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,

and that the dismissal was justifiable in law.

"*Note.*— . . . The pursuer will no doubt think that Mrs Stewart has acted very inconsiderately—not to say harshly—by him in dismissing him because he gave a couple of friends a lift in one of his mistress's carriages. No one can prevent the servant thinking so if he pleases, but the law will not sanction any such opinion. If the mistress's order was a lawful one—as undoubtedly it was here—the servant was bound to obey it whatever might have been his own views as to its reasonableness or unreasonableness. Moreover, whether it was or was not the first occasion on which he had offended in this way, there can be no doubt that the servant had been previously warned that such conduct would not be permitted. This added greatly to the offence. It aggravated the wilful character of the disobedience, and to quote the words of Lord Fraser, in his work on Master and Servant, 'where a servant deliberately violates his master's orders, or refuses to obey them when given, he is clearly guilty of the grossest breach of contract.' That is what, in the opinion of the Sheriff-Substitute, the servant has done here, and it is for this that he assoilzies the defender from the conclusion of this petition."

The pursuer appealed, and argued that there was not sufficient proof of such express previous order as would make this an act of disobedience. At most the fault was a venial one, and none but a harsh mistress would have dismissed her servant for it. It was not such an act of wilful disobedience as entitled the defender to dismiss him.

The defender replied—She had in point of fact previously forbidden him to use her carriage as he had done, and she was quite entitled to dismiss him for what was a wilful act of disobedience to her express orders.

At advising—

Lord Justice-Clerk—I think this is a narrow case, but I agree with the Sheriff-Substitute. I think that the act which was the cause of the appellant's dismissal was a sufficient ground in itself. I do not say that the use of his mistress's carriage for the conveyance of other people might not under certain circumstances have been a venial offence. It is, however, a thing which a master is not bound to submit to, and I think any master is entitled to dismiss a servant who does it. Besides, on one occasion the defender had to find fault with the pursuer for taking out the dogcart at an improper hour.

On the whole matter, I think that the admitted fact that the coachman took up certain wayfarers and allowed them to use his mistress's carriage was an act of indecorum and impropriety. His mistress was quite entitled if she saw fit to treat it as disrespect to her orders, which it was, and to dismiss him therefor. That is the general view I take of the case, and I think the Sheriff-Substitute is right.

Lord Rutherfurd Clark and Lord Trayner concurred.

Lord Young and Lord Craighill were absent.

The Court dismissed the appeal and affirmed the judgment.

Counsel for the Appellant—Gloag—G. W. Burnet. Agent—R. Stewart, S.S.C.

Counsel for the Defender—Graham Murray. Agents—Stuart & Stuart, W.S.

Saturday, June 9.

FIRST DIVISION.

[Lord Lee, Ordinary.

SIMPSON *v.* BROWN.

Bill of Exchange—Bills of Exchange Act, 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 100—*Suspension—Caution.*

The Bills of Exchange Act, 1882, by section 100, provides that in any judicial proceeding in Scotland any fact relating to a bill of exchange which is relevant to any question of liability thereon may be proved by parole evidence, but provides "that this enactment shall not in any way affect the existing law and practice whereby the party who is according to the tenour of any bill of exchange . . . debtor to the holder in the amount thereof, may be required as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation or to find such caution as the court or judge before whom the cause is depending may require."

Held that it was still within the discretion of the Court, before passing a note of suspension of a threatened charge, to ordain the complainer, the acceptor of a bill of exchange, to find caution, and circumstances in which *held* that the note should only be passed on caution.

On 16th March 1888 George Simpson, Lomond House, Trinity, was charged at the instance of William Brown, solicitor, Hamilton and Glasgow, to pay the sum of £282, with interest, being the amount contained in and due by a bill, dated 10th November 1887, drawn by W. V. & J. R. Orr, 93 West Regent Street, Glasgow, upon and accepted by the said George Simpson, and indorsed to Brown. Simpson brought a suspension of the charge, and prayed that the note might be passed without caution or consignation in the following circumstances.

The complainer, who was the respondent's brother-in-law, averred (Stat. 2) that in 1886 he had occasion to go to America, "and that before leaving he executed a power of attorney in favour of the responondent (Brown), to whom also he gave a number of bill stamps accepted in blank, to be used for his (complainer's) business if required. None of these stamps were required in the complainer's absence, and on his return the respondent obtained a discharge from him, which was given on the respondent's assurance that everything was in perfect order. The complainer at the time forgot about the bill stamps, and when he afterwards applied to the respondent for them, the latter declined to give them up. The complainer filled up one of these bills for £77 in favour of a Mr Robert Strachan, Wishaw, and when the bill became due he paid it himself. The first and only intimation of this