LORD SKERRINGTON—I construe the pursuers' minute No. 21 of process as admitting that the two individuals who are the sole partners of the Dutch firm which is the pursuer in the present action are alien enemies in this sense, that in addition to carrying on the business of the Dutch firm they also carry on a business in Germany and a business at Antwerp as the partners, although not the sole partners, of a German firm in the one case and of a Belgian firm in the other case. The minute states that the German and Belgian firms are registered under German and Belgian law respectively. On first reading this statement I thought that it might be intended to mean that the two individuals in question were merely shareholders in two joint-stock companies, which were corporations constituted the one under German and the other under Belgian law, but the pursuers' counsel disclaimed this meaning, and did not move, as he otherwise must have done, for leave to amend his minute. In these circumstances the only loophole of escape left for the pursuers was the very technical argument that there was no admission in the minute to the effect that the Dutch firm as distinguished from its individual partners carried on business either in Germany or at Antwerp. There is no substance in this technicality. If two persons are alien enemies they cannot be allowed to sue in this country either in their individual names or in the name of a firm of which they are the sole partners. The incapacity of an alien enemy to sue was recognised in Scotland so long ago as the year 1664 (*Blomart* v. *Roxburghe*, M. 16,091), though the disability was not enforced in that case because an actual state of war did not exist. It is unnecessary to cite any of the later authorities, because they are referred to in my opinion in the recent case *Orenstein & Köppel* v. *Egyptian Phosphate Company*. In none of these cases was the question raised whether arrestments on the dependence lawfully used by a pursuer in time of peace ought to be recalled in the event of the pursuer having become an alien enemy in consequence of a subsequent outbreak of war. Although in such a case the action on the dependence of which the arrestments were used is sisted only and is not dismissed, no analogy exists so far as regards this question between a compulsory sist due to the enemy character of the pursuer and a discretionary sist in the ordinary course of forensic procedure. An action at the instance of an alien enemy is sisted for a reason of urgent public policy, thus explained by Professor Bell in his Commentaries (7th ed., vol. i, p. 326)—"The principle is general that the enemy is not to be benefited even to the smallest extent." If an enemy pursuer is incapacitated from continuing to prosecute his action during the war it necessarily follows that he cannot claim from our Court that arrestments used on the dependence of the action shall be maintained in force for his benefit with the result that an embargo is laid upon the funds of a British subject. I am therefore of opinion that the two interlocutors reclaimed against should be recalled, that the action should be sisted, and the arrestments should be recalled *in toto*.

LORD ANDERSON delivered an opinion to the same effect.

The Court sisted the action and recalled the arrestments.

Counsel for the Pursuers and Reclaimers —Moncrieff, K.C.—W. T. Watson. Agents —Gordon, Falconer, & Fairweather, W.S.

Counsel for the Defenders and Respondents — Constable, K.C. — D. Jamieson. Agents—Dove, Lockhart, & Smart, S.S.C.

Thursday, February 17.

SECOND DIVISION.

[Lord Hunter, Ordinary.

PATERSON *v.* R. PATERSON & SONS, LIMITED.

Company—Articles of Association—Powers of Directors—Creation of Reserve Fund — Payment of Dividend — "Charges" against Profits—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 11, *and Schedule I, Table A, Article* 99.

Clause 12 of the articles of association of a private limited company provided —"After allowing for all charges, including the payment of directors' salaries, the profits of the company shall be applied as follows . . ." namely, in payment of dividends on the different classes of shares. *Held* that the directors could not allocate an amount to a reserve fund, the article being repugnant to, and consequently excluding, article 99 of table A of the First Schedule of the Companies (Consolidation) Act 1908 which gives power to do so, and the creation of a reserve fund not being a "charge."

Expenses—Company—Reclaiming Note—Personal Liability of Directors of Company—Construction of Articles as to Creation of Reserve Fund.

