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Friday, May 22.

FIRST DIVISION.

[Lord Stormonth-Darling,
Ordinary.]

MASON'S TRUSTEES v. CHIENE.

Company—Railway Company—Expenditure not Authorised by Act—Railway Expert—Deposit-Fund—Claim on Deposit-Fund—Ultra vires.

The private Act incorporating a railway company authorised the expenditure of the company's funds in the construction of the line and in payment of "all costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto." By agreement the company undertook to pay the sum of £5000 to A, who had formerly been manager of a railway, and then carried on business as a professional expert in railway matters, for professional services and assistance given by him in the promotion, preparation for, obtaining, and passing of the Act. A was to act as general manager and adviser to the promoters, giving them the aid of his technical and general knowledge, and to aid them in carrying the bill and negotiating with other railway companies. *Held* that this agreement was *ultra vires* of the company, in respect that it was not competent, under the section authorising payment of the expenses of obtaining the Act, to agree to pay, to a person not belonging to any of the recognised professions, such a lump sum, which could not be taxed or checked in any of the usual ways, and which was to be paid partly at least for the use of influence and not for services; and that consequently A was not entitled to payment of the sum agreed upon out of the parliamentary deposit fund consigned by the promoters of the company.

Process—Petition to Uplift Deposit-Fund—Validity of Decree—Challenge of Decree without Action of Reduction—Company—Deposit-Fund.

A obtained a decree in absence against a railway company incorporated under a private Act of Parliament, and charged upon the decree. *Held* that the validity of the decree could be considered in a process, raised some years afterwards, and initiated by a petition to uplift deposit funds consigned by the promoters of the company, in accordance with the provisions of the Standing Orders of both Houses of Parliament.

The Dundee Suburban Railway Company was incorporated by the Dundee Suburban

Railway Act, which received the Royal Assent on 28th July 1884.

The Act contained, *inter alia*, the following clause:—"All costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto, shall be paid by the company." With the exception of this section there was no authority in the Act for the expenditure of the company's funds except in the construction of the railway.

In January and May 1884 James Thomas Harris and Charles Stuart Blair, two of the promoters of the company, had lodged with the Court of Exchequer deposits amounting to £7799 and £1646, in accordance with the provisions of the Standing Orders of both Houses of Parliament and 9 and 10 Vict. cap. 20. The ultimate destination of these deposits was provided for, in a private Act obtained by the company in 1892, in the following terms:—"If the company do not, previously to the expiration of the period limited for the completion of the railway, complete the same and open it for the public conveyance of passengers, then, and in every such case, the deposit fund mentioned in section 50 of the Act of 1884 . . . shall, if a judicial factor has been appointed, or the company is insolvent, or the undertaking has been abandoned, be paid or transferred to such judicial factor or be applied in the discretion of the Court as part of the assets of the company, for the benefit of the creditors thereof, and, subject to such application, shall be repaid or re-transferred to the depositors."

Prior to the incorporation of the company, negotiations had been entered into between D. W. Paterson, S.S.C., solicitor to the promoters, and Mr S. L. Mason, formerly manager of the North British Railway Company. As a result of these negotiations Mr Mason wrote to Mr Paterson the following letter, dated 21st February 1884:—"Dear Sir—The following are the terms upon which I have, at your request, been acting and am in future to act in professionally advising and aiding in the promotion of the above railway.

"As a retaining fee and as a contribution towards my travelling and personal and other expenses, I am to be paid on the 28th February 1884 the sum of fifty guineas. If the Bill be thrown out of Parliament I am to receive no further remuneration. If it pass, my fee is to be two per cent. upon the capital authorised by the Act.

"I am to be general manager and adviser to the promoters, giving them the benefit of any technical and general knowledge I possess; aiding them in carrying the Bill, and in negotiating with the neighbouring Railway Companies.

"You are to procure the adoption of this arrangement by the promoters, the intention being to bind the Company when incorporated and not the promoters as individuals. But the promoters, or some of them to be now named, are to be bound to deliver to me within four weeks after the Act receives the Royal Assent an agree-

ment by the Company under seal adopting these terms.

