Thursday, November 7.

FIRST DIVISION.

[Lord Dundas, Ordinary.

MARMOR LIMITED *v.* ALEXANDER.

Company — Directors' Remuneration — Travelling Expenses to and from Board Meetings—Illegal Payments.

The articles of association of a limited company provided, *inter alia*—"77. The remuneration of the directors shall be a sum of £250 to the chairman and £200 per annum to each other director. . . . 92. The directors, trustees, and officers of the company shall be indemnified out of the funds of the company against all costs, charges, losses, damages, and expenses which they shall respectively incur and be put to in the execution of their respective offices, or by reason or on account of any contract, act, deed, matter, or thing which shall be made, done, permitted, entered into, or executed by them respectively on behalf of or *bona fide* in the interest of or with the view of benefiting the company, notwithstanding that the same may be *ultra vires* in point of law."

In an action by the company against one of its directors for repayment of a sum paid to him for travelling expenses incurred in attending the board meetings, *held* that the payment was illegal, and that the director was bound to refund the sum so paid.

On 19th June 1907, Marmor Limited, a company having its registered office in London, raised an action against W. H. Alexander, 166 Buchanan Street, Glasgow, in which they sought to recover (1) a sum of £279, 6s. paid to him for travelling expenses as a director of the company, and (2) a sum of £100 (with which, however, this report is not concerned) alleged to be due in respect of shares allotted to him. The defender, who had been a director of the company from its incorporation in September 1897 until the end of 1905, had previously raised an action against the company to recover a sum alleged to be due as director's fees and outlays, and the present action was to establish a counter claim.

The sum of £279, 6s. was £7, 7s. for each attendance of the defender at the board meetings, allowed him as travelling expenses, and had been credited to him in an account between him and the company which had been duly passed for payment by the directors. The pursuers now averred that the resolution and payment were irregular, *ultra vires*, and illegal, and that the board of directors and the defender had acted in the matter in breach of their duty.

The defender pleaded, *inter alia* — "(5) The payment now challenged not being illegal or *ultra vires* of the company, *et separatim*, being protected by the articles of association of the said company, the pursuers are not entitled to repayment of the sum claimed. (6) The defender being entitled to receive payment of said sum of £279, 6s. is not bound to make repetition of it to the pursuers."

The articles of association, so far as bearing on the question, are quoted *supra* in the rubric.

On 19th October 1907 the Lord Ordinary (DUNDAS), *inter alia*, repelled pleas five and six for the defender, and decerned against him for payment of the said sum of £279, 6s. (*quoad* the sum of £100, his Lordship allowed proof).

Opinion.—"The matter involved in the first conclusion of the summons may, I think, be disposed of upon the pleadings, without the necessity of inquiry by way of proof. Payment to the defender of travelling expenses, though made and accepted in perfect *bona fides*, was, in my opinion, illegal. I find no warrant for it in the articles of association of the company. By article 77 the 'remuneration' of each director (except the chairman) is declared to be £200 per annum. But the defender founds upon article 92, which, under the head of 'Indemnity to Officers,' provides that—[*quotes, supra in rubric*]. These words of indemnification are wide, but I do not think that expenses incurred by a director in arriving at the company's board-room to attend meetings (be the distance long or short) can be held to be expenses incurred by him in the execution of his office. Such expenses must, in my judgment, be included in the remuneration for which he agreed to give his services. The director, I take it, executes his office in the board-room but not on the way thither. It is, I consider, part of his ordinary duty, for which he is paid, to go to the place where the meetings are held. I should have come to this conclusion apart from authority, but I am fortified in it by the opinion of Farwell, J. (now L.J.) in the case of *Young*, 1905, 1 K.B. 687. The clause there under consideration is not, I think, materially different from article 92 of this company's articles, and I assent to the general observations made by his Lordship as to the position and duty of directors in this matter. The case seems to be a hard one from the defender's point of view. But if my conclusion is sound it follows that the company is entitled to recover the sum (first) sued for unless they are in some way barred from doing so. There are some averments to this effect upon the record, but I do not think they are relevant or sufficient to support a plea of bar. It is true that in the accounts and balance-sheets which were annually passed at general meetings of the company there is a recurring item for 'salaries, rents, rates, taxes, travelling expenses, cablegrams, &c.' But I do not think this colourless mention of 'travelling expenses'—a kind of charge which might quite legitimately be made under given circumstances—can be held to have brought to the shareholders' knowledge that payments of the sort now complained of had been made, so as to bar the company from recovering. I was referred on this matter to *Houldsworth*, 1868, L.R., 3 E. & I.

