

cised his discretion wrongly when he did not award expenses to the defender—*Murphy v. Farne Coal Company*, 1918 S.C. 659, 55 S.L.R. 557; *Feeney v. Fife Coal Company*, 1918 S.C. 197, 55 S.L.R. 223; *Speedie v. Blyth*, 1854, 16 D. 375; *Caledonian Iron and Foundry Company v. Clyne*, 1831, 10 S. 133; *Maclaren, Expenses*, p. 60. It was competent to appeal on a question of expenses merely—*Jack v. Black*, 1911 S.C. 691, 48 S.L.R. 586; *Garriock v. Glass*, 1911 S.C. 453, 48 S.L.R. 347.

Argued for the respondent—The pursuers had been misled by the incorrect copies of the bill of lading, which were in circulation, and the defender ought to have stated his position without lodging defences. The Lord Ordinary had rightly exercised his discretion, and in any event his discretion ought not to be interfered with—*Caldwell v. Dykes*, 1906, 8 F. 839, 43 S.L.R. 606.

LORD JUSTICE-CLERK—The question for our decision is presented to us in a most unsatisfactory aspect, because we have neither the correspondence which apparently passed before the action was raised, nor any note of the Lord Ordinary's views on the matter. Therefore we have to proceed on the statements of the parties without any indication as to what moved the Lord Ordinary in taking the course he did. We find that the pursuers raised an action on a bill of lading which was incomplete, and besides was signed not by the master but by someone on his behalf. It was, however, a clean bill of lading. In the defences they were met with a bill of lading which bears the very important memorandum—“Weight, quality, and quantity unknowing, and marks.” The pursuers must have had both bills of lading in their possession at some time or other, although perhaps not simultaneously. They passed on the complete bill of lading, which was not clean, to the receivers of the cargo in order that they might receive the cargo, which they did. Thereafter they sued upon the other bill of lading, and when they were met in the defences with the bill bearing the memorandum they abandoned their action before the record was closed. I cannot conceive any people acquainted with shipping matters getting a bill of lading with that memorandum and one without and not noticing the difference, because the difference is so material. The Lord Ordinary apparently heard an argument on the question now before us and exercised his discretion in the matter. In that state of matters the Court would as a rule be most unwilling to interfere with the discretion of the Lord Ordinary. But having, as I have said, no clue as to the grounds on which he proceeded and no note explaining his views, I cannot say I find in Mr Cooper's argument anything to justify a departure from the ordinary course, namely, that when a pursuer raises an action, and then after defences have been lodged sees proper to abandon it, he must pay the expenses to which the defender has been put. Therefore I think we ought to recal the judgment of the Lord Ordinary and find the defenders entitled to their expenses.

LORD DUNDAS—Like your Lordship, I am very unwilling to interfere with the discretion of a Lord Ordinary upon a pure matter of expenses. The Lord Ordinary must have had reasons which seemed to him good and sufficient for depriving the defender of his expenses, but the difficulty is that he has not told us what these were, and from the debate at our bar I have not learned any sufficient reason why the defender should not have been awarded his expenses. I think we must therefore recal the interlocutor of the Lord Ordinary. One other word. *Prima facie* the defender here would, I think, have been entitled to absolvitor, but Mr Sandeman explained that he did not desire this, and was content with dismissal of the action. I only mention this lest it should hereafter be supposed that this judgment was an authority for holding that the defender was only entitled to dismissal.

LORD SALVESEN—I concur with both your Lordships. I would only add a word as to the suggestion made by Lord Dundas in the course of the debate, that where a Lord Ordinary has disposed of a case without giving any opinion, and parties are dissatisfied with his judgment, it would be a very reasonable course if they afforded the Lord Ordinary an opportunity of writing a note which could be before us at the time the reclaiming note came to be discussed. I see no incompetency in that, and it would be very much easier to dispose of the matter when one knew the views which had influenced the Lord Ordinary in reaching his decision.

LORD ORMIDALE was not present.

The Court pronounced this interlocutor—

“Recal said interlocutor [19th March 1921]: Of new dismiss the action and decern: Find the defender entitled to expenses against pursuers in the Outer House and Inner House and remit the account to the Auditor to tax and to report.”

Counsel for the Reclaimer (Defender) — Sandeman, K.C. — Normand. Agents — Boyd, Jameson, & Young, W.S.

Counsel for the Respondents (Pursuers) — Cooper. Agents—Macpherson & Mackay, W.S.

Saturday, May 21.

FIRST DIVISION.

