lapse of the two years allowed before the repeal should take effect, the continued existence of the society even after the repeal is recognised by the statute itself, because every such society is still required to make up annual statements and accounts and submit them for audit. But apart from any inference which might be drawn from a construction which may perhaps be open to question, the Act of 1894 does not declare that societies founded under the repealed Act and not otherwise incorporated shall henceforth be deemed to be illegal, nor does it nullify their original legal constitution. By repealing the Act of 1836 it deprives them for the future of all the powers and benefits conferred by that Act, and it may probably disable them from carrying on their business. But the consequence of that will be that they must wind up. This society was properly established under the Act of 1836; and thereafter it has carried on business as a legal society, and rights and liabilities which are still unsettled have arisen out of its transaction of its lawful business. It cannot be presumed, if it is not expressed, that Parliament intended to disturb or destroy these perfectly legal obligations, by an *ex post facto* exclusion of the society from the cognisance of the courts of law; and therefore even if it must be deemed to be no longer in existence for other purposes, it must still exist for the purpose of winding up its business. I should come to this conclusion on a consideration of the Act of 1894 alone. But in connection with the repealing clause of that statute it is necessary to read the Interpretation Act of 1889. By the 38th section of that Act it is provided that where any Act passed after its commencement "repeals any other enactment, then, unless the contrary intention appears, this repeal shall not . . . affect the previous operation of any enactment so repealed, or anything duly done . . . or any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed." This society must therefore still be held to have been properly constituted; and if its rights and liabilities, which have also been duly constituted, are not to be affected, they must be still enforceable according to law notwithstanding the repeal. But if rights and liabilities are enforceable at law, it follows that the courts must take judicial notice of the society in which they inhere. I am therefore unable to sustain the respondents' plea that they form an association forbidden by law whose very existence cannot be recognised by the Court. They may be incapacitated, if so be, from carrying on business; but they are in no worse position than any dissolved company, and still exist for the purpose of winding-up.

It appears to me, therefore, that the petition cannot be dismissed on the ground of incompetency. The respondents' society is not struck at by the 4th section of the Act, it is not registered under the Act, and it is not alleged that the other condition of section 199 is not satisfied by reason of its consisting of fewer than seven persons. It is therefore liable to be wound up as an unregistered company.

If the winding-up order is competent, I think a sufficient *prima facie* case is made for granting it. According to the respondents' statement, they have taken up a proper position since the passing of the Act of 1894, because they say that since then they have engaged in no business except such as is incidental to the winding up of their affairs. But after that process has lasted for so long a period of years, I think a creditor whose debt is still unpaid is well entitled to bring matters to a point by applying for a judicial order.

I am therefore for granting the prayer of the petition.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

The Court pronounced an order for the winding up of the Society, and appointed a liquidator.

Counsel for the Petitioner—Clyde, K.C. —Wilton. Agent—George A. Munro, S.S.C.

Counsel for the Respondents—Salvesen, K.C.—Hunter. Agent—Wm. Croft Gray, S.S.C.

Tuesday, November 17.

SECOND DIVISION.

GUNNIS'S TRUSTEES *v.* GUNNIS.

Fee and Liferent—Company—Conversion of Profits into Capital—Bonus Paid from Reserve Funds — Reserve Funds Derived from Profits but Employed as Capital—Option to Take Bonus in Shares or Cash — Issue of New Shares in respect of Capitalisation of Profits.

Certain trustees, under trusts for beneficiaries in fee and liferent respectively, in accordance with their powers held shares in a steam navigation company which had power to increase its capital, and the directors of which had power to carry profits to reserve, and to use sums so carried in the business, and, with the sanction of a general meeting, for payment of a bonus.

The company resolved to increase its capital by the addition of part of reserve funds which under the articles had been created out of profits and had been employed as capital in the company's business. The increase of capital was effected (1) by the creation of new preference shares, (2) by the allotment of these shares to the holders of existing shares, and (3) by declaring and paying a bonus of 100 per cent. out of the reserve funds in order to enable the shareholders to pay for the shares allotted to them. The shareholders were given the option of payment of the bonus in cash or of accepting an allotment of the new preference shares, the bonus being applied in payment of these shares.

The trustees who held shares in the company accepted the offer of new preference shares, and these shares were allotted to them.

Held that the new shares were part of the capital of the trust estate, and not revenue.

