

was determined by the conveyance to the trustee for creditors, and at all events was expressly withdrawn before the lease was granted.

I come, therefore, to the conclusion that the lease is bad, because it is granted by persons who had no right or title to do so; and that makes it unnecessary to consider the second ground of objection, namely, that it was not a fair act of administration because it is prejudicial to the pursuer's security. I think that the objections taken to it on this head are not unsubstantial. But I am not prepared to hold that they would be sufficient of themselves to justify a reduction; and I prefer to rest my judgment on the other ground already stated.

The pursuer maintains that he is entitled to damages as well as reduction of the lease. But no ground for damages has, in my opinion, been established. On the other hand, it was urged that the best arrangement in the interest of the pursuer, as well as of the other parties, is to leave the arrangement undisturbed. But that is for the pursuer to consider. All that we have to do is to determine legal right, and I am of opinion that he is entitled to have the lease set aside.

The LORD PRESIDENT and LORD ADAM concurred.

LORD M'LAREN was absent.

The Court pronounced this interlocutor:—

“Recal the said interlocutor [of 4th April 1898]: Decern in terms of the declaratory and reductive conclusions of the summons, and in terms of the conclusion thereof to cede possession of and remove from the subjects in question: Dismiss the action *quoad* the conclusions for damages therein, and decern: Find the pursuer entitled to expenses from the compearing defenders, and remit,” &c.

Counsel for the Pursuer—W. Campbell, Q.C.—Macfarlane. Agents—Henderson & Clark, W.S.

Counsel for the Defenders—Ure, Q.C.—J. Wilson. Agent—A. R. Steedman, Solicitor.

Saturday, March 11.

## FIRST DIVISION.

### SMITH v. LORD ADVOCATE.

*Friendly Society—Trust—Charitable Trust—Jurisdiction—Settlement of Scheme.*

The Society of Sailors of Dunbar was incorporated by an Act of the Town Council of that burgh in 1730. Power was given to the Society to levy the duties used and wont, “payable to the poor of their trade, commonly called the ‘Sailor’s Box,’” and to settle pensions for relief and support of poor

sailors belonging to the burgh, and their wives and children. In 1806 the Society issued a code of bye-laws which, *inter alia*, enacted that no person over 40 years of age should be admitted a member unless he had previously been a member and paid up all arrears; which specified the amount of entry-money and quarterly contribution to be paid by masters and sailors respectively; which regulated the amount of sick-allowance and pensions; and from which it appeared that, apart from widows and children, only members in sickness or distress, or members over sixty years of age and unable to go to sea, were to receive allowances from the Society’s Box. In the course of its history the Society had occasionally granted relief to seafaring persons outside its membership.

A petition having been presented by the last surviving member of the Society for the settlement of a scheme of administration, *held* that the Society was not a charitable society, and therefore that the Court had no power to make directions as to the application of its funds.

This was a petition presented by Captain William Smith, boxmaster and sole surviving member of the Society of Sailors of Dunbar, craving the Court to settle a scheme of administration of the funds of that Society.

The following facts were set forth in the petition:—From time immemorial there have existed in Scotch seaport towns funds formed by the sailors for the necessitous or aged of their own number, and known as the “Sailors’ Box.” Such a box existed at Dunbar, and at the beginning of the 18th century had fallen under such bad management that the Provost, Bailies, and Magistrates intervened and assumed the control of it.

In 1730 certain shipmasters, for themselves and the other sailors of Dunbar, presented a petition to the Town Council praying them to grant a charter erecting the petitioners “into a society or body politic for the levying, managing, and applying of the said charity for the relief and behoof of poor sailors within this burgh, and other indigent seafaring persons.” The petition proceeded upon the narrative that “it is of great use in society for men of every craft and employment to erect funds of charity among themselves towards the relief and support of their own poor,” that a Sailors’ Box had been kept in the burgh time out of mind, and that the funds by which it was supported were “a duty of eight pennys on the pound Scots out of all wages paid to masters, mates, and sailors, together with such donations and free gifts as were made to the Box by persons charitably disposed.” In response to this petition the Town Council erected into a society or one body politic “all shipmasters residing in or sailing from the burgh, together with such others as have removed or shall remove their residence, and do or shall exercise their employment elsewhere, but nevertheless do or shall contribute and pay into the Poor’s



Box of Dunbar at least the poor money arising from their own wages." They also granted to the Society or their boxmaster the full power of levying and collecting the duties and taxations used and wont, payable to the poor of their trade, commonly called the Sailors' Box, with power to lend out the Society's money upon good security, and to take the rights and securities therefor in favour of their boxmaster for the time and his successors in office for the use of the poor; and further, with power to the Society to settle at the general meetings "pensions and salaries for relief and support of poor sailors belonging to the said burgh, and their wives and children." The Council also appointed that there should be a box for the use of the Society, and that the Society's writs and cash "over what is needful for occasional charitys throughout the year," should be kept therein.