"If the Bill be withdrawn by agreement, compromise, or any other arrangement or understanding with the Caledonian, North British, or the Dundee and Arbroath Joint Committee, or with any one or combination of them, the payment of my fee of two per cent. is to be part of the arrangement.

"Please write me confirming the above terms, and procure adoption of them by the parties or promoters who by arrangement with you are responsible for fees and outlays."

On 23rd February 1884 Mr Paterson replied confirming this arrangement.

At the first meeting of the directors of the company, held on 27th October 1884, an agreement between the company and Mr Mason was submitted and approved of, and Colonel Blair and Mr Couper, two of the directors, were authorised to sign it for the company. By this agreement, which was duly executed by Colonel Blair and Mr Couper, the company acknowledged that they were justly due and indebted to Mr Mason in the sum of £5000 "for professional services and assistance given by him in the promotion, preparation for, obtaining, and passing of the said Act, and for professionally advising and aiding in reference thereto, and to the undertaking thereby authorised, and in matters otherwise incident to the preparation for the obtaining and passing of the said Act, and which professional advice and services were secured and obtained for us, the said railway company, and were given by the said Samuel Lack Mason, in pursuance of an arrangement set forth in a letter dated the 21st day of February 1884 from the said Samuel Lack Mason to Duncan Wilkie Paterson, solicitor in Edinburgh, who acted on behalf of the parties afterwards incorporated as a company by the said Act."

In 1886 Mr Mason brought an action against the company concluding for payment of the sum of £5000 with interest. On 18th June 1886 decree in absence was pronounced in this action. Mr Mason extracted the decree and charged the company upon it, but took no further steps to obtain payment, and died on 2nd March 1889.

The period for making the railway, fixed at five years by the Act obtained in 1884, was extended by subsequent private Acts, but no railway ever was built, and in 1888 the estate and effects of the company were sequestrated, and George Todd Chiene, C.A., Edinburgh, was appointed judicial factor.

The present action was initiated by a petition presented by Mrs Mason and others (Mr Mason's trustees) and William Gregory, C.E., another creditor of the company. The petition set forth the facts stated above, and prayed the Court, *inter alia*, "to grant warrant to authorise, decern, and ordain the Bank of Scotland to pay to the petitioners, or to the said George Todd Chiene as judicial factor foresaid, or to such other person or persons as your Lord-

ship may appoint, the said statutory deposit fund, being the contents of the two consignment receipts above mentioned, amounting to £7799, 19s. and £1646, 5s. respectively, with all interest which has accrued or may accrue thereon; and to ordain the Queen's and Lord Treasurer's Remembrancer to deliver up the said deposit-receipts, so that said payment may be made; and in any event, to direct the said deposit fund to be applied as part of the assets of the said Railway Company—firstly, to and for the benefit *pari passu* of the petitioners as creditors of the said company; secondly, to and for the benefit of any other creditors of the said company; and thirdly and generally, to and for the purposes set forth in the Dundee Suburban Railway Act 1892, section 4, or in any other special Act or general Act dealing with parliamentary or statutory deposits."

A claim was lodged in this process by Mason's trustees, who claimed to be ranked and preferred to the amount of £5009, being the sum decerned for in 1886, with expenses.

Answers and claims were lodged for the judicial factor and for other creditors of the company.

Certain claimants objected to the claim for Mason's trustees on the ground, *inter alia*, that the agreement above referred to was *ultra vires*.

After sundry procedure, in the course of which the Lord Ordinary (STORMONTH DARLING) found that the undertaking had been abandoned within the meaning of the section of the Act of 1892 quoted above, and therefore that the deposited funds fell to be applied as part of the assets of the company for the benefit of its creditors, the Lord Ordinary allowed a proof with reference to the claim for Mr Mason's trustees.