App. 263 (*per* Lord Chancellor Cairns at p. 275); and *Ashbury Railway Carriage and Iron Co.*, 1875, L.R., 7 E. & I. App. 653 (*per* Lord O'Hagan at pp. 692, 693). There are also averments as to the sum in question having been part of a larger sum paid to the defender, and as to the method of payment to which he says he 'would not have agreed . . . if there had been any dispute about the said sum of £279, 6s. being properly due.' That payment was, as I consider, illegal, and I do not think that these averments amount to a relevant statement of bar against the pursuers. They are therefore, in my judgment, entitled to decree in terms of the first conclusion of the summons. . . ."

The defender reclaimed, and argued that the expenses of attending the board meetings were expenses incurred in the execution of his office, to which under article 92 (quoted *supra*) he was entitled.

Counsel for respondent were not called on.

LORD PRESIDENT—There are here two actions. The leading action was at the instance of Mr Alexander against a company called Marmor Limited, and in it Mr Alexander sued for fees due to him as director. The defence was that he had already been paid, except as to a certain balance, which was tendered; but the true matter of dispute between the parties was whether in an accounting between the parties the company were entitled to get back from Mr Alexander a sum of £279, 6s. which he had been paid in the name of travelling expenses, and also whether they were entitled to get from him a sum of £100 due upon certain shares which had been allotted to him. The Lord Ordinary held that these questions could not be raised by way of mere defence, but must be raised by counter action, and accordingly a counter action was raised by the company against Alexander for these two sums. It is in that action that the operative decree of the Lord Ordinary has been pronounced. What his Lordship has done is, he has decerned against Mr Alexander for £279, 6s., and he has allowed a proof as to the £100. In the reclaiming note parties have agreed that there must be a proof about this matter of the £100 as to whether it has been paid or not; but they are not at one about the £279, 6s.

Now the first question that arises upon the £279, 6s. is whether the payment as originally made was an illegal payment. It is common ground that the travelling expenses in question are not travelling expenses incurred in any particular journey on which Mr Alexander was sent by the other directors, such as a visit of inspection to quarries or anything of that sort, but simply represent Mr Alexander's own expenses in arriving at the scene of the company's meetings, the company's meetings being held in London, whereas Mr Alexander lived in Scotland. It is also common ground between the parties that these expenses were authorised to be made by the directors, and that they have never been submitted to one of the authorising meetings of the company. In these circumstances Mr Alexander pleads article 92 of the articles of association of the company, which is in these terms—"[*quotes, supra in rubric*] . . . I am clearly of opinion that these expenses do not come under either of these heads. I do not think that a payment to a director in order to get from his own dwelling-house to where the company has its meetings, is an expense which he is put to in the execution of his office. He only begins to execute his office for the company at the directors' meetings. I am not doubting that a payment of travelling expenses could be perfectly well made to a director, where the director, at the request of the other directors, undertakes any special visit of inspection, or undertakes to go anywhere where he would not naturally be in the interests of the company. If, for instance, this company had wished any of their quarries inspected, even if these quarries had been in Greece or any other far away part of the world, I do not doubt that it would have been a perfectly good charge to charge the travelling expenses of the director who was sent out there. But the ordinary expense which a man incurs in getting from where he himself chooses to live to the seat of the company's business does not seem to me to be expense that is incurred in the execution of his office at all. As little could it be expense that falls under the second head which truly deals with another and different class of matter altogether. That means that if the directors or officers of the company have done something in the interests of the company *bona fide* they should be paid for the expenses that they have incurred in that, even although it may be afterwards found to be *ultra vires* of the company. That has to do with a different category of circumstances. Therefore I have come to the conclusion, without any difficulty, that we should start the matter by finding that these expenses were illegally paid by the directors to the particular director, and the consequence is that in a question with the company he is bound to refund this illegal payment. . . . . .

