established. I cannot find in the evidence sufficient reason for differing from the result which the Sheriff-Substitute has arrived at. I have some misgivings whether evidence to set up a marriage of this kind ought to have been taken in an action to which the husband was not a party, and decree in which would not be final against him. But these scruples have been overcome by the consideration that for the purposes of this case evidence may be taken in the case as between the parties to the case only. I illustrated that view to my own mind by this:—Suppose that Old Kilpatrick had admitted that the pauper had been married to White after the death of Jenkins, that admission would have been sufficient for the purposes of this case, although it could have no effect in setting up a marriage against White if he denied it. Parties having joined issue on this matter, and the case having gone to trial on that footing, I should not feel justified in saying that the Sheriff-Substitute has arrived at an erroneous conclusion. If we affirm the marriage, then we affirm also that the husband has no settlement in Scotland, and that he has deserted her. I think that a man who denies that the woman who was married to him is his wife, and declines to contribute to her maintenance, is a deserting husband. The result is that the parish of Old Kilpatrick is the parish liable for the pauper's maintenance. I think that the judgment of the Sheriff was right.

LORD RUTHERFURD CLARK—I concur.

LORD TRAYNER—I agree in the result at which your Lordships have arrived. The primary question is, whether there was a marriage between the pauper and White? and I think the evidence establishes that such a marriage took place. It is quite true that our finding that such a marriage is established would have no effect in a question with White, who is not a party to this action. The evidence of marriage was led in this case as incidental to the question of the defender's liability, and it was so led in accordance with the practice of this Court. I do not doubt the competency or propriety of leading such evidence for such a purpose, and in questions like the present the balance of convenience is in favour of such a course, rather than saying that a separate declarator of marriage should be brought against the alleged husband.

I have also come to the conclusion, although with difficulty, that the pauper has been deserted by her husband. Taking the pauper therefore as a deserted wife whose husband has no settlement in Scotland, the liability for her support falls upon the parish of her own birth, as the Sheriff-Substitute has found.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute appealed against: Find that the pauper, after the death of her first husband Joseph Jenkins, was married to William White, a travelling basket-maker, at Flemington Inn, Berwickshire, on or about 24th January 1887: Find that the said William White is a native of England, and has no settlement in Scotland: Find that he deserted his wife, and that she having fallen into destitution, became a proper object of parochial relief and has been maintained by the parish of Dumbarton: Find that the pauper has no settlement in the parish of Dumbarton; but that she has a settlement in the parish of Old Kilpatrick, where she was born: Find that the pursuer's disbursements for the maintenance of the pauper to 31st May 1890 amount to £2, 16s. 5d.: Find in law that the pauper falls to be maintained by the parish of Old Kilpatrick: Therefore decern against the defenders in terms of the conclusions of the petition: Find the pursuer entitled to expenses," &c.

Counsel for Defender — Cheyne—J. A. Reid. Agent—William Officer, S.S.C.

Counsel for Pursuer — Thomson — W. Campbell. Agent—W. S. Harris, L.A.

Friday, February 20.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

LOUDON *v.* THE INCORPORATION OF TAILORS OF AYR.

Burgh—Incorporation of Tailors of Ayr—Qualification for Admission to Incorporation—Amendment—Relevancy.

A tailor in Annan, who was born and received his early education in Ayr, sought to have it declared that as the son of a former member he was entitled to be admitted into the Incorporation of the Tailors of Ayr. He failed to show on a proof that birth membership was in accordance with the constitution of the incorporation, but he maintained that as a member of the trade of tailors he was entitled to admission into this incorporation. *Held* that even if such an amendment of his action were competent—which was doubtful, as thereby the action originally brought for behoof of an individual would exist for behoof of a community—such a ground of action would be irrelevant.