Proof was accordingly led. The following excerpt from the evidence of Mr Drummond, S.S.C. explains Mr Mason's professional position:—"Mr Mason died on 2nd March 1889. He was at one time general manager of the North British Railway Company, having been appointed about 1868. I got to know him soon after his appointment. He remained general manager of the company till he retired in 1874. Previous to holding that appointment he had been in the service of the Great Northern Railway Company, and he had brothers who also held high positions in English railway companies. I know that he had very large experience in connection with parliamentary committee work and railway matters. After he left the Great Northern Company's service he carried on business as a professional expert in railway matters, not merely with regard to bills for constructing lines, but bills affecting railway policy, such as amalgamation bills, running powers, and that class of questions. He had an office in London and another in Leith for the purpose of carrying on his business. That is a well-recognised occupation; most solicitors could not move a step without such an adviser." . . .

On 3rd December 1902 the Lord Ordinary pronounced an interlocutor by which he

repelled the claim for Mr Mason's trustees.

Opinion.—[After dealing with a claim for another creditor]—“Now I pass to the claim for Mason's trustees, against which the same technical objections have been urged as against the claim of Mr Gregory. There are some minor differences with regard to the date of the service of the summons; and there is also this difference, making the case less favourable for Mason's trustees, that the decree was a decree in absence instead of being a decree *in foro*. But these do not seem to me to affect the technical objections themselves, and therefore, if there had been nothing else against Mr Mason's decree, I should have held these objections insufficient to impugn it. But then there is a much more serious objection to the decree in absence for £5000, which Mr Mason obtained on 18th June 1886, and that objection is that it was altogether *ultra vires* of this company, either of its directors or its shareholders, to make the agreement which they did with Mr Mason for the payment of that sum. It was *ultra vires* for this reason, that the special Act allows two purposes, and two purposes only, to which the funds of this company could be devoted. One was the construction of the line, the other was the payment of the costs, charges, and expenses incurred in obtaining the Special Act. No payment which was not made for one or other of these two purposes was within the competency of the company, and any shareholder of the company might at any time have disputed the payment upon that ground. Well now, the objection here is urged by a creditor of the company, and it is urged no doubt against a decree of this Court, but we are practically in the same position as if that creditor had brought a reduction, because this is a process for the distribution of the only remaining asset of the company, and I hold it to be perfectly competent for any creditor to attack a decree in absence upon a radical ground of this kind without the necessity of formally bringing a reduction. The mere fact that this company did not themselves defend the action which was brought against them is nothing to the purpose, because if they entered into an illegal agreement it was quite natural that they should forbear from stating a defence to an action founded upon that agreement. I hold myself therefore free to consider the matter as if there had been no decree in absence at all.

“Mr Dewar for the claimants has quite candidly, and I think quite properly, admitted that the case of *Mann v. Edinburgh Northern Tramways Company*, House of Lords, 20 R. 7, following upon a number of cases there cited, is conclusive against him, unless he can show that this agreement to pay Mr Mason £5000 fell within the clause of the Act authorising payment of the costs of obtaining it. I therefore do not require to elaborate the principle of law upon which the case proceeded, but I think it is shortly and completely contained in a single sentence of Lord Watson's opinion at page 12, where

