*Saturday, February* 18.

## OUTER HOUSE.

[Lord Low.

### DUNCAN *v.* DUNCAN.

*Husband and Wife—Divorce—Adultery—Proof—Extrajudicial Confession — Circumstances which, coupled with Extrajudicial Acknowledgment of the Illegitimacy of a Child, Held Sufficient to Infer Adultery on Part of a Wife, and to Entitle the Husband to Decree of Divorce.*

In an undefended action of divorce for adultery raised by a husband against his wife it was proved that the wife had registered a child as born on the 10th January 1892, and that when registering it she had stated to the registrar that her husband was not the father of the child, and that she had no personal communication with him since September 1889, when they had ceased to live together. The husband also deponed that he had no communication with his wife since that date. It was not proved however that there had been no opportunity of intercourse between the husband and wife, who had been residing in the same town at the time when the child must have been conceived. Apart from the evidence of the husband as above, there was no evidence except the certificate of registration of the birth of a child that the defender had committed adultery. The Court *granted* decree of divorce.

Counsel for Pursuer—Howden. Agent—W. C. Dudgeon, W.S.

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*Tuesday, February* 21.

## FIRST DIVISION.

[Lord Wellwood, Ordinary.

### MUIRHEAD *v.* FORTH AND NORTH SEA MUTUAL STEAMBOAT INSURANCE ASSOCIATION.

*Marine Insurance—Conditions in Policy—Insurance subject to Conditions in Articles of Association of Mutual Insurance Company — Alteration Made on Article without Procedure Required by Companies Acts being Followed.*

A mutual steamboat insurance company passed a special resolution altering one of its articles of association by inserting a regulation that it should be a condition of any insurance effected by the company on any vessel that the assured should keep one-fifth of the value of such vessel uninsured. The resolution was confirmed on the same day as it was passed contrary to the provisions of section 51 of the Companies Act 1862, which required a fortnight to elapse between the passing and confirming of a special resolution. After the resolution was registered a shipowner insured a vessel with the company for £1000. The declared value of the vessel was £3750, and it was provided in the policy that the articles of association should be deemed part thereof. The shipowners subsequently insured the same vessel with another company for £3000.

In an action by the shipowner, *held* that as the regulation contained in the special resolution was not contrary to the original articles of association, and was perfectly legal in itself, it was quite within the power of the company to make it a condition of the policies issued by them; that though the regulation had not validly been made part of the articles of association, the pursuer having accepted it as part of his contract, and having violated the condition it contained, could not recover under his policy.

*Marine Insurance — Valued Policy — Declared Value.*

A shipowner insured a steamer with an insurance company, the policy providing that the steamer for the purposes of the agreement between the insurers and the assured was and should be valued at £3750.

*Held* that in considering whether the assured had violated a condition of the policy which required him to keep one-fifth of the value of the steamer uninsured, the value of the steamer must be taken to be the value declared in the policy.

The Forth and North Sea Steamboat Mutual Insurance Association was incorporated under the Companies Acts for the purpose of insuring steamships in which the members of the association were interested. By article 3 of the articles of association a member was defined to be any person who insured a ship or part of a ship with the association, and such person's membership continued so long as he had a ship or part of a ship insured with the association. Article 6 empowered the directors to make calls upon the members for payment of the liabilities of the association, and declared that every person on the register of members when any liability arose should be liable for payment of such a proportion of the total amount thereof as the amount then insured by him should bear to the total amount of the insurances current at that date.

Article 31 provided—"A general meeting shall be held on or before the 1st day of February in each year. . . . The business to be transacted at this meeting and decided by a majority of the members present, shall be . . . and any alterations of the articles or warranties of the policy of insurance, of which, however, at least ten days' notice must have been given to the directors, and notified to the members seven days before the day of meeting." . . .

Article 66 provided—"The company may

from time to time, by special resolution passed in accordance with the provisions of the Companies Acts 1862 and 1867, or any subsisting statutory modification thereof, alter and make new provisions in lieu of or in addition to any of the regulations of the association contained in these articles."

Article 67 provided—"The sum insured on any one steamer shall not exceed one-half of its value, or such other sum, not exceeding £1000, as the directors may think prudent."