David Cunningham Loudon, tailor in Annan, raised the present action of declarator against the Incorporation of Tailors of Ayr, concluding, *inter alia*, that "in terms of the constitution and regulations of the said incorporation the pursuer is entitled to be admitted a member of the said guild brotherhood of the said Incorporation of Tailors as the son of a member and guild brother thereof." He also claimed to be admitted a member of the scheme in connection with the incorporation for the relief of widows and orphans and decayed members. He averred (Cond. 5) that his father

James Loudon, tailor and clothier in Ayr, became a member of the incorporation and relative scheme on or about 24th January 1831, and continued a member till his death on 28th November 1872; and that he enjoyed an annuity from the corporation for some years prior thereto, and that after his father's death his mother enjoyed an annuity till her death in August 1882. He further averred that he was born, brought up, and served his apprenticeship in the burgh of Ayr, and that he did a considerable tailoring business in the town; that he had made frequent applications for admission to the incorporation, and offered to pay the sums exigible on his entry. The pursuer also alleged that by the immemorial usage of the incorporation the sons of members, as such, were on application admitted members of the incorporation and scheme though not burgesses of Ayr or tailors carrying on trade in Ayr.

The defenders averred that entry to the scheme was distinct from entry to the incorporation, and that all members of the incorporation were not eligible as entrants to the scheme; that the incorporation had nothing to do with tailors in general, but only with those who exercised or proposed to exercise their trade in Ayr. They further averred that no one had ever been admitted a member of the incorporation who was not a burgess of Ayr, and who was not a tailor exercising or about to exercise his trade in the town; that the pursuer was not a burgess of Ayr, and was a tailor in Annan and not in Ayr; and that he was not at the date of the action or at any prior time qualified to be entered a member of the Incorporation of Tailors of Ayr or eligible to its said scheme.

The pursuer pleaded, *inter alia*—"(1) Under the constitution and regulations of the said incorporation and of said scheme, the pursuer, being a son of a member, is entitled as such to be admitted a member of said incorporation, and also a member of the benefit scheme incident thereto."

The defenders pleaded, *inter alia*—"(4) That the pursuer being neither a burgess of nor a tailor in Ayr was not qualified for admission as a member of the incorporation or of the scheme."

On 30th November 1889 the Lord Ordinary (KINCAIRNEY) allowed the parties a proof before answer.

"*Opinion.*—The pursuer, who is a tailor and clothier in Annan, concludes for declarator that as a son of a member of the Incorporation of Tailors of Ayr he is entitled to be admitted a member and guild brother of that incorporation, and of 'the scheme of said incorporation for the benefit of aged and infirm members and the widows and children of members.' He avers that he was born in 1845; that his father was a tailor and clothier in Ayr, and a member of the incorporation and of the scheme; that by the immemorial usage of the incorporation the sons of members as such were, on application, admitted members of the incorporation and scheme though not burgesses of Ayr or tailors carrying on their trade in Ayr; and that from 1872 downwards he, and his father on his behalf, had applied for the admission of the pursuer as a member of the incorporation and of the scheme.

"The pursuer's demand is resisted by the present members of the incorporation on two grounds—First, because the pursuer is not possessed of the essential qualification for membership, not being a burgess of Ayr nor a tailor exercising his trade in the burgh of Ayr; and secondly, because he has passed the age for admission to the scheme, which they aver has been fixed at the age of thirty by the regulations of the incorporation.

"On this latter point the pursuer's case seems to be, that a member of the incorporation according to the regulations is admissible to the scheme until he is forty, and that he applied for admission and was entitled to be admitted on his application before he had attained either age.

"There are thus two questions involved—First, Whether the pursuer possesses the requisite qualifications for membership of the incorporation? and secondly, Whether he established his right to be admitted to the scheme before he had reached the age at which he ceased to be eligible?

