

INCORPORATION OF FLESHERS OF GLASGOW, Appellants.
Solicitor-General Tindal—Fullerton.

No. 8.

CHRISTIAN NELSON OF SCOTLAND, Respondent.
Keay—T. H. Miller.

Et e Contra.

Incorporation.—An incorporation having by its by-laws fixed certain rates of annuity payable to different classes of decayed members and widows;—Found, (affirming the judgment of the Court of Session), That a widow was entitled to enforce, in a court of law, her claim as a matter of right, and was not bound to accept the allowance as a payment depending on the pleasure of the incorporation.

JAMES SCOTLAND, a vintner and chaise-hirer in Glasgow, married Christian Nelson, daughter of a flesher, who had been a member of the incorporation of fleshers in that city. By the rules of the incorporation, the sons or sons-in-law of a member were entitled to be admitted on more favourable terms than others; and various provisions had been made for providing certain sums to decayed members, or their widows, subject 'to be diminished or augmented by the trade.' On the 21st of October 1807 the following resolution was agreed to, and recorded in the books of the incorporation:—'At Glasgow, 21st October 1807.—The deacon and masters being met, proposed to the consideration of the trade an increase of the annual allowance to decayed members, and widows of members, in consideration of the high advance of the necessaries of life, and the change of circumstances since the last allowances were fixed by the trade. Thereafter, the ordinary members being called in, the whole being warned to this meeting, as verified by the trade's officer, the whole meeting took into consideration the proposition of raising the allowances to the trade's poor. It was carried, and is now enacted, that the annual allowances to reduced members and widows, to commence at Martinmas next, shall in future be to members who have carried on the flesher trade for five years or upwards, L.12 sterling; 2d, To members who have not carried on trade that time, L.6. 3s. sterling; to pendicles,† L.3 sterling: and to

June 20. 1828.*

1ST DIVISION.
 Lord M'Kenzie.

* This case was decided on the 4th, but was accidentally omitted in its proper place.

† Persons who were members, but did not exercise the trade of fleshers.

June 20. 1828. ‘ widows of the first class, L. 8 ; to widows of the second class,
‘ L. 5 ; and widows of the pendicles, or third class, L. 3 sterling ;
‘ but with power to the master-court to increase their allowances
‘ as circumstances shall require, or diminish the same, if the
‘ funds of the trade are to be encroached on, or will not afford
‘ these allowances.’ On the 16th September 1809 Scotland
entered with the incorporation, and paid L.4. 8s. 10½d. to the
funds ; and thereafter, and till his death in December 1819, the
annual contribution of one shilling. Soon thereafter his widow,
the respondent, raised an action before the Magistrates of Glas-
gow against the incorporation, in the summons of which she set
forth, ‘ That the pursuer’s late husband was, at the date of, and
‘ for a number of years previous to his death, which took place
‘ upon the 31st day of December 1819, a member of the said
‘ incorporation of fleshers, and made regular payment of the
‘ original entry-money, as well as of the yearly contributions to-
‘ wards their funds due by him as such : That the pursuer, as
‘ his widow, is now entitled to claim from the funds of said in-
‘ corporation a certain yearly allowance or annuity, besides a
‘ certain sum towards defraying her said husband’s funeral
‘ expenses ; but as the said defenders have refused to give her
‘ the necessary information, by allowing her inspection of the
‘ regulations of the fund or otherwise, she is at present unable
‘ to condescend with accuracy upon the precise amount to which
‘ she is entitled : That from the information, however, which
‘ the pursuer has been able to procure from several widows in a
‘ similar situation with herself, and who at present receive an
‘ allowance from said incorporation, she has the best reason to
‘ believe that she is entitled to claim from the funds of the said
‘ incorporation, as the widow of one of its members, the yearly
‘ sum of L.8 sterling, besides the sum of L.3 sterling towards
‘ defraying the funeral expenses of her late husband.’ She
therefore concluded for payment of the yearly sum of ‘ L.8
‘ sterling, or such other sum, more or less, as shall be found,
‘ upon exhibition and inspection of the regulations anent the
‘ allowance to be made to the widows of deceased members of
‘ said incorporation, to be the amount to which the pursuer is
‘ entitled, payable the said annuity quarterly.’ In defence the
incorporation stated, 1. That the fund which had been provided
was intended for distribution in charity among the poor widows
of members ; that a share of it could not be claimed as a matter
of right ; that they were entitled to exercise their discretion in
distributing it ; and that, although they had been willing to give

June 20. 1828.