KIRKCALDY CAFÉ COMPANY,
LIMITED, PETITIONERS.

Company — Memorandum — Alteration — Company Existing for Philanthropic Objects — Resolution to Remove Restriction on Rate of Dividend — Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 9 (b) and (e).

A company which was registered in 1901 presented a petition for confirmation of an alteration in the memorandum of association. The company's leading

objects were philanthropic and social, viz., the management of "respectable and well-conducted public-houses and licensed premises." The memorandum of association declared (article iii, sub-head (18)) that the surplus profits after providing for depreciation, for reserve fund, and for a dividend of 4 per cent., were to be applied to "purposes of public utility." The petition stated that owing to the increased rate of interest now obtainable on investments the shareholders were dissatisfied with the present limited dividend of 4 per cent., and that a resolution had accordingly been passed to alter the memorandum of association by deleting sub-head (18) of article iii, the effect of which would be to remove all restriction on the rate of dividend. The Court *continued* the petition in order that the petitioners might, if so advised, pass a resolution to alter the rate of dividend from 4 to 6 per cent., and this having been done *confirmed* the alteration.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) enacts—Section 9—“(1) Subject to the provisions of this section a company may by special resolution alter the provisions of its memorandum with respect to the objects of the company so far as may be required to enable it—(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 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. (2) The alteration shall not take effect until and except in so far as it is confirmed on petition by the Court. . . (4) The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper.”

The Kirkcaldy Café Company, Limited, *petitioners*, presented a petition to the Court under the Companies (Consolidation) Act 1908 for confirmation of an alteration in the memorandum of association of the company.

The petition, *inter alia*, set forth—“The objects for which the company was established are set forth in clause 3 of the memorandum of association. Among the objects are the following:—(1) To carry on in the town of Kirkcaldy in the county of Fife or elsewhere in Scotland the businesses of inn-keeper, spirit merchants, ale-house keepers, café and restaurant keepers, purveyors and caterers for public entertainments and amusements, and manufacturers of aerated waters and such other commodities as may be required by the company, or may be of advantage to it in carrying on its other businesses. . . (8) To make such arrangements and management of the company's public-houses and licensed premises that they shall be respectable and well-conducted houses of refreshment and rest, and places where food and non-intoxicating

drinks shall be supplied to customers as readily as intoxicants, the latter being when expedient removed from the prominence in to which they are placed in public-houses and licensed premises as at present conducted. (9) Prevention of drunkenness and habits of intemperance, and the furtherance by proper means of the principles of public-house reform as intended to be carried out by this company. (10) The prevention of adulteration and a more rigorous enforcement of the licensing laws generally. . . (14) To sell, improve, manage, develop, lease, mortgage, dispose of, turn to account, or otherwise deal with all or any part of the property and rights of the company, but the company shall not sell or lease any licensed premises belonging to them, with the licences held therefor, unless to a company whose main object is the same as this company, viz., the minimising the evils of the drink traffic. . . (18) To apply the whole surplus profits derived from the business carried on by the company, or the sale of the undertaking or any part thereof, after making provision for (1st) depreciation of assets, (2nd) a reserve fund, and (3rd) payment of a dividend of not more than 4 per centum per annum on the paid-up capital of the company, to such purposes of public utility in the extended burgh of Kirkcaldy or its neighbourhood or elsewhere in Scotland as the committee may determine. (19) To do all such acts or things as may be incidental or conducive to the attainment of the aforesaid objects or any of them.”

The petition also stated that since its inception the company had done a large and profitable business and had distributed substantial sums every year (in terms of clause 3 (18) of the memorandum of association) among various institutions. Owing, however, to the increased rate of interest now obtainable in investments of a similar nature the shareholders are dissatisfied with the present limited dividend of 4 per cent. A resolution had therefore been duly approved and confirmed by the company as follows—“That the provisions of the memorandum of association of the company with respect to the objects of the company be altered by deleting sub-clause (18) of clause 3 of the said memorandum.” The petitioners explained that it was not their intention to depart from their custom of distributing surplus profits, and in the event of the Court confirming the special resolution the articles of association would be altered and power given to the directors to apply surplus profits (after making provision for (1) depreciation of assets, (2) a reserve fund, and (3) payment of a dividend at such rate as may be determined by the directors with the sanction of the shareholders) in a similar manner to the provisions in the said clause 3 (18).

On 26th January 1921 the Court remitted to Sir George M. Paul, C.S., to inquire into the facts and circumstances and to report.