"The defenders have pleaded that the pursuer has no title to sue, and they have submitted a very interesting and weighty argument in support of that plea. It was based on the position that this Incorporation of the Tailors of Ayr, like other trade incorporations of the kind, was a subordinate burghal incorporation—a part of the wider incorporation which was the burgh itself. It was submitted that no man could be a trading member of the incorporation of a burgh without being a resident burgess, and that therefore it was impossible that anyone could be a member of the subordinate trade incorporations without being a resident burgess. In support of this position the defenders' counsel appealed to what is no doubt a work of the highest possible authority on this subject—the Report on the Municipal Corporations of Scotland, dated in 1837. The argument submitted and the authority for it will no doubt require careful consideration hereafter, but it does not appear possible to give effect to it at this stage of the cause. It may have been, and no doubt was very frequently the fact that the members of such minor incorporations were always resident burgesses. Still it was not maintained as a proposition in law that it was legally impossible for a person not a burgess to be admitted as a member of such an incorporation, and it appears impossible, on the strength of the argument submitted, to ignore and treat as wholly irrelevant the pursuer's averment that it was according to the usage of this particular incorporation to admit to its membership sons of members though not themselves burgesses nor residents in the burgh. I think the usage on the point must be ascertained, and the weight due to the usage carefully considered, and I cannot think that any satisfactory judgment could be pronounced founded on historical investigations as to

the usage of such trade incorporations generally without regard to the usage of this particular incorporation.

"It appears to me, therefore, that the pursuer has stated averments in support of his claim to be admitted a member of the incorporation which ought to be admitted to probation.

"Whether he is also entitled to be admitted to the scheme of the incorporation is a different question, and depends on the regulations of the incorporation on that point and on the date and character of the pursuer's application for admission. On these points the parties are at variance.

"The defenders urged that the proof should be confined, in the first instance, to the former point, because if that were determined in their favour an inquiry on the second point would be superseded. But it does not appear that the second point can involve any lengthened inquiry, and it does not appear expedient to take a course which might involve the necessity of having two separate proofs in the cause."

The defenders reclaimed, but their Lordships of the First Division on 8th January 1890 adhered to the Lord Ordinary's interlocutor.

The import of the proof, so far as material to the present question, sufficiently appears from the interlocutor of the Lord Ordinary of 1st July 1890, which is as follows:—"Finds that (1) it is not proved that the pursuer carried on the business of a tailor in Ayr; (2) that it is not established by proof of custom, or otherwise, that by the constitution of the Incorporation of Tailors in Ayr he is entitled to be admitted a member of that incorporation merely as the son of a member thereof; Therefore repels the first plea-in-law for the pursuer, and assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuer liable in expenses, &c., reserving meantime any question as to modification.

"*Opinion.*—In this action, by which the pursuer, who is a tailor in Annan, but whose father was a tailor in Ayr and a member of the Incorporation of Tailors of Ayr, seeks admission into that incorporation, and, consequent on that admission, participation in the relative scheme, a proof has now been taken, and it is desirable to have in view the precise case which the pursuer has undertaken to establish.

"The main averment is that 'by the immemorial usage and custom of said incorporation, both prior to and since 1761, the sons of members, as such, were on application admitted members thereof, and of the said relative scheme, though not burgesses of Ayr or tailors exercising their trade in Ayr.'

"The pursuer makes no averment about the usage of any other trade incorporation, and in the course of the proof I disallowed questions about the constitution of other incorporations, thinking it impossible to allow the pursuer to enter on a field of inquiry so unlimited without the most distinct averments.

"The pursuer states that he was born, brought up, served his apprenticeship, and learned his trade in Ayr, and that he still does a considerable tailoring business there.

"The pursuer's object in seeking admission to the incorporation is of course to obtain admission to the scheme which has considerable funds and which is a scheme within the incorporation, in the advantage of which no one but a member of the incorporation can participate. . . .

"The first question, however, regards the pursuer's right to enter the incorporation. The question as to the scheme only arises in the event of the former question being solved in his favour.

"The pursuer's leading proposition is, that according to the constitution of the incorporation he is entitled to be a member solely because he is a tailor and because his father was a member.

