Friday, March 13.

FIRST DIVISION.

SIME (LIQUIDATOR OF HUMBOLDT REDWOOD COMPANY, LIMITED) AND OTHERS *v.* MERCHANT BANKING COMPANY, LIMITED (IN LIQUIDATION).

Company — Capital — Memorandum and Articles of Association—Ordinary and Deferred Shares— Winding-up — Repayment of Capital—Preferential Ranking.

The memorandum of association of a limited liability company provided—"The capital of the company is £250,000, divided into 139,092 ordinary shares of £1 each, and 110,908 deferred shares of £1 each."

In the articles of association it was provided that the ordinary shares should have a preferential dividend, and that in the event of the winding-up of the company the shares of the company should be repaid in the order in which the shares were entitled to rank for payment of dividend.

In a question between the ordinary and the deferred shareholders arising in the winding-up of the company, *held* that as the memorandum only provided for the there being two classes of shares there was no inconsistency with it in the articles of association, and consequently that the ordinary shareholders were entitled to the preferential ranking therein provided.

Andrews v. *Gas Meter Company*, [1897] 1 Ch. 361, *approved.*

On January 18, 1908, William Sime, C.A., liquidator for winding-up voluntarily the Humboldt Redwood Company, Limited, a company registered on 17th August 1885 under the Companies Acts 1862 to 1883, presented under the Companies Acts 1862 to 1900, and particularly under section 138 of the Act of 1862 (25 and 26 Vict. cap. 89), a petition to determine a question arising in the winding-up.

The question submitted was—"Whether the ordinary shareholders are entitled to receive payment of their capital in full before the deferred shareholders receive anything on account of their capital or not?"

Answers were lodged by (1) Archibald Coates and others, holders of both ordinary and deferred shares, who claimed that the ordinary shareholders were entitled to payment of their capital in full before any payment was made to the deferred shareholders, and (2) by the liquidators of the Merchant Banking Company, Limited, holders of a large number of deferred shares, who maintained that they were entitled to a *pari passu* ranking with the ordinary shareholders.

The memorandum of association of the Humboldt Redwood Company, Limited, article 4, is quoted *supra in rubric.*

The articles of association of that company provided—Art. 43—"The holders of ordinary shares of the company shall be entitled to receive out of the profits of each year a cumulative preferential dividend at the rate of 10 per cent per annum on the amount for the time being paid up on the ordinary shares held by them respectively, and the surplus profits in each year shall belong to the holders of the deferred shares." Art. 137—"In the event of the company being dissolved and wound up, the different shares or stocks of the company shall be repaid out of the assets of the company as realised, in the order in which the shares or stocks are entitled to rank for payment of dividend."

Argued for Archibald Coats and others—The articles of association (article 137) specifically provided that the holders of ordinary shares were entitled to a preference in the matter of ranking for repayment of capital over the holders of deferred shares. It was perfectly competent to provide for this preference in the articles of association though the memorandum was silent on the subject. New shareholders might be brought in with a preference over the existing shareholders by special resolution—*Andrews* v. *Gas Meter Company*, [1897] 1 Ch. 361; *Bangor and Portmadoc Slate and Slab Company*, 1875, L.R., 20 Eq. Ca. 59. *A fortiori* such a preference could be created by the articles of association.

Argued for The Merchant Banking Company, Limited—The rights of the shareholders as regards ranking for repayment of capital were to be determined by reference to the Memorandum. The articles of association could not modify the memorandum in regard to any matters required to be stated in the memorandum — The Companies Act 1862 (25 and 26 Vict. cap. 89), sections 8, 12. The articles so far as inconsistent with the memorandum were invalid —*Guiness* v. *Land Corporation of Ireland*, 1882, 22 Ch. Div. 349. Here article 5 of the memorandum provided for equality of treatment *quoad* capital, and the articles of association so far as they modified that provision were invalid.

LORD PRESIDENT—The first matter that is before your Lordships in this case is the determination of a question which has arisen in the winding-up of the Humboldt Redwood Company, and which is brought before your Lordships by Mr Sime, the liquidator in the voluntary winding-up of that company. The question as put by the liquidator is this—". . . [*quotes, supra*] . . .?" That question is one of the simplest, and must be solved by reference to the constituting documents of the company. The memorandum of association provides in article 5 that . . . [*quotes v. rubric*] . . . The articles of association provide, by article 137, that . . . [*quotes, supra*] . . . And by the 43rd article it is provided that . . . [*quotes, supra*] . . .

