

corporated society are always proper persons to be named along with the society itself, both because they are likely to be substantial persons and acquainted with the affairs of the society, and also because they are the persons to whom the society has deputed the conduct of its affairs. I do not say that in every case it would be sufficient that the office-bearers of the club or society were named, but in the majority of cases it may be fairly considered that the office-bearers fairly represent both the mind of the society with whom they are associated and the requirement of character and responsibility. In the present case, while we have had very full argument upon the legal questions, no personal objection has been stated to any of the parties named as pursuers, and I must take it that those persons sufficiently represent the wishes of the Football Club, and that the objection to the instance is maintained upon theoretical grounds.

There is, however, a further condition of the right of an unincorporated society to sue by a representation of its members, and that is, that those persons must be duly authorised by a meeting of the society. It is plainly not necessary that they should be authorised by every individual member of the society or that there should be a signed power of attorney, because there would be the same difficulty in getting such a deed as there would be to find out the names of the persons to be inserted in the summons. But there must be an authority given by at all events a majority of the known members of the club, either in writing or by a resolution of a meeting attested in the ordinary way. The Lord Ordinary has allowed proof on the subject, and on the first explanation of the case we were all disposed to affirm the principle which the Lord Ordinary had laid down. But with the view of saving litigation, counsel interposed and produced a signed minute giving the necessary authority. It is objected to that minute that while it authorised the institution of the action it did not say in what name the action should be prosecuted, and if that had been the only objection to the mandate I should not have thought it a good one. It was the function of the meeting of a society to give authority to institute an action, but it was not part of their duty, because they were not a meeting of lawyers, to state the form in which the action should be brought. But the position of the case is now somewhat altered, because it is stated by counsel for the defenders that they mean to deny the authenticity of the mandate upon the ground that the meeting was not properly convened, and the result of that objection is that we must simply adhere to the Lord Ordinary's interlocutor and leave it to be proved, if it can be proved, that the requisite authority was given.

LORD ADAM and LORD KINNEAR concurred.

LORD ADAM intimated that the LORD PRESIDENT, who was absent, also concurred in the judgment.

The Court adhered.

Counsel for the Pursuers—Graham Murray—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for the Defenders—Asher, Q.C.—R. V. Campbell—C. S. Dickson. Agents—A. J. & J. Dickson, W.S.

Friday, March 13.

FIRST DIVISION.

THE GLASGOW TRAMWAY AND OMNIBUS COMPANY, LIMITED *v.* THE LORD PROVOST, MAGISTRATES, AND TOWN COUNCIL OF GLASGOW.

Public Company—Companies Memorandum of Association Act 1890 (53 and 54 Vict. cap. 62)—Alteration of Articles of Association—Confirmation Order.

The Companies Memorandum of Association Act 1890, sec. 62, provides:—

“1. Power for company to alter objects or form of constitution subject to confirmation by Court.—(1) Subject to the provisions of this Act, a company registered under the Companies Acts 1862 to 1886 may by special resolution alter the provisions of its memorandum of association or deed of settlement with respect to the objects of the company so far as may be required for any of the purposes hereinafter specified; . . . but in no case shall any such alteration take effect until confirmed on petition by the Court which has jurisdiction to make an order for winding-up the company. (2) Before confirming any such alteration, the Court must be satisfied—(a) That sufficient notice has been given to every holder of debentures or debenture stock of the company, and any persons or class of persons whose interest will, in the opinion of the Court, be affected by the alteration; and (b) That with respect to every creditor who in the opinion of the Court is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained, or his debt or claim has been discharged, or has determined, or has been secured to the satisfaction of the Court. . . .

(5) The Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company, if it appears that the alteration is required in order to enable the company—(a) To carry on its business more economically or more efficiently; or (b) To attain its main purpose by new or improved means; or (c) To enlarge or change the local area of its operations; or (d) To carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company; or (e) To restrict or abandon any of the objects specified

in the memorandum of association or deed of settlement.”

The Corporation of Glasgow possessed statutory powers to make and maintain tramways. Section 26 of their statute provided that animal power alone should be used on the tramways. The Corporation leased the tramways for twenty-three years from 1st July 1871 to a limited company, whose memorandum of association included the objects of working the tramway business and omnibus traffic in connection therewith, and after the expiry of the lease, of carrying on the business of omnibus proprietors in the city and vicinity. The company was bound to apply their whole capital to the purposes of the Glasgow tramways, and, besides, they undertook pecuniary obligations to the Corporation amounting to about £30,000 per annum, and the Corporation in security thereof held under disposition heritable property to the value of £129,232.

