that the defenders the said Clippens Oil Company, Limited, as lessees of the minerals in the lands of Pentland on both sides of the strip of ground belonging to the pursuers, described in the first conclusion of the summons, and where the pipe, also described in the first conclusion of the summons, is laid, and as the owners of the lands and minerals of Straiton are not entitled to work the shale, limestone, and other minerals adjacent to the said strip of ground and adjacent to or under the pipe or aqueduct belonging to the pursuers, described in the first conclusion of the summons, in such manner as to injure the said strip of ground or the said pipe or aqueduct, or to interfere with the continuous flow of water through the said pipe or aqueduct from the Crawley Spring to the Castle Hill Reservoir, described in the summons: Interdict, prohibit, and discharge the defenders the Clippens Oil Company, Limited, from working the said shale, limestone, and other minerals adjacent to the said strip, and adjacent to and under the pursuers' said pipe or aqueduct, where it is laid in the said lands of Pentland or in the said lands of Straiton, so as to injure the said strip of ground or the said pipe or aqueduct, or to interfere with the continuous flow of the water through the said pipe from the Crawley Spring to the Castle Hill Reservoir, and decern: Find the pursuers entitled to two-thirds of the taxed amount of the expenses from the beginning of the action, and remit," &c.

Counsel for the Pursuers — Dean of Faculty (Asher, Q.C.) — Guthrie, Q.C. — Cooper. Agents — Millar, Robson, & M'Lean, W.S.

Counsel for the Defenders — Solicitor-General (Dickson, Q.C.) — Clyde — T. B. Morison. Agent—J. Gordon Mason, S.S.C.

Friday, November 30.

FIRST DIVISION.

CUNLIFF'S TRUSTEES *v.* CUNLIFF.

Succession—Liferent and Fee—Rights of Liferenter and Fiar — Shares in Company—Profits Capitalised by Company—Reserve Fund Set Aside out of Profits—Reserve Fund Distributed—Distribution Made by Allotment of New Shares — Company—Trust.

Under the original articles of association of a company the directors were empowered to set aside out of the profits of the company such sums as they might think proper as a reserve fund to meet contingencies or for equalising dividends, or for certain other purposes.

Thereafter new articles were adopted under which it was provided, *inter alia*, that the board of directors should have control of certain unissued shares with power to issue and allot them as they should think advisable. Powers were conferred upon the board of setting aside out of the profits before declaring a dividend, such sum as they might think right for a reserve fund, and the board was further empowered, with the authority of a general meeting, to apply any of the moneys standing to the credit of the reserve fund "by way of dividend distributable among the members" . . . and to pay any dividend either by distribution of specific assets, or "in paid-up shares of the company." A meeting was called by the directors for the purpose of passing two resolutions, the first being to apply a sum at the credit of the reserve fund "by way of dividend distributable to the shareholders," and the second, to pay this dividend by the allotment of paid-up shares, in payment for which the dividend payable to shareholders under the first resolution was to be applied. Along with the notice calling the meeting a circular was sent to the shareholders in which they were reminded that at a former meeting it had been intimated that the board had under consideration whether it would be desirable "to convert a portion of the reserve fund into capital and issue it to the shareholders in that form," and it was further stated that the present meeting was being called to carry this into effect.

The two resolutions were duly passed, and the directors in exercise of the powers thereby conferred upon them allotted the unissued share samong the shareholders, and applied the money drawn from the reserve fund in paying for them.

Certain of the shares were held by trustees for one beneficiary in liferent and others in fee, and some of the newly issued shares were allotted to them.

In a question between the liferenter and the fiars, *held*, assuming it not to be disputed that the company had power to capitalise profits, (1) that the portion of profits taken from the reserve fund, instead of being paid as dividend, had been validly capitalised by the company; (2) that as the shareholders were bound by this capitalisation, the trustees were bound to hold and administer the new shares as part of the capital of the trust-estate; and (3) that the liferenter was not entitled to have the new shares transferred to her as revenue, or to receive payment of the sum with which the trustees had been credited as their share of the reserve fund.

This was a special case presented for the opinion and judgment of the Court by (first) the trustees of the late Richard Stedman Cunliff, (second) Mrs Cunliff the widow, and (third) the children and representatives of a deceased child of the truster.

The questions in the case related to certain shares held by the trustees in the British and African Steam Navigation Company, Limited.

