Wednesday, June 19.

FIRST DIVISION

[Lord Curriehill, Ordinary.

MITCHELL AND OTHERS *v.* BURNESS (JUDICIAL FACTOR ON THE ESTATE OF THE UNITED SOCIETY OF SEAMEN OF MONTROSE).

Friendly Society—Winding-up—Interference of Court.

Where an association of the nature of a friendly or assurance society had, in consequence of the death of nearly all its members, become unworkable, *held*, (1) that the survivor or survivors of its members were not entitled to divide the funds among them, and (2) that the Court could not interfere to adjust any scheme for its management as in the case of a public charity.

Expenses—Party bringing Action to have Friendly Society wound-up found Entitled to Expenses out of Fund though unsuccessful.

Held that the last surviving member of a friendly society, who by claiming the society's funds had brought the matter before the Court for their decision as to the legality of such a course, was entitled to have his expenses paid out of the funds of the society.

In the year 1801 the Ancient Fraternity of Seamen of Montrose and the Seamen's Friendly Association of Montrose, two societies for the relief of widows and children of decayed shipmasters and seamen of Montrose, resolved to unite themselves into one society, for the benefit of the widows and children of the existing members of the two societies and of those that should thereafter become members of the new society. The contract that was drawn up of that date recited that—"Considering that the shipmasters and master shipbuilders of Montrose have, past the memory of man, associated and incorporated themselves under the denomination of the Fraternity of Seamen of Montrose, and have contributed part of their wages for raising a fund for relief of the widows and children of such shipmasters and seamen as have become decayed in their means, whereby a considerable stock has been raised for that laudable purpose: And considering also that another association has within these few years been formed by other shipmasters, mariners, master shipbuilders, and others within the said town of Montrose, for the said laudable purpose of relieving their widows and children, under the name and denomination of the Seamen's Friendly Association of Montrose, whereby a considerable stock has already been raised; and the persons above named, present members of the said Ancient Fraternity of Seamen, and of the said Friendly Association of Montrose, being convinced that an union of the said two societies and of their funds would greatly tend to increasing the funds of both societies for relief of their poor: They have unanimously agreed to unite, and by tenor of this contract all the parties hereto subscribing do unite themselves into one society or association, with intention of perpetual succession, under the name and denomination of the United Society of Seamen of Montrose, for the benefit of the widows and children of them the contractors, and of such other persons as shall hereafter be admitted as members thereof in manner after mentioned, and to observe and fulfil and be subject to all the articles and conditions after written." The provisions necessary for amalgamating the funds of the societies and administering them in future were then inserted. Rules proper for the management of the new society, and conditions under which members were to be admitted, followed. The members were to be of three classes, and the widow and children of any member in the event of his death, or the members themselves upon attaining a certain age, were to receive payments out of the funds corresponding to the class to which they had belonged:—Articles 10 and 11 of the contract were as follows:—"(Article 10) That no person shall hereafter be admitted or received as a member of the said United Society unless he has formerly been or shall at the time be a shipmaster, a mate, or mariner, or ship-carpenter, and that no person shall be so received or admitted a member unless he is recommended by five of the members of the two highest classes, and shall afterwards be admitted by a majority of the managers of the funds of the society for the time; and every person upon his said admission shall pay into the treasurer for the time the sums payable by those admitted as before-mentioned in this contract, and shall become bound to pay his half-yearly contribution, and perform all the articles and conditions contained in this contract, and such other articles, rules, and conditions as shall afterwards be made for the regulation of the United Society's affairs, as hereinafter expressed."—"(Article 11) That the management of the funds of the said United Society, and all other matters and things concerning the same, shall be vested in and under the direction of the members who have entered upon the two highest classes, who shall meet annually on the first Wednesday of February, when a preses and other six managers for the then succeeding year shall be chosen from amongst them, and at this meeting a treasurer shall also be chosen for one year; and a meeting of the managers shall be held on the first Wednesday of August yearly—any four of them to be a quorum." There was nothing to show that the society had had any public object, or that anyone other than the widows or children of members of the society had derived any benefit from its funds, and in a memorial for the opinion of counsel drawn up in 1774 the Ancient Fraternity was expressly described as existing for behoof of the widows and children of members or of such of the members themselves as should have become indigent.