the respondent a certain allowance in charity, yet they must resist any demand on the footing of her having an absolute right to claim any sum from them, and could not be controlled by the discretion of a court of law: And, 2. That, supposing she could make a claim as a matter of right, then they averred, that her husband had not carried on business as a flesher for five years prior to his death, and therefore she was not entitled to a larger annuity than L. 5. The magistrates allowed her a proof ‘ that by the established rules of the corporation, or by ‘ agreement express or implied with the pursuer’s late husband, ‘ the defenders are legally bound to pay the pursuer the annuity ‘ and funeral expenses claimed in the libel, or to any greater ‘ amount than the rates offered in the answers.’ On advising the proof they pronounced this judgment:—‘ Find it proved, ‘ that, agreeably to by-laws or standing regulations of the corporation, the defenders have been in the practice, for upwards ‘ of forty years, of allowing certain rates of aliment to the widows ‘ of deceased freemen; and find, that corporations of tradesmen ‘ in royal burghs are subject to the controul of the competent ‘ Courts, with regard to the application of their funds to the ‘ legitimate purposes to which these funds are destined; Finlay ‘ *v.* Newbigging, 15th January 1793. But before determining ‘ whether the rate of aliment demanded by the pursuer in the ‘ present case can be competently enforced by a court of law as ‘ a matter of right, or whether the allowance of different rates of ‘ aliment to the widows of freemen by the corporation be not a ‘ matter of internal discretionary arrangement, with which it is ‘ not competent for courts of law to interfere, agreeably to the ‘ principle recognized in the case of Paterson *v.* the Corporation ‘ of Skinners in Edinburgh, 10th February 1803, appoint the ‘ pursuer to shew, in a note annexed to her last pleading, first, ‘ That her deceased husband actually exercised the trade of a ‘ flesher, or otherwise belonged to the description of members of ‘ the corporation, to whose widows the rate of aliment claimed ‘ by the pursuer was usually allowed, according to the last standing resolution of the corporation on the subject: secondly, That ‘ the entry-money and subsequent stated contributions made by ‘ her late husband to the funds of the corporation, were so made ‘ upon the condition, express or implied, as appearing from the ‘ minutes of the corporation or otherwise, of his widow receiving ‘ a certain rate of aliment.’ Thereafter they pronounced as follows:—‘ Find, That from the minutes of the corporation, and ‘ other evidence adduced, the pursuer’s claim to aliment appears

June 20. 1828.

‘ to rest on the contract of parties, express or implied, and not,
 ‘ to fall under the rule recognized in the case of *Paterson v. the*
 ‘ *Corporation of Skinners of Edinburgh*, 10th of February 1803,
 ‘ in which it does not appear that the deceased husband of the
 ‘ claimant had made any payment at the date of his entry, or
 ‘ any subsequent quarterly payments, on the condition or footing,
 ‘ express or implied, of his widow receiving a corresponding
 ‘ aliment. But before pronouncing any judgment on this point,
 ‘ allow the pursuer to adduce any farther proof she may have,
 ‘ that her deceased husband actually belonged to the description
 ‘ of members of the corporation to whose widows the rate of ali-
 ‘ ment claimed by the pursuer was usually allowed, according to
 ‘ the last standing resolution of the corporation on the subject.’
 With this interlocutor this note was issued :—‘ There is nothing
 ‘ in the original constitution of corporations, instituted chiefly for
 ‘ the promotion of trade and manufactures, to prevent them from
 ‘ engrafting upon it a plan for the support of their decayed mem-
 ‘ bers and widows, or from raising funds for that purpose, by con-
 ‘ tributions at the entry of members, or at subsequent stated
 ‘ periods, of which funds the corporation may have the distribu-
 ‘ tion, either entirely discretionary, if arranged upon that footing,
 ‘ or according to certain rules or rates, upon the principle of ex-
 ‘ press or implied contract with the individual members. From
 ‘ their minutes the Corporation of Fleshers of Glasgow appear to
 ‘ have adopted the latter mode of arrangement; and it is the
 ‘ duty of a court of law to give effect to the implied contract,
 ‘ when called upon to do so.’ On advising the additional proof,
 the Magistrates found it proved, that Scotland had exercised the
 trade of a flesher for the period requisite to entitle his widow
 to the annuity of L.8, and therefore decerned in terms of the
 libel. The incorporation having advocated, the Lord Ordinary
 assoilzied them, and observed in a note: ‘ The case of *Paterson*,
 ‘ 10th February 1803, and the want of contrary decisions on a
 ‘ point so practical, seems to the Lord Ordinary to establish
 ‘ at least this much, that when a corporation of this kind has
 ‘ fairly exercised its discretion on a claim of charitable relief by
 ‘ a member or member’s widow, that is all that can be legally
 ‘ demanded; and courts of law are not bound or at liberty to
 ‘ review the discretion of the corporation by the discretion of
 ‘ the court. Now, in this case, the Lord Ordinary sees no
 ‘ room for doubt that the complainers did fairly exercise their
 ‘ discretion on the respondent’s claim, and gave her such allow-
 ‘ ance as in their judgment was fit; and if there was error, from