The following statement of the circumstances under which the questions submitted in the case arose is taken from the opinion of the Lord President:—"The questions in this case are (1) whether Mrs Cunliff, the liferentrix of nine-tenths of the residue of the estate left by her husband, the truster, is entitled to have 352 shares in the British and African Steam Navigation Company, Limited, which were issued under the circumstances after mentioned, transferred to her as part of the revenue of the estate, or (2) whether she is entitled to payment of the sum of £3524, the amount of the dividend on the original shares applied to the extent of £3520 in payment of the new shares, or (3) whether the first parties, the truster's testamentary trustees, are entitled and bound to retain and administer the 352 shares as part of the capital of his trust estate.

"Mr Cunliff, the truster, died on 8th January 1879, leaving a trust-disposition and settlement and relative codicil dated respectively 28th July 1871 and 30th August 1875, under which the first parties are the acting trustees. By that trust-disposition and settlement the truster directed his trustees to hold nine-tenths of the residue for behoof of his spouse, the second party, in liferent, for her liferent use only, and he gave directions with respect to the capital which it is unnecessary now to consider.

"At the time of his death the truster held shares in the British and African Steam Navigation Company, Limited, and the residue of his estate liferented by the second party consists, *inter alia*, of 2290 shares of £10 each fully paid in that company, part of the truster's holding which the first parties were empowered to retain.

"By special resolution of the company passed at an extraordinary general meeting held on the 1st March 1899, and confirmed at another extraordinary general meeting held on the 22nd of the same month, new articles of association replacing the old ones were adopted. These new articles provided and declared, *inter alia*, that by article 3 the capital of the company then stood at £450,000, divided into 45,000 shares of £10 each, of which 39,000 shares had been issued, which were, or were deemed to be, fully paid up, and that the remaining 6000 had not been issued, and by article 4 that, 'the unissued shares shall be under the control of the board, who may issue such portion thereof as they may consider advisable, and allot, or otherwise dispose of the portion they resolve to issue, to such persons on such terms and conditions, and either at par or premium, and at such times as the board may determine.'

"Under the original articles the directors were empowered to set aside out of the profits of the company such sums as they might think proper, (1) as a reserve fund to meet contingencies, or for equalising dividends, or for repairing and maintaining, renewing, and replacing, and increasing the number of the vessels belonging to the company, or for any other purpose connected with the business of the company or any part thereof, or for discharging any of the liabilities of the company, or otherwise, as the directors should think reasonable; and (2) such sum as they might think proper as an insurance fund; and they were empowered to invest the sums so set aside as they might think fit.

"By 122 and 123 of the new articles large powers were conferred upon the board of setting aside out of the profits of the company, before declaring a dividend, (1) such sum as they might think proper as a reserve fund, and (2) such sum as they might think proper as an underwriting account or insurance fund. The board were also vested with a large discretion as to the investment of these funds.

"For many years the company had, besides writing off largely from the book-values of their ships for depreciation, kept, in terms of the articles, an underwriting account or insurance fund, crediting it with premiums in respect of the insurance of the ships, and debiting it with the amount of the losses.

"In December 1893 an account called 'Reserve Fund,' was opened, and large sums were carried to the credit of that account from the profits of the preceding year, and of certain subsequent years, the balance at the credit of the account at 31st December 1897 amounting to £65,000. At the same date the balance at the credit of the underwriting account was £90,000, and the company held £200,000 in cash and liquid assets. Its liabilities to the public were of small amount.

"By article 124 of the new articles the board were empowered from time to time (with the authority of a general meeting) to apply any of the moneys or investments then standing, or which may thereafter stand, to the credit of any reserve fund, or of the underwriting account or insurance fund for the time being, by way of dividend, distributable amongst the members in proportion to the amount paid up, or held to be paid up, on each of their shares; and that such dividend may be distributed wholly or partly in cash, or in specific assets as provided in the following article; and by article 125 it was declared that the board might (with the authority of a general meeting) 'pay any dividend wholly or in part by the distribution of specific assets, and, in particular, of paid-up shares of the company;' and that when any difficulty arose in regard to the distribution they might settle the same as they might think expedient, and in particular, might issue fractional certificates, and fix the value for distribution of such specific assets, or any part thereof, in order to adjust the rights of all parties.