The number of members became reduced, so that in 1858, there being but four members alive, and the contract having, *inter alia*, provided that the management of the society should be in the hands of a preses and six managers, a judicial factor was appointed on the application of three of these members to manage the society's affairs. The defender in the present action was the factor appointed on the death of Mr Greig, who was the person originally holding the office.

At the date of raising this action the pursuer William Mitchell was the only surviving member of the society, and the other pursuers were the annuitants entitled as widows of deceased members to participate in the funds of the society. No new member had joined the society for more than twenty years, and under bye-law 14, passed on 1st February 1837, Mitchell was

entitled to the old men's aliment of the first-class, which he had never been paid. These parties, who alone were now interested in the funds, had executed a minute of agreement arranging the terms on which the society's funds were to be divided among them, and now asked the Court to find (1) that the society had ceased to exist, in consequence of the membership thereof becoming reduced to so small a number that it was impossible to carry on its purposes; (2) that they, the pursuers, were entitled to the property of the society, amounting to £1870, in terms of the minute mentioned above, or in such other way as the Court should direct; and (3) that Mitchell was entitled to decree for £44, the equivalent of a first-class annuity since 4th April 1868, when he attained the age of sixty years; and (4) they all to decree for the remainder of the free proceeds of the Society's effects, in proportion to the annuities now payable to them.

The defender pleaded, *inter alia*—"(1) The pursuers have no right or title to distribute the funds of the United Society of Seamen amongst themselves, and the present action should be dismissed, with expenses. (2) In any view, no decree should be pronounced in terms of any of the conclusions of the summons until such intimation as the Court may direct has been made of the proposed dissolution of the society and division of its funds."

The Lord Ordinary (CURRIEHILL) pronounced an interlocutor with findings giving effect to the first two conclusions of the summons, and giving decree accordingly against the defender in terms of the 3d conclusion of the summons, and before further answer appointing certain documents to be lodged by the defender. He added this note:—

"*Note*—I am of opinion that the 'United Society of Seaman of Montrose' is not a corporation, but is a private charitable society for the relief of widows of deceased members and of decayed living members. The rules of the society make this quite clear. The society is a voluntary association, with no public rights or privileges, its affairs being regulated by certain rules and bye-laws framed by the members themselves, with reserved power to amend and alter the same from time to time. By these rules, which were adopted in 1801, it was agreed that the society 'shall subsist by succession amongst the parties to these presents, and those who may hereafter accede and become parties to the same.' But no one had or has right to demand admission. On the contrary, no one could be admitted unless recommended by five first-class contributors, and unless he was afterwards admitted by the majority of the managers, or body consisting of a preses and six other contributors of the first and second classes, and elected annually.

". . . The defender, as judicial factor, has very properly declined to accede to the demand of the pursuers to distribute the whole funds of the society among them unless and until authorised to do so by a judgment of the Court. He was appointed to uplift, administer, and preserve the estate of the society, not to distribute it. In the defences which he has lodged in the action, and in a very able argument submitted by his counsel at the bar, he has brought under the notice of the Court the grounds upon which he considered the legality of the proposed distribution of the funds to be at least doubtful; and if I had thought that the society in question was in any sense of the word a corporation I should have found it very difficult to refuse effect to the objections stated by the defender to the distribution of the funds. But, as I have already said, the society does not appear to me to be a corporation or to possess any of the characteristics of a corporation. It is purely a private society, and the only surviving member and all the known creditors of the society consent to its being finally wound up and its estate divided. Notwithstanding repeated advertisements of the dependence of the action, made by order of the Court, no one has appeared to claim an interest in the society, and there is no one in existence entitled to claim admission to the society, and no means by which any new member could be admitted. I am therefore of opinion that the time is come when the funds may be safely divided. Decree has therefore been pronounced in terms of the declaratory conclusions of the summons, and of the petitory conclusion for payment of the arrears of aliment due to the pursuer William Mitchell. But as the defender is entitled before parting with the funds not only to a judicial discharge, but to remunerations for his services and payment of the expenses incurred by him, final decree is postponed until the amount of the defender's claims against the society is ascertained."