"Now, no written constitution of incorporation has been produced or probably ever existed. The Act of Regulation by which the scheme was set afoot in 1761 does not refer to any written constitution, and therefore the constitution of the incorporation can only be ascertained by proof of custom, and as there has been no admission since 1855, and as only two members have been admitted since 1845, there has been no recent usage; and hence, notwithstanding the length of the parole proof, the proof on this, the main question, is almost wholly documentary.

"The case which the pursuer avers, therefore, comes to be, that it was the custom in this incorporation to admit as members the sons of tailors, though neither burgesses of Ayr nor carrying on the trade of tailor in Ayr, nor resident in Ayr.

"The pursuer is *in petitorio* and has to prove this custom, and it may here perhaps be observed that a custom cannot be proved by negative evidence. It can only be proved by positive proof of a sufficient number of instances in accordance with the pursuer's case.

"The pursuer's documentary proof—at least the most of it—is contained in a print of documents which includes excerpts from the regulations of the scheme of 1761, but which chiefly consists of a vidimus and of excerpts from the minute-books of the incorporation and scheme, explanatory or illustrative of the vidimus.

"The vidimus, which appears to have been correctly and carefully compiled by the pursuer's agent, is a list of the members of the incorporation with the dates of their admission to the incorporation and to the scheme, and also of the admission as burgesses of those of them who were burgesses. The list, which covers the period from 1761, includes 86 members, and it appears that of these 86, only 29 were burgesses when they entered the incorporation, 28 entered as burgesses afterwards, and 29 were never burgesses at all, so far as the minute-books of the burgh show.

"The documentary proof submitted by the defenders goes much further back, and consists of notes and excerpts from the burgh

records from 1428 to 1767, and from the books of the incorporation from 1565 to 1711.

"These excerpts are of importance and interest. It would extend this opinion too much to enter into any examination of them. I can only state what they would appear to me to establish. They seem to show:—

"1. That residence in the burgh was enforced as a condition of burgess-ship. This was enforced by refusing the freedom of the burgh to non-residents or persons who would not undertake to reside, and by deprivation of freedom if they ceased to reside. This rule may have been, and most probably was relaxed in later years, but I think these excerpts do not show any such relaxation.

"2. That no one but a burgess was permitted to trade within burgh. The entries to this effect are very numerous. The rule was enforced by fine and imprisonment, and by closing the booths in which the unfreemen exercised their trade.

"3. That members of the crafts or trade incorporations were required to be burgesses. There is a resolution to that effect by the magistrates with consent of the deacons of the trades in 1597 ('that nane person or persounis be ressavit fremen with ony craft quhill thai be first fremen of the burgh and admittit burges thairof'). The minutes of the incorporation, at least the earlier minutes, are even more distinct to that effect; in some cases burgess-ship being treated as a pre-requisite to admission to the incorporation, and in other cases the applicant being admitted under the obligation to enter as a burgess as soon as he was required to do so by the provost and magistrates. The obligation to be a burgess was enforced against sons and sons-in-law of freemen as well as against strangers or neutrals.

"4. No one not resident in burgh was entitled to trade in the burgh. Persons, for example, resident in the suburbs were not considered so entitled. This does not appear to have been invariably enforced, at least there is one instance in which an exception seems to have been made in favour of a resident in Newton-on-Ayr.

"5. Deacons of the crafts took part in the election of the magistrates.

"6. There is no excerpt from the minutes of the incorporation which bears expressly that any applicant was rejected because of non-residence, or that any was admitted who was not resident. But the first entry in the minute-book begins with the words 'the court of the tailzeouris within the burgh of Air,' implying *prima facie* that all the members were resident or exercised their trade in the burgh, and the requirement of burgess-ship probably carried along with it what was at least in early times held essential to burgess-ship, namely residence.

