could discover, there had been no applications under the Burgh Police (Scotland) Act of 1892. Section 113 of the Act of 1900 had been passed to meet such a case as the present. The prayer of the petition was alternative, and the first alternative might in the meantime be granted. Reference was also made to *Newhaven Local Board* v. *Newhaven School Board*, June 12, 1885, L.R. 30 C.D. 350.

[LORD M'LAREN—Might not the Court in such a case as the present appoint managers?]

The Court pronounced this interlocutor:—

". . . Appoint *hoc statu* a special election of seven Councillors to be held on Tuesday, 19th December 1905, by the electors in manner provided by section 36 of the Town Councils (Scotland) Act 1900, and appoint William Edgar, being the Senior Bailie and acting Chief Magistrate of the burgh, to be returning officer at the said election, with power to him to fix the dates for the the issue of all necessary notices, and for lodging and withdrawing nomination papers subject to the provisions of said section; and decern: *Quoad ultra* continue the petition. . . ."

Counsel for Petitioner—W. J. Robertson. Agents — Cuthbert & Marchbank, S.S.C.

Thursday, November 23.

FIRST DIVISION.

WEMYSS COLLIERIES TRUST, LIMTD. *v.* MELVILLE AND OTHERS.

Company—Articles of Association—Construction—Rearrangement of Capital—Powers of Directors—Payment to Reserve Fund—Detriment of Preference Shareholders.

The directors of a company, whose capital consisted of preference shares entitled to a cumulative preferential dividend as well as ordinary shares, had power under the original articles of association to apply out of the profits, before recommending any dividend, such sum as they thought proper to reserve fund. On a rearrangement of the capital, whereby the ordinary shares were divided into preferred ordinary and deferred ordinary, the preference shareholders received under certain new and additional articles of association, a right to, *inter alia*, an additional non-cumulative dividend of 1 per cent. if the profits were sufficient to meet certain other interests to which they were postponed *quoad* this increase of dividend. In 1904 the profits were sufficient to provide for these prior interests and to leave a surplus of £2884, 0s. 6d. The directors, however, proposed to apply to reserve fund £2500, the exact amount required to pay the additional non-cumulative 1 per cent. to the preference shareholders.

In a question with the preference shareholders as to the construction of the articles of association, *held* that the new articles of association giving the preference shareholders the increase of dividend did not derogate from the directors' power under the original articles to apply profits to reserve, and that the directors were entitled so to apply this sum, although thereby the preference shareholders were deprived of their additional 1 per cent. of dividend.

The Wemyss Collieries Trust, Limited, a company incorporated under the Companies Acts 1862-1890, for the purpose, *inter alia*, of acquiring the minerals and mineral rights in the estate of Wemyss, and having its registered office at East Wemyss, in the county of Fife, (*First Party*), and James Melville, accountant, Alloa, and others, holders of a number of the company's preference shares, (*Second Parties*), presented this special case for the opinion and judgment of the Court.

As originally constituted, the capital of the company was 25,000 4½ per cent. cumulative preference shares of £10 each and 25,000 ordinary shares of £10 each.

Article of association No. 7 was—"The holders of the preference shares shall be entitled to receive out of the profits, after payment of interest on debentures or debenture stock, and providing for a sinking fund for the redemption of such debentures or debenture stock in terms of any trust deed thereanent, a preferential cumulative dividend at the rate of 4½ per centum per annum on the amount for the time being paid up on the preference shares held by them respectively."

No. 8—"The surplus profits in each year, after providing for all interest due on any debentures or debenture stock, the said sinking fund for the redemption of debentures or debenture stock, and the dividend upon the said preference shares, shall be applicable to the payment of dividends to the holders of the ordinary shares in proportion to the capital paid up, and in proportion to the time during which such capital shall have been paid up."

No. 128.—"In the case of both ordinary and preference shares no larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend."

No. 129—"No dividend shall be payable except out of the profits arising from the business of the company, and the declaration of the board as to the amount thereof shall be conclusive. The directors shall out of profits, in the first place, pay the preferential cumulative dividend. And before declaring any dividend on the ordinary shares, the directors shall also provide out of profits for renewals and for depreciation. In cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one

year, the amount of such item may be so distributed."