"On 5th June 1899 the directors called a general meeting to be held on the 14th of that month, for the purpose of considering and, if so resolved, passing two resolutions —'(1) That the board may apply £60,000 of the moneys standing to the credit of the reserve fund by way of dividend, distribut-

able amongst the members in proportion to the amount paid up on each of their shares, and that such dividend be distributed as provided in the next resolution;' and '(2) That the board may pay said dividend by the distribution of paid-up shares of the company in manner following, that is to say, the board shall allot such new shares *pro rata* amongst the existing members according to the number of shares of which they may on the 14th day of June 1899 be registered as holders, in the proportion of two new shares to thirteen existing shares, or as near thereunto as may be; and that the dividend to which each member is entitled under the preceding resolution be applied in payment of the shares falling to him; and that cases involving the allotment of fractional parts of a share be adjusted by a cash payment of £1 for each fractional part, that is, £1 for each thirteenth part, the value of the shares being taken as equal to £13 per share, and that the board dispose of the fractional parts so as to provide the funds for such payment.'

"Along with the notice calling the meeting, a circular was sent to the shareholders reminding them that at the extraordinary general meeting of shareholders held on the 1st March then last, the chairman intimated that the board had had under consideration whether it might not be desirable 'at some time to convert a portion of the reserve fund into capital, and issue it to the shareholders in that form. The board having further considered the matter, have now resolved to carry this out, and the meeting on the 14th inst. is called for the purpose of giving effect to the resolutions.'

"The resolutions were duly passed, and the directors, in exercise of the powers conferred upon them, allotted the unissued shares among the shareholders and applied the £60,000 in paying for them. The shares were allotted without any application being made from the shareholders. 352 shares were issued to the first parties, and they received at the same time a cheque for £4 for the fractional parts of the allotment.

"After the shares were allotted, the £60,000 were transferred in the company's ledger, by a journal entry, from the reserve fund to the credit of the dividend account, the account out of which all the dividends are paid. The dividend account was then debited in the cash book with the amount due to each shareholder in respect of the dividend, the capital account being at the same time credited with the amount required to pay up each allotment, and the difference between the amount of dividend credited to each shareholder and the amount required to pay up his allotment being paid to him in cash. The sum entered in the dividend account as due in respect of the first parties' holding was £3524.

"On 14th June the shares of the company were, as quoted in the official list of the Glasgow Stock Exchange, at 14⅛, this being *cum* the new shares. Thereafter the shares were not quoted till 27th July, when the quotation was 14, this being *ex* the new shares.

"The second party contends that the shares issued as above mentioned should be treated as revenue, and be paid or transferred to her as liferentrix; or, alternatively, that she is entitled to the sum of £3524, the amount of the dividend on the original shares held by the first parties, applied to the extent of £3520 in payment of the new shares. The third parties contend that the shares form part of the capital of the trust estate, and ought to be retained and administered by the first parties as such."

The questions submitted for the opinion of the Court were—"(1) Is the second party entitled to have the said 352 shares transferred to her as part of the revenue of the estate liferented by her? or (2) Is she entitled to payment of the said sum of £3524? or (3) Are the first parties entitled and bound to retain and administer the said shares as part of the capital of said trust-estate?"

The arguments of the parties in support of their contentions sufficiently appear from the opinion of the Lord President.

The following cases were referred to by the parties in addition to those specially cited by his Lordship:—*Bouch* v. *Sproull*, [1887], 12 App. Cas. 385; *Bridgewater Navigation Company* [1891], 2 Ch. 317; *Malam* v. *Hitchens* [1894], 3 Ch. 578; *in re Northedge*, 1891, 60 L.J. Ch. 488.

At advising—

LORD PRESIDENT—[*After stating the circumstances of the case ut supra, his Lordship proceeded as follows*]—The questions which require to be considered are—(1) Had the company power to capitalise the profits which had gone to make up the reserve funds? (2) If it had this power, did it in intention and effect exercise it? and (3) If it did exercise it, do the shares form part of the capital of the trust estate, or are they payable to the second party as income of that estate?

I do not understand it to be disputed that the company had power to capitalise profits, thereby increasing the capital, and in this essential particular the present case differs from *Brander* v. *Brander* (4 Ves. 800) and *Irving* v. *Houston* (4 Paton's App. 521), which related to stock of the Bank of England and stock of the Bank of Scotland respectively, neither of which had by its constitution any power to increase its capital.

