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

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

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

LORD M'LAREN and LORD KINNEAR concurred.

LORD PEARSON was absent.

The Court answered the question in the affirmative.

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

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

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

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

Tuesday, March 17.

SECOND DIVISION.

[Lord Low, Ordinary

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

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

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

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

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

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

The defenders, before defences were lodged, by ordinary motion, and without presenting a petition under the Personal Diligence Act 1838, section 20, moved the Lord Ordinary for recal. The motion was opposed by the pursuers on the grounds *firstly*, that it was incompetent, *secondly*, that it was unwarranted on the merits, and the Lord Ordinary refused the motion on the former ground. The pursuers were ultimately successful in the action and were found entitled to expenses.

In their account they included a charge of £6, 6s. 10d. for their successful opposition of the motion for recal. This charge the Auditor disallowed *in toto*, and the pursuers objected to the disallowance in a note of objections to his report.

Argued for the pursuers—The Auditor had disallowed the charge in question on the ground that proceedings for the recal of arrestments formed of necessity a separate and independent process, and that accordingly they must be separately dealt with and could not form a charge in the principal action. That was probably true where there had been a separate petition for recal. In the present case, however, there had been no separate petition—what had happened merely was this that the pursuers had been successful in an incidental motion in the main process, for which they must get their expenses in the ordinary way. The Lord Ordinary had written no interlocutor and the pursuers accordingly had had no opportunity of having the expenses specially dealt with or specially reserved.

Argued for the defenders — Formerly arrestments could only be recalled by petition to the Inner House. The Personal Diligence Act 1838, section 20, had made a petition to Lord Ordinary competent, and had empowered him to dispose of the question of expenses. Such a petition was clearly a separate process, the expenses of which must be separately dealt with. It was true that an ordinary motion had by custom been allowed to take the place of the petition, but the motion was merely equivalent to the petition and was just as much a separate process as the petition. If expenses were to be recovered, they must be awarded, or at anyrate reserved, at the time.

The Court sustained the objection and allowed three guineas as the expenses.

Counsel for the Pursuers—Macmillan. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Defenders—C. D. Murray. Agent—R. H. Miller, S.S.C.

Tuesday, March 17.

SECOND DIVISION.

[Sheriff Court at Perth.

SINCLAIR *v.* MOULIN SCHOOL BOARD AND ANOTHER.

School—Education—School Board—Duty to Provide Education—Title to Sue—Child—Parent—Education (Scotland) Act 1872 (35 *and* 36 *Vict. cap.* 62), *secs.* 1 *and* 69—*Education (Scotland) Act* 1901 (1 *Edw. VII, cap.* 9), *sec.* 1.

A pupil child residing with his grandfather (his "parent" within the meaning of sec. 1 of the Education (Scotland) Act 1872) *held* to have no title to raise an action against a school board for the purpose of enforcing his alleged rights to receive education, the title to sue such an action being in the "parent," on whom the duty of providing elementary education for the child has been imposed by the Education Acts.

School—Education—Defective Children—Duty of School Board—The Education of Defective Children (Scotland) Act 1906 (6 *Edw. VII, c.* 10), *secs* 1 *and* 2—*Decision of School Board—Review.*

The Education of Defective Children (Scotland) Act 1906 enacts (sec. 1) that it shall be lawful for a school board "if they think fit" to make special provisions for the education of "defective" children, defined (by sec. 2) to mean "children who, not being imbecile, and not being merely dull or backward, are by reason of mental or physical defect incapable of receiving proper benefit from the instruction in the ordinary schools." *Held* (1) that a school board was entitled to refuse to receive such a child into its school, and at the same time to refuse to make special provision for its education elsewhere; (2) that the school board and Education Department were the proper judges of the fact of the child's defectiveness and unfitness for ordinary education, and that the Court would not review their decision nor allow a parent a proof of his averments that the child was not defective, if satisfied that the education authorities had exercised their discretion carefully and honestly.

The Education (Scotland) Act 1901 (1 Edw. VII, cap. 9), sec. 1, enacts—"It shall be the duty of every parent to provide efficient elementary education in reading, writing, and arithmetic for his children who are between five and fourteen years of age."

The Education of Defective Children (Scotland) Act 1906 (6 Edw. VII, cap. 10) which is (sec. 3) to "be construed as one with the Education (Scotland) Acts 1872 to 1906," sec. 1 enacts—"From and after the commencement of this Act it shall be lawful for a school board in Scotland, if they think fit, either alone or in combination with one or more school boards, to make special provision for the education,