Article 89 provided—"The policy of insurance to be issued from time to time shall be the ordinary form, as adjusted by the directors, and shall be subject to all the conditions, stipulations, and warranties, as contained in the articles 67 to 88, both inclusive, or in such varied form as may be required by the determination of the members assembled in ordinary general meeting in the manner set out in article numbered 31."

Article 67 was subsequently altered by special resolution of a meeting of members to the following effect—"Expunge the words 'one-half of its value,' &c., and read —'The sum insured on any one steamer shall not exceed £1000, or such other sum as the directors may think prudent, but in no case to exceed four-fifths of the value of such steamer including trawl gear, and it shall be a condition of this insurance that the assured shall keep one-fifth uninsured.'"

On 20th February 1891 James Muirhead, owner of the steamship "Malta," insured said steamship with the said association for £1000 from 20th February 1891 to 20th February 1892. It was declared in the policy that "the said steamship for so much as concerns the assured by agreement between the assured and the company in this policy, are and shall be valued at £3750; and it was further provided that the provisions contained in the said articles of association shall be deemed and considered part of this policy, and shall, so far as regards this insurance, be as binding upon the assured as upon the said person or persons effecting this insurance." On the face of the policy there was a reference to the other side, and on the back were set forth articles 67 to 89 as originally framed, and also article 67 as amended.

On 8th October 1891 the "Malta" was run into and sunk by another vessel, and thereafter Muirhead raised the present action against the Forth and North Sea Insurance Association for payment of the sum of £1000 for which he had insured the "Malta" with said association.

In defence the defenders averred that the pursuer had violated the condition contained in article 67, as amended, by insuring the "Malta" in June 1891 with another insurance company for a sum of £3000, and that they had consequently cancelled the policy by letter dated 4th August 1891.

The pursuer did not deny that he had insured the ship with another company to the amount stated by the defenders, but, *inter alia*, averred that "the declared value of vessels in policies of marine insurance is always fixed at a random sum, and in the present case it was much under the actual value of the vessel, which was £5000.

The defenders pleaded—"(1) The pursuer having violated the conditions under which the said steamship was insured, by insuring more than four-fifths of its value, the policy is void and cannot receive effect."

On 10th March 1892 the Lord Ordinary (WELLWOOD) found that at the date of the collision the policy effected by the pursuer had been justifiably declared forfeited in consequence of a breach of the condition that the assured should keep one-fifth of the value of the steamer uninsured, and therefore assoilzied the defenders from the conclusions of the summons.

"*Opinion—[After referring to the provisions of the 67th article of association as amended]*—The pursuer maintains that the words simply mean that only four-fifths should be insured with the defenders' company, and that he was at liberty to insure the balance elsewhere.

"The breach of the condition alleged by the defenders is, that whereas the value of the 'Malta' as declared in the policy was £3750, of which £1000 was insured with their company, the pursuer subsequently insured the 'Malta' for £3000 with the Sunderland Steamboat Association—the vessel in this way being insured for £4000 altogether, being £250 more than its declared value. I have no hesitation in holding that the construction maintained by the defenders is the true one. The object of the condition was to afford some security for the management and safety of the vessel by making the owner be his own underwriter to that extent.

"The pursuer, however, further maintains that he has not insured the 'Malta' to an extent beyond four-fifths of her value. He says that her actual value is £5000, and that the sum declared in the policy is simply a random sum. I do not think that this can be accepted. In the policy it is agreed, *inter alia*, 'that the said steamship, &c., for so much as concerns the assured by agreement between the assured and the company in this policy, are and should be valued at £3750.' Now, one material reason for having the value declared was, that the company should have an assurance binding on the pursuer of the total value of his vessel, both for the purpose of fixing the limits of the sum to be assured and also to enable them to judge whether the assured was or was not fulfilling the condition of keeping one-fifth of the value uninsured." . . .

The pursuer reclaimed, and when the case was in the Inner House, he craved and obtained the leave of the Court to amend his record by adding an averment to the effect that the provision contained in article 67 as amended was no part of the articles of association, in respect the special resolution embodying the amendment had been passed and confirmed on the same day, contrary to the provisions of section 51 of

the Companies Act 1862, which required an interval of at least a fortnight to intervene between the passing and confirming of a special resolution.

The defenders in answer admitted that the special resolution in question had been passed and confirmed on the same day, but explained that the amended article had, in accordance with the direction of the meeting which had passed and confirmed it, been registered, and that all policies subsequently issued by the defenders' association had been issued subject to the conditions contained therein.