Now, there can only be one meaning to these words. It is too clear to admit of argument that the ordinary shareholders are to be paid in full before the deferred

shareholders get anything. But the argument is that these provisions in the articles of association are bad as being contrary to the terms of the memorandum, and the well-known doctrine is invoked that the memorandum is the ruling document and overrides anything in the articles of association that may be contrary to its provisions.

As far as I can see there is no inconsistency between the two documents here. The memorandum only states that the capital of the company is to be divided in certain proportions between two classes of shares. Mr Hunter says the inference from that is that these shares are to rank equally both as to dividend and as to division of assets. There is no authority for that proposition, and I think the matter is determined by the decision in *Andrews* v. *Gas Meter Company*, L.R., [1897] 1 Ch. 361, where L.J. Lindley says—"These decisions turned upon the principle that although by section 8 of the Act the memorandum is to state the amount of the original capital and the number of shares into which it is to be divided, yet in other respects the rights of the shareholders in respect of their shares and the terms on which additional capital may be raised are matters to be regulated by the articles of association rather than by the memorandum, and are therefore matters which (unless provided for by the memorandum, as in *Ashbury* v. *Watson*, 30 Ch. D. 376) may be determined by the company from time to time by special resolution pursuant to section 50 of the Act. This view, however, clearly negatives the doctrine that there is a condition in the memorandum of association that all shareholders are to be on an equality unless the memorandum itself shows the contrary. That proposition is in our opinion unsound. Its unsoundness was distinctly pointed out by Lord Macnaghten in *British and American Trustee and Finance Corporation* v. *Couper*, L.R., [1894] A.C. 416, 417." To all there said I respectfully subscribe. All that the memorandum does here is to say that there shall be two classes of shareholders, but it leaves it to the articles of association to prescribe their respective rights. The answer, therefore, to the question put by the liquidator must be in the affirmative.

[*His Lordship then proceeded to deal with another matter.*]

LORD M'LAREN and LORD KINNEAR concurred.

LORD PEARSON was absent.

The Court answered the question in the affirmative.

Counsel for the Humboldt Redwood Company and the Liquidator—Grainger Stewart. Agents—W. & F. Haldane, W.S.

Counsel for Archibald Coats and Others—Macmillan. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Liquidators of the Merchant Banking Company, Limited—Hunter, K.C.—Horne. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for other Shareholders—Hon. W. Watson. Agents—Alan L. Menzies, W.S.—A. Thomson Clay, W.S.

Tuesday, March 17.

SECOND DIVISION.

[Lord Low, Ordinary

ROBERT MUIR & COMPANY, LIMITED *v.* THE UNITED COLLIERIES, LIMITED.

Expenses—Arrestments on Dependence—Motion for Recal—Separate Process—Arrestments on Dependence by Pursuer—Unsuccessful Motion for Recal by Defender—Ultimate Award of Expenses in Action to Pursuer—Expenses of Opposing Motion for Recal—Personal Diligence Act 1838 (1 *and* 2 *Vict. cap.* 114), *sec.* 20.

The pursuers in an action having used arrestments on the dependence of the summons, the defenders, before lodging defences, and without presenting a petition under section 20 of the Personal Diligence Act 1838; moved the Lord Ordinary in the motion roll to recal the arrestments. The pursuers opposed, and the Lord Ordinary, on the ground that the motion was incompetent, sustained their opposition. The pursuers being ultimately successful in their action were awarded expenses, and in their account charged £6, 6s. as the expenses of opposing the motion for recal. The Auditor disallowed the charge *in toto* on the ground that the expenses in question fell to be treated as expenses in a separate process (a process for recal of arrestments) and could not accordingly be recovered as expenses in the principal action. The pursuers objected to his report.

The Court *sustained* the objection to the extent of allowing three guineas of expenses.

The Personal Diligence Act 1838 (1 and 2 Vict. cap. 114), section 20, enacts—"And be it enacted that . . . . it shall be competent to the Lord Ordinary in the Court of Session before whom any summons containing warrant of arrestment shall be enrolled as judge therein, or before whom any action on the dependence whereof letters of arrestment have been executed has been or shall be enrolled as judge therein, and to the Lord Ordinary on the Bills in time of vacation, on the application of the debtor or defender by petition duly intimated to the creditor or pursuer, to which answers may be ordered, to recal or to restrict such arrestment, on caution or without caution, and to dispose of the question of expenses, as shall appear just. . . ."

Robert Muir & Company, Ltd., in an action against the United Collieries, used arrestments on the dependence of the summons.