292, appears to me to apply in terms to the case before us. But for that decision I should have had great difficulty in reaching the conclusion on the facts here presented, that the defenders were entitled to absolvitor, for the reason, among others, that the whole duty of protecting the interests of the cautioners seems thereby to be laid upon the persons receiving the guarantee by requiring them ultroneously to give information as to the character of the person guaranteed, and of the circumstances under which the guarantee has been asked, to cautioners who have intervened at the request and in the interest of the debtor only, while the cautioners are freed from any duty whatever of protecting themselves by making inquiry as to these points in which they appear to me to be at least as much interested as the receiver of the guarantee.

The only material point on which I differ from the Sheriff-Substitute is the distinction he draws between the position of the defender Jamieson and the other defenders. I think it is not proved that at the date of the guarantee Jamieson knew anything more about his son's indebtedness to the pursuer, or the circumstances under which that indebtedness was incurred, than his co-cautioners. I therefore think the whole defenders should be assoilzied.

The Court pronounced this judgment:—

"Find in fact that the defenders were induced to execute the cautionary obligation founded on, on the faith of the representations made by the said John T. Jamieson, and in ignorance of his previous conduct while in the pursuer's service: Find in law that in respect of the false and fraudulent representations of the said John T. Jamieson, and of the pursuer's failure to communicate to the defenders, or cause to be communicated to them, the circumstances in which the said cautionary obligation was granted, the defenders are not bound by the same: Find it unnecessary to deal with the separate pleas-in-law for the defender Jamieson: Therefore assoilzie the defenders from the conclusions of the action, and decern," &c.

Counsel for the Appellants Cameron and Others—Ure—Wilson. Agent—W. Gordon, Solicitor.

Counsel for the Appellant Jamieson—Hunter. Agents—Dove & Lockhart, S.S.C.

Counsel for the Respondent—C. S. Dickson—Deas. Agent—L. M'Intosh, S.S.C.

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*Friday, July* 14.

## SECOND DIVISION.

[Sheriff of Aberdeenshire.

## COCKER AND OTHERS *v.* CROMBIE AND OTHERS.

*Voluntary Association—Rules—Action to Compel Directors to Observe Rules—Jurisdiction—Competency.*

The rules of a horticultural society—a voluntary association—provided that the subscriptions of intending exhibitors at a flower show, to be held on August 18th 1892, must be paid by August 1st. A member of the society tendered his subscription some days late, and this, along with his exhibit, were declined. He sued the directors in the Sheriff Court to have them ordained to receive his exhibit, and the Sheriff-Substitute having on August 15 dismissed the action, the pursuer appealed to the Sheriff, who in March 1883 recalled the interlocutor. On appeal the Court *dismissed* the action as incompetent, as specific performance was impossible, and the pursuer's proper remedy was to sue for damages.

This was an action in the Sheriff Court of Aberdeen by James Cocker senior and others, members of the firm of James Cocker & Sons, nurserymen and seedsmen, Aberdeen, against John Crombie, C.A., Aberdeen, and others, the directors and officials of the Royal Horticultural Society, Aberdeen, as representing the society.

The prayer of the petition was to "ordain the defenders to receive the following articles intended for competition at the Grand Floral Fête to be held by the said Royal Horticultural Society of Aberdeen in the Central Park, Kittybrewster, on 18th, 19th, and 20th August 1892." A list of the plants to be exhibited followed, and the prayer proceeded—"And to submit the same to the judges of the exhibits at said Floral Fête in order that the pursuers may receive in respect thereof such of the money prizes as may be awarded by the said judges to them," &c.

The general rules of the association contained the following:—"3. *Members.*—The society shall consist of three classes of members, viz., honorary, ordinary, and working-class. The minimum annual payment to the funds of the society shall be as follows:—Honorary member, 10s. 6d.; ordinary member, including professional gardener, nurseryman, and amateur, 5s.; and working-class member, 2s. 6d.; which subscription must be paid on or before the 1st of August in each year. 10. *Arrears*—No tickets will be issued to any person whose subscription is one year in arrear; and if any member shall allow his subscription to remain unpaid for two successive years his name shall be erased from the books of the society."

The special rules for competition at the fête in question included—"2. All competi-

tors must be members, and subscriptions must be paid on or before 1st August 1892. 3. Entries must be lodged with the secretary, in writing, on or before Monday 15th August, by 12 noon. Every exhibit not entered will be excluded from competition."

