part of the company's name, or otherwise after such short period as your Lordships may think fit'; to direct registration by the Registrar of the final order; and 'to order notice of such registration to be given by such advertisement as to your Lordships shall seem proper.' Section 51 (3) of the statute provides that 'notice of the registration shall be published in such manner as the Court may direct.' The Second Division now usually orders advertisement in the *Edinburgh Gazette* alone, while the First Division on the other hand directs advertisement in the newspapers as well. In this case it would be in the *Scotsman* and the *Aberdeen Journal.*

"The question of dispensing with the words 'and reduced' is more difficult. It depends on the terms of section 48 of the statute—'On and from the confirmation by a company of a resolution for reducing share capital . . . the company shall add to its name until such date as the Court may fix the words "and reduced" as the last words in its name, and those words shall, until that date, be deemed to be part of the name of the company—provided that where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court may, if it thinks expedient, dispense altogether with the addition of the words "and reduced."' (This section consolidates the provisions of the Companies Act 1867, section 10, and the Companies Act 1877, section 4.) The present is a case of diminution of liability, and therefore does not seem to fall under the operation of the proviso.

"In a petition, *Glasgow Cotton Spinning Company, Limited, and Reduced,* for confirmation of reduction, 16th November 1905 (unfortunately not reported), which apart from procedure seems indistinguishable from the present, these matters were specially brought before the Court, and, no *interim* dispensation having been granted, the order pronounced was—'Edinburgh, 22nd December 1905.—The Lords . . . dispense with the addition of the words "and reduced" to the company's name from and after 15th January 1906: Appoint notice hereof to be made by advertisement once in the *Edinburgh Gazette* and in the *Scotsman* and *Glasgow Herald* newspapers, and decern.—J. H. A. MACDONALD, *I.P.D.*' That ruling, however, was departed from in the case of *Walker Steam Trawl Fishing Company,* 1908, S.C. 123, 45 S.L.R. 111, where the present practice of dispensing entirely with the use of the words 'and reduced,' and ordering advertisement once in the *Edinburgh Gazette* was adopted. (This case seems only to have been reported because the Court was there refusing to confirm an alternative scheme.) The reporter has since found many unreported cases of the class under consideration dealt with in both Divisions of the Court in accordance with the case of *Walker Steam Trawl Fishing Company* and not with that of *Glasgow Cotton Spinning Company.*

"The usual order pronounced by the English Courts in such cases is correctly given in Palmer's 'Company Precedents' (11th ed.), part I, p. 1297, as follows—'. . . And it is ordered that notice of the registration by the Registrar of Companies of this order and of the said minute be published as follows, that is to say, once each in the *London Gazette* and the (*other newspapers*) within ten days after such registration, and it is ordered that the words "and reduced" form part of the title of the said company for one month from the date of this order.' The company has also to use the words pending the proceedings—a period of usually more than six months, though this is sometimes dispensed with on cause shown, supported by affidavit."

The Court pronounced this interlocutor—

"... Confirm the reduction of capital resolved on by the special resolution passed at the extraordinary general meeting of the company held on the 2nd day of November 1915, and confirmed at the extraordinary general meeting held on the 17th day of November 1915, as set forth in the petition: Approve of the minute set forth in the petition: Dispense altogether with the words 'and reduced' as part of the name of the company: Direct registration of said confirmation order and minute by the Registrar of Joint Stock Companies, and on the said order and minute being registered by the said Registrar direct notice of such registration to be given by advertisement, once in the *Edinburgh Gazette,* and once in each of the *Scotsman* and the *Aberdeen Journal* newspapers, and decern."

Counsel for Petitioners—D. R. Scott. Agents—Alex. Morison & Company, W.S.

Thursday, January 20.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

GEBRUDER VAN UDEN *v.* BURRELL.

Diligence—Arrestment—War—Arrestments on Dependence—Arrestments Used before Outbreak of War.

Arrestments, on the dependence of an action at the instance of an enemy pursuer against a British defender, laid on before the outbreak of war, were *recalled* after the outbreak thereof.

Partnership—War—Alien Enemy—Trading with the Enemy Proclamation, 5th August 1914—*Sole Partners—Firm of Dutch Pursuers Individually Interested in Business Carried on in Germany.*

In an action against a British subject at the instance of a Dutch firm carrying on business in Holland, it was admitted that the sole partners of the firm were also individually interested in, though not the sole partners of, a firm which carried on business in Germany. *Held* that the pursuers were

alien enemies in the sense of Trading with the Enemy Acts and relative proclamations, and action *sisted* until termination of the war.