On 2nd June 1893 the Court closed the record on the pursuer's and defenders' amendments, and remitted to the Lord Ordinary to proceed as might be just.

On 28th June the Lord Ordinary of new assoilzied the defenders from the conclusions of the summons.

"*Opinion.*—The only matter debated was the effect of the pursuer's amendment of the record, which were made by permission of the Inner House. In my previous judgment I held that the policy was justifiably forfeited in consequence of a breach of the condition that the assured should keep one-fifth of the value of the steamer uninsured. In his amendment the pursuer now alleges that the condition in question was illegal and void, as the alteration on the original rule or article of association, No. 67, was not passed and confirmed in conformity with sections 50 and 51 of the Companies Act 1862. It is admitted that the alteration was not effected in conformity with those provisions, though it is alleged by the defenders to have been made in conformity with articles 31 and 89 of the articles of association.

"In the view which I take of this question it is not necessary to decide whether the alteration of article 67 was made regularly or not. My present impression is that it was not regularly made—even if regard is had to the articles of association themselves. One branch of the articles is headed 'Alteration of Articles,' and runs thus—'66. The company may from time to time, by special resolution passed in accordance with the provisions of the Companies Acts 1862 and 1867, or any subsisting statutory modification thereof, alter and make new provisions in lieu of or in addition to any of the regulations of the association in these articles.' That, it seems to me, is the ruling provision, and it is not inconsistent with the 31st article. The reference to alterations of articles or warranties in the latter article is simply an incidental statement of one kind of business which may be taken up at a general meeting of the association after certain notices, but it does not provide for confirmation, which must depend on the statutory provisions. I am therefore inclined to think that even according to the articles of association no alteration on the articles could properly be made except in conformity with sections 50 and 51 of the Companies Act 1862.

"I am not satisfied, however, that the error, such as it was, did not admit of ratification. Sections 50 and 51 of the Companies Act of 1872 were passed for the protection of shareholders. The alteration made was not inconsistent with the memorandum of association or against public law. It was an alteration which, so far as regards the condition now objected to by the pursuer, was made for the protection of the members of the association. It was registered in 1866, before the pursuer had any connection with the company, and has been acted upon by all concerned ever since. The members of the association could not but be aware of and ratify the alteration, because they were all holders of policies issued subject to the alteration. They obtained their policies on the footing that the alteration was valid, and paid calls which took the place of premiums, upon the same footing.

"It will thus be seen that the objection is not to a fundamental departure from or violation of the memorandum of association or the provisions of the statutes, but merely to an irregularity in the way in which the alteration was effected. The case is therefore widely different from *Trevor* v. *Whitworth*, 1887, L.R., 12 App. Cas. 409; *The General Property Investment Company* v. *Mathieson's Trustees*, 16 R. 282, and similar cases. If the pursuer's argument were well founded, the alteration would be held to be void, no matter how long it was acted on, even if there had been an interval of thirteen instead of fourteen days between the two resolutions. I therefore think that the alteration has been ratified by all the members, including the pursuer.

"But apart from this the pursuer is not suing as a member, but suing on the policy as a creditor. As such he is in no way prejudiced. The company could not plead against a creditor the irregularity of the manner in which the alteration was made—*in re Millersdale* v. *Ashwooddale Lime Wood Company*, L.R., 31 Ch. Div. 211. If, for instance, the sum insured had been—as it might have been—in excess of the maximum authorised in the original article, the company could not have screened themselves under the defence that the alteration was not made in conformity with the statutes. I think the pursuer is equally barred from repudiating the contract which he made, which was not subject to the original article 67, but subject to that article as altered. It is pretty clear that if the company had known that the pursuer intended to disregard the condition, they would not have insured the vessel even for £1000. If, again, the objection were well founded, and must receive effect, I think the result would be that the policy would be altogether void, and the pursuer's sole ground of action would fail.

"It seems to me, therefore, that this new plea—which has no equity to recommend it, and is an after-thought—is one which I am not bound to sustain. I shall therefore repeat my former judgment, and assoilzie the defenders."