The defender reclaimed, and argued—There was much difficulty in dividing the funds as Lord Ordinary proposed to do. Were not the representatives of deceased members who might have subscribed for many years to the fund entitled to a share in its accumulations? The judicial factor had, since the date of the Lord Ordinary's interlocutor, received four applications—two of them from children, two from other representatives of deceased members. It could not be ascertained with any certainty from whom the contributions came, or in what proportions, and therefore the Court was in the same position as that described by Lord Cottenham in the case of *Bain* v. *Black*, Feb. 22, 1849, 6 Bell's App. 317. The Court could vary the means for attaining a charitable object on cause shown, though they could not change the object itself—*Clephane* v. *Magistrates of Edinburgh*, Feb. 26, 1869, 7 Macph. (H.L.) 7. Lord Westbury in that case said that the powers exercised by the Court of Chancery and those exercised by the Court of Session in matters of this kind were identical. [LORD PRESIDENT—That I dispute; that is a rule I shall never follow.] The Court had certainly refused in several instances to permit the distribution of funds among members of a corporation, even when all existing interests were provided for, and such bodies as friendly societies could not be wound up unless the consent of all donors was obtained; hence to justify winding-up here not only present members but representatives of past subscribers ought to be convened of consent—*Howden* v. *The Incorporation of Goldsmiths*, June 2, 1840, 2 D. 996; *Mylne* v. *Fraser*, Nov. 25, 1859, 22 D. 33; *Steedman* v. *Malcolm*, June 23, 1842, 4 D. 1441; *Morrison* v. *Fleshers of Edinburgh*, Nov. 24, 1853, 16 D. 86; *Thomson* v. *Candlemakers of Edinburgh*, March 16, 1855, 17 D. 765.

Prescriptive possession was sufficient to constitute a corporation—Erskine i. 7, 64; *Graham*

v. *Writers to the Signet*, June 21, 1825, 1 W. & S. 538—and therefore this was a corporation, and the decisions quoted above were directly applicable. If the Court interfered it should be to devise some new regulation for the attainment of the object for which the Society was instituted. *Sailors of Prestonpans* v. *Warroch*, Feb. 10, 1801, reported in note to *Steedman's* case, quoted *supra*.

The respondents argued--This was a purely private body, and no one had a right to demand admission. That distinguished this case from *Mylne's*, where there were parties entitled to claim admission. There was no existing interest but that of the pursuers here. In *Steedman's* case and in the case of the *Fleshers* and the *Candlemakers* there was opposition from parties having an interest. The proposal to divide the funds in the *Goldsmiths'* case was resisted by a minority of the incorporation. Besides that, this was not an incorporation as these were, but a society—for the light in which such arrangements in the case of a private society should be regarded, it was instructive to look at the provisions of the Legislature in the Friendly Societies Act (38 and 39 Vict. cap. 60), sec. 25.

At advising—

LORD PRESIDENT—The conclusions of this action raise a very important question, and one which is perhaps altogether unprecedented in our practice. The ground of action, viz., that the Society in question has become unworkable, and that its object can now no longer be attained even with the aid of the Court, seems to be made out in point of fact.

Now, there are two observations that arise upon a consideration of the contract by which this Society was constituted — First, it is in no sense an incorporation. It is a voluntary association composed of private individuals, for general and laudable purposes no doubt, but not an incorporation. Second, it is not a charity. The association instituted in 1801 is plainly, on the face of it, of the nature of a mutual assurance or friendly society. There is no element of charity in it at all.