No. 138—"The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund for meeting contingencies, or for improvements or losses, or for equalising dividends, or for distribution by way of bonus among the members of the company for the time being, or for any other purpose whatsoever. Further, the directors, in borrowing money on the security of mortgage debentures or mortgage debenture stock or otherwise, may undertake to provide a sinking fund to redeem or more effectually secure such loans, and to pay thereto out of profits such sum or sums annually as they may think fit."

The case stated—"The following special resolution was passed on 29th July 1898, and confirmed on 16th August 1898, viz., 'That in conformity with an extraordinary resolution of the ordinary shareholders of the trust, passed on 20th July 1898, two new articles in the following terms be added to the articles of association, viz.—6-1. Of the 25,000 ordinary shares, 12,000 shall be called preferred ordinary shares and 13,000 deferred ordinary shares; and as between such preferred and deferred ordinary shares, the preferred ordinary shares shall have right to a preferential non-cumulative dividend yearly, at the rate of 5 per cent. per annum; but in no event shall said preferred ordinary shares be entitled to any higher dividend than 5 per cent. The deferred ordinary shares shall be entitled to the remainder of the surplus annual profits, subject to prior burdens, including the cumulative and non-cumulative dividends payable on the preference shares in the company, in terms of articles 7 and 7-1 of the articles of association. 7-1.—The holders of the preference shares shall also, after provision for a sinking fund, and payment of the interest and dividend referred to in article 7, and payment of a dividend of 5 per cent. on the whole ordinary shares, both preferred and deferred, be entitled, in the event of there being sufficient profit remaining, to such extra dividend not exceeding ½ per cent., as the balance of profit remaining will permit; that is to say, so much of the balance of profit remaining as is required to make up the above ½ per cent. shall be applied and divided among the whole preference shareholders according to their respective holdings; and on the foregoing provision being satisfied, and should the profits be sufficient to enable the payment of a dividend of 7 per cent. on the deferred ordinary shares—that is, an increase of 2 per cent. on the deferred ordinary shares after paying 5 per cent. on the whole ordinary shares, both preferred and deferred, and the extra ½ per cent. on the preference shares as before mentioned—then and in that event the preference shareholders shall be entitled to such additional dividend, not exceeding 1 per cent., as the balance of profit remaining will permit, and that in addition to and over and above the extra dividend of ½ per cent. before specified. The said extra and additional dividends of ½ per cent. and 1 per cent, respectively shall in no case be cumulative, but shall be contingent on the profits of the year.'

. . . . . .

"At the last ordinary general meeting which was held on 13th December 1904, the directors submitted to the meeting a report, and also a profit and loss account and balance-sheet made up as at 11th November 1904. The statements submitted to the meeting shewed that, after payment of the fixed dividend of 4½ per cent. on the preference shares, and 5 per cent. on the preferred ordinary shares, there remained a balance of £13,234, 0s. 6d.

"The following is the report submitted by the directors:—

"'Herewith are submitted the accounts for the year 1903-4.

"'It will be seen from the balance-sheet that after payment of all dividends due on the preference shares and the fund for the redemption of the debentures, there remains a balance of . . . £13,234 0 6

"'This sum your directors had intended to recommend should be dealt with as follows:—

Place to reserve a sum of .	2,500 0 0	
		£10,734 0 6

"'And that the balance should be dealt with as follows:—

Dividend of 5 per cent. on the deferred ordinary shares . . .	£6,500 0 0	
Additional dividend of ½ per cent. on the preference shares .	1,250 0 0	
Dividend of 2 per cent on the deferred ordinary shares . . .	2,600 0 0	
		10,350 0 0
Leaving to be carried forward to next year		£384 0 6

"'But in view of a legal question which has arisen as to the rights of the preference shareholders to receive the additional 1 per cent payable in terms of section 7-1 of the articles, they now recommend as follows:—

(1) Dividend of 5 per cent. on the deferred ordinary shares . . .	£6,500 0 0
(2) Additional dividend of ½ per cent. on the preference shares	1,250 0 0
(3) Dividend of 2 per cent. on the deferred ordinary shares	2,600 0 0
	£10,350 0 0

And that the balance of £2884, 0s. 6d. be carried to a suspense account — it being understood that the company will arrange for a special case to be adjusted between Messrs Carmichael & Miller, W.S., on behalf of certain preference shareholders, and the company, under which it is to be decided whether the extra 1 per cent. must

be paid to the preference shareholders—the expense of the special case to be paid by the company.'

