Saturday, December 20.

SECOND DIVISION.

FERGUSON & FORRESTER, LIMITED *v.* BUCHANAN AND OTHERS.

Company — Capital — Preference Shares— "Preferential Dividend" — Payment of Arrears out of Subsequent Profits.

The dividend rights of the shareholders in a limited company were regulated by this special resolution of the company— "That out of the profits of the company, after making due provision for depreciation and reserve fund, the holders of 'A' preference shares shall be entitled to receive, as a first charge thereon, a cumulative preferential dividend at the rate of 8 per centum per annum on the capital for the time being paid up on such shares; the holders of 'B' preference shares shall be entitled to receive, as a second and postponed charge, a preferential dividend at the rate of 5 per centum per annum on the said shares; and the holders of ordinary shares shall be entitled to receive, as a third and postponed charge, a preferential dividend at the rate of 2½ per centum per annum on the said shares; and the balance of profit shall be distributed as follows, viz., two-thirds thereof among the holders of 'A' preference shares in proportion to the amount held by them respectively, and one-third thereof among the holders of 'B' preference shares and ordinary shares in proportion to the amounts held by them respectively."

Held that the holders of "B" preference shares were entitled to get not only a preferential dividend at the rate of 5 per cent. per annum on their shares in any year, but also such sum as would make up a similar dividend for each and every preceding year in which the distributable profits had not sufficed for the payment of a dividend on the "B" preference shares at the stipulated rate.

Ferguson & Forrester, Limited, Glasgow and Edinburgh, *first parties;* Walter Buchanan, for himself and as representing the whole body of "A" preference shareholders of the company, *second party;* George Prentice, for himself and as representing the whole body of "B" preference shareholders of the company, *third party;* and James Haddow & Company, Limited, for themselves and as representing the whole body of ordinary shareholders of the company, *fourth parties*, brought a Special Case to determine the dividend rights of the holders of "B" preference shares of the company.

The *dividend rights* of the shareholders of the company were regulated by the special resolution *quoted in the rubric*, which was one of a series of special resolutions passed and confirmed by the company in 1904, whereby the share capital of the company was reduced and reorganised. The reduction and reorganisation of the share capital was the result of an arrangement with creditors of the company, the company's finances having become seriously involved.

The Case stated, *inter alia*—"6. For some years after the reorganisation of the share capital made by the foresaid resolutions of 1904 the revenue of the company did little more than meet current expenses without leaving a sufficient margin for distribution amongst the shareholders. For some time no dividend was paid to the 'A' preference shareholders, and since 1904 no dividend at all has been paid to the 'B' preference shareholders. The arrears of dividend on the 'A' preference shares have now been paid up to date, and there is a substantial balance (after allowing for depreciation and reserve) at the credit of profit and loss account available for division amongst the shareholders as dividend.

The *questions of law* were—"1. Subject to the rights of holders of 'A' preference shares to receive as a first charge on the distributable profits of the company in any year a cumulative preferential dividend at the rate of 8 per centum per annum on the capital for the time being paid up on such shares, are the holders of 'B' preference shares entitled to receive as a second and postponed charge thereon not only a preferential dividend at the rate of 5 per centum per annum on their shares for that year, but also *such sums as may be necessary to make up* [*amendment made at the bar*] a similar dividend for each and every preceding year in which the distributable profits had not sufficed for the payment of a dividend on the 'B' preference shares in preference to the rights of holders of ordinary shares to receive as a third and postponed charge a preferential dividend at the rate of 2½ per centum per annum and of all other rights postponed thereto? or 2. Is the preferential dividend of 5 per centum per annum, to which the holders of 'B' preference shares are entitled as a second and postponed charge, payable as regards each year out of the profits of that year only?"

The first parties offered no separate contention and presented no argument. The Case stated that they were interested in having the question disposed of and would give effect to the decision of the Court.

Argued for the third party—The word "preferential" was a word of style and meant the right to have dividends at any time if a fund existed out of which they could be met. The word "cumulative" was redundant. The words "preference dividend" without adding "cumulative" bore in the absence of anything to the contrary the same meaning—Buckley on Companies Acts, 9th ed., p. 650–1; Palmer's Company Law, 10th ed., p. 84. In *Foster* v. *Coles*, 1906, W.N. 107, the words "preference dividend" were held to mean cumulative preference dividend, although on a reconstruction of the capital of the company the word "cumulative" before the word "preference" had been struck out of the memorandum and articles.