‘ their holding that the respondent’s late husband was not five years in trade as a flesher before his death, it was, at least, error in a very doubtful matter.’ The respondent having reclaimed to the Inner-House, and the defenders having offered to continue the modified aliment of L. 5 in time to come, on the same footing and in the same manner as payments are made to other widows of the incorporation, the Court, on the 25th January 1825, of consent, decerned in terms of the minute, but quoad ultra adhered, and found no expenses due. She again reclaimed; and, when the case came to be advised, the Court was of opinion that she was entitled to the allowance provided to widows of the class to which her deceased husband had belonged, and that she should have at least the expenses incurred in discussing the point of right; and accordingly, on the 2d February 1826, their Lordships, ‘ in respect it is not denied that the pursuer, being widow of a member of the incorporation, was in indigent circumstances, she, in virtue of the subsisting regulations, was entitled to the annual allowance provided to widows of the class to which her deceased husband belonged, subject always to such variations as might become necessary from the inadequacy of the funds in regard to the provisions of the widows of the incorporation generally,’ altered the interlocutor of the Lord Ordinary,—in so far varied their own interlocutor,—decerned for the payment of the annual allowance of L. 5 sterling,—and refused the desire of the petition quoad ultra, except as to expenses, which afterwards they allowed to the extent of what were incurred in the discussion of the question of right.*

June 20. 1828.

The incorporation appealed, and the respondent cross appealed.

Appellants (in chief appeal).—As long as the respondent’s conduct is reputable, and the funds of the incorporation are adequate, the allowance will be given to her, but not as a claim of debt independent of the controul or discretion of the incorporation. If she had such a right, so have others, and the funds would speedily be exhausted. There is no doubt that an incorporation will not be permitted to misapply the funds by consuming them on any other than corporate objects; but still the widows of members have no legal right to demand payment of the rates which the incorporation may see fit to allow. The respondent’s case was not taken from under this rule by any special contract made with her husband when he entered. It is

* 1. Shaw and Dunlop, No. 275.

June 20. 1828. quite unreasonable to suppose that the incorporation would, for such an inadequate sum paid in by Scotland, have sold his widow an annuity of L. 5 per annum, which she could claim as a matter of right. The incorporation have no separate funds for the poor or decayed, but pay from the common stock what its amount may allow, and the cases of want may require. No doubt an incorporation may constitute themselves into a benefit society, and thus each member or his widow gain ex contractu a legal right to the annuities fixed to their respective classes or situations; but this was not the case with the appellants. Over whatever they have given they have exercised a discretionary power; and although a scale of allowances for decayed members and widows is entered in the incorporation minutes, and approved of, the incorporation never thought that thereby they had given the claimants a right to demand their respective rates, or had lost the power to alter, diminish, or increase the amount. The books afford innumerable instances of the exercise of this discretionary power, the inquiry being invariably as to the fact of the claimant's poverty, the character of the party, and the state of the incorporation funds. To the cross appeal the answer is sufficient, that the proof led shews that the pursuer's husband did not truly and bona fide carry on business as a flesher for five years before his death.

Respondent (in chief appeal).—Incorporations of tradesmen are very ancient in Scotland. Their first object was the protection of trade; but the alimending of widows of members, and members themselves who were in poverty, was also a most desirable end. Being, however, a secondary object, the amount given might at first be purely discretionary; but when the funds acquired a consistence and stability, so did the rates. This charitable purpose is mentioned in the fleshers' charter or seal of cause, and long since fixed by deliberate resolutions. There remained a discretionary power of protecting the principal of the funds from being encroached upon,—of giving, if the funds afforded, or the times required, an increased allowance, or administering further relief in clamant cases; but the rates fixed could not, except in the single instance reserved, (and that is not pretended to have occurred), be lessened. On the contrary, every member and widow entitled to aid have received it precisely agreeably to the scale that applied to them. As to the comparison of the amount of the allowance with the sum paid in, it is obvious that in many individual cases there may be a great difference. But to judge of the matter correctly, the aggregate of

June 20. 1828.

payments and receipts is to be looked to. The danger and result, however, described by the appellants, are quite fanciful. The respondent's husband took the scale as he found it; and under the rates of payment therein arranged, the funds of the incorporation have been increasing. Such being the case, the respondent is clearly entitled also to have her legal right declared by the Court. As to the length of time her husband followed the profession of flesher, the evidence is decidedly in favour of the space of five years, which lets her in to the highest rate; and therefore she is entitled to full costs.