he says that ‘it is beyond the power either of promoters or of directors or of shareholders to apply the monies of the company which are devoted by statute to special purposes to any purpose which is not sanctioned by the provisions of the Act of Incorporation.’ Well now, the agreement upon which this decree in absence was founded acknowledges on the part of the railway company that they are justly due and indebted to Samuel Lack Mason in the sum of £5000 for professional services and assistance given by him in the promotion, preparation for, obtaining, and passing of the said Act, and for professionally advising and aiding in regard thereto, and to the undertaking thereby authorised. It appears that Mr Mason was what is called a ‘railway expert,’ and that he advised the promoters with regard to their whole proceedings previous to obtaining the Act, that he used such influence as he possessed in obtaining the support of the two leading railway companies in Scotland, and that he negotiated an agreement with these companies which is scheduled to that Act. I do not doubt therefore that Mr Mason did render services to this company which were of some value, and that these services, if stated in the proper way, might have come within the definition of costs incident to the passing of the Act. But the question is whether the awarding of a lump sum for services of that kind is within the power of the directors. The security which a shareholder has is that he knows that his money can only be devoted either to the making of the line or to the payment of the costs of the Act, subject of course to taxation by a public officer; but I never heard it suggested that it would be within the power of the directors to make an agreement with, let us say, their Parliamentary solicitor, to carry through their Act for a lump sum, or that they would be entitled to say to anybody—‘We will give you £5000 if you will undertake the whole management of this business.’ For that sum there might, I do not doubt, be valuable services rendered, but it would be impossible to check them. It would be impossible to say how much really represented work done and how much represented a mere bonus to the person receiving it. Accordingly, as it seems to me, it is out of the question to maintain that a payment of this kind, not subject to either taxation or audit, because not broken up into its component parts, can fall within the costs section of the Act. This very matter was dealt with by Vice-Chancellor Kindersley in the case of *Lord Shrewsbury v. North Staffordshire Railway Company*, (1865), L.R., 1 Eq. at page 619. I there find that the learned Vice-Chancellor says, dealing with a lump sum of £20,000—‘It seems to me quite impossible to put that construction on the 65th section. The effect of so doing would be that every sum of money, for any purpose whatever, that the promoters might think fit to promise (however unreasonable or unrighteous such promise) in order to get their scheme passed through Parliament, would come

within the meaning of expenses incurred in obtaining the Act, or expenses incident thereto.' Following the same line of thought, Lord Ashbourne, in the case of the *Northern Tramways Company*, says—'The appellants insist on the validity of an agreement under which they were to receive £17,000 for the costs, charges, expenses, and payments therein referred to. This sum was to be given as a bulk sum, not subject to review, account, or audit.' It seems to me that this case is in precisely the same position, with the single exception, unfavourable to the present claimants, that the recipients of the £17,000 would be entitled to receive credit for any costs, charges, and expenses properly audited, which they could show that they had paid to other people. But here it is impossible to put any figure on the services rendered by Mr Mason. Whether these services were worth £5000 or £500, no one can possibly say. From the form of the agreement he must either get the whole sum or none at all. And accordingly it seems to me out of the question to say that he is in the same position as if he had followed the proper course by sending in his professional charges for work done in connection with obtaining the Act for this railway. Therefore it seems to me that his trustees have failed to show that he is a creditor of the company, and that their claim must be repelled."

Mason's trustees reclaimed, and argued—(1) The sum claimed formed part of the costs, charges, and expenses incident to preparing for and obtaining the company's Act, and was therefore an expenditure which the directors were justified in incurring. A payment for professional services did not become *ultra vires* because it was paid in a lump sum. The evidence showed that Mr Mason held a recognised position, was able to render important services, and had in fact done necessary work. The case was unlike *Mann v. Edinburgh Northern Tramways Company*, June 26, 1891, 18 R. 1140, 28 S.L.R. 823, *affd.* November 29, 1892, 20 R. (H.L.) 7, 30 S.L.R. 140; and *Caledonian and Dumbartonshire Railway Company v. Magistrates of Helensburgh*, June 19, 1856, 2 Macq. 391. In these cases there was an attempt to devote the money of the companies to payments for which no services had been rendered. It would not have been *ultra vires* to arrange with an engineer for a lump payment conditional on the Act being obtained. (2) The reclaimers were the holders of a decree, which though in absence had become equivalent to a decree *in foro* under the provisions of the Court of Session Act 1868, section 24. The validity of that decree could not be questioned except in a reduction.

Argued for the respondents—The sum sued for was claimed as due under an obligation which was *ultra vires* of the company. The money of the company could only be applied to the purposes sanctioned by the Act, viz., constructing the railway, and paying preliminary expenses. The £5000 sued for was not a proper expense of procuring the private Act, it was really a payment for influence. That was *ultra vires*—

Earl of Shrewsbury v. North Staffordshire Railway Company, 1865, L.R., 1 Eq. 593. (2) The decree obtained was invalid, because the company had no right to submit to a decree in absence for an *ultra vires* debt. An action of reduction was not necessary, because the present process was really a congeries of actions, analogous to a multiplexing.