Argued for the second and fourth parties—The question was not one of the constitu-

tion of the company but of the construction of the contract. The words "preferential dividend" merely meant that the dividend was to have priority over other dividends. The words did not mean that the dividend was to be cumulative. Where in the resolution it was intended that a dividend should be cumulative the word "cumulative" was used. Thus the 8 per cent. dividend of the A preference shareholders was expressly said to be a "cumulative preferential dividend," and thus was contrasted with the dividend in question. If neither the constitution of the company nor any enactment conferred the right to a cumulative dividend, the presumption was that the dividend was non-cumulative—*Staples* v. *Eastman Photographic Materials Company*, [1896], 2 Ch. 303, *per* Kay, L.J., at 309. *Partick, Hillhead, and Maryhill Gas Company, Limited*, v. *Taylor*, 1888, 15 R. 711, 25 S.L.R. 539, was different from the present case, because in that case there was no element of compromise or of contract, and no fund out of which the arrears of dividend could be paid. *Henry* v. *The Great Northern Railway Company*, 1857, 1 De G. & J. 606, was also different from the present case, because in that case the company was not a limited company, and the dividend was not payable out of a separate fund, and the dividend was called "interest or preference dividend." In *Miln* v. *Arizona Copper Company, Limited*, 1899, 1 F. 935, 36 S.L.R. 741, Lord M'Laren's observations on the meaning of the words "a preferential dividend" were *obiter* only.

LORD JUSTICE-CLERK—I am of opinion that the argument submitted on behalf of the "B" preference shareholders is sound.

The decision of this case depends entirely upon the construction of the fifth head of the special resolutions. By these special resolutions certain changes were made on the articles of association of the company, and particularly as to the distribution of capital and the dividend to be allowed thereon.

The clause itself begins with words that seem to me to be of general application, at any rate until you come down to where the "balance of profit" is disposed of, these introductory words being "that out of the profits of the company, after making due provision for depreciation and reserve fund," certain payments ars to be made to the holders of "A" preference shares, to the holders of "B" preference shares, and to the holders of ordinary shares. Now I cannot read these words "out of the profits of the company"—as meaning anything else than that the profits there mentioned are the whole profits of the company. The language is in marked contrast to the language which was used in the case which Mr Mackay founded on—"out of the net profits of each year"; and in the Scottish case of *Miln* v. *Arizona* (1899, 1 F. 935, 36 S.L.R. 741) the words were just the same—"to receive out of the profits of each year." It is quite recognised in company law and company documents that there is a very material and well-recognised difference between providing that dividends are to be paid "out of the profits of the company" and to be paid "out of the profits of each year of the company." And I agree with the argument of Mr Macmillan on this point that text-writers such as Palmer and Buckley are useful as guides as to the meaning of terms, which Mr Mackay quite readily agreed are in ordinary use, as well as of terms which have become terms of art in this particular branch of law or business having to do with joint-stock companies.

I notice that what I think is the result of both Sir Francis Palmer's views and those of Lord Wrenbury is stated thus in Stroud's Dictionary under the word "cumulative"—"A preference dividend is *prima facie* cumulative, so that failure of profits wherewith to pay it in any one year will be made good out of any profits that may be made in a subsequent year." As is pointed out, however, if there is room for doubt, the doubt may be removed by the addition of the word "cumulative." But it seems to me that a "preference dividend out of profits" implies a "preference dividend out of the whole profits" and not merely a "preference dividend out of the profits for one year." And that view is further strengthened when one sees the form in which the language of this article characterises the dividend. The description is that so far as the holders of the "A" preference shares are concerned they are "to receive, as a first charge thereon"—that is to say, on the whole profits of the company—"a cumulative preferential dividend." And then the "B" preference shareholders similarly get not merely a dividend but they get a "charge"—no doubt "a second and postponed charge," but still a "charge"—on the profits for a preferential dividend at the rate of 5 per cent. per annum. It seems to me that that necessarily means, when you look at the structure of the article, a charge upon the same whole profits for a preferential dividend. And similar language is used with regard to the payment of the fixed dividend to the ordinary shareholders—it is to be a charge upon these profits, that language being made more pointed by the fact that it is plainly contemplated that these charges and preferential dividends may not, and probably will not, exhaust the whole profits, because there is a riding clause at the end disposing of the balance of profit which is to be distributed, two-thirds thereof among the holders of "A" preference shares and one-third thereof to the holders of "B" preference shares and ordinary shares, but this for obvious reasons is not made a charge.