He reported—“It is understood that the company founds its application upon subsection 1 (e), which authorises the restriction or abandonment of any of the objects specified in the memorandum. In pursuance of

that presumed power the company has (subject to confirmation by your Lordships) passed the special resolution already referred to abandoning as one of its objects clause 18 of the memorandum, which directs the company how to dispose of the surplus profits arising from business done by the company through what is undoubtedly its leading object, viz., the management of 'respectable and well-conducted public-houses and licensed premises.' It has, however, occurred to the reporter that clause 18 should be considered as embodying not a separate object of the company but what is truly part and parcel, indeed one of the clauses, of the general direction as to its leading object, without which that object would obviously be incomplete. It will be noted that the company states in its petition that 'since its inception it has been successful and has done a large and profitable business.' Assuming, however, that clause 9 (1) is not inapplicable, another point arises—Does the company intend a real abandonment, in the sense of the sub-section, of the object specified in clause 18, beyond this, that it desires to be released from the restriction imposed on it by the memorandum? If it could be so released it would be enabled to 'regulate the amount of dividend payable to the shareholders.' The company explains that it is not its intention to depart from its custom of distributing surplus profits, but that in the event of the Court confirming the special resolution the articles of association will be altered and power will be given to the directors to apply surplus profits (after making provision for (1) depreciation of assets, (2) a reserve fund, and (3) payment of a dividend at such rate as may be determined by the directors with the sanction of the shareholders) in a similar manner to the provisions in the said clause 3 (18). While the reporter thinks 4 per cent. too low a rate of interest for the shareholders to be satisfied with, and would be glad if it should be found practicable to increase it, it seems to him as if the benevolent intentions of the promoters of the business were being gradually lost sight of as regards the proposed mode of paying dividends and disposal of surpluses. The company being released from the restriction of the memorandum and having its rule in that behalf transferred to the articles would be enabled at some future time to make by special resolution such new and different arrangements as it thought fit."

No answers were lodged.

On 12th March 1921 counsel was heard on the petition and report. The following authorities were referred to—Buckley's Company Law, p. 19; *In re Hearts of Oak Life and General Assurance Company, Limited, and Reduced*, [1920] 1 Ch. 544.

At advising—

LORD PRESIDENT—This petition presents some unusual features. The company is one which was originally formed and is still carried on for philanthropic and social objects, not for commercial gain. The proposal which we are asked to confirm consists in the deletion of sub-head (18) of

article iii of the memorandum of association, and involves a material declension from the altruistic principles on which the company was originally formed, because the effect would be that the appropriation of the whole surplus profits of the company to purposes of public utility, as provided in the memorandum, would disappear. The reporter in his report sounds a necessary note of warning with regard to such an alteration in the case of a company originally philanthropic in character, whose operations are conducted in a field usually occupied by ordinary commercial enterprise and in competition with ordinary commercial concerns. Mr Chree has accordingly suggested that the petitioners might be content with something less drastic than the complete deletion of sub-head (18). He suggests the deletion of the word "four" in the expression "four per centum" in clause (18), and the substitution for that figure of a higher percentage, which he suggested might be ten—leaving the clause otherwise to stand. I do not wish to say that it would be impossible to regard an increase in the dividend percentage as a "restriction" upon the public objects of the company as these are defined by sub-head (18) of article iii, and so as coming—at a stretch—within the ambit of sub-head (e) of sub-section (1) of section 9 of the Companies Act of 1908. But there is another way by which I think Mr Chree's modified proposal is more easily reconciled with the terms of the Act. Just because a company of this kind pursues in the main, if not entirely, non-commercial objects, it is necessary and expedient that it should have it in its power to offer a return upon the capital required by it, such as is consistent with the changed standard of money values as we now know them, and I do not think that it can be said to be in that position so long as its power of dividing dividend is restricted to a standard of four per cent. It would be an "improved means" of attaining its main purpose, within the meaning of sub-head (b) of sub-section (1) of section 9, if the company had the power to offer such a return as would reasonably enable it to get the capital which it requires from time to time at a rate which would attract, I do not say speculative investors, but at least ordinary owners of capital, and I am prepared to enlarge the rate of dividend percentage accordingly. But I do not think that it should be raised higher than six per cent. If the company with the views expressed to-day before it considers that its objects would be assisted by an alteration of sub-head (18) of article iii of the memorandum of association to the extent I have defined, the best course would be for the company to meet again and pass a resolution altering sub-head 18 in the manner suggested. If that were done it would then be possible for this Court to give the necessary confirmation.