At first sight there is a trace of a charitable element in the constitution of the Ancient Fraternity of the Seamen of Montrose. But the trace is so slight that it is impossible to say it was a charitable association. It is there narrated that the members of this Society "have contributed part of their wages for raising a fund for relief of the widows and children of such shipmasters and seamen as have become decayed in their means." One interpretation of that might be that it was intended to raise a fund for the relief of the widows and children of all decayed shipmasters and seamen whether they were members of the society or not. Whether that was so or not, this provision disappears in the constitution of the association of 1801. The manner in which the amalgamated society is to be carried on will be found in the 10th and 11th articles of the contract of 1801—[*reads ut supra*], and it is to be observed that under these two regulations no one can be admitted to the membership of this Society unless he is recommended by five of the members belonging to the two highest classes and admitted by a majority of the managers, and again the management of the affairs of the Society is vested in a preses and six managers, of whom four are to be a quorum.

The agreement of 22d February 1877 binds the sole surviving member of the Society and the remaining annuitants, who are fairly entitled to represent themselves as the whole parties interested, to divide the fund among them. In the scheme of this Association there is nothing whatever in the nature of a Tontine, and a survivor has no greater rights in the property of the Society than those dying at an earlier period.

This general question therefore is raised, Whether, when funds have been subscribed for purposes of this kind, and these purposes turn out to be unattainable, they who happen to survive, or he who happens to be the last living member, is entitled to put the funds in his pocket as if the Society were a Tontine. I know of no authority for the affirmative of that proposition, and it would be contrary to all legal principle. It is against the plain meaning of parties. This money was contributed for a specific purpose and cannot be lawfully applied to any other; and it would be to apply it to another purpose to give it to Mr Mitchell and these annuitants. I cannot therefore affirm the second declaratory conclusion of the summons as the Lord Ordinary has done.

How, then, is this money to be disposed of? If the pursuer and the surviving annuitants are not to have it, who is? That raises one of these great legal difficulties that this Court is not competent to solve, which was described by Lord Cottenham in the case of *Bain* v. *Black*, cited to us in the course of the argument, in somewhat memorable words. That case was described by the appellant as being a case where the purposes for which the money was subscribed were quite unattainable, and the money must be applied in some other way. Lord Cottenham was of opinion that it was not a case of that description, but if it were, he says the case would be full of difficulties. He said—"Many cases have arisen in which societies have been formed entirely by subscriptions, and by money advanced, and in which the object sought for could not be obtained. And then the question has arisen as to the means by which the property so collected could most fairly and properly be redistributed amongst those from whom it had come, and it has been found that the existing establishments of this country were totally inadequate to perform that duty, and Acts of Parliament have therefore been passed for the purpose of establishing machinery peculiar to each case, and with a view to do that which the regular proceedings in our Courts were found totally inefficient to accomplish." He adds —"Whether better means exist in the Court of Session it is not necessary now to inquire." But I am sorry to have to add that no better means exist in the Court of Session, and we are just as little competent to deal with a case of the kind as the Court of Chancery in England.

The conclusion therefore to which I have come is this, that this is an insoluble difficulty as far as we are concerned, and that unless the Legislature steps in to interfere the money must remain where it is. I am therefore of opinion that we cannot give effect to the declaratory conclusions of this action. There are some minor conclusions with which I do not propose to deal. We should, I think, leave the fund in the hands of

judicial factor, and it will be there to answer any demands that may be made on it.

Lord Deas—This Society, constituted by the contract of 1801, was, in my opinion, not a corporation but a friendly society. I am further of opinion that it has now come to an end, and that that circumstance does not entitle the surviving members to divide the funds among them. These are applicable, in the first place, to provide allowances to the widows and children of members, but the balance does not belong to these who may be the survivor or survivors and cannot therefore be divided among them.