The company in the course of their business acquired a large stock of horses and plant, the greater part of which would be rendered useless and a source of loss in the event of the lease not being renewed and their being reduced to the position of omnibus proprietors. To provide thereagainst the company applied to the Court for alteration of their memorandum of association so as to include, *inter alia*, these objects—“(10) To exercise the powers and carry on the business of a tramway company, and to promote or acquire, equip, work, and dispose of any tramways within the city of Glasgow and the vicinity. (11) To carry on the business of omnibus, road-car, coach, hackney, or stage carriage and cab proprietors, carting and general contractors, undertakers, funeral furnishers, and carriers in all their various branches. (12) To carry mails, parcels, and other matter transmitted through the post office. . . . (13) To work and move all or any of the carriages or other vehicles of the company by means of electrical power, steam power, or by any other mechanical power which may be available, or by means of haulage with wire ropes, cables, chains, or other appliances.”

The Corporation opposed the application (1) because No. 13 was inconsistent with the prohibition by Parliament of mechanical power; and (2) because their pecuniary interests under the contract would be prejudiced, and if the petitioners were allowed to enlarge the purposes of their business, it would be open to them to devote their capital to purposes foreign to the original constitution. It appeared that the company's obligations during the remainder of the lease amounted in full to £105,000, and they offered during that time not to apply their uncalled capital to other purposes than those of the existing lease.

Held (1) that No. 13 of the proposed

alterations would give the petitioners no right to use mechanical power contrary to the provisions of the statute, but would only have the effect of removing a disability personal to themselves, and enabling them to contract with any party entitled to authorise the use of mechanical power; (2) that in view of the property held by the Corporation under disposition in security, and the undertaking of the petitioners as to their uncalled capital, the interests of the Corporation were sufficiently secured; (3) that while the other proposed objects would not carry the business of the petitioners beyond the scope of the statute, the power sought in No. 10 to promote and dispose of tramways was foreign to the purposes of their memorandum of association.

On 10th August 1870 an Act was passed entitled “The Glasgow Street Tramways Act 1870,” by which certain persons were united into a company for the purpose of making and maintaining certain tramways on the streets of Glasgow. Before this Act was passed on 30th June 1870, the Corporation of the city concluded an agreement with its promoters, by which, *inter alia*, power was conferred on the Corporation, within six months after the passing of the Act, to intimate to the company thereby incorporated their desire to be substituted in place of the company. On such intimation being given, and on certain conditions set forth in the agreement being complied with, then the corporation were to have all the powers conferred by the Act on the company as to the construction, maintenance, and working of the tramways. This agreement was scheduled to the Act, and was confirmed by the 85th section thereof.

The Corporation exercised the option conferred on them by the said agreement; they took the place of the company under the Act, and they constructed the tramways authorised by the Act, and others subsequently sanctioned by Parliament.

By section 26 it was provided “that all carriages used on any tramway shall be moved by animal power only.” In terms of the Act the Corporation leased the tramways for twenty-three years from the 1st July 1871 to the Glasgow Tramway and Omnibus Company, Limited. It was stipulated that the capital of the company was to be not less than £200,000, “applicable solely to the tramways to be leased under this agreement, and omnibuses and omnibus traffic in connection therewith.”

The following pecuniary obligations were undertaken by the company—“(2) Interest paid by the Corporation on money expended on tramways, on capital account, and on expenses of the Glasgow Street Tramways Act 1870, and other expenses. (3) A sum of 3 per cent. on the gross sum expended on capital account to be set aside as a sinking fund. (9) £150 per annum for every mile of street on which tramway traffic was carried. (10) A percentage on money expended in making tramways to be set aside to meet expense of renewing and repairing roadways. (11) An invest-

ment of at least £60,000 in purchase of heritable property, to be conveyed to the Corporation in security of the company's obligations."

The company's memorandum of association included these objects—“(4) To work, conduct, and develop the business of the tramways . . . and of the omnibus traffic in connection therewith. (5) After the expiration of the lease or leases aforesaid, to carry on the business of omnibus proprietors in Glasgow and the vicinity.”