On 5th December 1913 Gebruder van Uden, steamship owners, Rotterdam, *pursuers*, brought an action in the Sheriff Court at Glasgow against Henry Burrell, shipowner there, *defender*, in which the pursuers sought payment of sums amounting *in cumulo* to £1670, alleged to be due to them by the defender as their share of the expenses of certain arbitration and other legal proceedings which had arisen out of an unsuccessful joint-adventure in which the parties had been engaged.

The Sheriff-Substitute (FYFE) granted warrant to arrest on the dependence of the action, and by virtue of this warrant the pursuers arrested certain sums amounting *in cumulo* to £1850.

In September 1914 the defender brought an action in the Sheriff Court at Glasgow for the recal or restriction of the arrestments.

On 22nd June 1914 the defender raised an action in the Court of Session against the pursuers for reduction of an agreement upon which the pursuers founded in their petitory action in the Sheriff Court. On 26th June 1915 the Lord Ordinary (ORMIDALE) ordered the process in the latter action to be transmitted, *ob contingentiam*, to the Court of Session. The process in the action for recal or restriction of arrestments was also so transmitted.

The defender thereafter lodged a minute. He stated "that since the record was closed in the said action he has ascertained and now avers that the said Gebruder van Uden carry on business at Duisberg in Germany, and also at Antwerp, which is presently in hostile occupation, and are therefore enemies within the meaning of the Trading with the Enemy Act 1914, and the Trading with the Enemy (Amendment) Act 1914, and the Trading with the Enemy (Occupied Territory) Proclamation, dated 16th February 1915," and that he therefore moved the Court "to sist the said action until the conclusion of the war between Great Britain and the German Empire."

The pursuers lodged answers in which they denied the averments made in the defender's minute, and stated—"The sole partners of the firm of Gebr. van Uden, which carries on business at Rotterdam, are Mr J. van t'Hoff and his son Mr C. van t'Hoff, both of whom reside at Rotterdam. The said firm of Gebr. van Uden in Rotterdam has branches at Amsterdam and Zaandam in Holland, which are under the charge of their manager Mr Lucassen. There is in Duisberg in Germany a firm carrying on business under the name of Gebruder van Uden, and the said J. van t'Hoff and C. van t'Hoff are interested therein individually, but they are not the owners of, or sole partners in, the said business. The said firm is registered under German law, and is independent of the business owned and carried on by the Messrs van t'Hoff in Rotterdam as aforesaid. There is also a firm in Antwerp carrying on business under the name of Gebruder van Uden & Co., in which the said J. van t'Hoff and C. van t'Hoff are interested individually, but there are other interests likewise involved in the said firm, which is quite separate from and independent of the Rotterdam firm, and is registered under Belgian law. The firm of Gebr. van Uden in Rotterdam are not liable in any form or way for the debts and obligations of the said businesses which are carried on at Duisberg and Antwerp under the firm names of Gebruder van Uden and Gebruder van Uden & Co., and are not owners of or entitled to the assets and rights of the said businesses or either of them."

On 30th November 1915 the Lord Ordinary allowed a proof of the averments made in the minute and answers; on 3rd December 1915, pronounced an interlocutor in which he restricted the arrestments which had been used on the dependence of the action to a certain sum, and recalled them in so far as they were in excess thereof.

Opinion.—"The first question I have to decide is whether the proceedings should be sisted in respect that the pursuers are enemies in the sense of the Trading with the Enemy Acts and the proclamation to which I was referred. There is a definite averment in the minute lodged by the defender that Gebruder van Uden carry on business at Duisberg in Germany, and also at Antwerp, which is presently in hostile occupation. If that is true in fact, then they are undoubtedly enemies in the sense of the legislation to which I have referred. But then the answers set out various particulars about the firm of Gebruder van Uden in Rotterdam to show that it has no connection with another firm of the same name in Duisberg and a firm in Antwerp, whose name is Gebruder van Uden & Company. Now, having regard to the English cases which were cited to me, I am not prepared to hold that if Gebruder van Uden of Rotterdam are truly a distinct and separate firm from Gebruder van Uden of Duisberg and Gebruder van Uden & Company of Antwerp, they are to be treated as enemies merely because the individual partners of the Rotterdam firm have a personal interest in the other firms to which I have referred. If I were so to hold without knowing precisely what, if any, is the commercial connection of the Rotterdam firm with the other firms, and how far the different businesses, if they are different, are inter-related, I might be doing an injustice to the Rotterdam firm.

"Accordingly there must be an inquiry.

"During the discussion I was inclined to think that it would be for the defender to lead in any proof that might be found necessary; but, on consideration, looking to the admissions made by the pursuers in their answers as to the existence of firms of the names Gebruder van Uden and Gebruder van Uden & Company in Duisberg and Antwerp in which they are interested, I have come to the conclusion that it is for them to prove that they do not in fact carry on business in Duisberg and Antwerp as well as in Rotterdam. No doubt they give

explanations to the effect that the interests of the different firms, notwithstanding the similarity of their titles, are *qua* commercial undertakings entirely distinct and several; it seems to me that in the circumstances it is for them to show that that is so.