Circumstances in which the Court *held* the directors of a company personally liable in the expenses of a reclaiming note in a case by a shareholder against the company and the directors dealing with the directors' powers under the articles of association to create a reserve fund, on the ground that the Lord Ordinary's decision should have been accepted.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 11, enacts:—"*Application of Table A.*—In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or if articles are registered, in so far as the articles do not exclude or modify the regulations in table A in the First Schedule to this Act, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to

the same extent as if they were contained in duly registered articles." *Sched. I, Table A, Art.* 99. — "The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies or for equalising dividends, or for any other purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit."

Campbell Paterson, Camphill, Newton-Mearns, in the county of Renfrew, *pursuer*, brought an action against R. Paterson & Sons, Limited, coffee essence manufacturers, Glasgow, and Robert Paterson and James Davidson Paterson, the two directors of the company, *defenders*, for reduction of a report of the directors and a minute of a general meeting of shareholders "in so far as the said report and minute propose to deal with the profits of the said R. Paterson & Sons, Limited, for the year to thirty-first March Nineteen hundred and fifteen, by transfering a sum of three thousand pounds to reserve instead of distributing the said sum as dividends among the shareholders;" for declarator "(1) that the profits earned by the said R. Paterson & Sons, Limited, after allowing for all charges, including the payment of directors' salaries, fall to be divided amongst the shareholders in accordance with clause 12 of the articles of association of the limited company, and (2) that the profits on the working of the company's business for the year to thirty-first March Nineteen hundred and fifteen, and stated in the said report to be twenty thousand one hundred and forty-three pounds twelve shillings and threepence, fall to be divided in terms of clause 12 of the articles of association as dividends among the shareholders;" and for an account by the company showing the division of the profits for the financial year ended 31st March 1915, whereby the true sum due to the pursuer in name of profits as a shareholder of the company might appear and be ascertained by the Court, and, failing an account, for payment of £5129, 13s. 1d.

The defenders R. Paterson & Sons, Limited, pleaded, *inter alia*—"(2) The actings of the defenders being legal and *intra vires* they should be assoilzied from the conclusions of the summons. (3) The defenders being entitled to allow for a sum being placed to reserve before dividing the profits, and in so doing having acted in the best interests of the company, should be assoilzied from the conclusions of the summons."

The defenders Robert Paterson and James Davidson Paterson pleaded, *inter alia* — "The actings of these defenders being legal and *intra vires* and done *bona fide* in the interests of the company, they should be assoilzied from the conclusions of the summons."

The *articles of association* of R. Paterson & Sons, Limited, *inter alia*, provided—"1. The regulations contained in table A in the First Schedule of the Companies (Consolidation) Act 1908 shall apply to this company only in so far as they are not excluded, altered, or modified by the following provisions:— . . . 3. . . Articles 35 to 40 of said table A are specially excluded. . . . 12. After allowing for all charges, including the payment of directors' salaries, the profits of the company shall be applied as follows:—(*a*) In payment of a cumulative preferential dividend on the preference shares at the rate of 6 per cent. per annum so long as they stand registered in the name of Campbell Paterson. (*b*) The balance of profits remaining after payment of the above dividend shall be applied in payment of a dividend on the (A) ordinary shares at the rate of 10 per cent. per annum, and on the (B) ordinary shares at the rate of 5 per cent. per annum, so long as these shares stand registered in the name of Campbell Paterson. (*c*) The balance of profits (if any), after paying the dividends on said (A) and (B) shares, shall be divided between the holders of said shares equally in proportion to their respective holdings."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (HUNTER), who on 1st December 1915 pronounced this interlocutor —"Reduces the report and minute libelled in so far as said report and minute propose to deal with the profits of the defenders R. Paterson & Sons, Limited, for the year to 31st March 1915, by transferring a sum of £3000 to reserve instead of distributing the said sum as dividends among the shareholders, and repones and restores the pursuer thereagainst *in integrum:* Finds and declares (1) that the profits earned by the said R. Paterson & Sons, Limited, after allowing for all charges, including the payment of directors' salaries, fall to be divided amongst the shareholders in accordance with clause 12 of the articles of association of the limited company, and (2) that the profits on the workings of the company's business for the year to 31st March 1915, stated in the said report to be £20,143, 12s. 3d., fall to be divided in terms of clause 12 of the articles of association as dividends among the shareholders, and decerns: *Quoad ultra* continues the cause, grants leave to reclaim, and reserves all questions of expenses."