In July 1900 the trustees of the late Mr and Mrs Gunnis held as part of the trust estate 286 shares of £50 each fully paid, and 211 shares of £50 each, £30 paid, of the British India Steam Navigation Company, Limited.

By the deeds under which they acted the trustees were directed to hold the trust estates for behoof of certain beneficiaries in fee and liferent respectively. Under the powers conferred upon them the trustees were empowered to hold the investment mentioned.

On 14th July 1900 the directors of the said company issued a circular letter to the shareholders of the company in the following terms:—

"*British India Steam Navigation Company, Limited.*

"Dear Sir or Madam,—The directors have for some time had under consideration the desirability of adding a part of the reserve funds of the company to capital. They consist of reserve fund, £300,000; boiler and repair fund, £100,000; insurance fund, £376,272, 6s. 4d.; and have, as appears from the annual balance-sheets, been employed in the company's business and so used as capital, and the directors have come to the conclusion that the present capital of the company should be increased by the addition of the whole of the reserve fund, boiler and repair fund, and £294,800 of the insurance fund, whereby the present paid-up capital of the company will be doubled.

"It is proposed that this should be effected—(*a*) By the creation of £700,000 of preference shares, carrying a cumulative preferential dividend at the rate of 5 per cent. per annum as from 1st January 1900, with a preference as regards capital. (*b*) By the allotment of £694,800 of the new preference shares to the shareholders in proportion to the amount paid up on the shares already held by them, and upon the footing that the full amount shall forthwith be paid up in cash. (*c*) By declaring and paying to the shareholders a bonus of 100 per cent. on the paid-up capital, which will enable them to pay up the preference shares allotted to them respectively. (*d*) By converting the new preference shares into stock.

"In the result the holder of every fully-paid share will receive £50 preference stock, and the holder of every share on which £30 only has been paid will receive £30 preference stock for each share held.

"The residue, £5200 of the new preference shares, will be issued when and to such persons and on such terms as the directors think fit.

"In order to carry out this proposal it is necessary first to make provision for the creation of the preference shares, and for the conversion thereof into stock, and for the payment of the bonus; and notice of an extraordinary general meeting of the company is sent herewith, when the proposal will be submitted for the sanction of the shareholders." . . .

The articles of association of the company provided, *inter alia*, as follows—"(30) The directors may, with the sanction of the company previously given in general meeting, further increase the capital by the issue of new shares, such aggregate increase to be of such amount and to be divided into shares of such respective amounts as the company in general meeting shall direct; . . . any such new shares . . . may be issued with special privileges or priorities over the shares previously issued, and generally on such terms as the company may determine. . . . (80) The directors may, with the sanction of the company in general meeting, declare a dividend, bonus, or both, to be paid to the shareholders respectively, in proportion, as heretofore, to the amount called and paid up on their shares. (82) No dividend or bonus shall be payable except out of the profits arising from the business of the company, including as profits any reserved or other funds arising from profits of previous years. (83) The directors may, before recommending any dividend . . . carry over out of the profits of the company such sums as they think proper to the reserve fund, to meet contingencies, or for equalising dividends, or for repairing or maintaining the ships, property, and works connected with the business of the company, or any part thereof, or to the insurance fund, or the boiler and repair fund, or to any of those or other funds which it may hereafter be deemed desirable to create; and the directors may use in the business of the company the sums so carried over, or invest the sums so carried over upon such securities as they in their discretion may select, whether such as are ordinarily permissible to trustees or not. Any of these funds may, with the sanction of a general meeting, be resorted to for dividends or for paying a bonus whenever the directors shall think it safe or proper to do so."

The reserve fund, the boiler and repair fund, and the insurance fund, had, in accordance with the powers given to the directors in the articles of association, been created out of sums set aside out of the annual profits of the company. As stated in the letter, these funds had been employed in the company's business and used as capital.

The requisite resolutions were duly passed at the general meeting, and the directors on 15th August 1900 issued another circular letter to the shareholders in similar terms to the following, which was the letter received by the trustees:—

"*British India Steam Navigation Company, Limited.*

"Sir (or Madam),—I am to inform you that the directors, pursuant to the authority conferred by the general meeting held on the 25th day of July 1900, have created 70,000 new shares of £10 each, to be called preference shares, and to carry a fixed cumulative preferential dividend at the

rate of 5 per cent. per annum, as from the first day of January 1900, and to rank both as regards dividend and capital in priority to the ordinary shares, but not to confer any further right to participation in profits or assets.