The capital of the said Tramway Company was £350,000, divided into 35,000 shares of £10 each. The whole capital was subscribed and issued, and at the date of the present application £9 per share had been called up.

The company, in terms of the lease above referred to, worked the tramways in Glasgow from July 1871, and were doing so in October 1890, when at two different meetings the following special resolutions were passed and confirmed—“I. That the memorandum of association of the company be altered so as to include among the objects for which the company is established, the following or any one or more of them, viz.—“(10) To exercise the powers and carry on the business of a tramway company, and to promote or acquire, equip, work, and dispose of any tramways within the city of Glasgow and the vicinity. (11) To carry on the business of omnibus, road-car, coach, hackney, or stage carriage and cab proprietors, carting and general contractors, undertakers, funeral furnishers, and carriers in all their various branches. (12) To carry mails, parcels, and other matter transmitted through the post office. . . . (13) To work and move all or any of the carriages or other vehicles of the company by means of electrical power, steam power, or by any other mechanical power which may be available, or by means of haulage with wire ropes, cables, chains, or other appliances. (14) To amalgamate the business of the company or any part of it with any company, corporation, or person carrying on the same or any similar business, or to work and carry on under agreement any similar business for the conveyance of passengers, parcels, and goods, and to make and carry into effect contracts and arrangements for such amalgamation or working, or for sharing of profits, or for securing community of interests. II. That the directors be and are hereby authorised to apply to the Court for confirmation of the foregoing resolutions, in terms of the Companies (Memorandum of Association) Act 1890. III. That the capital of the company be increased by £150,000 divided into 15,000 shares of £10 each, and may be issued at such times and at such prices, and on such terms and conditions as the board may from time to time determine. This third resolution had been duly filed with the Registrar of Joint-Stock Companies.”

In November 1890 the Tramway Company presented to the Court of Session a petition setting forth the proposed alterations of their memorandum of association, and praying for a confirmation order. They

averred that at the date of the present application the capital employed by them in their business was £369,562, that the pecuniary obligations undertaken by them to the Corporation amounted in all to less than £30,000 per annum, on the average of the last five years, and for the three and a-half years of the lease still to run the total amount to be paid by them would not on the average exceed £105,000; the Corporation, in terms of clause 11 of the lease, held under absolute disposition heritable property to the value of £129,232 in security of the petitioners' obligations; and that as a further security there was £35,000 of uncalled capital.

The Corporation had now intimated their intention to apply to Parliament in the ensuing session for powers to work the tramways by electricity or mechanical power, alleging that they already possessed the powers to work them by horses. In these circumstances, the petitioners thought it prudent that steps should be taken to widen the field of the petitioners' business, so that their large stock of horses and plant might not become useless, in the event of no arrangements for a prolongation of the lease being arranged, or in the event of the Corporation being successful in their said application to Parliament, so that the petitioners might be in a position to offer for a lease to work the tramways otherwise than by animal power. There were no holders of debentures or debenture stock of the petitioners' company, and (so far as the petitioners were aware) there were no persons or class of persons whose interests would be affected by the proposed alteration. The petitioners' company had no creditors other than ordinary trade creditors whose accounts were paid once a month. These creditors changed from month to month, and the petitioners' assets would meet these accounts many times over. The proposed alteration was required to enable, and would enable, the petitioners to carry on business more economically and more efficiently, and to work the tramways, and so to attain their main purpose by new or improved means, and to enlarge the local area of their operations and to carry on business which under existing circumstances might conveniently and advantageously be combined with the petitioners' business.

Answers were lodged for the Lord Provost and Magistrates of Glasgow, who, *inter alia*, averred—By virtue of the statutes, agreements, and lease above mentioned the petitioners' company are, the respondents contend, absolutely precluded, at all events during the subsistence of the lease, from carrying on any other business than the working of the tramways leased to them by the respondents. And it was on the faith that the energy and capital of the petitioners would be dedicated solely to this end that the respondents undertook the very large expenditure on the construction of tramways above mentioned. There is no warrant or authority whatever in the statute, agreements, or lease for the very