The pursuer reclaimed, and argued—A company incorporated under the Companies Acts had no power to alter its articles of association save in accordance with the

provisions of these Acts. If this were doubtful where a company was authorised by its articles to make alterations contrary to the provisions of the Companies Acts, it was not doubtful in this case, for article 66 of the defenders' articles of association only authorised the company to alter its articles in conformity with the provisions of the Companies Acts. But the alteration made on article 67 was confirmed on the same day as it was passed, contrary to the provisions of section 51 of the Companies Act 1862. It was therefore invalidly confirmed, and being invalidly confirmed, did not become one of the company's articles of association—*Railway Sleepers Supply Company*, 1885, L.R., 29 Ch. Div. 204. It could not bind the company, and accordingly could not bind the pursuer or the other members of the company. But if article 67 as amended was not one of the company's articles of association, it was not referred to in that provision of the policy which declared that "the articles of association" were to be deemed part of the policy, and was not a condition of the pursuer's contract with the defenders. It was no answer for the defenders to say that it was set forth on the back of the policy, for according to the provision in the body of the policy the pursuer was only bound by "the articles of association," and it was to these articles, and not to what was set forth on the back of the policy, that the pursuer was bound to look for the conditions of his contract. The railway ticket cases cited by the defenders had no bearing on the present question, for in them the holder was referred to the back of the ticket for the conditions of his contract, whereas here the contract referred him to the "articles of association," and he could not be bound by a condition set forth on the back of the policy, which was not contained in any of the articles of association. The pursuer was not bound to have known that an irregularity had been committed, and could not be held to have accepted the illegally altered article as a condition of his contract. Further, the alteration having been made contrary to the provisions of the articles of association and the Companies Act, could not be ratified — *Walker* v. *London Tramways Company*, 1879, L.R., 12 Ch. Div. 705; *Cambrian Peat Company*, January 14, 1875, 31 Law Times, 773; *Ashbury Railway Carriage and Iron Company* v. *Riche*, 1875, L.R., 7 Eng. & Ir. App. 653; Lindley on Company Law, 181. Even if the condition in article 67, as amended, were held to be binding on the pursuer, it was not to be assumed that he had broken it. The declared value of a ship in a policy of marine insurance was always stated at a random sum, and the pursuer undertook to prove that the value of the steamer was £5000—*Bousfield* v. *Barnes*, 1815, 4 Camp. 228.

Argued for the defenders — Though the amendment made on article 67 had not been regularly confirmed, it was one of the registered articles of association when the pursuer insured with the company, and was one of the articles of association which the policy declared were to be deemed part of it. It had accordingly been accepted by the pursuer as part of his policy, and he could not now, suing as a creditor on the policy, found on the fact that it had been irregularly confirmed—*Millersdale* v. *Ashwooddale Lime Company*, 1885, L.R., Ch. Div. 211. Further, though there had been an irregularity in the procedure the amendment was quite capable of ratification, the irregularity being merely one of formal procedure, and the act itself being within the company's powers. The Court might refuse to enforce such a regulation where matters were entire, as in the *Cambrian Peat Company's* case, but where a party had contracted on the footing that the regulation was part of his contract, he could not escape from it by pleading that the resolution imposing it had not been regularly confirmed. Being part of the contract it was binding on both parties—Lindley on Company Law, pp. 166, 167, 169. The irregularity was also patent on the face of the register, which showed that the special resolution had been passed and confirmed on the same day, and the pursuer must accordingly be held to have known of the irregularity when he accepted his policy. Further, articles 67 to 88 were rather regulations containing the conditions on which the company was willing to effect insurances than articles of association in the strict sense of the word, and the meaning of article 89 was that these regulations might be varied in form in the manner provided by article 31, even though the provisions of sections 50 and 51 of the Companies Act of 1862 were not complied with. It was as conditions of the insurance that articles 67 to 88 were set forth on the back of the policy, and they were to be read as part of it, for on the face of the policy the party accepting it was referred to what was set forth on the back—*Harris* v *Great Western Railway Company*, 1876, L.R., 1 Q.B.D. 515; *Highland Railway Company* v. *Menzies*, June 8, 1878, 5 R. 887. For the purposes of the policy the declared value must be taken to be the real value of the vessel insured. The case of *Bousfield* had been overruled; *Bruce* v. *Jones*, 1863, 32 L.J., Exch. 132; *North of England Insurance Association* v. *Armstrong*, 1870, L.R., 5 Q.B. 244; Arnould on Marine Insurance, pp. 298, 300. The pursuer had therefore broken an essential condition of his policy, and could not recover under it.

