

tained decree for one of the two sums only, and the defender obtained decree for modified expenses. On the Court being moved to grant decree for the defender's expenses in name of the agent-disburser, the pursuers opposed the motion on the ground that they ought not to be deprived of the right to set off the sum for which they had obtained decree against the expenses found due to the defender. The Court refused the motion.

The Masco Cabinet and Bedding Company, Limited, *pursuers*, raised an action in the Sheriff Court of Lanarkshire at Glasgow against A. G. Martin, one of the directors of the company, *defender*, for payment of £290, 14s. 5d., being (1) £163, 7s. 4d., the amount of a debt which the pursuers averred had been guaranteed by the defender and the interest thereon, and (2) £233, 3s. 2d., the amount which the defender had drawn in excess of his remuneration as a manager of the company at the date of his dismissal, under deduction of £111, 14s. 3d., the amount standing in the pursuer's books at the defender's credit.

On 11th November 1910 the Sheriff-Substitute (WELSH) decerned against the defender for £283, 10s. 9d.

The defender appealed to the Sheriff (GARDNER MILLAR), who on 22nd March 1911 dismissed the appeal.

The defender thereupon appealed to the Court of Session.

On 29th February 1912 the Court pronounced an interlocutor finding that the pursuers had failed to prove by competent evidence that the defender had guaranteed the debt of £163, 7s. 4d., but that the defender was liable to repay to the pursuers the sum of £231, 17s. 8d., being the amount of salary overdrawn, under deduction of the sum of £111, 14s. 3d., and finding "the pursuers liable to the defender in expenses in this Court modified to one half."

On the case appearing in the Single Bills on 20th March 1912 for approval of the Auditor's report, counsel for the defender moved the Court to grant decree for the taxed amount of the defender's expenses as modified, in name of the agent-disburser.

Counsel for the pursuers opposed the motion, and argued—The pursuers were entitled to set off the sum for which they had obtained decree against the expenses found due to the defender—*Grieve's Trustees v. Grieve*, 1907 S.C. 963, 44 S.L.R. 737; *Lochgelly Iron and Coal Company, Limited v. Sinclair*, 1907 S.C. 442, 44 S.L.R. 364. This was not an extrinsic claim of compensation, and the law agent was not therefore in any better position than the principal party—*Munro v. Bothwell*, September 16, 1846, Arkley, 118 (*per* Lord Moncreiff at 120) had been overruled.

Argued for the defender—The expenses were awarded to the defender on account of his success in the first branch of the case, which had no connection with the second, in which he had been unsuccessful.

The expenses awarded to him could not therefore be set against the sum for which he had been held liable, as the two were not *partes ejusdem negotii*—*Lochgelly Iron and Coal Company, Limited v. Sinclair* (*sup. cit.*); *Fine v. Edinburgh Life Assurance Company*, 1909 S.C. 636, 46 S.L.R. 480.

The Court (LORD JUSTICE-CLERK, LORDS DUNDAS, SALVESEN, and GUTHRIE) refused the motion.

Counsel for Pursuers (Respondents)—Hon. W. Watson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defender (Appellant)—James Stevenson. Agent—Harry H. Macbean, W.S.

Wednesday, March 20.

### FIRST DIVISION. INCORPORATION OF MALTMEN OF STIRLING, PETITIONERS.

*Friendly Society—Trade Incorporation—Burgh Trading (Scotland) Act 1846 (9 and 10 Vict. cap. 17), sec. 3—Application of Funds of Society nearly Extinct.*

An ancient incorporation of maltmen of a certain burgh, who had at one time had the privilege of exclusive trading, having become reduced to one member, presented a petition under the third section of the Burgh Trading (Scotland) Act 1846 for the interposition of the authority of the Court to certain proposed bye-laws or resolutions, of which the principal were to the effect that the funds should be held by a governing body consisting of the sole survivor and of the magistrates of the burgh, and of any other members of the incorporation who might be elected thereto; and that, after paying expenses of management and pensions, grants, and allowances according to use and wont the surplus funds should be paid to a certain educational trust in the burgh for such of the purposes of the trust as the foresaid governing body might decide. The Lord Advocate, as representing the Crown as *ultimus hæres*, did not object.

The Court, after a remit, *approved* of the resolutions.

The Burgh Trading (Scotland) Act 1846 (9 and 10 Vict. cap. 17) abolishes the exclusive privileges of trading incorporations in burghs, and provides (section 3) that where in consequence of the Act the revenues of any such incorporation may be affected and the membership diminished the incorporation may apply to the Court of Session by summary petition to sanction such bye-laws, regulations, and resolutions as may be proposed to meet the altered circumstances.