Opinion.—"In this action Mr Campbell Paterson sues R. Paterson & Sons, Limited, and Mr Robert Paterson and Mr James Davidson Paterson, its directors, for reduction of (*first*) a report of the directors of the company, dated 17th June 1915, and (*second*) a minute of the sixth annual ordinary general meeting of the shareholders, dated 25th June 1915, in so far as the said report and minute propose to deal with the profits of the said R. Paterson & Sons, Limited, for the year to 31st March 1915, by transferring a sum of £3000 to reserve instead of distributing the said sum as dividends among the shareholders. The pursuer also seeks to have it found and declared—(1) That the profits earned by the said R. Paterson & Sons, Limited, after allowing for all charges, including the

payment of directors' salaries, fall to be divided amongst the shareholders in accordance with clause 12 of the articles of association of the limited company; and (2) that the profits on the working of the company's business for the year to 31st March 1915, stated in the said report to be £20,143, 12s. 3d., fall to be divided in terms of clause 12 of the articles of association as dividends among the shareholders. In any event, he asks for an account by the company showing the division of the profits of the company for the financial year ended 31st March 1915, whereby the true sum due to the pursuer in name of profits as a shareholder of the said company may appear and be ascertained by the Court, and, failing an account, for payment of £5129, 13s. 1d.

"In 1909 the business of R. Paterson & Sons was converted into a private limited company under the Companies (Consolidation) Act 1908. The share capital of the limited company was fixed at £63,001, divided into (1) 35,000 cumulative preference shares of £1 each, (2) 14,000 (A) ordinary shares of £1 each, (3) 14,000 (B) ordinary shares of £1 each, and (4) 1 (C) ordinary share of £1. The whole of the preference shares, amounting to £35,000, and the whole of the 14,000 (B) ordinary shares, were allotted to the pursuer. The 14,000 (A) ordinary shares were allotted to the defenders Robert Paterson and James Davidson Paterson. The remaining 1 (C) ordinary share of £1 was allotted to Mr R. B. Paterson, a retired bank agent residing at 2 Windsor Quadrant, Glasgow. This share, with a vote attached, was created to prevent a deadlock in the event of the A ordinary shareholders voting against the B ordinary shareholders.

"The first directors of the company were the pursuer and the defenders Robert Paterson and James Davidson Paterson, and it was provided by the articles of association that they should hold office till death or resignation.

"On 5th May 1914 the pursuer retired from his position of managing director, under an agreement which stipulated that the profits of the business should continue to be divided as provided for in the existing articles of association, but in consideration of being left in sole charge of the business the defenders Robert Paterson and James Davidson Paterson thereby personally guaranteed that the pursuer's share of the profits would not in any year be less than £7000, which amount the said defenders guaranteed, subject to a right of appeal to the arbiter therein mentioned. It was provided that this arrangement should continue during the pursuer's lifetime.

"By the articles of association of the company, clause 12, it is provided as follows:—[*quoted supra*].

