was alive and no payments could take place till her death, should enable us I think to answer the second question. I should propose to answer it in the affirmative, simply because the testator has expressly said that "all payments made to children are to be reckoned as part of their ultimate share when the same falls to be divided." These words seem to me to include a prospective share ultimately falling either to an immediate child of the truster or to those in his right.

With regard to the question of vesting, it all turns, just as it did in *Cairns'* case, on the meaning to be attached to the words "the issue of predeceasing children taking among them the share which would have fallen to their parents if in life." Now when the word "predecease" or "survivorship" occurs in a will it plainly refers to some point of time, either death before the time, whatever it may be, or survivance after the time. I find that Lord Low in his opinion, at the top of page 124, deals with the words as *in pari casu*, for he speaks of "there being nothing in the context to take the case out of the general rule that provisions in regard to predecease or survivorship refer to the term of payment." And the effect of the whole judgment was to hold that while it was impossible to limit the words "any predeceasing child" to the event of the immediate child predeceasing the testator himself, it would be contrary to the current of recent decision to hold that vesting was absolutely suspended. Accordingly, we all agreed with Lord Kyllachy in the view which he had expressed in the case of *Wylie's Trustees*, 8 F. 617, that "a contingency depending merely upon the existence or survivance of issue falls to be read as a resolutive and not as a suspensive condition." But we did not decide there—and as I understand we do not decide here—that defeasance necessarily takes place on the child's issue merely surviving their parent (which has happened in the case of the three children of James Penny of Lochwood) irrespective of whether or not they also survive the liferentrix (which either may or may not happen). That question was expressly reserved by Lord Kyllachy in his opinion at 122 of S.C. (1907), and it would hardly be proper that we should attempt to decide it *ab ante*, since it may never arise as a practical question. I think, therefore, that we should reserve it here.

For these reasons, I am for answering the first and third branches of the first question in the negative, and the second branch of the first question in the affirmative. Further, I am for answering the second question (as amended) in the affirmative.

The LORD JUSTICE-CLERK and LORD ARDWALL concurred.

LORD LOW was absent.

The Court answered the second branch of the first question of law in the affirmative, and the first and third branches thereof in the negative, and answered the second question of law (as amended) in the affirmative.

Counsel for the First and Fifth Parties—The Dean of Faculty (Campbell, K.C.)—A. R. Brown. Agent—R. C. Gray, S.S.C.

Counsel for the Second, Third, and Fourth Parties—Cullen, K.C.—A. M. Mackay. Agents—Alex. Morison & Company, W.S.

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*Thursday, February 27.*

## FIRST DIVISION.

[Lord Guthrie, Ordinary.

## ABERDEEN MASTER MASONS' INCORPORATION, LIMITED *v.* SMITH.

*Friendly Society—Company—Trade Union—Title to Sue—Validity of Registration of Friendly Society under the Companies Acts—Trade Union Act* 1871 (34 *and* 35 *Vict. cap.* 31), *sec.* 5—*Trade Union Act Amendment Act* 1876 (39 *and* 40 *Vict. cap.* 22), *sec.* 16.

A society of master masons was formed, *inter alia*, to take over the assets of a previously existing unincorporated society said to have been a trade union, and it was incorporated and registered under the Companies Acts. The memorandum of association set forth a large number of objects connected with the trade, and prohibited the enforcement or support of any regulation which would make it a trade union. Its title to sue was challenged upon the ground that it was a trade union under sec. 16 of the Trade Union Act Amendment Act 1876, and consequently that its registration under the Companies Acts was void, in virtue of sec. 5 of the Trade Union Act 1871.

*Held*, upon a consideration of the constituting documents, that the society was not a trade union, and consequently that its registration was not void, and its title to sue good.

*Friendly Society—Company—Member—Admission of Member not having Qualifications Prescribed by Articles of Association—Right of Member to Plead Nullity of Admission when Sued by Society—Friendly Society Registered under the Companies Acts.*

The articles of association of a friendly society incorporated under the Companies Acts required certain qualifications as to age, medical examination, &c., in members on admission. A, who did not fulfil these qualifications, was admitted in 1904, and acted as a director, but in March 1906 he wrote a letter resigning. In June 1906 the society sued him for sums due as a member prior to his letter of resignation, when A pleaded that he had never been a member, his admission having been *ultra vires*. In October 1906 the society

at an extraordinary general meeting had confirmed A's admission.