At advising—

LORD KINNEAR—This is an action upon a policy of insurance by which the defenders insured the pursuer's steamship "Malta" for £1000. It is admitted that the insurance was effected, and that the ship was afterwards lost at sea; but the defenders maintain that before the loss occurred they had cancelled the policy in consequence of the pursuer's breach of a condition that one-fifth of the total value of the ship should be left uninsured. On the original record the pursuer's answer to this defence was founded on what he maintained to be the

true construction of this stipulation. He did not dispute that it was in fact a condition of the contract, and he raised no question as to its validity; but he maintained (1) that on a true construction of the contract he was entitled to insure this ship at her total value, provided he did not insure more than four-fifths with the defenders' company; (2) that she was not in fact insured beyond four-fifths of her value. The Lord Ordinary decided against the pursuer upon both these points. When the case came here on a reclaiming-note the pursuer asked and obtained leave to amend the record by adding a new plea for the purpose of challenging the validity of the condition which up till that time he had assumed to be binding. The Lord Ordinary has now decided this point also in favour of the defenders, and the first question we have to consider is, whether this last interlocutor is well founded.

We heard a very able argument for the company upon the points which were urged against the interlocutor, and I have come to the conclusion that his Lordship is right.

The defenders' company was incorporated under the Companies' Acts, and by a clause in the policy it is stipulated "that the provisions contained in the articles of association of the company shall be deemed and considered part of this policy, and shall be as binding upon the assured as upon the said person or persons effecting this insurance."

The 89th article of association provides that the policy of insurance to be issued shall be in the form to be adjusted by the directors, "and shall be subject to all the conditions, stipulations, and warranties as contained in the articles 67 to 88, both inclusive, or in such varied form as may be required by the determination of the members assembled in ordinary general meeting in the manner set out in article numbered 31." The clauses specified therefore—clauses 67 to 88—are, according to this provision of the articles, to be read into every policy; and being so read into the policy they are just as clearly conditions of the contract and as effectual as if they had been set out at length in the body of the policy itself. As the articles were originally framed they contained no stipulation to the effect of the provision upon which the pursuer now founds. The 67th article, as it originally stood, provided that "the sum insured on any one steamer shall not exceed one-half of its value, or such other sum not exceeding £1000 as the directors may think prudent." And therefore, as that article originally stood, there was no condition prohibiting the insured from insuring his ship up to its total value. But then the 31st article of association provided that a general meeting of the association should be held every year, and that the business to be transacted at these meetings should among other things include "any alteration of the articles or warranties of the policy of insurance, of which, however, at least ten days' notice must have been given to the directors, and notified to the members seven days before the day of meeting." Therefore there is a provision in this 31st article of association for certain alterations which may be made upon the policy of insurance. The defenders alleged that in conformity with this provision a notice was issued on the 11th of January 1886 calling the annual general meeting for the 18th immediately following, and intimating certain alterations, by special resolution, of the provision which I have just read in article 67. The alterations were proposed and passed accordingly at the meeting held upon the 18th January 1886. Immediately following the meeting at which they were passed an extraordinary or special general meeting was held, at which the alterations which had been passed were confirmed, and the secretary of the company was directed to have them endorsed upon all the policies of insurance which should thereafter be issued by the company, and to have them registered in terms of the Companies Act. Now, it is not disputed that all these proceedings took place following upon this resolution of the meeting. The alterations which they professed to have made upon the original articles of association were duly registered in accordance with the directions of the meeting, and the policies which thereafter were issued by the company, had endorsed upon the back the old regulations of the company, followed by the new regulations which were said to have been made. In the register of joint-stock companies the new rules are printed under the heading "Alterations and Additions to the above Rules conform to Articles 31 and 89."

Now, it is said that all these alterations are illegal and ineffectual because the articles of association could not be validly altered or amended except in conformity with the 50th or 51st sections of the Companies Acts 1862. The plea taken by the pursuer upon this point is not very clearly stated, because all that it says is that "the provisions quoted in answer 2, as part of article 67 of the articles of association as amended, forms no part of the articles of association, having been illegally and unwarrantably added thereto, and in disconformity with the Act of Parliament." I do not think that we can infer from a plea so stated that the pursuer means to maintain that the condition embodied in the amended article is not truly part of his contract, but only, that although part of his contract, it is not binding. But the argument appears to me to be somewhat complicated by the fusion of those two different questions, and we must consider them separately. We must first determine what is the meaning of the contract according to its terms; and it is only after that has been ascertained that we can proceed to consider what is its legal effect.