I do not entertain any great doubt that when funds are subscribed for a particular purpose, and that purpose fails, the money belongs to those who subscribed it, if you can ascertain who they were, and what amount each of them subscribed. I should be slow to think we could not find machinery in Scotland for determining a case of that sort. But where you cannot trace the funds —*e.g.*, where they consist of collections made at church doors—I do not know of any means of disposing of them by any ordinary judicial procedure.

That is not quite the case here, nor is this a case in which we can ascertain who the original subscribers were. It appears that the Society we have to deal with originated out of an older Society, so old that its origin and original constitution cannot be traced. The contract of 1801 narrates the constitution of the old Society so far. It runs—"Considering that the shipmasters and master shipbuilders of Montrose have, past the memory of man, associated and incorporated themselves under the denomination of the Fraternity of Seamen of Montrose, and have contributed part of their wages for raising a fund for relief of the widows and children of such shipmasters and seamen as have become decayed in their means, whereby a considerable stock has been raised for that laudable purpose." It appears that in 1801 the funds of the old Society were worth about £1200, and that this new Association appropriated that for its own purposes. The narrative of the constitution of the older Society, so far as I have read it, would indicate that the Society had a public object, the relief, namely, of the widows and children of all decayed seamen. That would be a very excellent, and certainly a public object, and if we had sufficient evidence that that did represent the constitution of the old Society I should have been of opinion that it was quite illegal for the new Society to appropriate this fund, and we should have proceeded to set that old Society going again. But we have not sufficient evidence that that was the constitution of the old Society. With the exception of that one clause in the contract all the items of evidence go in the opposite direction, and especially the memorial prepared for counsel in 1774.

In that state of matters, what we find here is that there are funds of a friendly society that has come to an end, and that there are no means of finding the individuals from whom these funds came, or who are their representatives. We are therefore in the position referred to by Lord Cottenham in the case of *Bain* v. *Black*, and the fund must therefore remain where it is until some Act of Parliament shall deal with it.

It cannot be divided among the surviving members, I am clear upon that.

Lord Mure concurred.

Lord Shand—I concur. This is a friendly society not of the nature of a Tontine, and therefore the pursuer and the annuitants have no right to divide it. On the other hand, the Court cannot interfere to adjust a scheme as in a society with a general charitable object. The affairs of a friendly society like this must be regulated by their own contract, and the Court cannot interfere.

The Court allowed the pursuer his expenses out of the fund, it having been argued for him that this question was one that must sooner or later have been brought to judicial determination, and that therefore it was not unreasonable that the fund, the constitution of which had given rise to the difficulty, should furnish the expenses.

Authority—*Milne* v. *Fraser*, November 25, 1859, 22 D. 33.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the defender James Burness against Lord Curriehill's interlocutor dated 20th July 1877, Adhere to the said interlocutor in so far as it decerns for £44 in terms of the third conclusion of the summons: *Quoad ultra* recal the said interlocutor: Sustain the first plea-in-law for the defender: Dismiss the action, and decern: Find the pursuers and defender entitled to expenses out of the funds in the hands of the defender as judicial factor: Allow accounts thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer (Respondent)—Crichton—Rankine. Agent—John Rutherfurd, W.S.

Counsel for Defenders (Reclaimers)—Mackay—Thorburn. Agents—W. & J. Burness, W.S.

Wednesday, June 19.

FIRST DIVISION.

[Lord Rutherfurd Clark.

CAMPBELL *v.* CAMPBELLS (CAMPBELL'S EXECUTORS).

Faculty—Reserved Power to Apportion among Children—Effect of Omission of Deceased Child.

Certain funds were secured by antenuptial marriage-contract to "A and B and to the longest liver of them in liferent for their liferent use allenarly, and to the child or children to be procreated betwixt them in fee," with a provision that the said funds "shall be divided between or among the said children in such way as the said A and B mutually or the longest liver of them shall direct by a writing under their hands, and failing such writing to be divided equally among them, share and share alike." The survivor of the marriage made a deed of ap-