extensive change in the character and scope of their business now projected by the petitioners. Further, the respondents entertain strong objections to the alterations now sought to be made upon the petitioners' memorandum of association, as being inimical to the public interests, which it is the duty of the respondents to conserve. Of the objects comprised within resolution I., the respondents regard (10), (13), and (14) as particularly objectionable. With regard to object (10), . . . the respondents contend that to introduce this object into the petitioners' memorandum of association would be to run entirely counter to the Act of Parliament on which the agreements and lease above mentioned are based. By that Act the petitioners' company came into existence solely for the purpose of working tramways which the respondents were empowered to construct. If the petitioners' company were now permitted to promote or acquire and work other tramways, then the capital, energy, and resources which the respondents were entitled to rely upon being dedicated exclusively to the tramways constructed by them may be dissipated on other and entirely different concerns. It is for the interest of the city of Glasgow that the petitioners' company should devote its resources and energies solely to the working of the Corporation Tramways. With regard to object (13), . . . the respondents contend that to introduce this object in the petitioners' memorandum of association would again be to run counter to the Act of Parliament. By the 26th section of the Act it is provided that "all carriages used on any tramway shall be moved by animal power only." Parliament has hitherto refused its sanction to the use of mechanical power on tramways formed on the streets of Glasgow. And the respondents contend that if the employment of any other than horse power is to be sanctioned, the right to use such power should be vested in the respondents as proprietors of the tramways and conservators of the streets of the city in the public interest, and not in companies or persons whose interest in the streets must necessarily be limited in character and duration, and in some respects antagonistic to the interests of the public. With regard to object (14), . . . the respondents have to deal only with the petitioners' company in relation to the tramways; and they entertain strong objection to the possibility of having other companies and concerns brought into connection with the tramways, for the working of which the petitioners' company is, under existing arrangements, solely responsible. In addition to the injury which the inclusion of such numerous and important objects within the petitioners' memorandum of association would or might inflict on the general public interest, the respondents contend that the pecuniary obligations to them under which the petitioners lie might, and probably would, be seriously affected. These pecuniary obligations are set forth in articles 2, 3, 9, 10, and 11 of the

lease. If the petitioners' company should embark on the numerous schemes embraced within the objects now sought to be included in its memorandum of association their financial resources will be seriously imperilled, and their ability to meet their pecuniary obligations to the respondents will be impaired if not destroyed.

Argued for the petitioners—The powers sought were within the scope of their memorandum and articles of association, and all that the petitioners desired to do was to take advantage of the recent statute to enable them to provide against loss in the event of their lease not being renewed. No alteration would be made on existing arrangements during the current lease, and the corporation were amply secured for all the liabilities of the company for the period of the present lease yet to run. They were willing to undertake that the uncalled-up capital should be applied solely to the purposes of the existing lease. They were also willing to abandon No. 14 of the proposed alterations. The alterations were necessary to enable the company to carry on its business more economically and more efficiently.

Argued for the respondents—The statute 53 and 54 Vict. c. 62, did not apply, and the present application was incompetent. The petitioners' company was formed to work the Glasgow Street Tramways Act 1870, and the present application was in breach of the agreement therein contained, which provided that in any contemplated alterations the Corporation and the company should act together. Even if the powers sought should be granted, they would, being premature, be inoperative, there being three years of the lease yet to run, and it was undesirable that the Court should speculate on the state of matters between the parties three years in advance. Even if the present application was competent, and if the statute applied, the Court had a discretion in confirming the alterations, and this was not a case in which it should be done.

At advising—

LORD KINNEAR—This is an application under the Companies Memorandum of Association Act 1890 for the confirmation of certain resolutions to alter the memorandum of the Glasgow Tramways Company. The Act was passed in order to enable companies, with the sanction of the Court, to enlarge the scope of their memorandum of association so as to relieve themselves to a limited extent, defined by the Act of Parliament, of an incapacity which disabled trading corporations created for certain definite purposes only, from undertaking any kind of business or entering into any contracts which were not warranted by the terms of their original constitution, either expressly or by necessary implication. There can be no question that in the position in which the petitioners were placed it is most reasonable that they should be allowed to avail themselves of the power conferred by the statute, provided that the interests which the statute

required to be protected were sufficiently secured.