"The sum of £2500 is the amount required to pay to the preference shareholders the dividend of 1 per cent. mentioned in the foresaid agreements and in article 7-1 of the articles of association."

The report was unanimously adopted, and thereafter there was presented to the Court this special case, in which the company was the first party and the preference shareholders the second parties.

The first party maintained that the whole provisions of the articles of association must be considered, and that by clause 138 the directors were authorised, before recommending any dividend, to set aside out of the profits of the company such sum as they might think proper as a reserve fund; further, that by clause 128 it is provided that no larger dividend shall be declared than is recommended by the directors; and further, that in any view clause 7-1, giving preference shareholders the right to payment of 1 per cent. must be read along with and qualified by clause 138, which provided for setting aside a sum to reserve.

The second parties maintained that the said balance of profits amounting to £2884, 0s. 6d. remaining after paying (1) the dividend of 4½ per cent. on the preference shares; (2) the dividend of 5 per cent. on the ordinary shares, preferred and deferred; (3) the extra dividend of ½ per cent. on the preference shares; and (4) the increased dividend of 2 per cent. on the deferred ordinary shares, fell to be applied now or hereafter to the extent of £2500 in payment to the preference shareholders of the additional dividend of 1 per cent. mentioned in article 7-1 of the articles of association. Alternatively they contended that the said balance fell to the extent of £384, 0s. 6d. to be applied towards payment of such additional dividend.

The following questions were submitted for the opinion and judgment of the Court:—"With reference to the disposal of the said sum of £2884, 0s. 6d., meantime carried to suspense account, are the preference shareholders entitled to have the same applied *primo loco* in the payment of the said additional dividend of 1 per cent. mentioned in the foresaid agreement and in article 7-1 of the said articles of association? Are the directors entitled before applying the said sum or any part thereof in payment of said additional dividend to place the same to the extent of £2500 to reserve?"

Argued for the first party—The directors had power to set money apart to reserve fund by article of association 138. Between it and the new article 7-1 there was no repugnancy. The rules to govern such a case as this had already been laid down—*Fisher* v. *Black and White Publishing Company*, [1901] 1 Ch. 174, opinion of Rigby (L.J.); *Burland and Others* v. *Earle and Others*, [1902] App. Cas. 83. The course proposed by the directors was within their power, and the questions of law should therefore be answered, the first in the negative and the second in the affirmative.

Argued for the second parties—The course proposed by the directors was *ultra vires*. If the opposite view was correct, in any year when 7 per cent. was paid on the ordinary shares the directors might defeat the preference shareholders' rights. The additional dividend of 1 per cent. to the preference shareholders was not cumulative, and was not to be diminished, by increasing a reserve fund, except for the necessities of that particular year—*Dent* v. *London Tramways Company*, 16 Ch. D. 344. Romer (L.J.) in the case of *Fisher, ut supra*, laid it down that the advantage of one class of shareholders could not be secured by the loss of another as was attempted here. Article 129 purposely put the preference dividend before renewal and depreciation out of design to favour the holders of preference shares, whose rights were enlarged by article 7-1, which impliedly overruled article 138. The preference shareholders were not to be affected by the reserve fund rule though ordinary shareholders might be.

Lord President—This is a special case between the Wemyss Collieries Trust, Limited, and certain of their own preference shareholders. The company as originally constituted had a capital of 25,000 4½ per cent. cumulative preference shares of £10 each and 25,000 ordinary shares, also of £10 each; and the arrangement as to the payment of dividends on these shares was as their names denote—that is to say, the ordinary shareholders only got a dividend after the preference shareholders were paid their 4½ per cent. At a subsequent period the holders of the ordinary shares wished to split their shares into preferred ordinary and deferred ordinary, and they proceeded to do that in the way allowed by the articles of the company, viz., by special resolution. In order to effectuate their purpose they had to take the preference shareholders with them, and a bargain was come to between the preference shareholders and the ordinary shareholders. This bargain was finally expressed in two new articles of association, which are numbered 6-1 and 7-1. Article 6-1 effectuated the splitting of the ordinary shares into 12,000 preferred ordinary and 13,000 deferred ordinary, and provided that as between them the preferred should have a 5 per cent. dividend and nothing more, and that any other dividend which effeired to them should go to the deferred. Article 7-1 dealt with the provisions of this bargain as between the holders of preference shares and the holders of deferred ordinary shares. It is in these terms.—[*His Lordship read the terms of Article* 7-1].