The circumstances were thus stated by the Sheriff-Substitute (ROBERTSON)—"The pursuers have been connected with and interested in the society for many years, Mr Cocker senior having been a director. In the spring of this year he disapproved of a new departure the society was making in the matter of their show or 'Fête,' ultimately resigning his position as a director, and intimating the withdrawal of a contribution which his firm had promised towards the expense of the show. So far as I read the correspondence in connection with the rules, the pursuers neither intimated their intention to cease being members of the society, nor in point of fact have they so ceased. The second rule of the society for the competition at the 'Grand Floral Fête' is to this effect—'All competitors must be members, and subscriptions must be paid on or before 1st August 1892.' In point of fact Messrs Cockers' subscription was not paid on or before 1st August, but was tendered some days later, was received by the secretary for the disposal of the directors, and was ultimately returned by them. Pursuers sent in a list of the exhibits they proposed to make at the exhibition in due time, but were informed by the officials that their exhibit was declined, and they then bring the present application."

The pursuers pleaded—"(1) The pursuers being members of the society in question are entitled to send articles for exhibition, and to compete for prizes which may be awarded in respect thereof, in terms of the society's rules and the prize schedule libelled. (2) The defenders having illegally and unwarrantably refused to receive the pursuers' intended exhibits, and the pursuers' patrimonial interests being thereby prejudiced, the pursuers are entitled to have the society's rules enforced by way of remedy as craved."

The defenders pleaded—"(1) The pursuers having resigned membership of the society either actually or constructively, are not entitled to exhibit as craved by them, and their application ought to be refused. (2) The subscriptions being tendered outwith their due dates, and beyond the time when they ought to have been paid to entitle them to compete, the defenders were justified in refusing to accept them, and ought to be assoilzied, with expenses. (3) The patrimonial interest averred by the pursuers is insufficient to entitle them to the remedy asked."

Upon 15th August 1892 parties were appointed to attend that day week and close the record, but upon the same day the Sheriff-Substitute pronounced an interlocutor dismissing the action.

"*Note.*—I had and have doubts as to the competency and as to the appropriateness of the remedy sought; and if this matter had been pleaded or argued I think I should have desiderated some authority for such an application. But it was not pleaded, and when the point was put to defenders from the bench, their agent expressed his willingness to accept the decision of this Court upon the matter at issue without raising any question of the competency of the application. In these circumstances I have considered the rules of the society, both general, and for the competition in question, and also the correspondence, and have come to the following conclusions:—I think, as I have said, that pursuers are still members of the society, and that defenders in no way improved their position by declining to receive pursuers' subscription. The effect of general rule 10 is, in my view, clearly that persons in arrear continue members until their names are erased from the list when they are two years in arrear. But while this is so, I am equally clearly of opinion that although pursuers continue members, the effect of special rule No. 2 above quoted, if the rule is put in force, is to bar them from competing at this competition. Whether the defenders are acting wisely for the interests of their society, or altogether fairly in view of their past practice as to subscriptions, is another matter altogether, with which, it seems to me, I have nothing to do. The rule is explicit, and the fact that apparently in some instances in the past the officials have not strictly enforced it would not justify me in holding that they had thereby waived altogether their rights to enforce the rule if in their discretion they think fit to do so now."

The pursuers appealed, and upon 25th March 1893 the Sheriff (GUTHRIE SMITH) pronounced this judgment—"Recals the interlocutor of 15th August 1892; repels the three first pleas-in-law for the defenders: Finds that it is not now necessary to pronounce any order under the petition," &c.

"*Note.*—The important and really difficult question in the case is whether the circumstances are such as to give the Court jurisdiction. The subject is discussed in two well-known judgments, one by Lord Deas in the *Cardross* case—*M'Millan* v. *Free Church*, July 19, 1861, 23 D. 1314—and the other by the late Sir G. Jessel in *Rigby* v. *Connol*, 14 Ch. Div. 482; and the principle on which a court of law acts in disputes between a member of a voluntary association and his fellow-members was thus stated by Lord Cranworth—'Save for the due disposal and administration of property, there is no authority in the Courts of either England or Scotland to take cognisance of the rules of a voluntary society entered into merely for the regulation of its own affairs'—*Forbes* v. *Eden*, L.R., 1 H.L. Sc. 568. The society is not a partnership; and where there is no patrimonial interest the expulsion of a member, however unjust, from the society, no matter what its object—a prayer meeting, a whist club, an association for some social, scientific, or political purpose—does not *per se* entitle him to legal redress. In this case I have come to the conclusion that there was