"The financial year of the company ended on 31st March. The general meeting of the company for the year 1915 was held on 25th June 1915. According to the directors' report presented to that meeting the result of the year's working showed a profit of £20,143, 12s. 3d., from which the directors proposed to transfer to reserve £3000, leaving the sum of £17,143, 12s. 3d. available for dividends on the preference and ordinary shares as follows:—(1) In payment of dividends on the preference shares; (2) in payment of dividends on the ordinary shares; and (3) the balance over to be divided in equal proportions between the A and B ordinary shares. The defender Mr Robert Paterson, who was in the chair at the general meeting, moved that the accounts be approved of and the dividends paid in accordance with the directors' recommendation. This motion was seconded by the defender Mr James Davidson Paterson. The pursuer moved the following amendment:—'The proposal of the directors being contrary to clause 12 of the articles of association of the company, this meeting resolves that the profits of the company for the past year be applied as follows:—(*a*) That a dividend of 6 per cent. be paid on the preference shares. (*b*) That a dividend of £10 per cent. be paid on the "A" ordinary shares, and 5 per cent. on the "B" ordinary shares. (*c*) That the balance of profits shall be divided equally between the holders of "A" and "B" ordinary shares, all in terms of clause 12 of the articles of association; and further, that these dividends and division of profits be paid immediately, and the directors instructed accordingly.' This amendment was seconded by Mr R. B. Paterson. Acting on the advice of the law agent of the company, the chairman ruled that the amendment in respect that it provided for the payment of a larger dividend than that recommended by the directors was incompetent. Against this ruling the pursuer protested.

"The pursuer has received payment of his dividend on his preference shares, and one-half of the dividend on his ordinary shares, the balance not having been yet paid.

"The question that I have now to determine is whether or not it was competent for the defenders to transfer £3000 to reserve instead of distributing the sum as dividends among the shareholders. By article 99 of table A in the First Schedule annexed to the Companies (Consolidation) Act 1908 it is provided—'. . . *quoted supra* . . .' Article 1 of the defenders' articles of association provides—'1. The regulations contained in table A in the First Schedule of the Companies (Consolidation) Act 1908 shall apply to this company only in so far as they are not excluded, altered, or modified by the following provisions.' It appears to me that the effect of this article is to preclude the defenders from creating a reserve, except in so far as it is justified under the 12th article of the articles of association of the defenders' company. In the case of *Fisher* v. *Black and White Publishing Company*, [1901] 1 Ch. 174, the memorandum of association made express provision for the distribution of 'the profits from time to time available for dividend.' The articles of association provided that in so far as they did not exclude or modify the regulations contained in table A in Schedule 1 of the Companies

Act 1862, these regulations should, so far as applicable, be deemed to be regulations of the company. Clause 74, which makes provision for creating a reserve similar to that made in clause 99 of table A of the 1908 Act, was not expressly excluded, and it was therefore held that it was not *in toto* excluded by implication, but that it must be taken to form part of the articles; that 'profits available for dividend' meant the net profits after making any deductions which the directors could properly make before declaring a dividend, and that the directors were justified in setting aside as a reserve fund to meet contingencies so much of the profits of a year as they thought fit. In that case the expression 'profits available for dividend' was treated as different from the expression 'profits' (*see* Lord Justice Rigby at p. 178 and Lord Justice Romer at p. 182). Article 12 of the articles of association of the defenders' company contains no such qualification of the word 'profits.' If, therefore, I am right in this view as to the limited application of article 99 of table A, I think it follows that the directors' position can only be justified by showing that the creation of the reserve was made as an allowance for charges. The question then arises, What is meant in this article by charges? I do not think that the expression is intended to cover future charges that properly form a deduction from future profits. If it did it would enable the directors as holders of the ordinary A shares to exercise their discretion to the prejudice of the holders of B shares. On the other hand, it does not seem an unreasonable view to hold that it includes charges either actually or contingently payable out of the profits of the year. The legality or illegality of the action of the directors of the defenders' company will therefore depend upon whether or not the reserve was created for such a purpose. The defenders explain that since the raising of the present action the Finance (No. 3) Bill 1915 has been introduced, and that if it becomes law they will, in terms of section 34, require to pay out of the profits for the year ending 31st March 1915 the sum of £4000 or thereby in name of excess profits duty. They do not, however, suggest that the reserve fund was created to meet such a claim—a circumstance which would have raised a different question from that now before me. On the contrary, they state that this charge will form a deduction from the dividend actually declared by them, and in fact they have tendered to the pursuer payment of the half-year's dividend still unpaid under deduction of £2000. The pursuer has averments against the *bona fides* of the individual defenders in exercising their discretion as they have done, but if their action was *ultra vires* I do not require to consider the relevance of these allegations. As I understand the defenders' position, they justify the creation of a reserve fund because it was advisable to have additional working capital. This appears to me to be different from setting aside the money to meet a charge in the sense in which I have construed that expression, and therefore not justified under the articles of association. They cannot exercise a power because it is advisable in the interests of the company if it is not conferred upon them. New powers can only be acquired by an alteration of the articles of association. I propose therefore to pronounce a decree under the reductive and declaratory conclusions of the summons, and *quoad ultra* to continue the cause."