In 1806 the Society codified its bye-laws, and printed them after its charter. The code of bye-laws proceeded on the preamble that "we recognise our charter dated 15th September 1730 . . . and are determined to keep its original end and design always in view, which was the relief of our distressed fellow-creatures of like occupation as ourselves, who have joined or may join with us in this laudable institution."

The following were among the bye-laws:—"Art. 3—No person shall be admitted a member who is above forty years of age, unless he has paid to the Box before, and then he must enter anew and pay up his full arrears, namely, *ten shillings* if a master, and *six shillings* if a sailor, for each year he has omitted payment, but this exception is not to be misconstrued by those who, finding old age coming on, take advantage of the Box and enter for the sake of a superannuated salary; therefore this door of admission, which is opened only for the sake of those who may have thought themselves aggrieved, will be shut at the end of twelve months from the date hereof; and at any rate, every person when he enters must be in perfect health, able and willing to work, and should it be found that any members hath entered above forty, or hath entered labouring under any disease, or shall by intemperance or irregularity bring trouble upon themselves, they shall forfeit all right they had to a pension. *Note.*—Anyone who formerly paid to the Box, and wishes to be re-admitted a member as above, must procure, at his own expense and trouble, testimonial proof that he really did pay, and at what time he ceased to do so. Art. 5—Every master shall pay a guinea at his entry, and two shillings and sixpence per quarter afterwards, and every sailor shall pay half a guinea at entry, and one shilling and sixpence per quarter afterwards, and all hands shall pay, in sickness or in health, in pay, or out of pay, at home or abroad, and if absent must pay by proxy; and one year's absence, if the member had an opportunity to attend a meeting, or one year's neglect of payment, is deemed a total desertion of the Box, unless it can be proved that the proxy betrayed his trust in

the absence of the member. Art. 9—A member under sickness or misfortune, on his intimating the same to the boxmaster, shall be entitled to receive, if a master, *six shillings* per week, and if a sailor *four shillings* per week, out of the funds of the Box, but if he continue half a year in distress he shall thereafter only receive the one half of these rates, and should he continue a whole year unwell, he shall then, as long as he continues so, receive, if a master *thirty shillings*, and if a sailor *fifteen shillings* half-yearly; but no member who has not been at least twelve months in the Box shall be entitled to receive anything out of it; and so soon as a member that hath been in distress is able to go to sea, or to pursue any other business so as he doth procure a livelihood, his pension from the Box shall cease. Art. 10—If a member turned of sixty years, whether a master or a sailor, intimates in writing to the managers that he intends to go no more to sea, he shall only pay half contribution, but should he go to sea again, he must resume paying the whole, and when a member through old age becomes unable to go to sea he shall receive from the funds of the Box *thirty shillings* if a master, and *fifteen shillings* if a sailor, half-yearly; but if he is so able as to pursue another business, and doth so, and procures thereby a livelihood, his pension from the Box shall cease. Art. 17—If a widow upon the Box marry again, she no longer gets anything from the Box, or if a member on the pension-list marry and continues on the list till he dies, his widow is not a widow with us, that were an imposition on the Box, but although he should marry while getting from the Box, if he afterwards gets completely better and goes to sea again, at least for twelve months, his widow, if he leaves any, shall be on the same footing with those of the other members. Art. 18—The entry-money shall be placed on a rising scale for seven years to come, to commence twelve months after the date hereof, that is to say, it shall be a *guinea* during the first year to a master, and *half a guinea* to a sailor, in the second year it shall be *two guineas* to a master, and *one guinea* to a sailor, and so onward, increasing each year by the addition of the first year's payment; consequently at the end of the seven years a master will pay *seven guineas*, and a sailor *three guineas and one half*; but it is reserved for the managers to modify this article if they shall think meet at a future period. Art. 20—Should a member remove his residence from this to any other port he is nevertheless considered as a member while he continues to pay his contribution regularly, and if he continues so doing till he die, his widow is entitled to a pension."