Now, as to the first of these questions, I cannot say that I see much room for doubt. The policy delivered by the defenders to the pursuer, and accepted by him, is in fact a proposal entered into upon certain conditions, and among others, on the

conditions which are said to be set forth in their articles of association. Now, I think it impossible to read the policy and read the clause which makes the articles of association a part of the policy, without seeing that what persons offering to insure have in their mind is a series of specific and definite conditions regulating the respective rights and liabilities of the insurers and the insured. The articles, therefore, containing the new rule appear to me to be the articles which the defenders have registered in terms of the Act, and have so published to the world as being in fact the conditions upon which they are carrying on their business, and by which they propose to regulate the rights of the persons who are insured with them, and I think it was impossible for any person proposing to insure with the defenders to read the registered articles of association without seeing that what the defenders hold out to the world as being conditions upon which they are prepared to insure are contained, not in the original articles only, but also include those which are embodied in the additional regulations which the company profess to have made in conformity with their original articles 31 and 89. Whether those two articles are sufficient to justify the procedure on which the alterations were made is a different question. They are rules which the defenders hold out to everyone transacting with them as being in fact the rules of their association, and therefore as being the condition upon which alone they are ready to effect an insurance. Reading the articles as they stand on the policy of insurance I am therefore of opinion that the defenders have undertaken to insure the pursuer's vessel on the express condition that the insurance is not to exceed four-fifths of the value of the steamer, and that the insured shall keep one-fifth uninsured.

But if that be in terms a condition of the policy, the next question that we have to consider is whether it is a binding condition in law. It is said to be bad because it is not contained in the original articles of association, and because no alteration of those articles can be effected which has not been carried out in conformity with the Act of Parliament. The Act of Parliament requires that an interval of fourteen days shall elapse between the meeting at which a special resolution altering the articles is passed, and the meeting at which that resolution is confirmed. I do not understand it to be disputed—or, at all events, it could not be disputed—that an alteration passed and confirmed on the same day is invalid, as not being in conformity with these regulations. Nor can it, in my opinion, be maintained that the 31st article of the defenders' rules of association gives any power to the company to alter its original articles otherwise than in conformity with the Act of Parliament. It does not appear to me to be at all necessary to consider whether any provision to this effect would be effectual if it were made, because the 31st article appears to me to contain no such provision. It does not refer to the articles of association, but only to such alterations of the articles or warranties of the policy of insurance as may be made at the annual general meeting upon a notice specified in the article itself. This must not be read as meaning that the company are to have power to alter any of the regulations of the conduct of its affairs which are embodied in its articles of association without fulfilling the conditions of the Act of Parliament, but only that it may alter them subject to these conditions. If this were at all doubtful, it is made perfectly clear by the terms of the 66th article of association of the defenders' company, which especially provides that such new regulations are to be made in accordance with the provisions of the Companies Acts.

It appears to me, therefore, that the 31st article of association enables such alterations only to be made in the policies of insurance as can be effected in conformity with the substance of the original articles of association and no other. Therefore I consider that any alteration passed in accordance with the regulations contained in the 31st article, and not in accordance with the regulations contained in the 50th and 51st sections of the statute, would be ineffectual to alter such conditions of the policy as are embodied in the original articles of association. So far, therefore, as the alterations and conditions passed in the circumstances I have mentioned are not consistent with the original articles of association, I am disposed to agree with the Lord Ordinary that they are invalid and ineffectual, and are not to be considered as regulations binding upon the company in the conduct of its affairs. But then it does not at all follow that every stipulation which is contained in these additional articles, and which in accordance with their directions may have been inserted in the policy, and in particular it does not follow that the condition which the company has imported into the pursuer's policy, on the mistaken assumption that it was a separate and new article of association binding upon them, is not a perfectly effectual condition of the contract which was made with the pursuer. It is material for the consideration of this question to observe that the condition itself is not only perfectly legal, but that it is entirely within the powers of the defenders' company. There is nothing in the articles of association which makes it *ultra vires* for them to stipulate, if they please, that persons who are to insure with them shall leave one-fifth of their vessels uninsured either with them or with any other company. The articles of association as originally framed did not oblige them to stipulate that the assured shall in every case observe this regulation; and therefore that is not a condition which by force of the original constitution of the company is made to affect every policy of insurance which they might make. But there is nothing in the articles of association to prevent the company stipulating to this effect; and there-