"These shares have been created and are to be issued on the footing that the company is to be at liberty from time to time and at any time hereafter to create further preference shares ranking *pari passu* therewith.

"The directors have also, pursuant to the authority conferred by such general meeting, declared a bonus of 100 per cent. on the paid-up capital, payable to the shareholders whose names are on the register on this day, which bonus is to be debited to the undivided profits of the company comprised in the general reserve fund £300,000, the boiler and repair fund £100,000 and £294,800 of the sum standing to the credit of the insurance fund.

"The company now offers to you in respect of your holding in the company 1563 of the said preference shares upon the footing that the par value thereof is to be paid up on allotment.

"The bonus payable to you is £15,630 in cash, and should you desire to take up the shares the bonus will be applied in paying for them, but should you decline the shares a cheque for the bonus will be sent to you in due course. I am to point out that the preference shares are likely to stand at a premium, and therefore that it is to your interest to take the allotment thereof.

"I enclose two forms for your reply. If you accept the offer of shares, please fill up, sign and return the form printed in black, but if you decide to decline the offer of shares the form printed in red should be filled up, signed, and returned." . . .

The two forms mentioned in said circular letter were in the following terms respectively:—

"*To The British India Steam Navigation Company, Limited.*

"Gentlemen,—I (We) accept the offer of preference shares of £10 each, contained in your letter of the 15th August 1900, and on the terms of that letter, and I (We) request you to apply the bonus, viz., £ payable to me (us) in paying up the said shares.—Yours, &c."

"*To The British India Steam Navigation Company, Limited.*

"Gentlemen,—I (We) decline the offer of preference shares of £10 each, contained in your letter of the 15th August 1900, and request that a cheque shall be sent to me (us) for the bonus payable to me (us).—Yours, &c."

The trustees being of opinion that it was to the advantage of the trusts under their charge to do so adopted the first of the two alternatives submitted to them in said circular letter, and accepted the offer of the 1563 preference shares, and filled in and returned to the company the first of the forms above quoted, and said shares were thereupon allotted to them, and the said sum of £15,630 was applied in paying for the said shares. The 1563 preference shares were thereafter converted into £15,630 5 per cent. cumulative preference stock.

In these circumstances a question arose as to whether the £15,630 5 per cent. cumulative preference stock ought to be treated as part of the capital of the trust estate or as revenue. For the settlement of the point a special case was presented to the Court. The parties to the case were (1) the trustees, (2), (3), (4) and (5) beneficiaries under the trust who contended that the stock ought to be treated as capital, and (6) and (7) beneficiaries who contended that it ought to be treated as revenue.

The question of law was—"Are the first parties entitled and bound to retain and administer the said £15,630 5 per cent. cumulative preference stock as part of the capital of said trust estates?"

Argued for the second, third, fourth, and fifth parties—The new shares must be treated as capital. The purpose for which the shares were issued and the bonus paid was in order to add a part of the reserve funds to capital. The bonus was paid out of the reserve funds, and the reserve funds were employed in the business and were treated by the company as capital. The issue of the new shares would naturally depreciate the old shares, and thus affected the value of the capital. The fact that the shareholders had the option of taking the bonus in cash did not alter the fact that the bonus was paid from capital, and that the object in granting it was to increase the capital of the company—*Bouch* v. *Sproule*, 1887, 12 App. Cas. 385; *Cunliff's Trustees* v. *Cunliff*, November 30, 1900, 3 F. 202, 38 S.L.R. 134.

Argued for the sixth and seventh parties—The shares should be treated as revenue. The bonus was paid out of accumulated profits, and profits accumulated were not thereby changed from income into capital. It was recognised by the judges in *Bouch, supra*, that there was no hard and fast rule that a bonus declared out of accumulated profits, even if these had *de facto* formed part of the capital of the company, must be treated as an addition to capital. See opinion of Lord Herschell, 12 App. Cas. 392. See also *in re Bridgewater Navigation Company* [1891], 2 Ch., opinion of Lindley, L.J., 327. But the principal feature in this case which distinguished it from the cases quoted on the other side and made it clear that the bonus must be treated as revenue was the fact that the shareholders had the option of taking the bonus in cash—*in re Northage*, 1891, 60 L.J. Ch. 488; *in re Malam* [1894], 3 Ch. 578. If the bonus had been taken by the trustees in cash it would have been revenue of the trust, and conversion of estate by trustees did not alter the quality of the succession—M'Laren on Wills, i. 237.