In the year which ended on 13th December 1904 there was a sufficient profit to admit of paying the fixed dividend of 4½ per cent. on the preference shares and 5 per cent. on the preferred ordinary shares. There remained a balance of a considerable sum, of which the directors proposed to put aside £2500 to a reserve fund, and to pay an addi-

tional dividend of ½ per cent. on the preference shares and 2 per cent. on the deferred ordinary shares, which would exhaust the profits with the exception of a trifling balance which it was proposed to carry forward to the next year. The effect of carrying that £2500 to a reserve fund was on the particular figures of the year to prevent the preference shareholders from getting their additional dividend of 1 per cent. The preference shareholders raised the question whether the company was entitled to deal with the money in this way. The money was put in a suspense account, and it was agreed that it should be paid according to the decision in the special case now before the Court.

The point comes to be a very sharp and short one. By article 138 of the articles of association it is provided that the directors may, before recommending any dividend, set aside out of the profits of the company such sum as they should think proper as a reserve fund for meeting contingencies, or for improvements or losses, &c. And the directors appeal to that article as the warrant for what they have done. The preference shareholders say that at the time that article was written there was nothing more than the common position of 4½ per cent. cumulative preference shareholders and the ordinary shareholders, who got the balance after satisfying the preferential dividend; and that it never could damnify the preference shareholders that a sum should be carried to a reserve fund either because it would not trench on their dividend, or if it did trench on their dividend, then inasmuch as it was used for the preservation of the company's assets, it would benefit them primarily by enabling the company to earn greater profits in succeeding years. and so it, in respect that their dividend was cumulative, would come back to them to the extent of supplying the *lacuna* in previous years. But, they say, that is altered by article 7-1, inasmuch as under that article they now have right to come in after the ordinary shareholders and get extra dividends in the event of the profits being enough in any particular year. That, they say, is really inconsistent with article 138, and their covenant being altered in this way, that article (138) ought not to be used to defeat their right to their additional dividend.

I have come to be of opinion that the directors are within their powers in putting this money in a reserve fund. In the first place, it is not disputed that, if it is *intra vires*, it is a right and proper thing to do. We are not inquiring whether they are doing a right thing in the sense of a prudent thing, and we must begin in the view that what they propose is what any prudent person would do if it were the business of an individual in place of a company. The only question is whether it is *intra vires*. It can only be *ultra vires* if there is something inconsistent in article 7-1 with the terms of article 138. Technically speaking, I think the directors set aside this sum for the reserve fund at the wrong time, because their right to set aside a reserve fund arises before recommending any dividend whatever. But the apportionment being within the terms of article 138, is there anything in article 7-1 which is inconsistent with it. I think not. There is no difficulty in reading the two articles together. Article 7-1 provides for certain ways in which profits are to be divided if they amount to a sufficient sum. The particular obligation of that article will vary from year to year according as the profits are more or less. They may pay none of the additional dividends or one or all of them. And the sum which will be available for this purpose will vary according as the directors have set aside a sum to reserve or not. When we consider the question whether an article in a document is inconsistent with another article in the same document we are bound to make the whole document read together if we can, and only have recourse to the maxim *posteriora derogant prioribus* when there is a true contradiction between the two.

I am fortified in my view by the case of *Fisher* v. *Black and White Publishing Company* ([1901] 1 Ch. 174). The question there was not actually the same as this, but it is very near it. The point arose in this way. There were two classes of shareholders and a covenanted distribution of the whole profits between them in a specified way, but there was a general clause which said that, in so far as not excluded or modified, the regulations contained in Table A of Schedule I of the Companies Act 1862 should be deemed to be the regulations of the company. That table by article 74 has a reserve fund clause practically identical with the clause in the present case, and the question was whether article 74 of Table A was so inconsistent with the covenanted provisions as to make it necessary to say that it did not apply. Their Lordships said that no doubt the practical effect of setting apart money for the reserve fund would be to take away money which would otherwise be available for dividends; but, they said, this is a power which has been given to the directors which is not in itself inconsistent with the ultimate division of the available profits, and which they are entitled to act upon so long as they do so in good faith. I think the case of *Fisher* is really in point.