At advising—

LORD PRESIDENT—The question in this case is whether the reclaimers are entitled to be ranked upon a Parliamentary deposited fund consisting of £7999, 19s. and £1646, 5s., for the sum of £5000, with interest thereon at four per cent. per annum from 28th July 1884, and also for certain expenses of process and dues of extract, in respect of which they allege that they are creditors of the Dundee Suburban Railway Company.

That company was incorporated under the Dundee Suburban Railway Act, 1884, which received the Royal Assent on 28th July of that year.

The capital which that Act authorised to be raised for the purposes of the undertaking, was £250,000, in 25,000 shares of £10 each, and £83,000 by borrowing.

By section 71 of the Act of 1884 it was provided "that all costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto, shall be paid by the company."

Five gentlemen named were appointed to be the first directors of the company by section 42 of the Act of 1884, and it was thereby declared that they should continue in office until the first ordinary meeting to be held after the passing of the Act. Only three of the five continued to be directors after that meeting, the other two never having qualified. The period for making the railway was limited to five years from the passing of the Act of 1884, and that period was repeatedly extended by subsequent Acts, but the railway never was made, and so far as appears, there are now no directors and no shareholders of the company.

In accordance with the Standing Orders of both Houses of Parliament, and the Act 9 and 10 Vict. cap. 20, the sum of £7999, 19s., being 5 per cent. upon the amount of the original estimate of the cost of the Dundee Suburban Railway, was on 11th January 1884 deposited with the Court of Exchequer in Scotland by two persons described as directors, or persons having the management of the affairs of that projected undertaking, and a further deposit of £1646, 5s. was afterwards made on 13th May 1884.

By section 50 of the company's Act of 1884 it was declared that these two consigned sums should not be paid or transferred to the depositors, unless the company should, previously to the expiration of the time limited by its Act for completion of the railway, open the same for the public conveyance of passengers.

This not having been done, the deposit fund now falls to be disposed of either in terms of the company's Special Act of 1892, which received the Royal Assent on

20th May 1892, or of the General Act to the same effect, which was passed in June 1892 under the title of the Parliamentary Deposits and Bonds Act 1892. I shall assume, in accordance with the contention of the reclaimers, that the case is governed by the former Act. By section 50 of that Act various provisions were made in regard to the disposal of the fund, one of them, which appears to me to apply to the present case, being that the deposit fund, or such portions thereof as may not be required to satisfy the prior claims therein mentioned, "shall, if a judicial factor has been appointed, or the company is insolvent, or the undertaking has been abandoned, be paid to or transferred to such judicial factor, or be applied, in the discretion of the Court, as part of the assets of the company, for the benefit of the creditors thereof, and, subject to such application, shall be repaid or re-transferred to the depositors."

By letter, dated 21st February 1884 (fully five months prior to the passing of the Act by which the company was incorporated), addressed by Samuel Lack Mason, whom the reclaimers represent, to Duncan Wilkie Paterson, solicitor for the projected railway company, the former said that the terms upon which he had at Mr Paterson's request been acting, and was in future to act, in professionally advising and aiding in the promotion of the railway, were that, as a retaining fee, and as a contribution towards his travelling, personal, and other expenses, he was to be paid on 28th February 1884 the sum of fifty guineas, and that if the Bill should be thrown out by Parliament he was to receive no further remuneration, but that if it should pass his fee was to be two per cent. upon the capital authorised by the Act.

The letter further bore that Mr Mason was to be general manager and adviser to the promoters, giving them the benefit of any technical or general knowledge he possessed, aiding them in carrying the Bill, and in negotiating with the neighbouring railway companies.