The House of Lords 'ordered and adjudged, that the interlocutors complained of be affirmed, and the appeals be dismissed.'

LORD CHANCELLOR.—My Lords, In this case the Incorporation of the Fleshers of Glasgow are the appellants, and Mrs Christian Nelson or Scotland is the respondent. This case was heard at your Lordships' Bar a short time since. It is a claim preferred by the pursuer to an annuity of L. 8 a-year, as the widow of Mr Scotland, who was a member of this community, and carried on the business of a flesher, as it is contended, for a period of more than five years,—five years or upwards. The subject in contest is an annuity of L. 8 a-year during the life of this widow; and I apprehend that, in the final winding up of this cause, it will be found that the expenses that have been incurred exceed, in a twenty-fold degree, the amount of the subject in contest. It is now before your Lordships, and it is for your Lordships finally to decide it.

This corporation, as it appears, has been in the habit for a long series of years of making allowances to decayed members, and of making allowance also to widows of indigent members of the community, under the name of aliment, according to the practice which has prevailed in different institutions and corporations of this kind throughout Scotland. At an early period it appears that these payments were arbitrary. Each individual case came before the members of the corporation; the case was investigated, and they gave an allowance, according to their judgment of the nature of the claim; and it appears also, that at different periods they exercised the power of discontinuing those allowances. Alterations, however, took place, to which it is unnecessary for me particularly to advert; because I will call your Lordships' attention to the change which took place in the year 1807. In the year 1807 a proposal was made to revise the laws of this corporation; a committee was appointed for that purpose; that committee was sitting for a considerable time, and made their report to the whole body.

June 20. 1828.

Upon that report being made to the body, they came to an agreement among themselves, in the month of October 1807, by which they finally regulated these matters; and according to the agreement, as far as relates to the present question, at that time entered into, it was arranged between them, that the widow of a member of the corporation, who had carried on the business for a period of five years and upwards, should be entitled to a fixed payment of L. 8. a-year; and that in the case of a widow of a member of the corporation who had not carried on the business so long as five years, the sum allowed should be L. 5 a-year; and there was this clause,—that in the event of the funds of the corporation not being sufficient to meet these payments, the master-court should have the power of reducing them, vested in the master-court in that event, and in that event only.

After this arrangement had been made in the year 1807, namely in the year I think 1809, James Scotland became a member of the society. He had married a person of the name of Nelson, the daughter of a freeman. He became entitled, therefore, upon making a certain payment to the funds of the society, to take up his freedom. He accordingly took up his freedom in the year 1809, continued a member of the society to the period of his death in the year 1819, and made a small annual payment every year, that was incident to his situation as a freeman. He became therefore a party to this agreement. He became entitled to the benefit of this arrangement; and in consequence, in the year 1819, upon his death, his widow claimed a payment of L. 8 a-year, on the ground that her husband had carried on the business of a flesher for a period of five years and upwards.

Now, my Lords, upon the agitation of this question, two points have been submitted to the consideration of the various tribunals before whom this question has been considered. One point, and a material point for consideration, is, as to whether or not this right can be enforced in a court of justice? Another question, and that is a question of fact, is, as to whether she is entitled to the L. 5 annuity, or to the annuity of L. 8 a-year? With respect to the first and material point for consideration, it is to be recollected, that this was an agreement entered into between the members of this society; that after that agreement had been entered into, Mr Scotland became a member of the Society—made his payments as a member of the society—continued a member of the society to the time of his death—and became therefore a party to the agreement, and entitled to all the benefits of the agreement for himself, and for his widow in the event of her surviving.

My Lords,—There has been no dispute in the progress of this cause as to the poverty of the claimant, as to her being in indigent circumstances, so as to entitle her to the benefit of this regulation. There has been no impeachment whatever of her moral conduct. It is admitted that she comes fairly within the rule; and the question is, whether, coming fairly within the rule, there being no exception on the

ground of her not being indigent, there being no exception what- June 20. 1828.
 ever to her on account of any impropriety of conduct, this society
 have a right arbitrarily to withhold this payment—because they can
 arbitrarily withhold this payment, unless there is a means of enforcing
 the payment through the medium of a court of justice? I apprehend
 this is to be considered as an agreement and an arrangement between
 this society and every individual member of the society, and, so long
 as this arrangement continues in force, every member has a right to
 the benefit of it; and if that benefit is attempted to be withheld from
 him, I apprehend, under such circumstances, he is entitled to come
 to a court of justice for the purpose of claiming redress.

