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

application had been "paid to and received by" the company in terms of section 4, sub-section (1), of the Companies Act 1900, and that the allotment was therefore valid.

The Glasgow Pavilion, Limited, raised an action in the Sheriff Court at Glasgow against William Motherwell, Ibrox, craving decree for payment of (1) the sum of £62, 10s., with interest from 8th April 1902, and (2) the sum of £125, with interest from 1st May 1902.

The pursuers averred that on 27th March 1902 the defender applied for 500 shares in the company, and paid the pursuers the sum of £62, 10s., being the deposit of 2s. 6d. per share on the number of shares applied for; that on 8th April 1902 500 ordinary shares were allotted to the defender, and a further sum of 2s. 6d. per share, amounting to £62, 10s., became payable by the defender; that on 1st May 1902 a first call of 5s. per share, amounting to £125, became due by the defender, and that the defender refused to pay these sums.

The defender denied liability, and explained that by the prospectus of the company it was provided that the minimum subscription upon which the directors would proceed to allotment was 20,000 ordinary shares, and that at the date of allotment the minimum subscription had not been obtained, and that he therefore had repudiated the allotment and called on the board to return him the £62, 10s. of deposit paid by him on application.

A proof was led, which showed that the shares of the company were offered to the public; that the minimum subscription on which the directors could proceed to allotment was 20,000 ordinary shares; that the directors proceeded to allotment on 8th April 1902; that on that date several applications for shares, along with cheques for the sums payable on application, were handed to the directors, but it being after bank hours these cheques could not be cashed or put in bank during that day; that on the next day these cheques were banked and were honoured in ordinary course; and that unless the applications received with these cheques were taken into account the minimum amount had not been subscribed, and unless the amount of these cheques was taken into account the amount payable on application for the minimum subscription had not been paid to and received by the company before allotment.

On 2nd July 1903 the Sheriff-Substitute (FYFE) pronounced the following interlocutor:—"Finds (1) that the defender applied for 500 shares in the pursuers' company upon the prospectus No. 7/1 of process, which shares were allotted to him on 8th April 1902; (2) that it was a condition of said prospectus that the directors should not proceed to allotment unless upon a minimum subscription of 20,000 ordinary shares; (3) that at 8th April 1902 20,000 ordinary shares had not been subscribed for, the amount due upon application not having been paid to and received by the pursuers; (4) that defender repudiated the allotment: Finds in law that, in respect the minimum subscription had not been obtained when the directors proceeded to allotment, the allotment was invalid, and defender is not bound to accept the shares or pay the calls sued for: Therefore assoilzies the defender."

Note.—. . . "My opinion upon the proof is that when they proceeded to allotment on 8th April the directors had not this minimum subscription.

"The directors' minute allots in all 24,727 shares, but these shares had not been 'applied for' to the effect of warranting allotment unless the directors at the moment of allotment had in their cash-box or in the custody of their bankers, at their call, actual cash (not paper) representing 2s. 6d. on each share applied for. It was argued that company directors may proceed to allotment if they have cheques from subscribers although these have not been cashed. But cheques may be stopped before presentation, or they may never be met, and the application call is, according to the form of the prospectus itself, to be paid to the company's bankers—that is, of course, to be paid in cash. The Companies Act 1900, section 4, is most emphatic that the application subscription is to be paid to and received by the company, and in calculating a minimum subscription for purposes of allotment cash payment only is recognised." . . .

The pursuers appealed, and argued—The sum payable on application had been paid to and received by the company on the date of allotment. The amount in the cheques which had been received after bank hours on the date of allotment must be taken into account in calculating the sum received. A cheque which was accepted as cash and duly honoured was payment in cash as at the date on which it was received. Any other result would be "absurd and unjustifiable"—*Spargo's* case, 1873, L.R., 8 Ch. Ap. 407, opinion of James, L.J., 411. The same objection could be taken against the notes of Scottish banks as against cheques.