The Incorporation of Maltmen of the Burgh of Stirling, and William Robert

Galbraith, civil engineer, residing at 91 Finchley Road, London, sole surviving member of the said incorporation, presented a petition to the Court to inter-pone authority to certain bye-laws and regulations contained in a minute as after mentioned.

The petition was served upon the Provost, Magistrates, and Council of the Burgh of Stirling, and upon the executor-nominate of the last treasurer of the Incorporation. It was also intimated to the Lord Advocate, who by letter in process stated that he did not object to the prayer of the petition being granted.

The petition set forth—"The petitioner William Robert Galbraith is, so far as can be ascertained, the sole surviving member of the Incorporation of Maltmen of the Burgh of Stirling. He was admitted a member on 17th November 1857.

"Down to the year 1846 the Incorporation had from a very early period enjoyed the exclusive privilege of malting within the burgh of Stirling. This privilege was recognised in a Seal of Cause from King James VI in 1603, and several grants and enactments have subsequently been made in favour of the Incorporation by the magistrates of the burgh.

"The Incorporation has no written constitution, but its bye-laws and regulations seem to have been either made or confirmed by the town council. Under the regulations for entry thus made sons of members were entered for a payment of £1, sons-in-law for £1, 3s. 4d., and strangers for £6, latterly £8.

"The Incorporation was in the practice of giving pensions or charitable grants to members and to the widows and children of members, and payments were also made for clothing and funeral expenses. Since 1686, and probably prior thereto, an annual sum of £5, 16s. 8d., has been paid to the Town Council of Stirling under the name of 'ladle-roll money.' Occasional grants out of surplus income have been made to the poor of the town generally, and to various public undertakings, such as the first water scheme of the burgh, the building of schools, and the improvement of the high roads.

"By the Burgh Trading Act 1846 (9 and 10 Vict. cap. 17), the exclusive privileges of trading incorporations in burghs were abolished, and thereafter the membership of this Incorporation declined. No new members have been admitted since 1862, and the petitioner is not aware of anyone who has since then applied to be admitted. In the year 1884, so far as can be traced, there were five members, other than the petitioner, alive, but they are all known to be dead.

"There is no record of any meeting since 1864, except a meeting in 1886, when the question of taking counsel's opinion as to winding-up the Incorporation was considered, but no action followed.

"There is no record of any new pensions or gratuities having been granted since 1864, and all the pensioners then alive are now dead.

"Mr James Brown, writer, Stirling, who for many years acted as treasurer of the Incorporation, died in the month of August 1909, and no successor has been appointed. His executrix-nominate is Mrs Jessie Davie or Brown, widow, residing at No. 11 Windsor Place, Stirling, who is called as a respondent in this petition.

"The petitioner, as sole surviving member, being desirous of making arrangements for the continuation of the Incorporation, and of putting the management of its affairs under proper control, signed on 27th November 1911 a minute containing certain bye-laws and regulations as follows—*[In the first regulation a slight alteration was made on the suggestion of the reporter as after mentioned, the words in square brackets being deleted and those in italics inserted]*—

"MINUTE by William Robert Galbraith  
*[designation followed]*.

"Whereas the said William Robert Galbraith is now, so far as is known, the sole surviving member of the Incorporation of Maltmen of the Burgh of Stirling: And whereas there have not been since the year 1862 any entrants to the said Incorporation, nor since the year 1888 any pensioners receiving pensions from the funds of the Incorporation: And whereas it is desirable to make provision for the continued management of the funds of the Incorporation, and for applying the funds of the Incorporation to the purposes to which such funds have hitherto, according to use and wont, been applied, and for disposing of any surplus funds for kindred or analogous purposes: therefore the said William Robert Galbraith, as sole surviving member foresaid, has resolved, and hereby resolves, subject to the approval of the Town Council of the burgh of Stirling, and thereafter the approval and sanction of the Court of Session being obtained, that the following be the bye-laws and regulations for the management and application of the funds and property of the Incorporation, viz. :—*(First)* That the funds and property of the Incorporation shall be held and managed by a governing body, consisting of the Provost and Magistrates for the time being of the Royal Burgh of Stirling, and [himself] *the said William Robert Galbraith*, and such of the other members of the Incorporation as may be duly admitted into the Incorporation and elected to act on said governing body by annual election by the members of the Incorporation to the number [including the said William Robert Galbraith] of not exceeding six in all, a majority of the members of the governing body acting for the time being always a quorum. *(Second)* That the said governing body shall apply the income of the funds and property of the Incorporation, and such portions as they may think fit of all future entry monies of members joining the said Incorporation as follows, *videlicet*:—(1) In payment of the necessary expenses of management. (2) In payment of pensions, grants, and allowances according to the use and wont of the Incorporation, that is