fore when the defenders' company, at a general meeting, profess to alter the articles of association by resolving that in future every policy shall contain such a stipulation, it appears to me to be a perfectly sufficient authority to their directors or managers to direct them in these terms, and I do not think it makes any difference that they profess to make this regulation of the company a condition of its constitution. So long as that regulation stands unaltered I am unable to see why any policy granted in accordance with its terms should not be effectual. The company have in fact made a contract with the pursuer upon the special condition that his vessel shall be kept uninsured to the extent of one-fifth of its total value, and there is nothing in the articles of association to make that a condition ineffectual or illegal as in a question between the company and the persons insured with them. The pursuer has accepted an offer of insurance made upon these terms, and I am of opinion that is a perfectly good contract between him and the defenders.

But if the condition should be held invalid, contrary to the opinion which I have expressed, then I should agree with the Lord Ordinary in holding that there can be no contract at all. The defenders have undertaken to insure on this condition and on no other terms, and if the condition flies off in respect of any statutory invalidity attaching to it, then I am unable to see how their obligation to insure can be said to subsist.

Then it is said that this is a mutual insurance company; that the pursuer, by effecting an insurance, became a member of the company; and that the rights of every member must be regulated by the articles as they are binding in law upon the partners *inter se*, and not by any special stipulation which may have been made with himself as an individual. But then the pursuer is a party contracting with the company before he becomes a member, and the policy, which forms the contract between him and them, sets forth in terms that which would be its legal effect, I have no doubt, if it had not been expressed, that while the payment of the contributions which are to be made by the insured in respect of his insurance are to be calculated upon a certain principle which has the effect of making him a member of this company of mutual insurers, the contract itself is to be a contract of insurance with the company. Now, it appears to me that the pursuer comes into the company as effecting a contract expressed in certain terms and subject to the conditions of that contract and no other. Nor do I see that there can be any complication in working out the conditions of the contract, arising from the stipulation inserted into the policy not forming part of the deed of constitution binding the company itself and its members *inter se*. The company having stipulated that this particular policy—and I presume all other policies which have been made since the date of the proposed alteration of the company's regulations was passed—is to be subject to a particular stipulation, I cannot see that there is any difficulty in holding that any person accepting the insurance accepted also the terms on which it was offered notwithstanding that by contracting with the company as insurers he becomes in fact a member of the copartnery of mutual insurers.

I am, therefore, of opinion with the Lord Ordinary, that the stipulation in question is perfectly effectual and binding as between the parties. If it be binding between the parties, then it does not appear that the questions which were originally raised before the Lord Ordinary in the Outer House and were disposed of by his first interlocutor present any serious difficulty. Indeed, it was not very seriously argued that his Lordship's interlocutor in these respects was wrong. I do not think there can be any question that upon the true construction of this stipulation it is contracted between the parties that the pursuer effecting an insurance with the company, shall insure either with them or with any other insurers to the extent of four-fifths of the value of his vessel, and that he shall keep one-fifth uninsured. The other construction by which it is suggested that he contracts with the defenders to the extent of four-fifths only, but may insure to the extent of the remaining one-fifth with any other insurer appears to me quite untenable and inadmissible upon the plain words of the stipulation. I also think it pretty clear that the question of fact whether he has or has not kept one-fifth uninsured must be determined, not with reference to what is alleged to be the actual value of the ship, which the pursuer undertakes to prove, but with reference to what is the declared value by the terms of the policy itself. The declared value is to be the value as between the insurer and insured for all purposes of the policy.

On all grounds, therefore, I entirely concur with the Lord Ordinary.

LORD ADAM concurred.

LORD M'LAREN—It appears to me that the argument addressed to us against the interlocutor of the Lord Ordinary really rests upon an ambiguity, because it does not distinguish between the use that has been made of the 67th article in this policy merely as a condition of the policy, and the effect of that article as an article of the association binding the company and limiting the sphere of its operations. Lord Kinnear, by examining the articles separately, has shown, I think, very distinctly and conclusively, that the argument in question is not well founded. I would only say this, agreeing as I do with Lord Kinnear's opinion, that when a company is constituted for the purpose of insurance, the directors or managers of that company are entitled to insert in the contracts which they make with the public—or if it be a mutual insurance company, with those who are to become members of the association—all such conditions as are not inconsistent

with the ordinary course of the business in which the company is engaged.

