of the company, except in the sense that all the shareholders are creditors of the company, and in that sense and in that only are they preferential creditors. I know no rule which limits the claim of these preferential shareholders to their 5½ per cent. out of the profits of any one year. If from any cause they have not been paid their dividend in any one year, I see nothing to bar their claim in a subsequent year when profits have been earned, to have the sum which should have been paid made good to them. To hold otherwise would be most unfair, and accordingly when profits have been earned by this company in any year, this 5½ per cent. dividend is a preferable claim on these profits.

But this question has been very clearly determined in the case of *Henry* by Lord Cranworth, and Lords Justices Knight, Bruce, and Turner. I should have hesitated about going against such high authority even if I had had any doubts in my own mind as to the result arrived at in that case, but on the contrary, far from having any hesitation in the matter, I quite agree with the principles there laid down.

Our attention was called to the articles of association, and to that branch of them which deals with the "Application of Earnings."—[*His Lordship here read the passages from the articles of association quoted above.*]

Now, the first three sections I have read merely relate to the primary application of the income of the company in payment of its debts whensoever these were incurred. But this was an obligation imposed upon the company whether it was provided by the articles of association or not. Then it was further urged that as in the last two clauses relating to the payments of the preferential and ordinary shareholders, the words "all arrears" are omitted, it was intended to deprive the preferential shareholders of the right to claim arrears, if (as in the present case) after a series of unfortunate years the company should again enter upon a more successful career.

Now, I cannot adopt any such construction of these clauses. It is much too fanciful, and would lead to injustice. Such clauses are common in articles of association, but a right of this kind is not one which can be cut off in the manner proposed by the first parties, and without some very clear expression to that effect.

As to the second question, it is capable of being answered very shortly. If profits are earned, the preference shareholders are entitled to be paid their dividend, while if no profits are earned no payments can be made, and as this is not the fault of the debtor, no interest is due. Interest runs because of the failure from fault to pay the debt at a certain time, but here as I have pointed out, if no profits were earned, no dividend could be paid, and no interest is due.

I am, therefore, for answering the first alternative of the first question in the affirmative, the second alternative in the negative, and the second question in the negative.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

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

Counsel for the First Parties — Darling — Younger. Agents—Morton, Neilson, & Smart, W.S.

Counsel for the Second Parties — Guthrie— Davidson. Agents—Bruce & Kerr, W.S.

Thursday, June 7.

SECOND DIVISION.

[Sheriff Court of Inverness, at Elgin.

THOMSON *v.* STEWART.

Master and Servant — Wrongous Dismissal — Coachman—Disobedience.

A coachman was dismissed by his mistress from her service for having, in defiance of previous warning, driven two of his own friends in her carriage. In an action for wrongous dismissal, the Court *assoilzied* the defender, holding that the pursuer had been guilty of such disobedience to her orders as entitled her to dismiss him.

This was an action of damages for wrongous dismissal at the instance of Hugh Thomson, coachman, against his mistress, Mrs Stewart of Logie House, Elgin. The ground of dismissal was admitted by the pursuer, and was that in spite of previous warning, the pursuer had driven in the defender's landau a gamekeeper and a crofter on the estate of Dunphail from Forres to Logie.

At the proof Mrs Stewart deponed that she had dismissed the pursuer for driving these people, and that she had warned him before not to carry people in her carriage, and that she had also said the carriage was not to be used for any other purpose but her own.

The Sheriff-Substitute (RAMPINI), on 17th December 1887, found that the pursuer had been guilty of express and wilful disobedience, and that the defender was entitled to dismiss him,