to say, in payment of pensions, grants, and allowances to members of the Incorporation who may be in destitute or necessitous circumstances, and to the widows and children of deceased members who have been left or are at the time in destitute or necessitous circumstances, and in payment of the funeral expenses of deceased members who may have died in such circumstances, all as the recipients of such pensions and other payments shall be selected by the governing body. (3) In payment of any surplus remaining after meeting the foregoing purposes, to the Governors of the Stirling Educational Trust, to be applied by the said Governors for such of the purposes of the scheme for the administration of the Stirling Endowments framed by the Educational Endowments (Scotland) Commission, and approved by Her Majesty by Order in Council, 3rd April 1886, as they in their sole and absolute discretion may decide. (*Third*) That the said governing body may appoint such office-bearers as they deem necessary. (*Fourth*) That the members of the Incorporation shall have the whole powers, rights, and privileges competent to the members of the Incorporation according to use and wont, save only as altered by the provisions hereof.

"For the purposes of this minute the said William Robert Galbraith hereby records that to the best of his knowledge and belief the funds of the Incorporation as at present existing are as follows:—

- "1. £100 Edinburgh Corporation 3 per cent. Redeemable Stock.
- "2. £200 on loan to the Town Council of Stirling.
- "3. £170 on loan to Spittal's Hospital, Stirling.
- "4. Four pews in the East Church, Stirling, yielding an annual revenue of £1, 10s.
- "5. Sums in bank on deposit—receipt amounting in all to £200 or thereby.

"W. M. R. GALBRAITH.

"27th November 1911.

"Before signing said minute the petitioner submitted it to the Town Council of the Burgh of Stirling, and by letter of date 21st November 1911 from the Town Clerk to Messrs Mathie, MacLuckie, & Lupton, writers, Stirling, agents for the Incorporation, the Town Council intimated their approval of the said minute, and consented to an application being made to your Lordships for the sanction of the bye-laws and regulations therein contained.

"The Town Council and Magistrates further agreed that the Provost and Magistrates for the time being would act on the governing body as provided by said minute, in the event of your Lordships' sanction being obtained.

"The present application is accordingly made under section 3 of the Burgh Trading Act 1846 (9 and 10 Vict. cap. 17)."

The Court on 23rd January 1912 remitted to the Right Honourable Lord Kinross, advocate, to inquire as to the facts and

circumstances set forth in the petition, and to report.

On 8th March 1912 the reporter lodged this report—"The reporter, in terms of an interlocutor dated 23rd January 1912, has inquired into the facts and circumstances set forth in this petition, and is of opinion that the application is in all respects regular and proper, and may be granted.

"The Incorporation of the Maltmen of the burgh of Stirling, who in the person of the only surviving member are the petitioners, are a body of ancient standing. Their rights and privileges are recognised in a Seal of Cause granted by James the Sixth in 1603, from which it appears that the craftsmen of the burgh had sought to interfere with the privileges of the maltmen, thereby causing dispeace in the burgh. This deed declares the separate identity of the maltmen as a privileged trade. The Incorporation have, as evidenced by documents produced to the reporter, existed under the protection of the magistrates of the burgh who have regulated and controlled from time to time the fees, &c., chargeable by the Incorporation. The Incorporation have expended their funds in payment of pensions, sick benefits, funeral expenses, &c., to its members and their families. They also have been in use to pay a sum to the Town Council of Stirling of £5, 16s. 8d. in name of 'ladle-roll money,' and have further subscribed to undertakings of public utility in Stirling. Their funds amount to between six and seven hundred pounds.

"Since the passing of the Burgh Trading Act 1846, which abolished the privileges of exclusive trading enjoyed by trade incorporations in burghs heretofore, there has been in this, as in other incorporations, a steady and gradual diminution of membership, and the minutes show that since 1862 no application for admission to the Incorporation has been made.

"The petitioner Mr Galbraith is the last survivor of the Incorporation, and there are no persons alive who are in enjoyment of pensions.

"The proposals of the petitioners are embodied in a minute dated 27th November 1911. . . .

"The Stirling Educational Trust administer a scheme under the Educational Endowments Act 1882 under which certain foundationers are maintained and educated at the High School, Stirling, chosen from among the sons of persons resident in Stirling, who belong to or have belonged to the Seven Incorporated Trades of, or Guildry, or Society of Mechanics in Stirling. The funds are also utilised for the furtherance of higher education and the establishment of bursaries.