Then as to the second question, it appears to me that the company validly exercised the power to convert the money in question into capital. If this be so, it would *prima facie* appear that the shares of capital created by capitalisation would, like other shares of capital in such a question as the present, form part of the estate falling to be held by the trustees, and would not be payable to the liferentrix as income. But the second party maintains that a specialty is introduced by the terms of articles 124 and 125 of the new articles as well as of the resolutions of 14th June 1899,

and these require careful attention. By article 124 the board were authorised to apply any moneys standing at the credit of any reserve fund by way of dividend, and it was declared that such dividend might be distributed in cash or in specific assets, and by article 125 the board were empowered to pay any dividend by distribution of specific assets, "and in particular of paid-up shares of the company." It appears to me that if the power thus far recited had been exercised *simpliciter* and according to its terms, *i.e.*, by the board first declaring a dividend, and then resolving that it should be paid in paid-up shares, there would have been strong grounds for holding the second party as liferentrix entitled to the shares. But what was actually done seems to me to have been essentially different. While by the second resolution of 14th June 1899 the board were empowered to pay the dividend by distribution of paid-up shares in the manner therein mentioned, it was also thereby declared that the dividend to which each member was entitled under the resolution should be applied in payment of the shares falling to him, and in the accompanying circular the shareholders were reminded that at the meeting of 1st March the chairman had intimated that the board had had under consideration "whether it might not be desirable at some time to convert a portion of the reserve fund into capital and issue it to the shareholders in that form. The board having further considered the matter have now resolved to carry this out, and the meeting on the 14th instant is called for the purpose of giving effect to the resolution." This appears to me not to be a resolution to pay dividends by shares, but instead of paying dividends to capitalise the amount which would have been required to pay them, and issue the shares in payment of which that amount was applied, with all the qualities and incidents attaching to shares of capital. The statement in the case as to the manner in which the operation was carried out is in entire accordance with this view.

The true principle upon which such questions should be solved appears to be that which was stated by Lord Hatherley (when Vice-Chancellor) in *in re Barton's Trust*, L.R., 5 Eq. 244. "The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare. And when the company meet to say that they will not declare a dividend, but will carry over some portion of the half-year's earnings to the capital account and turn it into capital, it is competent for them, I apprehend, to do so, and when this is done everybody is bound by it, and the tenant for life of those shares cannot complain."

The case of *Bouch* v. *Sproule*, 12 App. Cas. 385, is, in my judgment, *a fortiori* of the present case, as it related to a "bonus dividend," and the House of Lords held that looking at all the circumstances the real nature of the transactions was that the company did not pay or intend to pay any sum as dividend, but intended to appropriate, and did appropriate, the undivided profits as an increase to the capital stock; that the bonus dividend was therefore capital of the testator's estate, and that the life tenant was not entitled to the bonus of the new shares. In the present case the act of the company was not ambiguous; it was unequivocally a creation of capital in exercise of an express power to do so.

The cases of *in re Bridgewater Navigation Company* [1891], 2 Ch. 317; and *in re Malam* [1894], 3 Ch. 578, were relied upon by the second party, but neither of them appears to me to be at variance with the views which I have just expressed.

In the former case it was held that all the three reserve funds in question represented undrawn "profits" uncapitalised, and were therefore to be treated as income to which, subject to the preferential dividend of a broken financial year, the ordinary shareholders were exclusively entitled, and not as "capital" or "assets" distributable among both the ordinary and the preference shareholders, but this conclusion was arrived at upon a state of facts essentially different from that which exists in the present case.

In the latter case it was held, first, upon the evidence, that the company intended to distribute its profits as dividend, not to capitalise them, and second, that the tenant for life was only entitled to so much of the value of the new shares as represented the dividend applied by the trustees in taking them up, the balance of such value forming part of the capital of the estate. For the reasons already given I consider that in the present case the company intended to convert, and did convert, the part of the profits in question into capital.

I am therefore of opinion that the first and second questions should be answered in the negative, and that the third question should be answered in the affirmative.

LORD M'LAREN—I concur, and have little to add. The principle on which the case must be determined is, that when a company has power to apportion its profits by distributing so much as income or dividend to shareholders and adding so much to its capital, everyone becoming a member of the company, either original or by purchase of shares, is bound by his contract to accept as income or dividend so much as the company declares to fall under that denomination. That is the essence of Lord Hatherley's statement, which is the foundation of the law upon this point. I think there are two consequential propositions following on this. First, that where shares are held by two persons in liferent and fee, or where one is entitled eventually to the capital of shares held by trustees and another to the income, when once it has been ascertained what share of the profits is income and what is capital, that is binding on the persons holding such shares, just as in the case of an individual having the full property of the shares. But, again, it seems to me that it can make no difference whether the portions of profits which a company adds to its capital are paid into the capital account,