The only case which was cited for the other view was *Dent* v. *London Tramways Company* (16 Ch. D. 344), but that, I think, is clearly distinguishable. That was a case of a tramway company which had preference and ordinary shareholders; and it had power to form a reserve fund for maintenance, repairs, renewals, and depreciation. The company had prospered and had paid large dividends to the ordinary shareholders, but they had done this at the expense of letting their line go down and become unfit for use, and the day came when they had to spend a large sum in putting matters right. They seem at first to have been inclined to go on in their old ocurse and give

dividends out of what was really the capital of the company, because the first branch of the case consists in an application to restrain them from paying away their whole gross profits in dividends without making any provision for depreciation, and Sir G. Jessel, M.R., gave an injunction against them. That judgment seems to have been misunderstood, and this gave rise to the other branch of the case. The company refused to pay the preference shareholders a dividend until the reserve fund had reached what ought to have been its proper position if it had been kept up all along. But Jessel, M.R., explained that his judgment did not go to that. It did not lay down that since they had fairly made profits this year they were not only to set aside a sum for depreciation out of these profits but also to apply the whole of them to making up deficiencies in the reserve fund. Accordingly he held they were not entitled to injure the preference shareholders by making up in one year what was necessary to put the line in condition. No question arose in that case as to the possibility of creating a reserve fund at all. The class of question that arises here did not and could not arise in *Dent*.

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

LORD ADAM—I concur.

LORD M'LAREN—In considering the construction of power given to directors by articles of association it is well to bear in mind that directors are almost always substantial holders of shares in the company whose affairs they are administering, and that they are selected by the other shareholders as men of capacity and honesty to manage their affairs. Directors as such are not expected to take part in the mechanical details of the business, but only to give their attention to matters of general administration, and it is necessary that they should be entrusted with considerable powers. Any power may, of course, be proved unworkable if it is supposed that the directors are incompetent or untrustworthy. But the answer is that in such a case the shareholders would not continue such a body in the control of their affairs.

When we come to clause 138 in these articles of association—a very usual clause in articles of association—we find that this clause gives the directors such powers of dealing with the reserve fund as a reasonable man might be expected to use in the conduct of his own affairs. Before recommending a dividend they are to consider the wants of the undertaking, the amount of depreciation, and the future contingencies to be provided for. When the articles were amended by the introduction of 6-1 and 7-1 there is nothing in the language of either of these clauses to suggest that it ever was in the minds of the shareholders to interfere with the directors' powers as to reserves.

As I have said, such powers may be abused. But even if these additional provisions had not been introduced into the articles of association the directors might have put the whole profits into the reserve fund without declaring a dividend at all. It is probable, indeed, that they would not be able to do so more than once. That being so, I think the directors were within their powers in carrying these sums to the reserve fund, even though the effect of that was to deprive the preference shareholders of the additional one per cent. to which they would otherwise have been entitled. They could, of course, not be permanently deprived of this one per cent. if the increase in the profits became so large that the directors, acting in good faith, could not refuse to increase the dividend according to the rule prescribed. I think that the discretion of the directors under section 138 is not interfered with by the new articles, and that the decision to which your Lordship has referred is clearly in point.

LORD KINNEAR was not present.

The Court answered the first question in the negative and the second in the affirmative.

Counsel for the First Parties—Ure, K.C. —Hunter, K.C.—J. B. Young. Agents—Mitchell & Baxter, W.S.

Counsel for the Second Parties—Dean of Faculty (Campbell, K.C.)—Horne—J. M. Hunter. Agents — Carmichael & Miller, W.S.

Saturday, November 25.

SECOND DIVISION.

[Sheriff Court of the Lothians and Peebles at Edinburgh.

MACPHERSON *v.* DRUMMOND (MACPHERSON'S TRUSTEE).

Bankruptcy — Sequestration — Beneficium Competentiæ — Working Tools — Implements of Livelihood—Tools of a Practiser of Dentistry—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 102—*Relevancy.*

A, who practised dentistry, brought an action against the trustee on his sequestrated estate, in which he prayed the Court to interdict the defender from selling, removing, or otherwise interfering with certain articles. Pursuer averred that the articles in question were absolutely necessary and essential for his carrying on the business of dentist, and so earning his livelihood, and pleaded that these articles in consequence remained his property, and did not fall under the sequestration.

Held that the rule exempting working tools from being attachable for debt was not necessarily confined to labouring men, and proof allowed.

Observed that where "a dentist does