The letter also bore that Mr Paterson was to procure the adoption of this arrangement by the promoters, the intention being to bind the company when incorporated, and not the promoters as individuals, but that the promoters or some of them to be then named were to be bound to deliver to Mr Mason, within four weeks after the Act received the Royal Assent, an agreement by the company, under seal, adopting the terms mentioned. It was also declared by the letter that if the Bill should be withdrawn by agreement, compromise, or any other arrangement or understanding with the Caledonian, North British, or the Dundee and Arbroath Joint Committee, or with any one or combination of them, the payment of Mr Mason's fee of two per cent. should be part of the arrangement.

On 23rd February 1884 Mr Paterson wrote to Mr Mason acknowledging receipt of his letter of 21st February, and stating that he was authorised to, and thereby did, confirm the arrangement set forth in Mr

Mason's letter, but the only persons whom he named as having approved of it were Colonel Charles Stuart Blair and General Harris, whom he described as "acting as chief promoters and providing cash." I do not see any evidence that Mr Paterson had such authority from anyone as could make his confirmation of the arrangement effectual in law.

It is to be observed that the letter of 23rd February 1884 does not bear that any arrangement of the nature expressed in it had been made with the promoters of the undertaking, but only that Mr Mason had, at Mr Paterson's request, been acting upon these terms.

The Bill was, as already stated, passed into law as "The Dundee Suburban Railway Act 1884," having received the Royal Assent on 28th July 1884, and the defenders were thereby incorporated and empowered to construct railways in and near the town of Dundee, and certain arrangements with the Caledonian and North British Railway were confirmed. The Act does not, as I understand, contain any confirmation of, or any authority to confirm, the agreement with Mr Mason.

By "Agreement" dated 27th October 1884 the Dundee Suburban Railway Company acknowledged that they were justly due and indebted to Mr Mason in the sum of £5000 for professional services and assistance given by him in the promotion, preparation for, obtaining, and passing of the Act, and for professionally advising and aiding in reference thereto, in pursuance of Mr Mason's letter to Mr Paterson, dated 21st February 1884 above mentioned, and they thereby agreed to pay interest on that sum to him at the rate of four per cent. per annum from 28th July 1884 until payment. This agreement was signed by two of the directors as authorised at the first meeting of the Company, held on 27th October 1884.

On 18th June 1888 the Lord Ordinary (LORD LEE), in an action at the instance of Mr Mason against the Dundee Suburban Railway Company for payment of the sum of £5000 just mentioned and interest, decerned in absence against the company in terms of the conclusions of the summons, and the decree having been duly extracted, the company was charged upon it to make payment of the sums decerned for. Mr Mason never obtained a decree *in foro* for the £5000 claimed, and he died on 2nd March 1889.

The Lord Ordinary has expressed the view that the decree which Mr Mason did obtain, even when followed by a charge, does not aid the reclaimers in this proceeding, because it was *ultra vires* of the company, either by its promoters, its directors, or its shareholders, to make the agreement with Mr Mason for the payment of a lump sum of £5000, irrespective of the quantity, quality, or value of any services which he might have rendered. It was in his Lordship's view *ultra vires* for this reason, that the Special Act mentions two purposes, and two purposes only, to which the funds of the company could be lawfully applied, one being the construction of the

line, and the other (section 71 of the Act already quoted) the payment of the costs, charges, and expenses of and incident to the preparing for, obtaining, and passing the Act, or otherwise in relation thereto. The Lord Ordinary says that any payment which was not made for one or other of these purposes was beyond the competency of the company, and that any shareholder of the company might at any time have objected to payment being made out of the assets of the Company upon that ground. I entirely concur in the views thus expressed by his Lordship. It is true that the objection which we now have to consider is stated not by a shareholder, but by a person who has a legitimate interest to see that the deposited fund is not diminished otherwise than by lawful claims, and although Mr Mason obtained a decree of this Court for the £5000, that decree was (as has been already pointed out) in absence, and as the present process is for the distribution of the only remaining asset (or rather of a sum which is to be treated as if it was an asset) of the company, it seems to me to be competent for any person interested to criticise and object to the claim of the reclaimers upon the ground of its invalidity, without the necessity of raising an action of reduction of it. As the process is really for the distribution of funds which, for the purposes of the present question are assimilated to assets of the company, it appears to me to be competent to treat it (the process) as equivalent to a congeries of all the actions necessary to do complete justice between and among the parties having, or claiming to have, an interest in these funds.