Argued for the defender and respondent—The requirements of the Act of 1900 were not complied with when the directors went to allotment. The provision of the statute was that the sums payable on application must "be paid to and received by" the company. That had not been complied with. These cheques were not the equivalent of cash on the day of allotment. It was impossible on that date to say whether the cheques would or would not be honoured. A cheque which had been honoured before allotment was a payment in cash, but a cheque which might or might not be honoured was not. If the argument on the other side was right a company might go to allotment having received nothing but cheques which might turn out to be worthless, or might even be bogus. This would defeat the purpose of the statute. The case of *Spargo* was not an authority on the present question. That case raised a question of compensation. It was held that a person who took shares in

a company was entitled to arrange with the company to pay the price of his shares out of a sum due to him by the company, and that there was no need of his handing money to the company and the company handing it back to him. But *Spargo* decided nothing beyond this. See opinion of James, L.J., in *White's* case, 1879, 12 Ch. D. 515. Bank notes were not in the same position as cheques. Bank notes were "treated as money, as cash, in the ordinary course and transaction of business by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes"—*Guardians of Lichfield Union* v. *Greene*, 1857, 1 H. & N. 884, opinion of Bramwell, B., 889. A bank cheque if dishonoured was not a payment at all. If a bank cheque was not presented within a reasonable time, and the drawer was prejudiced thereby, the seller was held to have made the cheque his own, and the payment as between seller and drawer became absolute—Bell's Prin. (10th ed.), sec. 127; *Hopkins* v. *Wane*, 1869, L.R., 4 Exch. 268. This made it plain that a cheque was not to be treated as payment in cash at the date of its receipt but at the date of its being presented and honoured in ordinary course of business.

Lord Justice-Clerk—The question in this case is, whether the directors, having in their possession cash and cheques of such amount as represented the application money on the 20,000 ordinary shares, were entitled to proceed to allotment. I am of opinion that they were. A payment by cheque is an ordinary and convenient mode of transacting business. I think that Lord Justice James in the case of *Spargo* made a sound statement of law when he said it would not be right to construe section 25 of the Companies Act 1867 so as to lead to the result "that an exchange of cheques would not be payment in cash, or that an order upon a banker to transfer money from the account of a man to the account of a company would not be a payment in cash," and that it appeared to him that "anything which amounted to what would be in law sufficient evidence to support a plea of payment would be a payment in cash" in the meaning of the section. In the course of the debate Lord Trayner called attention to a matter which illustrates this, namely, that it has been held in bankruptcy law (where of course everything must be carried out in the strictest manner) if a person receives a cheque and transfers it on to another as payment, that is struck at by the statute, but if he gives a cheque on his own account which is duly honoured that is not a payment which is struck at and cut down by the Bankruptcy Act—it is held to be a cash payment. I think that is sound.

Or again, suppose these payments had been made, not by cheque but in the notes of one of our Scottish banks, could it have been contended for a moment that these payments were not in cash? I am of opinion that it could not, although after all a bank note is simply a promise to pay, depending on the credit of the bank which issues it. I think that the same rule is applicable to payment by cheque, and that if the cheque is duly honoured it must be accepted as payment in cash on the day it arrived.

If these cheques are to be accepted as cash it is not disputed that the directors had sufficient payment to entitle them to proceed to allotment in terms of the prospectus. I therefore think that the decision of the Sheriff-Substitute was wrong, and ought to be recalled.

Lord Young—This case, in my opinion, has been erroneously decided by the Sheriff-Substitute. I think so on the grounds which your Lordship has stated. The question is, whether on the date on which the allotment was made the company had received payment, in the sense of the statute, of all the half-crowns which were payable on application for the 20,000 shares which had been issued. In my opinion they had. It is true that part of the 20,000 half-crowns had been paid in cheques, which had not been honoured on the date when the allotment was made. But these cheques were accepted by the directors in payment, and were duly honoured—I assume upon the next day as soon as the banks were opened upon which the cheques were drawn. Now, that payment by a cheque which is accepted and duly honoured is a payment in cash, as the expression is used in our law, is, I think, a question not capable of being easily disputed. No creditor is bound to receive payment of a debt due to him by cheque or otherwise than in the current coin of the realm. A creditor may even refuse to accept Scottish bank notes, and insist on his debtor bringing him current coin of the realm to the amount of his debt. Nevertheless, if he choose to accept these bank notes in payment, I do not think that it is capable of being disputed that he would be held, according to our law and practice, to have been paid in cash. In the same way, if he receives, although not bound to do so, a cheque from his debtor and gives him a receipt for the sum contained in the cheque, that is regarded as a payment in cash if the cheque is duly honoured, and the payment in cash is not at the date of the honouring of the cheque, but at the date of its receipt by the creditor.