The defenders reclaimed, and argued—The defenders were entitled to allow for a sum being placed to reserve before they proceeded to divide the profits. Unless prohibited by its constitution a company was not prohibited from creating a reserve fund —*Burland* v. *Earle*, [1902] A.C. 83. By the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 11, the model articles contained in Table A applied to the company unless they were excluded by the company's own articles of association, and the *onus* was on the pursuers to show that any of the model articles were excluded. The model article 99 was not expressly excluded by article 12 of the articles of association of the company. Nor was it excluded by implication. The two articles were not mutually repugnant—*Wemyss Collieries Trust, Limited* v. *Melville*, (1905) 8 F. 143, 43 S.L.R. 98. Certain other of the model articles were expressly excluded. Accordingly, since *exclusio unius est expressio alterius*, article 99 was impliedly included. There was a presumption against the exclusion of a reasonable provision such as that contained in article 99. The dividends referred to in article 12 were not called "yearly" dividends and did not refer to immediate division. The provision of a reserve fund out of the profits was not inconsistent with the profits so reserved eventually going to their proper destination. Moreover, article 12 only directed a division of the profits "after allowing for all charges," which meant after making all proper deductions, and the provision of a reserve fund was a proper deduction. *Fisher* v. *Black and White Publishing Company*, [1901] 1 Ch. 174, decided that where a distribution of "profits available for dividend" was directed it was lawful to create a reserve fund, but that case did not decide that, where a distribution of "profits" was directed, it was unlawful to create a reserve fund. Moreover, the construction of the word "profits" in that case could have no bearing on the construction of the word in the present case, where it occurred in a different document.

Argued for the respondents—The defenders were not entitled to allow for a sum being placed to reserve before they proceeded to divide the profits. The company's own articles of association were the test as to how much of table A was included. The articles of association of a company might be so framed as to altogether exclude table A. The true question in such cases was not one of admission as against non-admission, but rather one of inclusion as against extrusion. In the present case the true question was not as to whether the model article 99 was inconsistent with article 12 of the company's own articles of association, but

rather as to whether article 99 was included in the company's articles at all. Article 99 was necessarily excluded because it was absolutely inconsistent with article 12, which was mandatory and excluded any discretionary power to create a reserve fund out of the profits. The whole fasciculus of clauses 95 to 102 of table A was excluded. The mere fact that certain other articles of table A were expressly excluded gave rise to no implication that it was intended to include article 99. In *Fisher* v. *Black and White Publishing Company* (*cit.*), although certain articles of table A were expressly excluded, no such inference was drawn. The absence of a reserve fund was not unreasonable. The company had never hitherto had a reserve fund. It was a family company of a unique character, and it had power to borrow money. It was an inference from the decision in *Fisher* v. *Black and White Publishing Company* (*cit.*) that where there was a direction to divide "profits" as distinguished from "profits available for dividend" it was not lawful to create a reserve fund out of profits—*see* Kekewich, J., at 17 T.L.R. 103, and Rigby, L.J., at [1901] 1 Ch. 178, and Romer, L.J., at [1901] 1 Ch. 182. *Wemyss Collieries Trust, Limited* v. *Melville* (*cit.*), was distinguishable. In that case it was conceded that both the articles in dispute were included, and the question was how to read them together, but in the present case the *de quo* was whether article 99 was included at all. Moreover, in that case the article which corresponded to article 12 in the present case was quite different from article 12, and there was express power to create a reserve fund.