I understood that the counsel for the reclaimers did not dispute that the decision of the House of Lords in *Mann v. Edinburgh Northern Tramways Company*, 20 R. (H.L.) 7, and the decisions in the previous cases there referred to, would apply to the present claim, unless the £5000 could be brought within section 71 of the Act, which, as already stated, declares that all costs, charges, and expenses of and incident to, preparing for, obtaining, and passing of the Act, or otherwise in relation thereto, shall be paid by the company. The argument of the reclaimers on this point I understood to be that this declaration made such costs debts of the company, and that if they were proper debts of the company there would be strong grounds for holding that they constituted valid claims upon the deposited fund, preferable to the claims of the depositors. The question on this part of the case thus comes to be whether the undertaking to pay the £5000 was in a reasonable sense a cost of obtaining the Act, or otherwise relating to it. The charge is made for what are described as professional services and professionally advising and aiding the promoters in regard to the Bill, and the steps necessary for having it converted by Parliament into an Act. Upon this question it is to be observed that Mr Mason did not belong to any of the professions the members of which have known rights and are

subject to known responsibilities and liabilities. It appears that besides being skilled in railway promotion and administration, Mr Mason possessed, or was supposed to possess, influence with other railway companies and persons, the benefit of which he was to give to the promoters of the Dundee Suburban Railway Company. It may be therefore, that if he had made charges having some relation to the amount and character of the work which he did, so that it could be ascertained at what rate or upon what principle that work was charged for, the case might have been different, but I am not aware of any authority, nor can I see any ground in principle for holding that promoters of a company can, prior to obtaining an Act for its constitution, make an agreement for payment by the company of such a lump sum to a person not belonging to any of the known professions, and which could not be taxed or checked in any of the modes applicable to proper professional accounts, unless, of course, the agreement was expressly validated by the Act sanctioning the undertaking. Further, as the sum was agreed upon, not before but after the services, or part of them, had been rendered, it is now impossible to allocate or apply it to the services for the purpose of seeing what relation as regards amount or value the £5000 bears to the services. It is not a charge which could be taxed with reference to these services. Indeed the claim is not stated as representing the value of the services on the principle of *quantum meruit*; it is based upon an agreement to pay a fixed sum, without any regard to the quantity, quality, or value of the services (if any) which had already been or might after it was entered into be rendered by Mr Mason. It appears that one of the reasons for agreeing to pay to Mr Mason the sum in question was that he was supposed to be possessed of influence with other railway companies and also with persons, and that the exercise of that influence was one of the considerations in respect of which it was agreed to pay a lump sum to him. This seems to come within the principle of the case of *The Earl of Shrewsbury v. North Staffordshire Railway Company*, 1 L.R. Eq. 593, in which it was held that contracts by promoters and directors of a railway company to pay money for countenance and support in procuring the Act were *ultra vires* of the company and could not be enforced against the company as payment of expenses of obtaining the Act under the 65th section of the Companies Clauses Act, or otherwise. If this purchase of influence (as distinguished from service) was to any extent a consideration for the payment of a lump sum, no means exist for separating the part applicable to proper service from the part applicable to influence, and the result would be that the whole claim would fail on that ground. I do not think that a claim upon what was, in my judgment, an illegal agreement should be sustained in a process of equitable distribution like the present.