On these grounds I am clear that the Sheriff-Substitute has arrived at a wrong conclusion.

Lord Trayner—I am of the same opinion. The statute requires that before the directors of a public company proceed to allotment there shall have been applications made for the minimum number of shares specified in the prospectus, and in respect of these applications they shall have received the money which the prospectus provides shall be paid on application. The words of the statute are that the application money shall have been "paid to and received by" the company. Now, the question in this case is, whether

the moneys due on application were "paid to and received by" the directors where, instead of coin, cheques for the amount payable in respect of the application were sent and received. I concur in the view that the cheques so sent were payment in the sense and meaning of the statute. I think that what the statute was intended to prevent was what I call bogus applications—applications by persons who had not the money due on application, and who were offering either to take the shares on credit, or offering to give something in return for the shares that was not cash or anything equivalent to cash. The statute requires no more than that there shall be money paid or what is immediately convertible into money. Now, the case of *Spargo* cited to us, and the opinion there quoted by Lord Justice James, seem to me to be extremely apposite to the question we are considering here. His Lordship says that it would be absurd and unjustifiable to maintain "that an exchange of cheques would not be payment in cash, or that an order upon a banker to transfer money from the account of a man to the account of a company," which is just the case of a cheque drawn by a man on his account, "would not be a payment in cash." Not only does it appear to me that this is a common-sense view of the case, but I think it is in conformity with our own law. In bankruptcy cases we are familiar with the distinction drawn between assignation and alienation of estate and cash payments. If a bankrupt within sixty days of bankruptcy indorses to a creditor a cheque which he (the debtor) had received from some one else, it is struck at by the Act of 1696. If he grants his creditor a cheque on his (the bankrupt's) own bank account, it is considered a cash payment and not struck at. The cheque is regarded as a cash payment (*Carter* v. *Johnstone*, 13 R. 598, 23 S.L.R. 458. In like manner I think the person who pays the amount due on application for shares by a cheque is also making a cash payment.

A difficulty, no doubt, might arise if the cheques had not been honoured. But they were. The directors having received the cheque as payment, were entitled, in my opinion, to proceed with their allotment. Therefore I agree that the appeal should be sustained.

LORD MONCREIFF—Although I do not propose to dissent formally I have more difficulty than the rest of your Lordships seem to have. I am impressed with the argument that under the statute the allotment must be either good or bad from the start, and that subsequent events cannot make an allotment good which was bad in the beginning. The provision of the statute so far as it affects this question is this—[*His Lordship quoted sec. 4, sub-sec. 1 (a), of the Companies Act 1900, quoted supra*]. Therefore the company must not proceed to allotment until they have got payment of the minimum subscription named in the prospectus. Now, several at least of the applicants, instead of paying cash or sending cheques timeously, which were cashed before allotment, delayed sending their applications and cheques until the very day of allotment, and some of them not till after bank hours on that day. It has turned out in point of fact that these cheques were good—that is, they were honoured when presented after the day of allotment; but that might not have been the case. The company proceeded to allotment before they had ascertained whether these cheques would be honoured or not. Now, the purpose of the statute is to prevent a company from proceeding to allotment before they have cash in some shape, as distinguished from uncashed cheques, in their hands; and to accept cheques as equivalent to cash might defeat the statute. The illustrations from the law of bankruptcy are scarcely in point, as the distinction there was between a payment by cheque drawn by the debtor (presumably good) and an indorsation by the debtor of another man's cheque to which he had right. I do not think that any of the cases to which we have been referred have direct or close application to this case. It turns out that the necessary number of shares were applied and paid for in this sense, that the cheques which were in the hands of the company before allotment were good cheques, *i.e.*, they were paid on presentment; and taking that as a broad view of the position I do not press my objections further than to express the doubt which I entertain.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute of Lanark dated 2nd July 1903 appealed against: Find in fact that the 500 shares referred to on record were duly allotted to the defender in terms of his application, and in law that he is liable to pay the calls due thereon; therefore decern against the defender in terms of the conclusions of the action, and decern."

Counsel for the Pursuers and Appellants—Salvesen, K.C.—Hunter. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defender and Respondent — Kincaid Mackenzie, K.C. — Younger. Agents—Macrae, Flett, & Rennie, W.S.