At advising—

LORD TRAYNER—I am of opinion that the new shares of the British India Steam Navigation Company referred to in this case form part of the capital of Mr

Gunnis' trust estate. I shall shortly state the grounds on which I come to this opinion. The original proposal as to the creation and issuing of these new shares was contained in the circular addressed by the directors to the shareholders of the company in July 1900, which is printed *in extenso* in the case before us. From it it appears that the directors were of opinion that the time had arrived when a large sum in their hands standing at the credit of reserve fund should be added to the capital of the company. They proposed to effect this by issuing new shares, to allot these among the existing shareholders in proportion to their then present holding, and to declare and pay a bonus (out of the reserve fund before mentioned) to such an extent as would entitle the shareholders to pay for the new shares. In a word, new shares were to be issued to the shareholders, the price of which was not to be paid or advanced by them, but taken out of the reserve fund, which in that form would be capitalised—that is, added to the capital of the company. This proposal was duly approved by the shareholders and carried out. Now, it is apparent that the purpose and intention of this proceeding in the view of the directors was, as they said in their circular, "that the present capital of the company should be increased by the addition of " the reserve fund "whereby the present paid-up capital of the company will be doubled." There was power under the articles of the company to increase their capital, and their right to do so, approved by resolution of the shareholders, is not challenged.

The reserve fund thus added to the capital of the company consisted, no doubt, of profits of the company previously earned, and not paid or distributed among the shareholders as dividends on their respective holdings. But it is not doubtful, I think, that the directors had power to lay up as reserve fund such parts of the company's profits as they thought right, to meet any contingency or claim that from time to time in the course of their dealings might arise and require to be provided for. The shareholders could not have insisted on payment of the whole profits year by year as dividends if the directors thought that such payment should not be made, and the funds so reserved might equally be added to capital if there was power to increase the capital (as there was here), that being approved by the shareholders. In fact in this case the fund which the directors treated as reserve fund had been and was being used as working capital. That is not unusual, because the company using its own reserve fund as capital where it can be usefully so employed, or is actually required for business purposes, is able (in the ordinary case) to make more by its use in that way than it would gain by investing it and borrowing an equivalent sum. The interest on the borrowed money would exceed the interest on a safe investment. What therefore was done by the directors was to increase the capital of the company by adding to it what had hitherto been used as capital, but appeared in the company's books as reserve fund. It was not intended to pay over the reserve fund or any part of it as dividend to the shareholder, but to give him an increased interest in the capital of the company—increased, that is, by the addition of the reserve fund. The opinion of Fry, L.J., in the case of *Bouch* v. *Sproule*, 29 Ch. D. 653 (approved in the House of Lords, 12 App. Cas. 397) appears to me to apply directly to the question before us. His Lordship said—"When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividends or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, 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 shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital. In a word, what the company says is income shall be income, and what it says is capital shall be capital." Now, what the directors of the company did in the present case was not to declare or pay a dividend, but to increase the capital out of the reserve fund, and to confer the right to that capital on the shareholders by the issue of new shares. The principal ground on which it was maintained for the sixth and seventh parties that the law as applied in *Bouch* v. *Sproule* and other cases should not be applied here was that the directors in the present case had given the shareholders the option of taking the new shares or taking payment of the bonus in cash. It was said that if payment in cash had been taken it would have fallen to the liferenters, and that the trustees had no power by exercising an option to benefit the fiars at the expense of the liferenters. But this argument fails if it be clear that what the directors offered to the shareholders was not dividend, and to get the answer to the question whether it was dividend or not regard must be had both to the form and substance (I should say chiefly the substance) of what the directors did. Now, what they did was to declare (with the assent of the shareholders) that practically the whole of the reserve fund consisting of undistributed profits should be made capital, and they made it capital But the option conferred on the shareholders was to take so much of the capital out of the company's hands by accepting payment of that share of it which pertained to their holdings, or to leave it in the company's hands and take the voucher for it in the shape of new shares. In either case the shareholder was dealing (as were the directors) with capital, not dividend or revenue. The directors did not declare a dividend and ask the shareholders not to exact payment. I am therefore of opinion that the new shares in question, which in my opin-

ion the trustees acted rightly in accepting, represent capital of the trust-estate, and should be so dealt with.