"There are two excepts from the incorporation minutes relating to sons of members which require notice. As I read these excerpts they do not imply that freemen's sons should not be under obligation to enter as burgesses, but relate to the more favourable terms of their admission.

"On the whole, I think that the excerpts which have been furnished by the defenders at the very least strongly support the view that at the dates to which the excerpts refer, it was the custom of the Incorporation of Tailors to require of their members (1) burgess-ship and (2) residence, or at least the exercise of the craft within the burgh, and that in the case of sons of members as well as of strangers.

"The defenders argued that it followed from the documentary evidence and the law applicable to the matter that burgess-ship was from the very nature of the case an essential requisite of membership of a trade incorporation. They maintained that crafts were only subordinate incorporations within the burgh incorporation, and were just sub-divisions of the burgesses—Bankton, book 1. t. 2, sec. 19—and that the practice of the Ayr Incorporation had been in accordance with and confirmed that theory.

"I concur in this argument to a considerable extent, although not to the full extent. The history and gradual development of burghs and crafts is obscure, but it seems at least probable that at first a burgh was a body made up of inhabitants within the burgh admitted as burgesses without distinctions among themselves—Ersk. i. 4, 20 and note 101—the burgh boundaries being sometimes very extensive and stretching far beyond the limits of the principal town; that at a subsequent period a distinction arose among the burgesses between the merchants or guild brethren and the artisans or craftsmen; and that at a still later stage these latter were sub-divided into distinct subordinate bodies, each consisting of those craftsmen being burgesses who followed any particular trade, sometimes with seals of cause and sometimes without any written constitution. According to this view a trade incorporation must at first have consisted of burgesses. But the constitution and rules of trade in trade incorporations as in burghs were liable to be changed, and may depend, not on any theoretical view of the original character of a trade incorporation, but on the custom of the particular incorporation in question; and in this case it is open to doubt whether the incorporation's custom of requiring burgess-ship, about which at early dates there seems very little room to doubt, can be held to have been continued. It is possible to hold that it was the interest of the magistrates and not of the incorporation to compel tradesmen to take the freedom of the burgh; it may have become the custom of the incorporation to leave it to the magistrates to insist on entry to the freedom of the burgh if they chose, and to admit applicants without paying any attention to the fulfilment of an obligation in which they had no real interest.

"The circumstance that of the eighty-six members in the vidimus only twenty-nine became burgesses before being received as members of the incorporation points to

some such relaxation. If the vidimus is correct, a burgess ticket was produced in comparatively few cases since 1761, and possibly was required still more rarely, and it is difficult to hold that if a tailor resident and carrying on business in Ayr had applied, say in 1799 or about that time, he would have been rejected. While I accede to the argument that originally members of the incorporated trade of tailors must have been or in all probability were burgesses, and agree that the excerpts which the defenders have produced show that they were so in the fourteenth and fifteenth centuries, yet of later years that seems not to have been the case, and if the want of a burgess ticket had been all that could be stated in objection to the pursuer's application, I incline to think that that would not have been allowed to stand in his way.

"The stronger objection seems to be in the fact that he is not a tailor in Ayr at all. Now the very name of the incorporation points to the limitation of the incorporation to tradesmen in the burgh. The title in the minute book 'court of the tailzeouris within the burgh of Air' is still more definite; it is almost the same as resident within the burgh; then it is pretty clear that in fact such residence was at first essential were it for no other reason than that burgess-ship was at first held essential; and perhaps it is still more to the purpose to say that no one in the earlier history of the incorporation could have the smallest interest to join the incorporation except a tailor resident or carrying on his trade in the burgh, for he could not well carry on a trade in a burgh where he himself was not, and it is clear that he could not be permitted to do so through the agency of servants or apprentices—*Bakers of Edinburgh* v. *M'Duff*, March 21, 1628, M. 1903; see to a similar effect *The Weavers of Perth*, December 4, 1669, M. 1906; *Laird of Polmaise*, 1671, M. 1907. Hence as no one who did not mean to carry on business in Ayr had, at least before the scheme was set on foot, the smallest interest to enter as a member of the incorporation, it is at least improbable that it was the custom for such persons to apply for admission or for the incorporation to admit them.