LORD MACKENZIE—I am of the same opinion. The main object of this company, as appears from article iii of its memorandum of association, was philanthropic,

and the reporter points out the different sub-heads of article iii which bear that out. Amongst others is sub-head (18), which restricts the dividend to be paid to four per cent, per annum upon the paid-up capital of the company, and provides that, after making provision for depreciation of assets, a reserve fund, and payment of a dividend of not more than that amount, then the whole of the surplus profits are to be applied to such purposes of public utility as the committee may determine. It would be difficult to bring that within section 9 of the 1908 Act, sub-section (1), but we are not now asked to give a decision upon that point. The reporter points out that clause (18) should be considered as embodying, not a separate object of the company but what is truly part and parcel, indeed one of the clauses, of the general direction as to its leading object, without which that object would obviously be incomplete. Nothing that is done to-day will give any encouragement to companies promoted for philanthropic purposes in seeking to get the sanction of this Court to the deletion of a clause which plays so important a part as clause (18) in the present case. It is, however, quite a different question whether as a matter of practical business it is not desirable to bring the four per cent., which appears in the original clause (18), more into relation with the value of money at the present time, and so far as we are asked to do that it appears to me that if the company passes a resolution with that in view it would be in the power of this Court to sanction such a course.

LORD CULLEN—I concur.

LORD SKERRINGTON was absent.

The Court continued the petition.

On 21st May 1921 the petitioners presented a note which, *inter alia*, stated—“In accordance with the above recommendation by the Court, at an extraordinary general meeting of the members of the company . . . held . . . on the 6th day of April 1921 the following resolution was duly passed, and at a subsequent extraordinary general meeting held on the 22nd day of April 1921 the same was duly confirmed:—‘That the provisions of the memorandum of association of the company with respect to the objects of the company be altered by deleting the word “four” in sub-clause (18) of clause iii . . . and substituting therefor the word “six.” . . .’”

After hearing counsel further the Court confirmed the said alteration of the memorandum of association as quoted in the note.

Counsel for Petitioners—Chree, K.C.—J. B. Young. Agents—Maxwell, Gill, & Pringle, W.S.

VALUATION APPEAL COURT.

Thursday, March 17.

(Before Lord Salvesen, Lord Cullen, and Lord Hunter.)

M'GARRITY v. ASSESSOR FOR LANARKSHIRE.

Valuation Cases—“*Yearly Rent or Value*”—*Small Dwelling-house*—*Monthly Tenancy*—*Valuation for Year Ending Whitsunday 1921*—*Increase on Standard Rent as from 28th August 1920*—*Failure to Give Statutory Notice under House Letting Act 1911 of Termination of Contract of Let*—*Increase of Rent and Mortgage Interest (Restrictions) Act 1920* (10 and 11 Geo. V, cap. 17), *secs. 2 and 3.*

The Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (10 and 11 Geo. V, cap. 17), which authorised the owners of dwelling-houses to which the Act applied to increase the standard rent by a certain percentage, enacts—Section 3 (1)—“Nothing in this Act shall be taken to authorise any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession.” The Act came into force on 2nd July 1920.

The owner of a house of the description to which the Act applied, and which was let under a contract of monthly tenancy at 12s. 6d. a-month, served a notice on 28th July 1920 upon the tenant to the effect that from 28th August he intended to increase the rent. No notice of termination of let under section 4 of the House Letting and Rating (Scotland) Act 1911 had been served on the tenant. The assessor entered the annual value of the house in the valuation roll for 1920-21 at £10, 2s., which sum he arrived at by taking the standard rent for the first three months and adding thereto the increase which was to be payable for the remaining nine months. *Held* that the assessor was entitled to take into consideration information which came into his possession subsequent to Whitsunday 1920 but before the roll was finally made up, and that for the purpose of determining the value the intention of the proprietor to increase the rent was a relevant consideration. *Held* further that the assessor had power to increase the valuation notwithstanding the owner's failure to give due statutory notice before increasing the rent.

At a meeting of the Valuation Committee for the Middle Ward of the County of Lanark held at Hamilton on 14th September 1920, John M'Garrity, *appellant*, appealed against the following entry in the valuation roll for the county of Lanark for the year ending Whitsunday 1921, viz.—

Description.	Situation.	Proprietor.	Tenant.	Occupier.	Yearly Rent.
House	20 Crosshill	John	John	John	£10, 2s.
	8 square, Baillieston, parish of Old Monkland	Fotheringham	M'Garrity	M'Garrity	