The petitioners' company was incorporated in 1871, mainly for the purpose of working certain tramways in Glasgow under a lease from the Corporation for twenty-three years from July 1871, and after that period under a new lease of the same subjects, and for carrying on an omnibus traffic in connection with the tramways during the subsistence of the leases, and after their expiration for carrying on the business of omnibus proprietors in Glasgow. In carrying on their business under the lease up to this date the company have employed a capital of £369,562, they have acquired a great deal of property, both heritable and moveable, and they are now in possession of a very large stock of horses and plant which are necessary for the conduct of their business. They say that if the lease which they now hold from the corporation should come to an end without being renewed they would be in this position, that their constitution as established by their present memorandum of association would allow of their applying this large and valuable stock of horses and plant to no useful purpose, except in so far as regards the comparatively inconsiderable portion of it which may be used in the business of omnibus proprietors. They aver that they are placed in a very disadvantageous position for contracting with the Corporation for a renewal of the lease, and that if they should fail to come to terms with the Corporation, which seems to be probable, they will have this valuable stock thrown upon their hands, and they will have no resource except to sell it at what is called a "break-up" value, to the serious loss of the shareholders. In these circumstances it is quite legitimate and most reasonable that they should endeavour now so to enlarge the scope of their corporate life as to enable them to make some profitable use of their property when the lease comes to an end, in case it should not be renewed, and in the meantime to make valid agreements for that purpose which will be binding upon them and the persons with whom they may contract, because it is quite clear, as their memorandum of association now stands, that any agreement which they may now make for the purpose of using their property for any other objects than those expressly warranted by the memorandum of association will be altogether invalid and ineffectual. And therefore, so far as their application depends upon the general reasonableness of its character, it appears to me that they have presented a case which will entitle them to obtain the sanction of the Court to the resolutions which they have passed.

But the Court is not entitled to sanction these resolutions merely because they appear reasonable or proper in the interests of the company itself. We must be satisfied that the conditions under which the statute allows the memorandum to be enlarged is complied with. Now, these conditions are of two kinds. In the first place, the statute allows the alteration of the

memorandum of association only for certain limited and definite purposes, and the Court therefore cannot confirm a resolution for altering a memorandum unless it appeared that such alteration is required for those purposes; and in the second place—even if it did so appear—the Court cannot confirm a resolution unless they are satisfied that sufficient notice had been given to all persons interested, and that the interests of those who are entitled to object have been duly secured. Now, with regard to the first of these conditions, what is required is that the company shall show that the alteration is necessary to enable it to do one or other of five things—to carry on its business more economically or more efficiently—that, of course, means its present business—to attain its main purpose by new or improved means, to enlarge or change the local area of its operations, to carry on some business or businesses which under existing circumstances might be advantageously combined with the business of the company, or to restrict or abandon any of the objects specified in the memorandum of association.

The first question, therefore, appears to me to be, whether the resolutions which the company ask to be confirmed are in accordance with these conditions of the statute. The new objects which they propose to add to their memorandum of association are stated under six separate heads, but one of these has now been withdrawn from consideration. They had proposed to take power to amalgamate the business of the company with that of other companies or corporations, but that is now withdrawn, and we are not required to consider it. There remain, therefore, the five other heads under which the new objects or purposes of the memorandum are set forth. It appears to me there is only one of these which raises a question of difficulty upon this branch of the statute, and that is the power contained in the first of the new resolutions, which, if the resolutions are confirmed, will become the 10th of the purposes of the memorandum of association—"to exercise the powers and carry on the business of a tramway company, and to promote or acquire, equip, work, and dispose of any tramways within the city of Glasgow and the vicinity." In so far as that resolution proposes as an object of the company the exercising of the powers and carrying on the business of a tramway company, and the acquisition, equipment, and working of tramways within the city of Glasgow and the vicinity, it would appear to fall within the power given by the fifth section of the statute to enlarge or change the local area of the operations. It does not appear to me that, in so far as the words which I have read go, the resolution would carry the business of the company beyond the scope of the provisions of the statute. But then in addition to the purposes expressed in these terms, the tenth resolution proposes that the company should promote and dispose of any tramways within the city of Glasgow and the vicinity. Now, the disposition of