"I think there is very strong ground for holding that at the date at which the pursuer's vidimus begins it was not in accordance with the custom of the incorporation to admit members who did not carry on or propose to carry on their craft in the burgh.

"The next question is, whether the pursuer's vidimus shows any contrary practice. The vidimus does not give any designation of the first forty-nine members except two. One is designed staymaker, and the other tailor. But after that and from 1797 they are all designed 'tailor in Ayr' with three exceptions. In one of these cases the designation is staymaker in Ayr, an exception which need not be considered, as not germane to this question at all. The other exceptions are (50) Hugh Brown, tailor in Wallacetown, and (57) Thomas Aird, tailor in Alloway.

"Hugh Brown is entered in the burgh minute book as tailor in Ayr, and the witness Andrew Cowan, who (I may say in passing) appeared to me to be a very sensible man and reliable witness, has produced his father's indenture as an apprentice with Hugh Brown, who is designed as tailor in Ayr. Wallacetown is a suburb of Ayr, separated from it by the water of Ayr. On the whole the evidence preponderates that Hugh Brown was a tailor in Ayr.

"The defenders seek to explain the case of Thomas Aird on the ground of the exceptional relation in which Alloway stands to Ayr. It is said that it was once part of the common good of Ayr. The matter is explained by the witness the Rev. Mr Macleod. I hardly think the defender's explanation very satisfactory. Perhaps it is more to the purpose to notice that Thomas Aird was as appears from the minute entered as a stranger, and therefore his case does not support that of the pursuer, which is that he is entitled to admission because he is the son of a member. It is not contended that all tailors wherever they carry on business are eligible. I think, therefore, that these two cases are not of importance.

"There is, however, one case which is more in point, that of (75) James Logan. He is entered in the minute-book as tailor in Ayr, but is designed in the burgh minute-book tailor in Mauchline. Evidence has been led to show that he carried on his trade at Mauchline, but Andrew Cowan thinks that at the date of his entry he was really a tailor in Ayr. It must be admitted that the preponderance of the evidence is the other way, and if he was a tailor in Mauchline the case is exactly in point. All that can be said is that the precise circumstances under which he was admitted are not known. He may have been treated for some reason with exceptional favour, or those who admitted him may have been under a mistake and may have believed him to be, as they entered him, a tailor in Ayr. Indeed, that mistake must have been made, for otherwise the entry would not have been so made. If it was a mistake this entry proves no intentional departure from the usual practice. Clearly in general the admitted applicants were tailors in Ayr. If Logan's case be an exception it seems to stand alone.

"The practice on this point after 1761 does not detract from what was in all probability the rule and custom in and before 1761.

"But the pursuer has to prove the custom which he alleges, and he cannot prove his custom by merely proving that in some cases burgess-ship was not required, or that non-residence was not required. He must prove his alleged custom by affirmative instances, and how can a custom be proved by one example? That, I think, is plainly impossible, and I do not see where the pursuer's proof of custom is except in his vidimus.

"The regulations for the scheme do not, in my opinion, aid the pursuer's case. I con-

sider that the references to freemen's sons in the regulations have reference only to the fees which they are required to pay on admission.

"On the whole, I am of opinion that the pursuer has not established that his claim for admission merely on the ground that his father was a member is in accordance with the custom of the incorporation.

"But the pursuer has maintained that he is in truth a tailor carrying on his trade in Ayr. That point I may treat very shortly. I do not think he has proved that he is in any reasonable sense a tailor in Ayr. I do not go into details on this point. Further, I do not think it possible to maintain that a claim by a tailor in another town on the ground that he has customers in Ayr could possibly be sustained in accordance with the practice of the incorporation. No such state of matters could possibly have given rise to a right to share in the exclusive privileges of the incorporation within the burgh while these existed, and therefore I think that this claim cannot be consistent with old usage." . . .