Pecuniary assistance was sometimes given out of the funds of the Society to poor sailors within the burgh not being members of the Society, and to other indigent seafaring persons. In support of this statement the petitioner adduced the following extracts from the minute-books of the Society by way of illustration:—



“Minute dated 21st November 1733.  
Pensions to inhabitants, in all five  
pounds five shill. sterl. . . . £5 5 0  
Transient charitys, two pounds  
twelve shillings and one penny . . . 2 12 1

“Minute dated 21st November 1733.  
The same day Captain Robert  
Macklish was allowed four shil-  
lings sterling paid by him to eight  
French sailors . . . . . £0 4 0

and they (the boxmasters) have  
paid out to transient sailors,  
which is approven of, being four  
Dysart men ship wreckt at Holy  
Island, four shillings . . . . . 0 4 0

“Minute dated 3rd August 1829.

“It was suggested at this meeting that James Paterson, a sailor belonging to this town and well known to the members of this Society, was in great distress through sickness and want of the means of support, this meeting commiserating his distressed circumstance and knowing that there have been at various times donations made to individuals in distress, we direct the clerk to send him merely as a charitable gift one pound sterg.”

In the course of the present century the trade of Dunbar gradually decayed, and the membership of the Society decreased. The petitioner, who was now close upon eighty years of age, was appointed boxmaster in 1874, and since his appointment there had never been a quorum of office-bearers. No minute existed subsequent to 28th November 1874. The funds of the society amounted to £2834, yielding an annual income of £85, whereof pensions to the petitioner and the surviving widows of three deceased members absorbed £61. The three last-mentioned annuitants were all over seventy years of age. The scheme of administration proposed by the petitioner was that the income of the fund should be distributed in annuities of £4 or £5 to old men, old women, and orphans, preference being given to seafaring persons and their wives and children.

Answers were lodged by the Lord Advocate, who admitted the facts stated by the petitioner, and averred that “as matters now stand the Society must come to an end with the lives of the petitioner and the said annuitants, in which event the whole property of the Society as *bona vacantia* will fall to Her Majesty as *ultimus hæres*. The Society is a friendly society, and is not a society for charitable purposes. It is, at all events, not a proper charity in such a sense as to entitle the Court to settle a scheme for the future administration of the Society or of its funds.”

The respondent accordingly submitted that the petition should be dismissed as incompetent.

Argued for the petitioner—The Sailors’ Box was a charitable institution, not a friendly society. The very word “charity” was employed in its charter, which contemplated the giving of assistance to other than members of the Society. Such assistance had been given. Charity was nothing

more than relief of poverty—*Baird’s Trustees v. Lord Advocate*, June 1, 1888, 15 R. 682, *per* L.P. Inglis, 688. It was the marked presence of the charitable element here which distinguished the present case from that of *Mitchell, &c. v. Burness*, June 19, 1878, 5 R. 954 (where see opinions of L.P. Inglis, Lord Deas, and Lord Shand). *Kirk-Session of Prestonpans v. School Board of Prestonpans*, November 28, 1891, 19 R. 193, also referred to. The charitable element was much more noticeable in the Society than the contractual. No member was entitled to relief merely because he was a member. He must be in want, in sickness, or over a certain age—*Banty v. Mackey*, L.R. (1896), 2 Ch. 727.

The respondent argued—This was not a charity. It was a friendly society embodying a contractual arrangement between certain sailors in Dunbar. Art. 3 of the bye-laws made no provision for sailors outside the Box, and indeed made subscription to the Box a condition of participating in its benefits. The Society was in no way different in principle from a sickness or accident assurance society—*Bain v. Black and Others*, February 22, 1849, 6 Bell’s App. 317, *per* L.C. Cottenham, 329; *Cunnack v. Edwards*, L.R. (1896), 2 Ch. 679; and *Mitchell, ut sup.*, referred to.

LORD ADAM—This petition is presented by Captain William Smith, the sole surviving member of the Society of Sailors of Dunbar. He tells us that he is 80 years of age, and that the only other persons having an interest in the funds of the Society are three widows, all of whom are over 70 years of age.

It seems that of late years the Society has been very prosperous, because it has ceased for various reasons to have any new members joining it—with the result that it has accumulated upwards of £2834. The annual income, which is about £85, is required to the extent of £61 to meet the annuities which fall to be paid to the petitioner himself and the three widows.

I am not surprised that a gentleman in the position of the petitioner should have thought it his duty to see whether the funds under his charge, which he has no means to dispose of under the rules of his Society, could be placed in proper hands and a scheme settled for their administration. I quite sympathise with the course followed by Captain Smith, and if competent I would gladly assist him in the way proposed.