I concur with the Lord Ordinary in thinking that the case falls within the terms of

section 4 of the Special Act of 1892, providing for the application of the deposit-fund, one of these modes being "or be applied in the discretion of the Court as part of the assets of the company for the benefit of the creditors thereof, and, subject to such application, shall be repaid or retransferred to the depositors." I think that the reclaimers might have a claim under this provision if they could establish that Mr Mason possessed the character of a proper creditor of the company in respect of the agreement upon which they rely. But I have already given my reasons for thinking that the claim did not become a debt of the company by virtue of the provision of section 71 of the Act of 1884, under which the company was constituted, and it does not appear to me to have become possessed of that character in any other way.

If the standard of being "meritorious," which was at one time applied to claims made upon such deposited funds, was still in force, I should be quite unable to affirm that the present claim is "meritorious."

If I be right in thinking that it was *ultra vires* of the persons who made the agreement with Mr Mason to do so to the effect of binding the company, or any person interested in its assets (or *quasi* assets), it, in my judgment, follows that it was equally *ultra vires* of them to submit to a decree in absence in an action at his instance, to the effect of binding anyone interested in the assets of the company, or in funds like the present, which are for the purposes of questions like the present assimilated to its assets.

It was argued by the counsel for the reclaimers that the decree in absence was converted into a decree *in foro* by a charge having been given upon it, but I do not think that this would protect the decree from being examined and objected to upon the grounds now pleaded against it.

For these reasons I am of opinion that the judgment of the Lord Ordinary should be adhered to.

LORD ADAM and LORD KINNBAR concurred.

The LORD PRESIDENT intimated that LORD M'LAREN, who was absent at advising, concurred.

The Court adhered.

Counsel for the Reclaimers (Mason's Trustees)—The Solicitor-General (Dickson, K.C.)—Dewar—Horne. Agents—Drummond & Reid, W.S.

Counsel for the Respondents—Cooper—Gordon. Agents—Macrae, Flett, & Rennie, W.S.

Saturday, May 30.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.]

FULTON v. STUBBS, LIMITED.

Reparation—Wrongful Publication of Private and Confidential Matter—Newspaper—Meeting of Creditors.

In an action of damages against the publishers of a *Gazette* for wrongful publication of private and confidential matter, the pursuer averred that, having found himself in embarrassed circumstances in consequence of serious illness, he called a meeting of his creditors, at which he offered a composition of 5s. per £, and that the meeting unanimously accepted that offer; that a representative of the defenders was present at the meeting on behalf of a creditor; that, notwithstanding a statement made at the meeting that the pursuer objected to any publication of the state of his affairs, the defenders published an account of what passed at the meeting under the heading, "Lists of Principal Creditors;" and that in consequence of the publication he had suffered serious loss and damage. *Held* (aff. judgment of Lord Stormonth Darling) that the pursuer's averments were irrelevant.

Gregan Fulton, architect, 12 Castle Street, Edinburgh, raised an action of damages for wrongful publication of a private and confidential matter against Stubbs, Limited, 72 Princes Street, Edinburgh, the proprietors and publishers of *Stubbs' Weekly Gazette*.

The pursuer averred—" (Cond. 1) . . . The said *Stubbs' Weekly Gazette* is published every Thursday. It professes to give lists of protested bills of exchange and decrees in absence obtained in the Debts Recovery and Small Debt Courts in Scotland, and also proceedings under sequestrations and cessios. It is circulated largely among the trading class of the community. (Cond. 2) About the month of September 1902 the pursuer found himself in embarrassed circumstances as the result of serious illness and in consequence of a house which he had taken at North Berwick for a period of two years at a rent of £40 a-year, and furnished with valuable furniture, remaining unlet for the whole of the said period. He accordingly consulted his agents with a view of coming to a private arrangement with his creditors. . . . The pursuer thereafter instructed his agents to call a meeting of his creditors to submit to them a state of affairs, and to make to them an offer of a composition of 5s. per £. The said agents accordingly called a meeting for Tuesday, 14th October 1902. (Cond. 3) On 14th October 1902 seven creditors or representatives of creditors assembled in the chambers of the pursuer's agents at 50 George Street, Edinburgh. The pursuer was represented by Mr R. Galbraith Stewart, S.S.C., a partner of his law-agents' firm, at said meeting.