*Held* that the possible objections to A's admission as a member were objections pleadable by the incorporation only, and from which he could obtain no benefit.

The Trade Union Act 1871 (34 and 35 Vict. cap. 31), sec. 5, enacts—"The following Acts, that is to say . . . (3) The Companies Acts 1862 and 1867 shall not apply to any trade union, and the registration of any trade union under any of the said Acts shall be void. . . ."

The Trade Union Act Amendment Act 1876 (39 and 40 Vict. cap. 22), sec. 16, enacts —". . . The term 'trade union' means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act [1871] had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

On June 4, 1906, the Aberdeen Master Masons' Incorporation, Limited, incorporated under the Companies Acts 1862 to 1900, brought an action against Leslie Smith, master mason, 77 Skene Street, Aberdeen, to have him ordained to produce and exhibit "a schedule or schedules containing a short description of all work contracted to be performed by him between the 8th day of July 1904 and the 20th day of March 1906, and the amount of the contract price in each case in so far as the prices under the several contracts exceed £10 sterling and refer to work contracted to be performed inside the boundary line round the city and suburban area of Aberdeen, fixed between the Unincorporated Aberdeen Master Masons' Association and the Aberdeen Operative Masons' and Stone Cutters' Society, in order that the subscriptions at the rate of 1 per cent. on the prices of said contracts, payable by the defender as a member of the pursuers' incorporation, in terms of their articles of association, may appear and be ascertained," and to make payment of £100 or such other sum as might appear to be due in respect of such percentages.

The defender pleaded, *inter alia*—"(2) The pursuers, being a trade union, are not validly registered, and have no title to sue. . . . (4) The defender never having been eligible for admission to membership under pursuers' articles of association, his alleged admission was *ultra vires* of the incorporation and the directors. (5) The defender never having become a member of the incorporation, is entitled to absolvitor."

The pursuers, the Aberdeen Master Masons' Incorporation, Limited, was incorporated under the Companies Acts 1862–1900 on 15th October 1903, its objects, as given in the memorandum of association, being: to take over the assets and liabilities of "The Aberdeen Master Masons' Association"; to promote the study of science and art, more especially in relation to building and construction works, including dwelling-houses, offices, sewage and drainage works, &c.; to improve and elevate the technical and general knowledge of persons engaged in building or construction works; to investigate, test, and ascertain the merits and demerits of different kinds of building materials; to promote just and honourable practice in the conduct of business in relation to building and construction works, and to suppress malpractice; to arrange and promote the adoption of equitable forms of contracts and other documents used in relation to building and construction works; and to distribute any of the revenue of the incorporation amongst any members and widows and children of members and others in accordance with the regulations of the incorporation.

The memorandum of association provided—"(*Third*) The objects for which the association is formed are—1. To take over the whole or any of the assets and liabilities of the unincorporated association known as The Aberdeen Master Masons' Association. . . . 13. To establish, subsidise, promote, co-operate with, receive into union, become a member of, act as or appoint trustees, agents, or delegates to control, manage, superintend, lend monetary assistance to or otherwise assist any association and institutions, incorporated or not incorporated, with objects altogether or in part similar to those of the trade and not being a trade union. . . . 17. To distribute any of the revenue of the incorporation amongst any members and widows and children of members or others in accordance with any provision for the time being, and from time to time of the regulations of the incorporation. . . . 22. To do all such other lawful things as are incidental or conducive to the attainment of the above objects or any of them, provided that the incorporation shall not impose on its members, or support with its funds, any regulation which, if an object of the incorporation, would make it a trade union. . . . 25. To do all such lawful things as are incidental or conducive to the attainment of the above objects or any of them. . . ."

The articles of association provided, *inter alia*—"Art. 42. The following shall be held to be the first members of this incorporation:—(1) Members carrying on business inside the boundary line round the city and suburban area of Aberdeen, fixed and described in art. 43 hereof. . . . [*here followed a list of names not including defender's*] . . . Art. 43. The above-named members being those entered under head 1 carry on business inside the boundary line round the city and suburban area of Aberdeen, . . . and they shall be entitled to all benefits of the incorporation, including right to participate in the funds of the incorporation as hereinafter provided, without payment of entry-money. . . . Art. 44. The directors shall have the power of admitting new members of good char-