At advising—

LORD JUSTICE-CLERK — The question raised in this case depends on the construction of articles 1 and 12 of the company's articles of association.

The Dean's first proposition was that every limited company formed under the Companies Acts starts with a constitution in which table A forms a part. Of course this cannot be so, and could not have been intended to be maintained by the Dean in the case of a company the first of whose articles is that the regulations in table A shall not apply. But it is, I think, an unsound proposition in some other cases. If nothing was said in the articles as to table A the proposition might be a legitimate deduction from section 11 of the statute. But in my opinion it is not a sound proposition where the articles start with one expressed in the terms of article 1 of the present company. That article reads thus —[*His Lordship quoted the article*].

I think the Lord Advocate's argument was well founded when he maintained that that article required that you should begin with "the following provisions" as the ruling provisions, and should then go over table A and include only the articles in that table which were "not excluded, altered, or modified" by these "following provisions." Adopting that course I am of opinion that article 12 disposes of the whole profits of the company by a mandatory instruction requiring the directors, "after allowing for all charges," to pay and divide the whole profits as dividends. This appears to me to be quite inconsistent with article 99 of table A, which authorises the directors before recommending any dividend to set aside out of, *i.e.*, to deduct from, the profits such sums as they think proper as a reserve for the purposes therein mentioned. In my opinion article 99 of table A is impliedly excluded by article 12 of the company's articles.

The Dean of Faculty, differing from the argument put forward by Mr Macmillan, urged that any sum which the directors chose to "transfer to reserve" was a charge in the sense of article 12. I cannot accept this construction. Under article 99 the directors have control over the profits so far as the creation of a reserve is concerned, whereas under article 12 I think the company has given peremptory and complete instructions to the directors as to the disposal of the whole profits after allowing for charges. I cannot read this provision regarding charges as importing an authority to the directors to create at their discretion charges on the profits any more than it would authorise them to increase their own salaries.

It was argued that the concluding sentence of article 3 exhausted the significance of the word "excluded" in article 1, and that there was no room for implied exclusion. We were, however, referred to several instances which to my mind conclusively established that there were cases in which exclusion by implication must be inferred.

Two authorities alone were founded on—*Fisher*, [1901] 1 Ch. 174, and *Wemyss Colliery Trust*, 8 F. 143. The English case, in my opinion, rather supports the respondents' contention, and in the Scottish case the articles under consideration appear to me to have been so differently expressed from those we are now considering as to make it, in my opinion, inapplicable.

I am of opinion that the reclaiming note should be refused, and the Lord Ordinary's interlocutor affirmed.

LORD DUNDAS—It appears to me that the terms of article 12, read by themselves, amount to an imperative direction to apply the company's profits in each year in payment of dividends, and by necessary implication exclude any power to create a reserve fund such as that which is here sought to be inaugurated. We are not concerned to consider the wisdom (or the reverse) of such a provision, but merely to construe its language, and I think the only proper construction of article 12 is that above indicated. The defenders' counsel did, indeed, found an argument to the contrary upon the words "after allowing all charges," but I agree with the Lord Ordinary that the interpretation suggested cannot reasonably be put upon these words. The defenders' main contention, strenuously pressed at our bar, was based upon the language of article 1, which, though not identical with, is in my judgment substantially