thus increasing the value of existing shares, or whether these are kept apart and formed into additional stock divided into shares. I cannot see that such a circumstance affects the interests of liferenter and fiar, or of any person holding a qualified interest in shares. The views stated by your Lordship seem to me sufficient for the decision of the case, and I would only add that it would be difficult to apply any other rule by attempting to go outside the determination of the company. I may suggest, by way of illustration, the case of a company which every year sets apart a portion of its profits—not into a reserve fund, but as irrevocably applied to capital or extension of its business; everyone must admit that such money cannot be regarded as anything but capital, and so, too, if there is such application at regular intervals of two or three years. But it would be vain to seek for any criterion distinguishing between additions made to capital at regular and at irregular intervals. Another difficulty in a different relation would be to distinguish between company law and what might be done in private partnerships, because in the first case the powers of the company are regulated by their articles of association, while in the second there is a greater latitude given to the partners in dealing with their shares. I do not, however, elaborate that point. I do not think that our decision necessarily determines the case of bonus dividends. I desire to reserve my opinion on that point, because in an English decision the two cases are apparently treated as illustrating each other. If a bonus means an extraordinary dividend, our decision would not be in point.

LORD ADAM and LORD KINNEAR concurred.

The Court answered the first and second questions in the negative and the third in the affirmative.

Counsel for the First Parties—Edwin. Adam. Agent—Arthur Adam, W.S.

Counsel for the Second Party—Lorimer—Younger. Agent—Arthur Adam, W.S.

Counsel for the Third Parties—Clyde. Agents—Webster, Will, & Co., S.S.C.

Friday, November 30.

SECOND DIVISION.

[Sheriff of Lanarkshire.

STEVENSON *v.* SNEDDON.

Expenses—Dominus Litis.

A, a feuar, obtained decree in an action of interdict against B, an adjacent feuar, on the ground of certain encroachments by B upon his feu, and was found entitled to expenses. B having become bankrupt, A brought an action against C, their common superior, to recover the expenses in the original action, on the ground that C had been the true *dominus litis* therein. It was proved that B did not wish to defend the action, but was urged to do so by C, who agreed to pay his expenses; that in respect of this undertaking B appeared in and defended the action; that the defence in the Sheriff Court was conducted for B by C's law-agent, who kept C duly informed of all the proceedings; that after interdict was granted in the Sheriff Court, C, without the authority and against the wish of B, caused an appeal to be taken to the Court of Session, which was conducted entirely on his instructions; and that C paid the whole expenses of the defence both in the Sheriff Court and in the Court of Session.

Held that C was the true *dominus litis* in the appeal to the Court of Session, and that he was accordingly liable for the pursuer's expenses therein, but that he was not liable as *dominus litis* for the expenses of the proceedings in the Sheriff Court — *diss.* Lord Young, who was of opinion that no liability as *dominus litis* had been established against the defender.

This was an action brought in the Sheriff Court at Airdrie at the instance of William Stevenson junior, ironmonger, Dykehead, Shotts, against Robert Sneddon, coalmaster, Hillhouseridge, Shotts, concluding for payment of £82, 9s. 1d., being the taxed expenses found due to the pursuer in a previous action at his instance against Alexander Bennett, miner, Dykehead, Shotts.

In 1894 the defender feued to Bennett a piece of ground which was adjacent to certain ground previously feued to the pursuer. Bennett proceeded to make erections upon his feu, and in so doing he, as Stevenson maintained, encroached upon his, Stevenson's, property. Stevenson thereupon brought an action of interdict against Bennett, in which he was successful, both in the Sheriff Court and on appeal to the Court of Session, and he was found entitled to expenses. Thereafter Bennett became bankrupt, and Stevenson raised the present action.

He averred—"(Cond. 5) In that action the said Alexander Bennett was not the real defender. The real *dominus litis* was the said Robert Sneddon. He acted as principal, and the said Alexander Bennett acted as his agent. Although directed only against the said Alexander Bennett, the said action seriously affected the said Robert Sneddon. It decided whether or not it was *ultra vires* of him to grant a disposition such as he did to the said Alexander Bennett. Accordingly when said action was raised, the said Alexander Bennett requested the defender to free and relieve him of all expenses connected therewith. This the defender did by granting to the said Alexander Bennett a letter of guarantee. In so doing he authorised the said Alexander Bennett to defend said action, and during the whole period of its dependence defender's real attitude to it