a property, real or heritable, is for certain purposes a small, ancillary, and necessary power without which it would be impossible to carry on the main purposes of the corporation, and therefore if nothing more were implied in the words "dispose of tramways" than the power which the company already has under their eighth article of memorandum, it would not appear to me to create any difficulty. But the words as taken together appear to cover undertakings which go very far beyond this. The word "promote" is not a word of any very definite meaning, but if the company takes the power to promote and dispose of tramways, that would certainly, I think, cover the promotion of undertakings for the construction of tramways, and for the disposal of those tramways after they had been constructed, and might possibly be held to cover speculations departing even more widely from the original purposes of the company. I am disposed to think that the purposes involved in the undertaking "to promote and dispose of tramways" are entirely foreign to the original purposes of the memorandum of association, and I cannot say that it has been made apparent that that alteration is required in order to enable the company to do any of the things desired. So far as my opinion goes, therefore, I am unable to see that we are in a position to confirm the resolution in so far as it is a resolution authorising the company to promote and dispose of tramways. With that exception it appears to me that all of the new purposes which the company desires to undertake are clearly within the purposes of the statute. They are either objects which would enable the company to carry on their business more efficiently or to attain its purposes by new or improved means, to enlarge the local area of their operations, or to carry on other business which might be conveniently or advantageously combined with theirs.

I do not think it necessary to examine all the remaining purposes in detail, because it appeared to me, so far as I can see, that they are all of them entirely within the statute. If we assume that to be so, there is a second condition which must be satisfied before we can confirm the resolution. The Court is required to be satisfied that with respect to every creditor who in the opinion of the Court is entitled to object or to signify his objection in some manner, that he either gave his consent, or his debt or claim has been discharged or determined, or he has been secured to the satisfaction of the Court. The company is at present working certain tramways in Glasgow under lease from the Corporation, and I think there can be no doubt whatever that the position of the Corporation as a creditor in the obligations of that lease, enables them to state objections to the alterations proposed, and if their objections cannot be otherwise satisfied, entitles them to insist that their claims shall either be secured to the satisfaction of the Court or otherwise discharged. The Corporation accordingly have stated objections, and

maintained them very strenuously before the Court. Their objections appeared to me to be of two kinds. In the first place, they maintain in argument that the proposed alterations ought not to be made, as being inconsistent with the statute, and as otherwise objectionable irrespective of their special claims as creditors in the obligations of the lease; and in the second place, they maintain that they ought not to be allowed, because they would prejudice the interests secured to them by that contract. As to the first of these grounds, I think that it applies mainly to the fourth of the new resolutions, which would stand, if it were confirmed, thirteenth among the purposes of the memorandum. They say that to introduce this object into the petitioners' memorandum of association would be to run counter to the Act of Parliament. By the 26th section of the Act it is provided that all carriages used on any tramway shall be moved by animal power only. Parliament has hitherto refused its sanction to the use of mechanical power on tramways formed on the streets of Glasgow, and the respondents maintain that if the employment of any other than horse power were to be sanctioned, the right to use such power should be vested in the respondents as proprietors of the tramways and conservators of the city, and not in persons whose interests in the streets must be limited in duration, and in some respects antagonistic to the interests of the Corporation. It appears to me that that is an objection which is not relevant to any question which we require to consider here. It proceeds upon an entire misconception of what it is that the company proposes to do, and of what it is competent for it to do, by enlarging the scope of its business. It is quite manifest no resolution of the company, and no confirmation of any of their resolutions, can possibly vest in them any right to use mechanical power in the streets of Glasgow. If the effect of the Act of Parliament has been correctly stated, then it is perfectly clear that nothing that the company can do would enable them to use mechanical power upon any of the streets of Glasgow contrary to the provisions of the Act of Parliament. The only effect of their resolution, if confirmed, would be that it would remove a disability which was personal entirely to themselves; it would give them no right adverse to the Corporation, and no power to do anything which was not at present perfectly lawful to any private company or any individual, or to any association of persons who might choose to combine for the purpose of using mechanical power, and set forth that purpose in a memorandum of association registered under the Companies Acts. Therefore it seems to me that the apprehension of the Corporation is entirely without any foundation. The only effect of the resolution, if we confirm it, will be to enable the company to make contracts with the Corporation, or with any other person who may be entitled to authorise, or hereafter may become entitled to authorise, the use of mechanical

power on tramways in the city and its vicinity. I do not know whether it may not be that the company has that power already. It does not appear to me that they are expressly limited by the memorandum of their association to the use of animal power only, but it may very well be that they are so limited by implication, because they have come into existence according to the constitution contained in the existing memorandum for certain limited purposes only, which may probably be held to involve the use of tramways by animal power. Therefore, one can quite understand why they should think it proper to take the additional power of using mechanical means in express terms in case they should obtain other power on confirmation of the other resolutions which would enable them to carry on a more extended business than they do now.