"Accordingly I shall allow the pursuers Gebruder van Uden an opportunity of proving the averments contained in their answers. My own opinion is that the proof allowed in the present circumstances will be very difficult to carry out, and if either party were to move me for a sist I should as at present advised be prepared to grant the motion.

"As regards the question of arrestments Gebruder van Uden have used a diligence which they were entitled to use in the ordinary course. Now the defender here has not satisfied me that the amount of funds arrested, in relation to the amount claimed in the action against him, is so large as to warrant me in holding that the use of the diligence is oppressive. It must be noted also that the petition for recal of the arrestments which was presented in the Sheriff Court so long ago as September 1914 has not, although it might have, been insisted in. Accordingly I do not propose to recal the arrestments. If, however, the defender is well founded in stating that the arrestments have attached two funds of £1250 and £1600 respectively, amounting in all to £2850, then in my opinion the arrestments ought to be restricted. The sum sued for in the action is £1670 or thereby, and to some extent is a random sum. Against this a counter claim for £480 is stated by the defender, and although it appears to me to be very largely of the nature of a random sum, I am at this stage of the proceedings bound to take it into consideration at least to some extent.

"Accordingly I think that I shall be doing justice to both parties if I restrict the amount of the arrestments to the sum of £1200—£600 in the case of each set of arrestees; and I shall make an order accordingly."

The pursuers reclaimed against these interlocutors to the First Division. At the hearing on 7th January 1916 counsel for the defender moved the Court to recal the arrestments and sist the action.

Argued for the defender—It was admitted in the pursuers' note that the two sole members of their firm carried on business in Germany. They were therefore alien enemies in the sense of the Trading with the Enemy legislation and proclamations, and the action should accordingly be sisted—Trading with the Enemy Amendment Act 1914 (5 Geo. V, c. 12), Preamble; Trading with the Enemy Proclamation, 5th August 1914. It was immaterial that the pursuers were a Dutch firm. It was admitted that its members carried on business in Germany. The defenders were entitled to assume in this matter that the rights and liabilities of partners of such a firm were governed by law similar to that of Scotland, and that these gentlemen were liable for its debts and shared in its profits. In this respect the case was distinguished from that of *Continental Tyre and Rubber Company* v. *Daimler Company*, [1915] 1 K.B. 893, for here there was a clear inference that the firm's profits would actually be paid to alien enemies, an inference which the Court did not see its way to draw in the case cited. A firm could not be other than alien and enemy when all its members were alien enemies—Lindley on Partnership, 8th ed., p. 22. The Court was entitled to act in such a matter upon a *prima facie* view, and the German character of the Van Uden business appeared quite clearly *prima facie* from the admissions in the case—see also *H.M. Advocate* v. *Hetherington*, 1915 S.C. (J.) 79, 52 S.L.R. 742. The Court was not bound to go into any minute examination of the co-relation of these firms and their individual partners — *Orenstein & Köppel* v. *Egyptian Phosphate Company*, 1915 S.C. 55, 52 S.L.R. 54. Whatever equities might be pleaded on behalf of an enemy defender, an enemy pursuer seeking to recover payments from a British defender was not entitled to any exceptional treatment—*Porter* v. *Frendenberg*, [1915] 1 K.B. 857. As regards the arrestments an enemy party was entitled to no assistance from the Court whilst the war lasted, and the arrestments should therefore be recalled.

Argued for the pursuers—The action was at the instance of a Dutch, a neutral, firm. The fact that the Dutch firm had members who were in fact partners in an enemy business did not fix an enemy character upon it, and the neutral firm was therefore not debarred from suing in our courts. If this argument was sound it followed that the arrestments used should not be recalled.

LORD PRESIDENT—In the action of payment I am of opinion that the process must be sisted because the pursuers in the action, J. van t'Hoff and C. van t'Hoff, are, by their own admission, alien enemies. They both, by their own admission, carry on business in Germany. They are therefore persons with whom the defender as a British subject can, during the period that the war lasts, engage in no commercial intercourse. They are persons to whom the defender can make no payment of money and to whom he can give no security of any kind whatever. They are persons who cannot enforce their civil rights by invoking the assistance of His Majesty's courts of law. They cannot be heard in any proceeding in which they are the persons first setting the Courts in motion. The proposition that an alien enemy cannot sue rests, as Lord Justice Buckley observed in the *Continental Tyre and Rubber Company (Great Britain)* case, [1915] 1 K.B. 893, "upon the proposition that such an one cannot approach the King and cannot invoke the assistance of the King. The Court is the King's Court. The alien enemy cannot come into that Court or have the assistance of that Court, because the Court is, for judicial purposes, the King sitting in his Court, and the alien enemy cannot approach him."