"The reporter is humbly of opinion that the proposals of the petitioners have the merit of retaining intact the capital of the funds of the Incorporation, and of applying the income thereof primarily for the existing objects of the Incorporation, while in regard to the application of any surplus income thereafter the proposals seem to

the reporter to be reasonable and proper and in accordance with the practice already initiated of subscription by the Incorporation to objects of utility within the burgh.

"In circumstances very similar to the present the Court, in the petition of *The United Incorporation of Masons and Wrights of Haddington*, 1881, 8 R. 1029, being moved in terms of section 3 of the Burgh Trading Act 1846, authorised regulations allowing the application of the income of a quasi derelict incorporation to purposes of a kindred nature to the present."

He then referred to the small alteration above mentioned, and suggested the interlocutor which the Court eventually pronounced (see *infra*).

Counsel for the petitioner referred to the *United Incorporation of Masons and Wrights of Haddington*, June 7, 1881, 8 R. 1029, 18 S.L.R. 550.

LORD PRESIDENT—This is a somewhat unusual and peculiar application. It has been presented by the sole surviving member of one of the old trading incorporations, the Maltmen of the Burgh of Stirling. He quite frankly not only admits that he is the last maltman, but says that it is very improbable that there will ever be a maltman again. I do not suppose any other such person can be found in Stirling—I mean a person who could have entered the Incorporation in the way in which the rules provide. He comes forward with an application for the sanction of some new bye-laws which he as the Incorporation has passed; and those bye-laws provide that for the future there shall be an association of the Provost and the Magistrates of Stirling with the members of the Incorporation, if any, that is to say, himself at first and his successors, if any; and that this new governing body shall dispose of the funds, first of all, according to use and wont, that is to say, in payments to the members of the Incorporation, if any such exist; and then anything that is left over is to be transferred to the Governors of the Stirling Educational Trust—a trust existing in Stirling, which is administered in terms of a scheme approved under the Educational Endowments Act.

As to the actual application of the moneys, I do not have any difficulty, because although no doubt we are aware that these trading incorporations generally spend their moneys upon themselves and their members, I do not know that they might not have devoted their moneys to any purposes of education or charity if the Incorporation were willing to do so, and I do not see why we should not have sanctioned bye-laws for such purposes. The real difficulty which has weighed upon me is that, under the colour of a change of bye-laws, there is being provided a new governing body; and inasmuch as I am quite clear that we are only sitting here in terms of the Burgh Trading Act of 1846 (9 and 10 Vict. cap. 17) to give our sanction to bye-laws, I confess that I think the application is very unusual, and I am not

sure that I should have seen my way to granting it but for two things. The first is that the same thing seems to have been done by the other Division of the Court in a case quoted to us (*the United Incorporation of Masons and Wrights of Haddington*, 1881, 8 R. 1029), and the other is—and it weighs with me quite as much—that there are no objections. We have got to consider who are the other persons who could object. The only persons who could object—there being no actual maltmen—within the limits of Stirling would be the burgh of Stirling themselves—I mean the Provost and Magistrates. They clearly do not object, because they have approved of the new arrangement. The only other person who, I think, might have objected would be the Lord Advocate, representing the Crown as *ultimus hæres* entitled to take up any derelict funds. The matter has been intimated to him, and we have a letter from him in process saying that he does not object to the prayer of the petition being granted. In these circumstances I think we ought to grant the prayer of the petition.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

The Court pronounced this interlocutor—

"... Approve of said proposed bye-laws, regulations, or resolutions, which bye-laws, regulations, or resolutions are as follows, viz.—[*Here followed the resolutions as altered by the reporter*]—and further, Find the expenses of this application, taxed as between agent and client, payable out of the funds of the Incorporation, and decern."

Counsel for the Petitioners—Inglis. Agents—Fraser, Stodart, & Ballingall, W.S.

Wednesday, March 20.

## FIRST DIVISION.

### MUNRO'S TRUSTEES v. SPENCER.

*Succession—Will—Condition—Name and Arms Clause—Surname.*

A clause in a *mortis causa* settlement provided that each of the beneficiaries who should succeed to a certain estate should assume and constantly thereafter use "the surname, arms, and designation of Munro of Teaninich as their proper surname, arms, and designation, in addition to their own surname, arms, and designation," and that should any of the beneficiaries decline to accept or contravene this condition their right under the settlement should cease and determine.

*Held (diss. Lord Mackenzie)* that a beneficiary sufficiently complied with the clause by prefixing the surname of Munro to his own surname and calling himself Munro-Spencer of Teaninich.