acter not exceeding fifty years of age, such members being proposed by one of the directors and seconded by another, and thereafter balloted for. No new member . . . shall be admitted unless at the date of his being proposed his life be certified by a duly qualified medical man as a good average insurable life. Every new member . . . shall upon his admission pay £50 of entry-money. . . . Art. 47. [*Provided for widows of members who had contributed for five years having an interest in incorporation's revenue.*] . . . Art. 48. [*Provided as to children of deceased member.*] . . . Art. 53. All members who carry on business inside the boundary line mentioned in art. 43 hereof . . . shall regularly pay . . . for behoof of the funds of the incorporation a sum equal to 1 per cent. on the contract price of all work within the said boundary line, for which they or their firm, as the case may be, may offer and for which their offer shall be accepted, and the contract price of which exceeds £10. . . . In the event . . . of the failure of any member or firm to pay the sum equivalent to 1 per cent. of the contract price . . . he or the firm . . . shall be reported . . . to the directors, who shall have power to impose on the offending member or firm a fine. . . . In the event of a second offence, he or the firm shall be reported . . . to the directors, who shall have power to impose such fine as they may think proper. In the event of a third or successive offence, . . . the directors shall have power to impose such fine as they may think fit or they shall have power to expel the offending member. . . . In the event of non-payment of any fine, and the sum equivalent to the 1 per cent. on the contract price, within six days after intimation has been made by the secretary and treasurer to the offending member or firm, the directors shall expel such member or members of the firm, as the case may be, from the incorporation. . . ."

The *facts* in the case are given in the *opinion* of the Lord Ordinary (ARDWALL), who on 2nd February 1907 repelled the defences and ordained the defender to produce the required schedule of work contracted for by him.

*Opinion.*—"This is an action brought against the defender, who is alleged to be a member of the pursuers' incorporation, and it is practically an action of accounting with the view of determining what sum is due by him as a contribution to the funds of the incorporation, and the defender resists the action mainly on three grounds.

"(First) That the incorporation is a trade union, and that accordingly, in terms of the Trade Union Act 1871 (34 and 35 Vict. cap. 31), sec. 5, and the Trade Union Amendment Act 1876 (39 and 40 Vict. cap. 22), sec. 16, the registration of the pursuers under the Companies Acts is void, and that therefore they have no title to sue, as was decided in the case of the *Edinburgh and District Aerated Waters Manufacturers' Defence Association* v. *Jenkinson*, 5 F. 1159. I am of opinion that this argument is ill founded. This question, I think, must be judged of by the constituting documents of the company. Now by article 13 of the memorandum of association the purposes of incorporation are set forth as follows —'. . . [*Quotes, supra*] . . .' Further, by article 22 of the said memorandum it is provided that the following shall be among the objects for which the incorporation is founded—'. . . [*Quotes, supra*] . . .'

"In face of these provisions it seems to me that it is in vain to argue that this is a combination 'for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business,' because if the directors or members of the incorporation were to make any regulation or perform any act which would make the incorporation a trade union, such act would be wholly void and null under the above recited clause of the memorandum of association.

"(Second) The defender maintains that, even assuming the incorporation to be a properly constituted company, the defender never was a member of it, and never could lawfully become so, in respect of the provisions of article 44 of the pursuers' articles of association, which are to the effect that the directors have only power to admit as members persons not exceeding fifty years of age, and that only on their lives being certified by a duly qualified medical man as good average insurable lives. Now it is admitted that at the date when the defender was admitted a member of the incorporation he possessed neither of these qualifications, being at the date of his alleged admission sixty-eight years of age and never having been medically certified. The important facts regarding the defender's admission to the society and his subsequent conduct as a member are as follows—The pursuers were incorporated on 15th October 1903 for the purpose, *inter alia*, of superseding and taking over the assets and liabilities of an unincorporated association known as the Aberdeen Master Masons' Association. The defender was an active member of this association, and apparently took a great interest in the arrangements that went on for adjusting the constitution of the incorporated association which it was proposed to form. The history is set forth in detail, but whether it is quite correct or not it is certain that owing to the defender's disapproval of some of the proposals for the formation of the association he declined to join the pursuers' incorporation at the date of its being incorporated on 15th October 1903. It seems, however, that afterwards he became desirous of joining the incorporation, and at a meeting of the pursuers' directors on 8th July 1904 he was, in accordance with his own desire, formally admitted a member of the incorporation on the same terms as if he had been a person whose name had been mentioned in article 42 of the articles of association. These persons were held to be the first members of the