LORD JUSTICE-CLERK — The trustees under the marriage contract and under the settlement of the late Mr Francis George Gunnis, held, under the authority given to them, a large interest in the British Steam Navigation Company. The directors had power, with the approval of the company, to issue additional capital. They had placed large sums to reserve and repair funds, and in the year 1900, in respect of the then position of the company, it was resolved to issue a large number of new preference shares, to give the first option of taking these shares to the present members of the company, and to apply a bonus which was declared to pay the shares of those members of the company who desired to take up the shares allotted to them, any shareholder not so desiring being paid the bonus in cash.

The trustees considered it advisable to accept the new preference shares, and did so, and the question is now raised by the liferenters of the funds, whether they are entitled to have the value of these shares treated as revenue, it being maintained by the trustees and by the ultimate fiars that these shares form part of the capital of the estate, and must be retained by the trustees, the annual proceeds only of the investment being paid to those in right of the liferent.

I am of opinion that the contention of the latter is sound. That which falls to be paid to the liferenters of a fund which is invested in a trading company is that part of the net profits which in the exercise of their discretion the directors may see proper to divide. What is put to reserve or repair fund is practically added to the working capital, and goes to aid the management in successfully carrying on the business, and when at a later stage, in consequence of success in business, it may be thought advisable to apply funds accumulated to the creation of new shares, it appears to me that such shares are truly capital and not applicable to liferent use.

Here what it was intended to do was, as in *Bouch* v. *Sproule's* case, to appropriate past undivided profits to the creation of shares, and that is what was done. But even had it been otherwise, had it been money handed over in the particular case, I should have considered it still to fall into capital, not to be income. The company was dealing with the money as capital, and if it was doing so, then there is the authority of *Bouch* v. *Sproule* for saying that it is capital. I cannot hold here that the directors were paying dividend even in those cases where those interested preferred to be paid out instead of taking up more capital.

The whole purpose of the proceeding plainly was to create new capital, and I do not think it makes any difference that the company were willing in any special cases to pay the bonus in cash. There appears to be no ground for holding that they would have carried the matter out as they did unless it had been ascertained that the company as a whole was resolved on the new issue of capital. And the trustees having had the power to hold the shares in the company, and having accepted the shares, I cannot doubt that they are capital in their hands, and must be treated as such. I am therefore in favour of answering the question in the affirmative.

LORD YOUNG concurred.

LORD MONCREIFF was absent.

The Court answered the question in the affirmative.

Counsel for the First, Second, Third, Fourth, and Fifth Parties—Campbell, K.C. —Younger. Agents—Bell & Bannerman, W.S.

Counsel for the Sixth and Seventh Parties —H. Johnston, K.C.—Tait. Agents—Forrester & Davidson, W.S.

Wednesday, November 18.

SECOND DIVISION.

[Sheriff Court at Glasgow.

THE GLASGOW PAVILION, LIMITED *v.* MOTHERWELL.

Company — Allotment — Minimum Subscription—Sum Payable on Application —Paid to and Received by Company— Payment by Cheque — Allotment after Receipt of Cheque but before Cheque Honoured—Companies Act 1900 (63 *and* 64 *Vict. c.* 48), *sec.* 4 (1).

Section 4, sub-section (1), of the Companies Act 1900 (63 and 64 Vict. c. 48) enacts—"No allotment shall be made of any share capital of a company offered to the public for subscription unless the following conditions have been complied with, namely, (*a*) the amount (if any) fixed by the memorandum or articles of association and named in the prospectus as the minimum subscription upon which the directors may proceed to allotment . . . has been subscribed, and the sum payable on application for the amount so fixed and named . . . has been paid to and received by the company."

The prospectus of a company whose shares were offered to the public provided that the directors should not proceed to allotment unless upon a certain minimum subscription. The directors proceeded to allotment. Part of the amount required to complete the sum payable on allotment for the minimum subscription consisted of cheques received by the directors before allotment on the day of allotment, but not honoured until a subsequent date.

Held (*dub.* Lord Moncreiff) that before allotment the sum payable on