Now, reading that clause as a whole, it seems to me that the "A" preference shareholders, the "B" preference shareholders, and the ordinary shareholders so far as their fixed dividends are concerned, are given a charge on the profits which entitles them to get out of the profits, whether they were for the year actually in question or for any subsequent year, what would make their dividends, under the heads I have been dealing with, preferential dividends

in the ordinary sense of the term, and that, to my mind, means a preferential cumulative dividend. I think if there had been no other word than "preferential" that that would involve that it was "cumulative."

But there is the point which Mr Mackay founded on very strongly in this respect, that as regards the holders of the "A" preference shares their dividend is described as being "a cumulative preferential dividend," whereas the word "cumulative" is not repeated as regards the preference dividend of the "B" shareholders nor as regards the 2½ per cent. dividend to the ordinary shareholders. I confess that I do not appreciate the reason for the difference between the ways in which these several dividends are expressed. But I think it would be reading the clauses too strictly to say that, having regard to the particular terms of this resolution, what I regard as the ordinary meaning of the word "preference," namely, that it imports that it should be a cumulative dividend, should not receive effect.

Of the authorities cited to us there was none exactly in point, but two of them come near to the present case. I refer particularly to the case of the *Partick, Hillhead, and Maryhill Gas Company Limited* v. *Taylor*, 1888, 15 R. 711, at p. 713, 25 S.L.R. 539. There was a distinction taken there between certain of the dividends in respect that one of them was declared to be a charge for dividend for the year and "all arrears," whereas these words did not occur as regards certain of the other dividends; and it was urged, therefore, that dividends where the words did not occur were not to be cumulative. But the Lord President there said this—"The fourth rule is this—'In payment to the preferential shareholders, if any, of their dividends according to their respective priority.' With regard to that rule it is said that the words 'all arrears' which occur in rule 1 are omitted, and it is therefore contended that the directors are not entitled to pay arrears of these dividends. I think that it is far too strict, I may say too fanciful, a construction of the rule. If the rights of preference shareholders are such as I have stated them to be I cannot think they can be cut off by any such construction of the articles of association." And, accordingly, the omission of these words in regard to the dividend to one set of shares was not held sufficient to deprive them of their preferential character so as to make them non-cumulative.

In the same way, in the case of *Foster* v. *Coles*, 1906, W. N. 107, to which Mr Macmillan referred, there is an indication that even alterations on the articles of association such as occurred in that case will not take away the right of preferential shareholders to get arrears of dividends. In that case the dividend was originally declared to be a cumulative preference dividend. In a subsequently amended set of articles the word "cumulative" was struck out, and it was simply left to be a "preference dividend." But it was held that although that change had been effected it made no difference as regards the cumulative character of the right, the learned Judge saying that the preference shareholders were entitled to have any deficiency in their dividends made up out of the profits of subsequent years.

The result is therefore that in my opinion the 5th article of the special resolutions is so expressed that the "A" shareholders and the "B" shareholders and the ordinary shareholders, so far as their fixed return of 8 per cent., 5 per cent., and 2½ per cent. respectively is concerned, are each entitled to a charge on all the profits of the company whether made in the year of division or in subsequent years, so as to give them what have been called "arrears of their dividend" in one year out of subsequent profits, if these subsequent profits allow of that being done. I think that reserves the preferential rights to all the shareholders so far as they were entitled to a preference, and gives them the benefit of the words that they were to have a "charge on profits" without interfering with the rights provided for the "A" shareholders in other respects.

Accordingly I am of opinion that we cannot read this 5th article as the "A" shareholders desire us to read it—as restricting the "B" and ordinary shareholders so far as their fixed dividend is concerned to getting it out of the profits of each year only, to use the language of the alternative question put to us. I think the legal view of the provision is expressed in the first alternative of the question which is submitted to us—that the "B" shareholders are entitled to get "not only a preferential dividend at the rate of 5 per cent. per annum on their shares for that year, but also such sum as will make up a similar dividend for each and every preceding year in which the distributable profits had not sufficed for the payment of a dividend on the 'B' preference shares" at the stipulated rate.

I am therefore of opinion that we should answer the first alternative in the affirmative and the second alternative in the negative.

Lord Dundas—I am of the same opinion. I think the third parties are right. The textwriters, whose word is, I think, important in a question of this sort, lay it down that the use of the words "preferential dividend" *prima facie* imports the right to a cumulative dividend, and that the insertion of the word "cumulative" is unnecessary, although, as the learned author of Palmer's Company Law (10th ed., p. 84) observes, it prevents any mistake.