incorporation, and were, as the defender was, members of the former unincorporated association already referred to. All those persons were admitted as original members without payment of entry-money and under exemption from the conditions applicable to new members under article 44. It must be assumed that at, or at all events immediately after, his admission the defender was aware of this, and in law he must be presumed to have been acquainted with the articles and memorandum of association on becoming a member of the incorporation. He never, however, attempted to get rid of his obligations, nor did he forego his privileges as a member. On the contrary, he took an active part in the business of the incorporation, was elected and acted as a director, and in every way conducted himself as a member till 20th March 1906, when he wrote a letter in these terms—'I hereby resign membership of the Aberdeen Master Masons' Incorporation as at this date.' But it is said that it was *ultra vires* of the directors to admit him as a member, and that no actings of his can make him one. I do not agree with this view. If the defender's admission as a member was contrary to the constitution of the incorporation, it was only so because it was contrary to the articles of association, and not to the memorandum. It was in the power of the incorporation to alter the articles of association or to homologate anything done in violation of them, and this they did by resolution of 29th October 1906, which is printed in the closed record. But the point is in my view a simple one. The defender's agreement to become a member was a contract between him and the incorporation, and he is barred by his actings from resiling from that agreement, and the incorporation having all along impliedly and afterwards expressly homologated that agreement it therefore must be held to be valid.

"The third objection to the action is . . . that Nos. 46 and 47 of the articles of association—at all events the latter—confer a right to participate in profits on persons other than members, contrary to the provisions of sec. 27, sub-sec. 3, of the Companies Act 1900. I am of opinion that on a sound construction of these articles they do not transgress the statute.

"Some other points are stated by way of defence, but they are not of such relevancy or importance as to merit special notice."

The Lord Ordinary refused leave to reclaim.

On 1st March 1907 the defender having, under protest, produced a schedule showing work to the amount of £5161 contracted for by him, the Lord Ordinary (GUTHRIE) gave decree against him for £51, 12s. 2d.

The defender reclaimed, and argued—(1) The unincorporated association, the place of which had been taken by the pursuing incorporation, and of which it was the lineal successor, was undoubtedly a trade union. Head 22 of the memorandum (*Third*) might be read as compelling the pursuers to refrain from acts proper to a trade union, but head 25 had no limitation. This incorporation was in substance a trade union. The mere wording of its constitution was to be disregarded—*Procurator-Fiscal* v. *Wool-combers in Aberdeen*, December 15, 1762, M. 1961; *Barr* v. *Carr*, January 21, 1766, M. 9564—and the true intention of the incorporation was to be looked to. If it was a trade union the action was incompetent, and the plea of no title to sue should be sustained—*Edinburgh and District Aerated Water Manufacturers' Defence Association, Limited* v. *James Jenkinson & Company*, July 15, 1903, 5 F. 1159, 40 S.L.R. 825. (2) The pursuer was not, nor ever had been, a member of the incorporation. The defender had not been admitted under article 42; his name was not in the list of favoured persons. Article 44 it was which applied to him, and the incorporation had a duty to see that his admission was valid, which it was not. The issuing of a certificate of admission by the directors was *ultra vires*, and the act of homologation by the members came too late to validate the action of the directors. The defender was therefore not a member, and the interlocutor of the Lord Ordinary should be recalled.

Argued for the pursuers (respondents)—(1) All the defender could point to as making this incorporation a trade union was head 1 of the article third of the memorandum of association, which article narrated its objects. But taking over assets and liabilities did not involve taking over the character of the original association. The memorandum of association, and that alone, determined the character of the incorporation, and the character so determined did not fall within the definition of trade union contained in the Act of 1876, sec. 16. If the objects of the incorporation as set forth in the memorandum did not constitute it a trade union, then the registration under the Companies Acts was valid, and nothing done subsequently by the incorporation could affect that validity. *Edinburgh and District Aerated Water Manufacturers' Defence Association, Limited* v. *James Jenkinson & Co., cit. sup.*, was distinguished, for there the articles of association contained stipulations in restraint of trade. The registration here was valid, and the incorporation had a title to sue. (2) The defender was personally barred from objecting to the terms of his admission, as he must be taken to have known the terms of the articles of association, and to have contracted on the footing that the conditions contained in article 44 were waived in his favour. The admission of the defender as a member might have been *ultra vires* of the directors, but it was not for the defender to take that objection. The only parties who might have taken that objection were the incorporation. The judgment of the Lord Ordinary should be affirmed.