a certain patrimonial interest of which, by the action of the committee, the pursuers have been wrongfully deprived. How far the mere chance of gaining a prize would be sufficient may be open to doubt. My impression is that the opportunity of competing for a prize is always of some value capable of estimation in money. But apart from this, their exclusion from the exhibition—in which they were to appear, not as amateurs, but as professional florists, anxious for the sake of their business to have their roses and dahlias shown alongside those of other growers—might evidently be injurious to their trade. It would have been a good advertisement whether they succeeded in getting a prize or not, and if they did succeed, so much the better. For these reasons I am unable to affirm the judgment of the Sheriff-Substitute dismissing the action, and although it is too late to pronounce an operative decree, I think the action was properly brought, and the defenders must be found liable in expenses."

The defenders appealed.

At advising—

LORD JUSTICE-CLERK—I think that the petition should never have been presented. If Mr Cocker thought that he was injured by the action of the society, he had his remedy in damages. It was an unprecedented application to the Sheriff-Substitute to ask him to order the society to receive the pursuer's exhibits for a show which was to be held within six days of the application. I see that the Sheriff-Substitute thought that it was an incompetent application, and would not have considered it if the defenders' agent in his Court had raised any question of the competency. Now, I think the view of the Sheriff-Substitute was right, and that the application should be refused.

LORD YOUNG—I am of the same opinion, and that very clearly. If the pursuer has suffered any wrong, then his remedy is to sue for damages. I see no reason why the Court should interfere by ordering specific performance, as it is manifest that such is an impossibility.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court sustained the appeal and dismissed the petition.

Counsel for the Appellants—Guthrie—Dundas. Agents—Henry & Scott, W.S.

Counsel for the Respondents—Comrie Thomson—C. Watt. Agents—Wishart & Macnaughten, W.S.

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*Friday, July* 14.

## FIRST DIVISION.

[Sheriff of Dumbartonshire.

## GILLESPIE *v.* LUCAS & AIRD.

*Railway—Construction—Statutory Powers—Want of Precaution in Conducting Dangerous Operations—Interdict—Railway Clauses Consolidation Act* 1845 (8 *Vict. c.* 20), *sec.* 16.

The Railway Clauses Consolidation Act 1845 by section 16 provides that it shall be lawful for the company for the purpose of constructing the railway to do all acts necessary for making the railway, provided always that in the exercise of the powers granted, the company shall do as little damage as can be. Consequently *held* that contractors constructing a railway for a company, under statutory powers, whose blasting operations had done serious damage to adjoining property, and who had failed to show that any precautions had been taken or even considered, were not protected from interdict by said section.

Mrs Agnes Gillespie, Ardmay Cottage, Arrochar, brought an action in the Sheriff Court at Dumbarton against Messrs Lucas & Aird, contractors for the West Highland Railway Company, who under the sanction of the West Highland Railway Act 1889 were constructing a line passing along the hillside above Loch Long, praying the Court "to interdict the defenders (1) from carrying on blasting operations in the neighbourhood of Ardmay Cottage, in the parish of Arrochar and county of Dumbarton, and the grounds attached thereto; or (2) at least from carrying on said operations in such a manner as to injure the said cottage and ground, endanger the persons of people therein, or cause inconvenience or annoyance to the pursuer in her occupancy thereof, and to grant interim interdict."

The pursuer averred that "the said blasting has been and is being conducted in such a manner as to cause damage to the cottage and ground attached thereto, to endanger the persons of the pursuer and others therein, and to inconvenience and annoy the pursuer in her occupancy thereof. The pursuer has repeatedly, on the warning of the defenders, or of their servants, had to temporarily leave the cottage to avoid accident from the blasting complained of."

The defenders explained that the cottage was 510 feet from the railway line and 290 feet below it at the foot of an exceedingly precipitous slope. They stated that the blasting operations complained of were necessary for the execution of the said works, and had been and were being conducted by the defenders in the usual and proper manner in which such operations are conducted. The operations had been within the limits of deviation of the said railway, and in the necessary course of