The pursuers reclaimed, and argued—That in the circumstances he was entitled to be admitted. The benefit scheme was a mere incident, and in judging of the pursuer's right to be admitted to this incorporation, the Court would not take into account the circumstances of the benefit scheme at all but deal with the wider claim on its merits. The defenders' object was to make this scheme a species of tontine, and the pursuer could not be excluded solely because he was not a burgess of Ayr. There were instances in which parties who were not buyers had been admitted, and the defenders were not entitled to make an exception against the pursuer merely to benefit themselves. At least he was entitled to admission as a member of the trade of tailors, and if necessary he was prepared to amend his summons to this effect.

Counsel for the respondents were not called upon.

At advising—

LORD PRESIDENT—I understand that none of your Lordships think it necessary to require an answer in this case. The action is laid upon a very distinct ground, namely, that the pursuer has a right to be admitted as a member of the Incorporation of Tailors of Ayr, and the qualification which he alleges is that he is the son of a member and guild brother thereof. The leading conclusion of the action is for declarator that "in terms of the constitution and regulations of the said incorporation the pursuer is entitled to be admitted a member of the said guild brotherhood of the said Incorporation of Tailors as the son of a member and guild brother thereof," and the further conclusions of the summons are precisly in accordance with that leading declarator. In like manner the qualification set out in the statement on record is the same, and the pleas-in-law are all embodied in plea No. 1, because the others are merely ancillary pleas. Plea No. 1 is that "under the constitution and regulations of the said Incorporation of Tailors of Ayr and of the said scheme, the pursuer being the son of a member is entitled to be admitted a member of the incorporation, and also a member of the benefit scheme incident thereto."

Now, I may just say in a single word in regard to the benefit scheme mentioned in that plea, that that really has no bearing upon the question at present before us. Of course the pursuer can have no interest in or right to that benefit scheme unless he is entitled to become a member of the incorporation, and his title to become a member of the incorporation depends entirely, upon the face of this record, upon his being the son of a previous member.

The case was brought before us at an earlier stage by a reclaiming-note against a judgment of the Lord Ordinary allowing a proof to the pursuer of his averments, and it was very clear from the Lord Ordinary's note appended to the interlocutor of 30th November 1889 what it was that he intended that the pursuer should be allowed to prove. He sets out that the pursuer avers "that he was born in 1845, that his father was a tailor and clothier in Ayr and a member of the incorporation and of the scheme, and that by the immemorial usage of the incorporation the sons of members, as such, were on application admitted members of the incorporation and scheme, though not burgesses of Ayr or tailors carrying on trade in Ayr." Again, he says in a later part of his note:—"It appears impossible to ignore and treat as wholly irrelevant the pursuer's averment that it was according to the usage of this particular incorporation to admit to its membership the sons of members, though not themselves burgesses nor resident in the burgh." Now, in adhering to that interlocutor, I am quite satisfied that we adopted the view which the Lord Ordinary thus expressed, and that it was because of that particular averment as to the immemorial usage of the incorporation to admit sons of members, as such, on application that we affirmed his Lordship's interlocutor and held that it was a matter proper for inquiry; and indeed, in looking over the record again, I do not see that there is any other matter for inquiry at all. That seems to be the only substantive averment in support of the action as laid, namely, an action for declarator that the pursuer is entitled, as the son of a former corporator, to be admitted, as such, a member of the incorporation. It is now matter of concession that that immemorial usage which is supposed to exist has really no existence at all, and that the fact of a man being the son of a former corporator gave him no title whatever according to the usages of the corporation to be admitted a member himself. The pursuer is a tailor no doubt, and I have no doubt he was bred in Ayr, and probably received his early education in Ayr, but his present position in life is that he is a tailor in Annan, and it is not said that a tailor in Annan has any particular qualification to be admitted to the Incorporation of Tailors of Ayr.