The other objection the Corporation stated is this, that by their contract the Tramway Company are bound to them in the first place, under very large pecuniary obligations; in the second place, to devote their whole capital, energy, and resources exclusively to the tramways constructed by the Corporation and at present leased to the petitioners; and therefore that it would be contrary to the express conditions of their contract if they undertook or were allowed to undertake different business to which they might devote any portion of the capital and resources which the Corporation say ought to be dedicated exclusively to their service. Now the lease certainly does impose very heavy obligations upon the company, and secures to the Corporation in the public interest very important rights. But it appears to me that all these obligations of the company to the Corporation are already very amply secured. They are secured by the terms of the lease itself, and by the conduct of the business which has followed upon the lease in the execution of its terms. The lease provides in the first place that in security of the pecuniary obligations of the company to the Corporation, the company shall be required to invest a sum of not less than £60,000 in the purchase of heritable property to be conveyed to the Corporation in security of their obligations, and then, in order to secure the proper performance of the company's obligation to maintain the tramways and to run cars upon them for the benefit of the community, to carry on their business fairly for the benefit of the community, there are a great number of very stringent stipulations in the lease which it appears to me will leave the Corporation in a very secure position indeed as against the company; and therefore, on consideration of the objection which has been stated on behalf of the Corporation with reference to the provisions of the lease, I am disposed to think that the Corporation is so amply secured that it will not be proper to refuse what is in itself a most reasonable alteration, upon the ground of any interest which the Corporation may have. But then there is one special obligation in favour of the Corporation which raises a more difficult question.

The main security for the pecuniary obligations of the Company is, as I have said, that they were to invest a sum of not less than £60,000 in the purchase of heritable property, and convey that to the Corporation. Now the statement of the respondents is that their present pecuniary obligations amount to something less than £30,000 per annum on the average of the last five years, and that if they are duly paid that sum for the three and a-half years of the lease still to run, the total amount to be paid will on this average not exceed £105,000; and then they say the respondents, in terms of clause 11, hold heritable property to the value of £129,232 in security of the pursuers' obligations. The answer to that is that the pecuniary obligations amount to the sum mentioned, and has been paid; but they go on to say—"Quoad ultra, not known and not admitted." Now I cannot take that as a denial of a specific statement—the truth of which of course they must know—that they hold under absolute disposition heritable property of the value mentioned, and therefore I take it upon the record that the Corporation admits that statement.

Therefore it appears to me, as I have said, that the pecuniary obligations, so far as they have to be performed by the company, are amply secured. But then there is the special stipulation to which I have already referred, and which appears to me to raise a question of some difficulty. The contract of lease imports an obligation which in effect comes to this, that the company comes bound to apply its whole capital of at least £200,000 exclusively to the purposes of the Glasgow tramways, and it is said that if they are allowed to enlarge the purposes of their business in the manner proposed they will be induced—or at all events enabled, in breach of that obligation—to devote some part of their capital to purposes foreign altogether to the original constitution. Now, there no doubt may be a question of construction upon the contract as to whether that is or is not too rigorous a reading of the obligation, or whether, on the other hand, that obligation is not satisfied by the company having already devoted a much larger amount of capital than the minimum mentioned in the memorandum. But if there should be any such question, I do not think this is a proper process in which to decide it, and therefore that is an objection which must be considered on the assumption that the construction of the contract maintained by the company is the true one. Therefore the question comes to be, whether that obligation is, like the others, sufficiently secured or not. I think that there is a great deal to be said for the view taken by the petitioners, that it was sufficiently secured already, but I think we may be relieved of the difficulty of determining that question, which is not without some delicacy, by the proposal which was made by the petitioners at the bar during the course of the argument. The petitioners stated that if there was any question as to the right of the Corporation to insist that the remaining capital which they were entitled to call under their memo-

randum should be applied exclusively to their purposes, they were willing to undertake that during the subsistence of the lease they would not call up any of the uncalled capital of the company or allow it to be applied to any purposes except the purposes of the tramway lease. If they are willing to give that undertaking, and make that a condition of their resolutions being confirmed, then I am of opinion that all their resolutions ought to be confirmed except the portion of the first resolution to which I have stated an objection which appeared to me, as at present advised, to be unanswerable.