indistinguishable from that of section 11 of the public Act of 1908. I do not shrink from adopting the test applied by Romer, L.J., to a somewhat similar argument presented to the English Court in *Fisher* v. *Black and White Publishing Company.* In that case certain clauses of table A of the Companies Act 1862 were expressly excluded by the company's articles of association, but certain other clauses, one of which corresponded to article 99 of table A in the Act of 1908, were not expressly excluded. The learned judge thought it was a fair deduction that the framers of the articles must have had these clauses in their minds, and did not think it necessary expressly to exclude them, and he added that in his opinion "those clauses ought certainly to be considered as included, unless there is some grave reason why they should be excluded." In the case before us it seems to me that there is grave reason why article 99 of table A should be held to be excluded. The pursuer's counsel referred us to more than one instance where articles of table A are plainly excluded, though not in express words, by necessary implication from this company's articles of association. Thus, articles 78 to 86 of table A could not stand along with clause 9 of the articles of association, nor article 69 of the former along with clause 10 of the latter. In the same way, it appears to me that clause 12 of the articles is so absolutely repugnant to article 99 of table A—and, indeed, to the whole fasciculus (articles 95 to 102) of which it forms part—that they could not stand together, with the result that we must hold article 99 to be excluded. The case of *Wemyss Collieries Trust* was founded on by the defenders' senior counsel as demonstrating that clause 12 of the articles and article 99 of table A could stand alongside each other, and could be read without repugnancy even if set forth side by side in one and the same document. The case does not in my judgment warrant that view, because while the articles of association there before the Court did contain a clause substantially similar to article 99 of table A, I do not think that the clause or clauses which are said to correspond with clause 12 of the articles now under consideration are truly of identical purpose and effect with it, as they are not conceived in the imperative and unambiguous terms of clause 12. In my opinion, therefore, we ought to adhere to the Lord Ordinary's interlocutor.

LORD SALVESEN—The Lord Ordinary has stated with fulness and accuracy the circumstances which have led to this litigation and the question which is in controversy between the parties. Shortly stated, the whole case turns upon whether article 12 of the articles of association of the defenders' company is repugnant to article 99 of Table A of the First Schedule annexed to the Companies (Consolidation) Act 1908. I am of opinion that it is, and that the two cannot be read together.

The composition of this private company is very peculiar. There are only four shareholders—the pursuer and his two sons, the latter of whom are the managing directors of the company—and a gentleman of the same name who holds a single share and is entitled to one vote. All the preference shares and the (B) ordinary shares are held by the pursuer, and all the (A) ordinary shares are held by the managing directors of the company. The single share held by Mr R. B. Paterson is in a separate class and is called a (C) ordinary share. He is not entitled to rank for dividend or to any share of the capital in the event of winding up. Apparently it was created simply in order to enable him to hold the balance between the pursuer and his two sons when it came to be a question of voting.

By the 10th article the pursuer's two sons are appointed managing directors at a fixed salary, and it is provided that the pursuer is to receive the same salary as a managing director, but shall only be bound to take such part in the management of the business as he thinks fit. The directors are thus not appointed by the shareholders, nor is their remuneration dependent upon the wishes of the shareholders as expressed at the annual meetings. Accordingly many of the articles of table A which deal with the directors, their appointment and duties, are not applicable to this particular company although they are not expressly excluded, as articles 35 to 40 are.

Article 12 of the company's articles of association regulates the mode in which the profits of the company must be applied These profits are to be reached "after allowing for all charges, including the payment of directors' salaries." Are the directors then entitled under this clause to apply any portion of the profits in creating a reserve fund "for meeting contingencies or for equalising dividends, or for any other purpose to which the profits of the company may be properly applied," which are the powers conferred on directors generally by article 99 of table A? I answer this question in the negative. I of course assume that the profit and loss account may contain items to provide for known and ascertained or contingent liabilities. It would not be a proper profit and loss account if it did not do so, but this is a matter for the auditor and not the directors to determine. The question we have to decide is Whether, after all allowances have been made in reaching the true profits that have been earned, the directors can apportion out of the profits on which income tax falls to be paid a sum for the purpose of providing additional working capital or other similar purpose, and to do so without challenge by the pursuer because of article 95, table A, which provides that the company in general meeting may not declare a dividend in excess of the amount recommended by the directors. I think if we were so to hold we should be defeating the plain intention of the parties to the contract embodied in the articles of association; for article 12 provides for an annual distribution of all the profits between the three persons who are the only true shareholders. If one has regard merely to the articles of association it might seem

to be a matter of indifference whether the whole profits were annually divided after paying the dividends at the specified rates; but since the minute of agreement of 8th and 13th October 1914, by which the pursuer's sons personally guaranteed that his share of the profits should not in any year be less than £7000, their interest in creating a reserve fund in a year of prosperity which would enable them in a less prosperous year to make up the guaranteed sum out of the accumulations from past profits has become very obvious, and may unconsciously have influenced the managing directors in the action which they took with reference to the profits for the year ending 31st March 1915.