My Lords,—This was the view of the case taken by the Court of
 Session, and accordingly they pronounced the interlocutor against
 which this appeal has been preferred. The interlocutor is in these
 terms, drawn up after much consideration and much attention to the
 subject:—(His Lordship read the interlocutor.) The Court, therefore,
 considering that there was no dispute, and there had been no contro-
 versy in the progress of the cause in respect of the indigent state of this
 woman—that there was no objection whatever to her moral character
 and conduct—felt that she was entitled to the benefit of this agreement;
 that that being withheld from her, she was entitled, as a matter of right,
 to come to a court of justice and to seek redress.

I think your Lordships will be of opinion that this judgment ought
 to be affirmed. The only argument that was pressed against it, in
 point of authority, arose out of the case of Paterson against the Cor-
 poration of Skinners of Edinburgh; but that case has no reference
 whatever to that before your Lordships. It is true that was a case of
 aliment; but in the case of Paterson against the Corporation of Skin-
 ners, it appears, according to the facts of that case, that in the re-
 gulations which existed for the original constitution of that corpo-
 ration, each individual case was considered by itself; that the claimant
 preferred her claim to the corporation—they considered the nature of
 her claim, and made her such allowance as they thought proper; and it
 appeared that they were in the habit, from time to time, of withdrawing
 those allowances, according to their own discretion and their sense of
 the propriety of the act. It is perfectly clear, therefore, that that case
 has no resemblance to a case like the present, where an arrangement
 was entered into with respect to a fixed amount, appropriated accord-
 ing to a certain course of payment, to which all the members of the
 corporation were parties. I think your Lordships will be of opinion,
 that the case of Paterson against the Incorporation of Skinners is no
 authority for this opposition, and that the Court of Session distinguish-
 ing that from the case now before your Lordships, that judgment was,
 in respect to the point to which I have adverted, perfectly correct.

My Lords,—With respect to the question of fact, as to whether
 the woman is entitled to the five or the eight pounds, I will not trouble
 your Lordships by going through the detail of the evidence. I will

June 20. 1828. only state generally to your Lordships, that after having looked with as much attention as I can into the subject, it appears to me that it is not made out in a manner satisfactory to my mind ; at least it is not made out and established in evidence, that her husband carried on the business of a flesher for a period of five years and upwards ; and that not being made out satisfactorily in point of evidence, the consequence is, that she cannot be entitled to claim more than the sum of five pounds a-year. I have read through the judgments of the Court of Session with respect to the question of fact: they came to the same conclusion after considering it most fully. I think their judgment in this respect is perfectly correct, and I should recommend to your Lordships, therefore, to confirm that part of the case.

With respect to the costs, the manner in which the costs have been arranged appears to me also to be fair and equitable—that part of the costs that arose out of the discussion of the question of right has been allowed to the widow, but she has not been considered by the Court below as entitled to those costs resulting out of the investigation of the question of fact, the decision of the fact having been against her ; and I think your Lordships will be of opinion that they ought to be disallowed, provided your Lordships are of opinion the judgment of the Court on the other points ought to be affirmed. I should submit to your Lordships, therefore, upon the whole case, that the final judgment of the Court of Session below should be affirmed, and both appeals dismissed. There is an original appeal by the corporation, and there is a cross appeal by the widow ; the decision, therefore, I should recommend to your Lordships is, to dismiss both appeals, and I think upon the whole it will be better that there should be costs on neither side.

SPOTTISWOODE and ROBERTSON—MONCREIFF, WEBSTER, and THOMPSON,—Solicitors.

No. 9. ALBION FIRE AND LIFE INSURANCE COMPANY, Appellants.
Solicitor-General Tindal—Scarlett.

WILLIAM MILLS, and Others, Respondents.—*Adam—Brougham.*

Insurance—Stat. 6. Geo. I. c. 18.—An English Insurance Company having, through their agent in Glasgow, agreed to insure a steam-vessel at sea against fire,—Held, 1. (contrary to the judgment of the Court of Session), That such an insurance fell under the above statute ; but, 2. That it was a Scotch contract, and that the statute did not apply to Scotland quoad hoc.

June 27. 1828.

2D DIVISION,
Lord M'Kenzie,
and
Jury Court.

THE Albion Fire and Life Insurance Company, an English Company established in London for carrying on the business of insurance, had accredited agents in the chief provincial towns in