In the resolution before us, in the case of the "A" shareholders both words are used and mistake is prevented. In the case of the "B" shareholders the word "preferential" alone is used, and it is argued that this imports a simple and not a cumulative preference.

I am not prepared to deduce this result from the mere omission of the word "cumulative." I think the unexplained omission of the word, in itself unnecessary, although it does cause perplexity, should not lead us to derogate from the usual meaning of the

word "preferential." If that had been the intention it would have been easy to insert the word "non-cumulative" as regards "B" shareholders.

As regards the reported cases I agree with what the Lord Justice-Clerk has said.

LORD GUTHRIE—I agree. I was at first impressed with Mr Mackay's argument that we should approach this case favourably for his clients. It appears from the case that the "A" preference shareholders really saved the company some years ago and got them out of a serious financial difficulty, and it was suggested that it was therefore quite natural that they in respect of a cumulative dividend should be treated more favourably than the "B" shareholders and than the ordinary shareholders.

I think Mr Macmillan effectually displaced that view by pointing out that without giving them what they ask in this case their action still receives very important recognition, because they have under article 5 a first charge and 8 per cent. as against 5 per cent. and 2½ per cent., and then the provision as to the balance of profit gives two-thirds as against one-third to the "B" shareholders and the ordinary shareholders together.

I think therefore that the case must be treated as your Lordships have treated it—as a pure question of construction without aid from presumptions. So treating the case, I am of opinion that the unexplained insertion of the word "cumulative" in one clause and not in two others is not sufficient to displace the *prima facie* meaning and the effect of the word "preferential," and I agree that this result is materially aided by the opening words of the 5th article.

LORD SALVESEN was not present.

The Court answered the first question of law as amended at the bar in the affirmative, and the second, the alternative question, in the negative.

Counsel for the First Parties — Paton. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Second and Fourth Parties — Mackay. Agents — J. W. & J. Mackenzie, W.S.

Counsel for the Third Party—Macmillan, K.C.—Fleming. Agents—R. Addison Smith & Company, W.S.

Thursday, January 8.

SECOND DIVISION.

[Lord Sands, Ordinary.

NORTH BRITISH STORAGE AND TRANSIT COMPANY, LIMITED *v.* BURNESS AND OTHERS (STEELE'S TRUSTEES).

Lease — Reparation — Obligation to Keep Premises Wind and Water Tight — Choked Drain-Pipe—Negligence of Third Party.

A storage company rented the basement of a tenement and stored sacks of flour in one of the rooms. There was a sink and a water-closet in the basement, and in the room where the flour was stored there was an uncovered grease box connected with the drainage system. The sanitary arrangements were in good working order. The grease box was of an antiquated design, but it had been authorised by the Dean of Guild Court at the time of its construction nearly thirty years previously, and since then had worked without mishap. Owing to the drain-pipe into which the grease box discharged becoming choked sewage water regurgitated into the grease box and overflowing into the room damaged the flour stored there. The cause of the choking of the pipe was unexplained, but was probably due to some careless use of a water-closet by a tenant in one of the upper flats. The choking of the pipe was not discovered for a considerable time, and no intimation was sent to the landlord until all the damage had been done. In an action of damages by the storage company against the landlord the Court *assoilzied* the defender, *holding* that the condition of the grease box was not such as either necessarily, or probably likely, to cause the damage which had occurred, and the landlord was not liable for some abnormal or improper use of the drainage system.

The North British Storage and Transit Company, Limited, Leith, *pursuers*, brought an action against James Burness and others, the marriage-contract trustees of John Steele and Mrs Jane Hume or Steele, *defenders*, in which they sought to recover £211, 8s. 5d. as damages in respect of damage done to some sacks of flour stored by the pursuers in the basement of a tenement house rented from the defenders, through the regurgitation of sewage water from a grease box situated in the room where the flour was stored.

The pursuers *pleaded*—"1. The pursuers having sustained damage as stated through the improper and faulty construction and repair of their drains at the warehouse let by them to the pursuers, decree should be granted as craved. 2. The defenders having let premises to the pursuers for use as a warehouse, and the said warehouse having been, through the state of the drains, insufficient or defective, the defenders are liable in damages as craved. 3. The pursuers having sustained damage through the negligence of the defenders, are entitled to decree as concluded for."

The defenders pleaded—"1. The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. 2. The pursuers' averments, in so far as material, being unfounded in fact, the defenders should be assoilzied. 3. The defenders having duly fulfilled all the duties incumbent upon them both under their contract with the pursuers and at common law, they are entitled to absolvitor. 4. The pursuers not having sus-