LORD ADAM and LORD M'LAREN concurred.

LORD ADAM stated that the LORD PRESIDENT, who was absent, concurred in the judgment.

The Court pronounced the following interlocutor:—

“Confirm the proposed alteration of the petitioners' memorandum of association except in so far as regards the power to promote and dispose of tramways contained in the 10th article, and in so far as regards the 14th article thereof, but under the condition that the uncalled-up capital should be applied solely to the purposes of the existing lease.”

Counsel for the Petitioners—Graham Murray—C. S. Dickson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for the Respondents—Comrie Thomson—Ure. Agents—T. J. Gordon & Falconer, W.S.

Tuesday, March 17.

SECOND DIVISION.

[Sheriff of Argyllshire.

MACGILP v. SCHOOL BOARD OF KILCHOMAN.

Process—Appeal—Competency—Schoolmaster's Right to Compensation for Remission of Fees—Local Government (Scotland) Act 1889—(52 and 53 Vict. cap. 50), sec. 86.

The Local Government (Scotland Act 1889), sec. 86, enacts—“If under the provisions of this Act, or of anything made or done in pursuance thereof, any teacher appointed previously to the passing of the Education (Scotland) Act 1872 shall be prejudiced in any right to school fees possessed by him at the passing of this Act, he shall, after the passing of this Act, be entitled to receive from the school board compensation in respect of any loss so sustained by him, and such compensation, failing agreement, may be determined finally by the sheriff, and shall be payable out of the school fund.”

A schoolmaster appointed before the date of the Education (Scotland) Act 1872 was entitled to the fees charged for the scholars attending the school. In August 1889 the school board resolved to remit these fees, and to pay a sum as compensation therefor. The schoolmaster repudiated the arrangement, and applied to the sheriff to fix the amount of compensation, and a record was made up between the parties. In the course of the proceedings the Sheriff-Substitute appointed the pursuer to lodge a claim stating details of certain alleged arrears of fees paid and payable to him, and the fees of children who paid in kind. On appeal the Sheriff ordered a proof. The defenders appealed to the Court of Session.

Held that the Court could not interfere with the mode taken by the Sheriff-Substitute to inform himself as to the amount of compensation due, and the appeal dismissed as incompetent.

Donald Macgilp was appointed schoolmaster of the parochial school of Kilchoman, Islay, on 27th October 1869. After the passing of the Education (Scotland) Act 1872 the school was under the authority of the school board of the parish. By virtue of his appointment the pursuer was entitled to receive, *inter alia*, payment of the fees exigible for the scholars taught in the school. In August 1890 the school board, in pursuance of the Local Government (Scotland) Act 1889, resolved to remit entirely as from 1st October 1889 the fees in use to be charged for the scholars attending the school. Upon 13th February 1890 the board fixed the compensation to which the teacher was entitled in lieu of school fees at £23, 15s. 8d. per annum.

Macgilp brought an action in the Sheriff Court to have it declared that the amount of compensation due to him should be fixed at £45 sterling per annum.

Upon 1st November 1890 the Sheriff-Substitute (SHAIRP) pronounced this interlocutor—“Appoints the pursuer to lodge in process, within fourteen days, a minute stating in detail the arrears referred to in article 6 of his answers to the defenders' statement of facts, and all arrears due for the five years ending Whitsunday 1889 received up to the date of lodging the minute, with the dates of payment, and the names of the parties from whom received, also the fees of the children who paid in kind.”

The pursuer appealed, and upon 4th February 1891 the Sheriff (IRVINE) pronounced this interlocutor—“Having considered the appeal for the pursuer against the interlocutor of the Sheriff-Substitute, dated 1st November 1890, reclaiming petition for the pursuer, answers thereto for the defenders, and whole process, sustains the appeal, Recals the interlocutor appealed against: Allows to the pursuer a proof of his averments, and to the defenders a conjunct probation: Remits to the Sheriff-Substitute to take said proof; meantime reserves all questions of expenses.

“*Note.*—The Sheriff sees nothing either in