The Crown, however, has appeared, and submitted that the petition is incompetent. The Society, it is said, is a friendly society, and not a society for charitable purposes.

My own opinion is that the Society is not a proper charity in the sense that would entitle the Court to interfere and to settle a scheme for the future administration of its funds. In all its leading features the Society is just a friendly society. I agree with Mr Guthrie that in a sense it possesses an element of charity, for it appears that no member is entitled to receive a benefit unless he is in poor circumstances or in distress. But then I do not think that



that makes it a charitable institution, for the recipient has truly paid for the relief which he gets by the contributions which he has made from time to time to the funds of the Society under his agreement with it. It makes no difference that he stipulates that he shall have the relief at a certain age and be at the time in poor circumstances. That does not make it any the less a matter of contract.

The history and constitution of the Society show that it is truly a friendly society. [*His Lordship then examined the charter and bye-laws.*]

That, then, is my opinion. And the question is, have we power to interfere and prepare a scheme? I think we have not. I think we have no jurisdiction in this matter, and that on the ground that this is not a charitable institution. The petition therefore must be refused.

LORD M'LAREN—If this institution is not a charitable institution, it is one which has adopted as its fundamental principle that charities begin at home, because we have seen from the deed of incorporation and bye-laws, and from the excerpts from the minutes, that as far back as we have any trace of the existence of the Society its funds were appropriated exclusively to the benefit of its members and their widows and children. In fact it is what is called a benefit society, and it does not detract from its character as such that the claims upon it only become exigible in the case of sickness or death. It is a known form of insurance or indemnity against the risks of life to insure by mutual contributions against poverty resulting from accident, sickness, or old age; and of course if only the poor are to be indemnified, then the amount payable by each contributor will be the less.

Then again, I need hardly advert, after what has been said by Lord Adam, to the fact that to some small extent gratuities have been paid to the widows or children of sailors who were not as matter of right entitled to relief from the Society, and to certain persons who are described in the picturesque language of the minutes as "transient sailors,"—seamen who had been shipwrecked, on their way to their native ports. That fact can make no difference.

The Society, therefore, is not a charitable institution but a benefit society, and we have no jurisdiction to frame a scheme for the administration of its affairs.

I quite sympathise with the object and wish of the petitioner, finding himself the last surviving member, to place the administration of the funds in the hands of persons constituted by public authority, and although we are not able to help him in that way, I should be disposed to consider very favourably an application for the payment of the costs of the petition out of the funds of the Society.

LORD KINNEAR—I quite agree with your Lordship that it was very natural for the petitioner, finding himself at a very advanced age to be the sole survivor of the

Society, to look forward a little and consider what would become of the funds when the present claims upon the Society should fall in, and that it was a very proper course for him to come to the Court for a scheme of administration if he was advised that it was a case in which the Court could interfere. I should be disposed to say further that the scheme of administration suggested by him may probably be a very reasonable one in itself, because if a fund is appropriated to charitable purposes for the benefit of seamen at Dunbar and their wives and orphan children, and there are no such seamen to be found, it may be a very proper application of such a fund that the claims of seagoing fishermen and their wives and children should be considered instead. Therefore I concur in the observation of Lord M'Laren that the expenditure incurred by the petitioner in coming here may be a very proper outlay of the funds in his charge.

But we have no power to interfere with the administration of this fund unless it is a charity in the sense in which the Court has hitherto found itself competent to administer charitable funds; and I agree with both your Lordships that this is not a charity. It is a Society formed for raising funds by the contributions of its members for distribution among themselves and for distribution among their widows at their death. It is quite true that all the contributors to the Society have not an absolute right to payments in old age, but only a right contingent upon their requiring it from their circumstances, but that does not make the payments which those who in fact are in enjoyment of pensions receive mere charities, because they are still earned according to the scheme of the constitution by their own contributions or the contributions of members whom they represent. I must, therefore, agree with your Lordships that this is a friendly society rather than a simple charity, and therefore that we have no power to interfere with the management and disposal of its funds.

The LORD PRESIDENT was absent.

The Court refused the petition as incompetent, and found the petitioner entitled to charge against the funds in his hands the expenses of the petition.

Counsel for the Petitioner—Guthrie, Q.C.—Welsh. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Respondent—Sol.-Gen. Dickson, Q.C.—Guy. Agent—W. G. L. Winchester, W.S.



Tuesday, March 14.