Now, it distinctly appears that the directors and managers of this mutual association desired to insert as a term of their policies the condition that the ships insured should only be covered to the extent of four-fifths of their total value; and I cannot doubt that that was a legal and effectual condition to be inserted in the policies to be effected by the company in such a case, because it had the effect of leaving a portion of the vessel uninsured, and giving to the shipowner a stronger inducement to have his vessel in a seaworthy condition, and to be careful in his selection of the master and crew in order that he might be kept safe from loss. Now, if this policy had contained a clause providing as a condition of the insurance that the ship should be to the extent of one-fifth uninsured, I hardly conceive that any question could have been raised as to the validity of that condition; and if the pursuer had in that case insured the vessel to its full value, it would have been impossible for him to recover. But then it is said that because we do not have the condition in express words, but only in the shape of rules in the articles of association, we are entitled to inquire whether this particular article was so adopted by the association of underwriters as to make it an article of association—a term of the constitution of the company itself. If the company had proposed to insure the pursuer's vessel to an extent exceeding four-fifths of its value, the question which I have proposed would have been tabled for consideration. The question then would have been, whether the contract was legal, or whether the managers of the company had not exceeded their powers in granting a policy under conditions which were forbidden by the articles of association. In such a question it would have been right to consider whether that article should not have been passed. But no one has said, nor can it be said, that it was illegal or unconstitutional of this association to grant policies containing the conditions in question, and therefore it appears to me that there is no materiality at all in the inquiry whether the resolution so passed was part of the articles of association of the company. Of course, if the meaning of the contract contained in this policy, as averred, was not that this particular article 67 was embodied, but that the pursuer insured on this condition that he was to be bound by any articles which the company from time to time might pass, then the question as to the validity of the article would arise. But no sensible person ever would insure on such terms, or terms which would put it in the power of the company to cut down his insurance by passing a *post facto* resolution. Therefore I take it that everyone who insures in terms of articles means to insure in terms of what are represented and purport to be the articles existing at the time. And those articles are referred to not as articles but as conditions of the policy, and for that purpose only are to be treated as part of the policy.

It appears to me that the pursuer cannot recover if he agreed that he should keep his vessel to the extent of one-fifth uninsured. I therefore am of opinion that the interlocutor of the Lord Ordinary is right, and should be affirmed.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer—Sol.-Gen. Asher, Q.C. — Watt. Agent — Robert Denholm, S.S.C.

Counsel for the Defenders—C. S. Dickson —Salvesen. Agents — Beveridge, Sutherland, & Smith, S.S.C.

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*Tuesday, February* 21.

## FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

## GRANT *v.* MORREN AND ANOTHER (GRANT'S EXECUTORS).

*Succession—Testament—Words Importing a Bequest of Heritage—Titles to Land Consolidation Act* 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 20.

A testator died in 1890 without issue, leaving a testament executed in that year, in which he nominated his wife and another "to be my joint executors and administrators, with full power to them to intromit with my whole estate and executry of every description, . . . and generally to do everything in the premises competent to an executor." Then, after certain legacies, there came this clause—"And whatever residue there may be of my said means and estate falling under this testament, I ordain the same to be paid to my wife Elizabeth Grant, for her own absolute property, whom I hereby appoint to be my residuary legatee."

The estate comprised heritage and moveables, but the latter scarcely covered the debts, expenses, and legacies. The heir-at-law sued for a declarator that he was entitled to the heritable estate.

*Held* (Lord Adam *diss.*) that the deed did not import an intention on the part of the testator to bequeath his heritable estate to his widow, and that the heritage, not being carried by the testament, fell to the heir-at-law.

*Observations* on section 20 of the Titles to Lands Consolidation Act 1868 in regard to the words *sufficient* under it to carry heritage.

William Grant, 27 Nelson Street, Huntly, died without issue, but survived by his widow, on 6th September 1890, leaving the following settlement, dated 10th March 1890—"I, . . . do hereby make and appoint Elizabeth Grant, my wife, and James Smith Grant Morren, slater, to be my