At advising—

LORD PRESIDENT — In this case I agree with the Lord Ordinary and really have

nothing to add to what his Lordship says It seems to me that, first of all, looking at the constituting documents of the association it is impossible to find that this is a trade union. Secondly, as regards the other question of liability, it seems to me that the only objections to receiving the defender as a member of the association were objections which were pleadable by the company and by no one else; he cannot take advantage of them on his own behalf. In other words, I think this class of question has been decided again and again in liquidation cases, and if the matter had been tested by the company being wound up there is no doubt whatsoever in my mind that this gentleman would have been put upon the list as a contributor. That really ends the matter, because whether there could or could not have been a question as to whether he could get out of the company by the simple act of resignation, that question is not raised in this proceeding, as the sum for which he is sued is a sum entirely due before the date of his resignation. I am for adhering.

LORD KINNEAR—I am of the same opinion. I think the defender is liable upon his own agreement with the company for the sum sued for, whether he is technically a member or not.

LORD M'LAREN concurred.

The Court adhered and refused the reclaiming note.

Counsel for the Pursuers (Respondents) Hunter, K.C. — A. R. Brown. Agents— Alex. Morison & Co., W.S.

Counsel for the Defender (Reclaimer)— Scott Dickson, K.C. — Chree. Agents — Henry & Scott, W.S.

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*Friday, February* 28.

## FIRST DIVISION.

[Lord Dundas, Ordinary.

## STAGG & ROBSON, LIMITED *v.* STIRLING AND OTHERS.

*Bill of Exchange — Proof — Parole — Competency of Parole Proof of Verbal Agreement to Renew Bills Granted in Terms of Written Agreement—Bills of Exchange Act* 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 100.

An action was settled by written agreement which provided that the defending company should pay the pursuers a certain sum, so much in cash and so much in bills at so many months, the bills to be guaranteed by three directors of the company. The action was withdrawn, the cash paid, and the bills delivered. Certain of the bills not having been met, the pursuers sued the guarantors, who in defence sought to establish by parole (relying on the Bills of Exchange Act 1882, sec. 100) an alleged verbal agreement that the pursuers were to renew the bills from time to time until there was delivered certain material which had not yet been delivered.

*Held* that the proof sought was incompetent.

*Per* the Lord President—"The meaning of the provision, I think, was clear enough—to allow you to prove by parole what the rules of law might not allow to be proved by parole, namely, the true relations to each other of the parties upon the bill."

The Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), sec. 100, enacts—"In any judicial proceeding in Scotland any fact relating to a bill of exchange, bank cheque, or promissory-note, which is relevant to any question of liability thereon, may be proved by parole evidence. . . ."

On September 30, 1907, Stagg & Robson, Limited, van and waggon makers, Selby, Yorkshire, raised an action against John Stirling, Brookdene, Twickenham, and two others, with a conclusion against them jointly and severally for payment of "(*First*) the sum of £400, with interest thereon at the rate of five per centum per annum from 20th August 1907 until payment; (*Second*) the sum of £500, with interest thereon at said rate from 20th September 1907 until payment; and (*Third*) the sum of £500, with interest thereon at said rate from 20th October until payment, being the amounts past due to the pursuers under a guarantee dated 27th July 1907, granted by the defenders in favour of the pursuers." The sum first sued for was the balance of the amount contained in a bill, and the other two sums were the amounts contained in two other bills, all granted by Scott, Stirling, & Company, Limited, carriage builders, Hamilton, in favour of the pursuers, and guaranteed by the defenders, who were the managing and two other directors of that company.

The defenders pleaded, *inter alia*,—"(2) The sums sued for not being due by the said Scott, Stirling, & Company under said bills, the pursuers are not liable therefor under said guarantee. (3) The pursuers being bound to renew said bills are not entitled to decree for the sums sued for."

The *facts* of the case and the nature of the defenders' *averments* are, so far as necessary for this report, given in the *opinion* of the Lord Ordinary (DUNDAS) who on 22nd November 1907, before answer, allowed parties a proof—defenders to lead therein.

*Opinion.*—"The pursuers, van and waggon makers at Selby in Yorkshire, sue the defenders, who carry on business as carriage builders, etc., at Hamilton, for payment of various sums of money contained in bills drawn by the pursuers upon and accepted by the defenders, which the pursuers say are overdue. The case is the sequel of a former action which the pursuers raised against the defenders on 28th January 1907 for payment of a sum of money as the balance due in respect of goods supplied to the defenders in connection with certain double-decked motor