FIRST DIVISION.

[Lord Pearson, Ordinary.]

INGLIS v. CALEDONIAN RAILWAY COMPANY AND OTHERS.

*Railway — Lands Clauses Consolidation (Scotland) Act (8 Vict. cap. 19), secs, 67, 68, and 79—Entail—Petition to Acquire Money in Fee-Simple—Expenses.*

Where part of the compensation money for lands taken by the promoters of an undertaking from an heir of entail in possession had been invested in consols in the name of trustees, held that the promoters were liable in the expenses of an application presented by the heir in possession to acquire the money in fee-simple, including the expense of the transfer of the stock by the trustees to him, and of a discharge by him to the trustees.

This was a petition presented by John Alexander Inglis, heir of entail in possession of Auchindinny and Redhall, for authority, *inter alia*, to acquire in fee-simple two sums of £481, 13s. 3d. and £1787, 15s. 6d. consolidated stock of the United Kingdom. The application was presented under sections 2 and 26 of the Entail Amendment Act 1868 (11 and 12 Vict. cap 36). The petitioner also craved the Court to find the Caledonian Railway Company and the Water of Leith Commissioners liable in the expenses of the application.

The sums in question represented the balance of the compensation money paid to the preceding heir of entail for certain lands compulsorily acquired from him by the Caledonian Railway Company and the Water of Leith Purification and Sewerage Commissioners. They were invested in consols, and held in trust for the behoof of the petitioner and his successors under a declaration of trust executed under the authority of the Court obtained in an application by the petitioner's father and predecessor in the entailed estates. The expenses of these applications had been paid by the Railway Company and the Water of Leith Commissioners.

The Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 19), sec. 67, enacts that the purchase or compensation money payable to parties under disability shall be paid into bank to the intent that it shall be applied under the authority of the Court to some one or more of the following purposes, viz., in the discharge of any debt or incumbrance affecting the land taken; in the purchase of lands; or in payment to any party becoming absolutely entitled to such money.

Section 68 — "Such money may be so applied as aforesaid upon an order of the Court of Session made on the petition of the party who would have been entitled to the rents and profits of the land in respect of which such money shall have been depos-

ited; and until the money can be so applied it shall be retained in the bank at interest, or shall be laid out and invested in the public funds or in heritable securities."

Section 79 empowers the Court to order the expenses of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking, viz., "the expense of the purchase or taking of the lands . . . and the expenses of the investment of such moneys in Government or real securities, and of the re-investment thereof in the purchase of other lands, and of re-entailing any of such lands . . . and of the orders . . . for the payment of the principal of such moneys . . . and of all proceedings relating thereto . . . provided always that the expense of one application only for the re-investment in land shall be allowed."

On 14th February 1899 the Lord Ordinary (PEARSON) granted warrant to and authorised the petitioner to acquire in fee-simple the stocks in question, and to the trustees under the declarations in trust to execute the necessary transfers of stock to the petitioner on the petitioner granting them a valid discharge of their whole actings and intromissions as trustees; and found the Water of Leith Commissioners and the Caledonian Railway Company "liable equally between them in the expenses of the petition and the proceedings following thereon, so far as these expenses are applicable to the obtaining of authority to acquire the said stocks in fee-simple, and also the whole expenses of the said transfers in favour of the petitioner, and the discharge or discharges to be granted by the petitioner in terms of this interlocutor, including the expense of recording the said discharge or discharges in the Books of Council and Session."

The Railway Company and the Water of Leith Commissioners reclaimed, and argued — The Lord Ordinary was wrong in finding them liable in the expenses of this application. The petition to acquire the money in fee-simple was simply a petition to disentail; it was not an application under the Lands Clauses Acts at all. There was a distinction between petitions to disentail and petitions to uplift consigned money — *Torphichen v. Caledonian Railway Company*, July 19, 1851, 13 D. 1400; *Countess of Stair*, May 20, 1882, 19 S.L.R. 618; *Stirling Stuart v. Caledonian Railway Company*, July 8, 1893, 20 R. 932. The money here had got beyond the stage of being deposited in bank. The investment in consols might at first have been temporary, but the present application was the best proof that the petitioner regarded it as permanent. If indeed the petitioner proposed to invest the money in lands the company and the Commissioners might be liable. But what he proposed was tantamount to asking them to pay the expenses of an application to disentail after the money had been permanently reinvested in the purchase of lands. The respondents would not be liable to defray such expenses.

The petitioner's argument sufficiently appears from the Lord President's opinion.