The only other ground of argument that he has a qualification is that he is a tailor in Scotland. It seems to me to come to that, and if that is a qualification, it certainly seems a very strange one, and such as I never heard in connection with corporation law before. But if being a tailor in Scotland is a qualification to be admitted as a member of the Incorporation of Tailors of Ayr, I do not see how we are to stop at Scotland at all. Why should not every tailor all the world over have a good right to be admitted to the benefits of this incorporation? I cannot see a ground of distinction, and therefore, even if the pursuer was in a position to amend his record and to introduce this as a new ground of action, I should have very great difficulty indeed in listening to such a suggestion. In the first place, I doubt the competency of such an amendment in a case of this kind, because in this this case the pursuer is pursuing on his own account. He is suing to be admitted a member because he is the son of a previous member; but if he converts his action into a suit to be admitted as a member because he is a tailor, that is to say, because he is either a Scottish tailor or a tailor somewhere else in the world, then it becomes an action of a very different class indeed—much more comprehensive in its conclusions. It would be an action suing not for behoof of the pursuer himself, but for behoof of a great community. I do not think that it is within the scope and intention of the Act of Parliament, which allows such extensive amendments as we are now acquainted with.

But really it is in vain to speculate upon whether that amendment could by possibility be allowed, because if it were, and if this action were converted into an action of declarator that every tailor in Scotland was entitled to be a member of this incorporation, that would be so plainly and obviously irrelevant that I think your Lordships would at once reject the whole amendment without any more about it. And therefore I think the pursuer's case entirely fails. He has no title according to the evidence of immemorial use as the son of a previous member, and he has in my opinion no title or shadow of a title arising from the mere fact that he happens to be a tailor and is in some way connected by birth or education with Ayr. I am therefore of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

LORD ADAM concurred.

LORD M'LAREN—I concur in your Lordship's opinion. In coming to the consideration of this question, we start with a very elementary rule of the law of corporations, namely, that such bodies keep up their membership by co-operation. That is the universal mode of continuing the personality of a corporation, subject of course to modification, according to the written or customary law of the particular institution. But there is unquestionably an element of choice in the mode in which the membership of a corporation is continued or increased. We know that in such cases certain persons, especially sons of former members, have either under the original constitution of the body, or by custom acquired the privilege of being admitted as of right, and the case with which the pursuer came into Court was of that nature, that in respect of being the son of a member he could claim to be admitted into this body as of right. That is a perfectly intelligible case, and if well founded in fact, is consistent with what we know of the usage of such bodies. But when we come to the question of fact on which proof was allowed, the Lord Ordinary has shown that the case of the pursuer entirely fails, and it was not suggested in the argument addressed to us that the proof contained anything contrary to the Lord Ordinary's opinion.

It is admitted that the claim as founded on birth membership has failed, and now it is sought for the first time to press the claim of the pursuer on a very different and more general ground, namely, that in respect of mere membership of the trade or ability to exercise the trade, the pursuer can claim to be admitted without reference to the wishes, or, I take it, to the past practice of this corporation. Certainly it has not been shown that the past practice of the society recognises any absolute right on the part of non-resident tailors to be admitted to the Corporation of Tailors of Ayr. The records contain instances of individuals who were non-residents being admitted to membership, but these instances are not very numerous, and there is nothing to show that the admission was given as matter of right, the inference is rather, I think, of the opposite character.

I am of opinion with your Lordship that the position which is taken up by the pursuer is really hardly distinguishable from this, that any person is entitled to join this corporation. That does not seem to me to be a statement of relevant qualification at all, and therefore both in respect that it is different from the ground of action set forth on record, and also because it does not appear to me to be a relevant ground of action, even if it were there, I am of opinion that the action has failed.

LORD KINNEAR concurred.

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