It must not be forgotten that the principle which lies at the root of this legisla-

tion—I refer to the Trading with the Enemy Acts and also to the Royal Proclamation thereanent—is public policy which forbids the doing of acts that will be or may be to the advantage of the enemy state by increasing its capacity for prolonging hostilities, in adding to the credit, money, or goods, or other resources available to individuals in the enemy state. In short, as Mr Justice Willes observed in the case of *Esposito* v. *Bowden*, 1867, 7 E. & B. 763, "It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the individuals of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal." And as was observed in somewhat popular but even more forcible language by the President of the Board of Trade—"While the war is on we ought to do everything in our power to injure and to ruin German finance. During the war we should do everything we can to destroy German credit, and to that end we should do everything in our power to cripple, cramp, squeeze, and destroy her trade."

Now when I turn to the action for payment I find it is raised at the instance of a firm named Gebruder van Uden, who are designed as shipowners and carry on business at Rotterdam. And in a subsequent minute given in by them in the process after the outbreak of war they say that the sole partners of the firm of Gebruder van Uden, which carries on business at Rotterdam, are Mr J. van t'Hoff and his son Mr C. van t'Hoff, both of whom reside at Rotterdam. They are the pursuers of the action; they directed the raising of the action; they are now prosecuting the action. If they are successful they will recover a sum which we were informed would amount to upwards of £1400, every penny of which would go into the pockets of these two persons, and they in the meantime hold a security over British assets for the recovery of the amount of that debt.

It is quite true that the action is raised in the name of the firm Gebruder van Uden, but that is wholly immaterial. It might equally well have been raised in name of these two men, J. van t'Hoff and C. van t'Hoff, as partners of that firm and as individuals. They are the persons who direct and control this litigation. They are the persons who are, so far as we know, solely interested in this litigation, and they are the persons who are now seeking the aid of His Majesty's courts of law to recover a debt from a British subject. And accordingly it signifies nothing under what name, title, or designation they sue.

Now after the outbreak of war—the action was raised prior to the outbreak of war—the defender lodged a minute in process in which he averred that Gebruder van Uden carry on business at Duisberg in Germany. If that averment is correct, then, of course, this action cannot go on. In answer the pursuers in their minute say there is in Duisberg in Germany a firm carrying on business under the name of Gebruder van Uden, and the said J. van t'Hoff and C. van t'Hoff are interested therein individually, but they are not sole partners in the said business. That I take to be a clear and explicit admission that the two pursuers in this action, J. van t'Hoff and C. van t'Hoff, father and son, are interested in a business at present being carried on in Germany and are partners in that business, although not the sole partners. But it signifies absolutely nothing who their co-partners are—of what nationality they are or what number they are—because if these two are partners in a business carried on at Duisberg in Germany then they are carrying on business in an enemy country and they are alien enemies within the meaning of the Trading with the Enemy Act and within the meaning of the Royal Proclamation. If that is so, then it is obvious that they have no right to ask the aid of this Court to enforce their civil rights. They cannot approach this Court. We cannot hear them in this Court. And accordingly it follows that inasmuch as they are alien enemies the process must be sisted until the end of the war.

When I turn to the petition for recal of arrestment, it appears to me that it necessarily follows, from the conclusion I have reached in the action for payment, that the arrestments must be recalled. It is quite true that they were laid on and the security thereby conferred was obtained before the outbreak of war, but it is equally certain that after the outbreak of war they could not have obtained this security over the defender's assets and property. And if not, then I hold it follows necessarily that they cannot retain or maintain a security over the assets of a British subject which they could not now obtain. They are not permitted to take any step whatever for the recovery of their debts in the Courts of His Majesty, and I know of no step which can make surer that their debt will be recovered than to hold a good security for payment of that debt.

Now they can only retain that security by the aid of His Majesty's Courts, for undeniably we have power to recal the arrestments and to release the embargo which has thus been placed upon British assets, which may for aught that I know form a fund of credit for alien enemies. I hold therefore that it would be a direct violation of the spirit if not of the letter of the Trading with the Enemy Acts and the Royal Proclamation if we were to refuse the remedy which the British subject here seeks and to refuse to release from the embargo under which they now lie the assets which belong to him.

Accordingly I am in favour, in the action for payment, of recalling the interlocutor of the Lord Ordinary of 30th November last and sisting the process until the end of the war; and in the petition for recal of arrestments I am for recalling the interlocutor of the Lord Ordinary of 3rd December and granting the prayer of the petition.

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