The view above expressed is in conformity with the decision in the case of *Fisher*, for as I read the opinions of the Court of Appeal the judgment of Kekewich, J., would not have been reversed but for the specialty that the clause which regulated the distribution of profits contained the qualification that it should be made "from the profits from time to time available for dividend." For my own part I prefer the judgment of Kekewich, J., who construed these words as meaning legally available for dividends, whereas the Judges of the Court of Appeal held that they were synonymous with "properly applicable to the payment of dividends" or "after deducting all sums properly appropriated by the directors out of the profit shown in the profit and loss account." I note, however, that Romer, L.J., indicated that the clause which corresponded to article 99 of table A was modified to some extent, and that the powers of the directors could not be used for the purpose of creating a reserve fund to be applied in equalising dividends, for that might be an injustice as between the owners of the respective classes of shares. That view applies very forcibly in the present case, but it is unnecessary to criticise the opinions further, as all the judgments seem to have assumed that it was only the presence of the words "from time to time available for dividends" that entitled the directors to create a reserve fund to the prejudice of the holders of the founders' shares. I have, however, difficulty in distinguishing the facts in this case from those which were the subject of decision in the *Wemyss Collieries Trust*. The one point of distinction is that the powers conferred on the directors by article 99, table A, were not incorporated by reference as they are here, but were expressed in the articles of association of the particular company. The distinction is substantial, because it ought to be assumed that the two paragraphs of the articles of association were capable of being read together, and if so the construction which the Court adopted was perhaps the only possible one. Here article 99 of table A is incorporated only in so far as not altered or modified by the provisions expressed in the articles of association. Accordingly, if on a comparison of article 12 with article 99, table A, it is found that the latter is altered or modified by the former, it does not form part of the regulations affecting this company. I have therefore come to be of opinion with your Lordships that the judgment of the Lord Ordinary ought to be adhered to.

Counsel for the respondent moved for his expenses in the Inner House against the defenders Robert Paterson and James Davidson Paterson personally, and argued—The respondent having been successful was entitled to his expenses, but if it was the company and not the directors personally who were made liable for them the result would be that the respondent as one of the principal shareholders would ultimately have to pay the greater part of his own expenses, although the directors in reclaiming were acting in antagonism to him. Where trustees litigated they were personally liable for expenses to their opponent. So also here the directors should be made personally liable because they were not entitled in their capacity of directors to reclaim against the Lord Ordinary's interlocutor—*Anderson* v. *Anderson's Trustees*, (1901) 4 F. 96, *per* Lord Adam at 104 and Lord Kinnear at 106, 39 S.L.R. 94, at 98 and 99.

Argued for the defenders Robert Paterson and James Davidson Paterson—The directors should not be made personally liable for the respondent's expenses. Directors of a company were not in the same position as trustees of a trust. A company was a separate entity. The directors in reclaiming were acting on behalf of and in the interests of the company. The question of the propriety of their action in reclaiming was a domestic question between them as directors of the company and the shareholders as such, which was not appropriate to the present process.

LORD JUSTICE-CLERK—We have not been asked to deal with anything but the expenses of the Inner House, where the only point raised on the merits was one of construction. That question was one as to which so far as the Court was concerned the Lord Ordinary's interlocutor should have been accepted as final, and accordingly I am of opinion that the motion should be granted.

The Court adhered and found the defenders Robert Paterson and James Davidson Paterson personally liable to the pursuer in expenses since 1st December 1915.

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Counsel for the Respondent (Pursuer)—Lord Advocate (Munro, K.C.) — Watson, K.C. — Cooper. Agents — Macpherson & Mackay, S.S.C.