Accordingly, I think the Lord Ordinary has come to a right conclusion. As regards the actual form of the judgment he has made a decerniture for payment, which, of course, is not what was meant. I would advise your Lordships to recal the Lord Ordinary's interlocutor in so far as it decerns the defender to make payment to the pursuers of the sum of £279, 6s., and in lieu thereof find that the defender is bound to make payment, and *quoad ultra* adhere to the interlocutor.

LORD M'LAREN—I agree with all that has been said by your Lordship in the chair. On the first branch of the case I think it is perfectly clear that directors' duties in general are to be performed at board meetings, for the business of directors of companies necessitates meetings for consultation, and the fees allowed to the directors cover the expenses of going to

the board meetings. Of course if a director is sent anywhere on a delegated duty it is equally clear that he has to be paid his expenses, because I do not think that his colleagues would be able to secure the services of one of their number to go upon a distant journey except under the condition that he should be relieved of the expenses that he incurred in the interests of the company.

LORD KINNEAR—I concur.

LORD PEARSON was absent.

The Court recalled the Lord Ordinary's interlocutor in so far as it decerned against the defender for payment to the pursuers of the sum of £279, 6s., and in lieu thereof found that he was bound to make payment of the said sum, and *quoad ultra* adhered.

Counsel for Pursuers (Respondents) — Scott Dickson, K.C.—J. G. Jameson. Agents —Boyd, Jameson, & Young, W.S.

Counsel for Defender (Reclaimer)—Hunter, K.C.—R. S. Horne. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Friday, November 15.

SECOND DIVISION.

[Lord Johnston, Ordinary.

POLWARTH *v.* NORHT BRITISH RAILWAY COMPANY AND OTHERS.

Contract—Carriage—Railway—Breach of Contract—Deviation from Route—Effect of Request for Carriage Back by Same Route as on Outward Journey when that was a Condition of Half Rates—Stipulation Solely in Interest of One Party to the Contract.

A railway company agreed to charge only half rates for the return journey of stock not sold at a show at A., on condition that the exhibitor consigned them "on the return journey by the same route as they were sent." An exhibitor signed a form supplied by the company requesting them to carry back to M. three unsold cattle "by the same route as on the journey here" at their reduced rate, and in consideration thereof he undertook to relieve the company of all liability for loss or damage unless caused by wilful misconduct on the part of their servants. The cattle on the outward journey had been consigned from M. to A. *via* K., no route being specified between K. and A. From K. there were two routes to A., with little difference as regarded distance and convenience. The company had carried the cattle by the one route on the outward journey, and were carrying them by the other on the return journey, when the truck containing the cattle went on fire, from the effects of which they died.

Held (1) that the stipulation for carriage back "by the same route as on the journey here" was not a condition of the contract which the company could waive as having been made solely in its own interest; and (2) that the company had broken the contract.

Carriage—Railway—Contract for Carriage of Cattle at Owner's Risk—Cattle Carried by Route not that Specified in Contract—Liability of Railway Company for Loss—Limitation of Liability—Railway and Canal Traffic Act 1854 (17 *and* 18 *Vict. cap.* 31), *sec.* 7.

A railway company in carrying cattle to their destination carried them by a route, deliberately adopted, different from that specified in the contract of carriage. The cattle were injured owing to the truck taking fire.

Held that the company's breach of contract precluded them from founding on a clause therein which indemnified them from loss, but that the breach did not put them outside the Railway and Canal Traffic Act 1854, sec. 7, which consequently limited their liability.

The Railway and Canal Traffic Act 1854 (17 and 18 Vict. cap. 31), enacts—Sec. 2—"Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic" (which term by section 1 includes animals) "upon and from the several railways and canals belonging to or worked by such companies respectively. . . ."

Section 7—"Every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: . . . Provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals beyond the sums hereinafter mentioned; (that is to say) . . . for any neat cattle, per head fifteen pounds; . . . unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned. . . ."

On 1st February 1905 Lord Polwarth, Mertoun House, St Boswells, brought an action against the North British and the North-Eastern Railway Companies to recover, jointly and severally, £800 with interest.

The following narrative of the *facts* is taken from the opinion of the Lord Ordinary (JOHNSTON)—"This action is raised by Lord Polwarth to establish liability against the North British Railway Company and the North-Eastern Railway Com-