CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1844.

[15*th March*, 1844.]

WILLIAM ELLIS, and Others, *Appellants.*

ROBERT HENDERSON, and Others, *Respondents.*

Corporation.—A corporation having in its charter certain purposes specified as the objects of the application of its funds, is not limited in such application to the purposes specified, but may extend it to other purposes *ejusdem generis* with those specified or within the scope of its constitution.

Personal Exception—Corporation.—A member of a corporation knowing, and for several years not complaining, of acts of the corporation, is barred *personali exceptione*, from afterwards quarrelling with these acts as *ultra vires—Semble.*

IN the year 1784, certain parties who had been admitted, and were entitled to practise as Solicitors before the Supreme Courts of Scotland, formed themselves into a Society, under a Contract or Articles of Association. The 25th and 27th Articles of this Contract were expressed in these terms:—25th. "The whole "sums of money which shall be paid to, or come into the hands "of the treasurers of this Society, and all subjects, securities, "and effects, which shall fall under the care, management, or

" administration of the treasurers, or of the commissioners of " accompts, or any of them, by virtue or in consequence hereof, or " of any other regulation, order, or resolutions of this Society, are " and shall be the absolute property, and at the disposal of the " members thereof; and the treasurers, commissioners of ac- " compts, and every other person whom it shall or may concern, " shall accordingly strictly obey and conform themselves to all " resolutions and directions of this Society, in relation to the pre- " mises, as shall to them respectively appertain."

27th. " At each general stated meeting on the first Monday " of August annually, the whole unfunded monies of the Society, " and the unexhausted interest thereof, shall be accumulated and " formed into a capital or principal sum, which, after deduction " of such sum or sums as shall then be deposited and left in the " hands of the treasurer, as above said, together with such other " sum or sums of the said interest as shall appear needful to be " otherwise disposed of, shall be converted into a capital, and " ordered to be funded, or laid out on interest, or for annual " profit, at the sight of the treasurer and commissioners of " accompts, as shall be then directed by the Society, or a majority " of the qualified members then present; and the security or " securities for the sum or sums so accumulated, shall be taken " and conceived, *quoad* the said capital or principal, in favour of " the presidents, treasurer, and commissioners of accompts for " the time then being, *nominatim*, or to any three of them, (who " shall be a quorum, the treasurer, while in office, being one, *et* " *sine quo non*,) and to their assignees, as trustees for behoof of " the whole members of this Society, and the interest or annual " profits accruing from the said principal sums, shall always be " payable to the treasurer for the time, as sole trustee, for behoof " of the whole members of this Society; to whom he, and the " other trustees aforesaid, shall be answerable at all times *pro* " *rata*, for his or their management, acts and deeds, in relation to " the premises."

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The 30th Article was in these terms, "Three-fifths of the "interest, rents, and annual profits, due for the time, accruing "from the whole principal sums, and other subjects belonging "to this Society, after deduction of the salaries and necessary "expenses then due, shall be at the disposal of a majority of "the qualified members, in general meetings duly assembled, "for the relief of indigent members, widows, and children, and "for such other purposes as shall appear proper, until the funds "of the Society shall be deemed sufficient to yield such stated "or fixed annuities as shall be hereafter provided for by this "Society; but it shall not be lawful to fewer than two-thirds in "number of the qualified members in general meetings duly "convened, to order to be paid away or disposed of any more or "greater sum of the said interest, on any account whatever."

In the year 1797 the Society obtained a Charter from the Crown, which, among other things, recited "quod quoque sum-"mam pecuniæ collegerunt tanquam principium pecuniæ depo-"sitæ pro bibliotheca librorum utilium et necessariorum com-"paranda, proque subsidio sociorum defectorum, et viduarum "liberorumque sociorum in rebus egenis morientium: Et quan-"doquidem pro his propositis consequendis, et pro dictæ socie-"tatis meliori tutamine atque administratione in pecuniarum "depositarum aliarumque rerum cum securitate, promovere et "negotia reipublicæ, in quantum ad eorum praxeos occupatio-"nemque in dictis curiis refert, in modo proprio et regulari "perficere possint, petitores humillime supplicaverunt, ut nobis "gratiose placeret regiam cartam nostram concedere petititores."

The granting part of the Charter was at one place expressed in these terms: "Et quod illi eorumve successores in omni tem-"pore futuro, durationem perpetuam et successionem habebunt, "ut melius magisque efficaciter administrare, dirigere, ordinare "et constituere possint, omnia res et negotia ad dictam socie-"tatem spectantia, pecuniasque depositas ad eandem pertinentes; "Cum protestate ad illos aut partem majorem illorum adminis-

" trandi, dirigendi, ordinandi et constituendi, in omnibus rebus " et negotiis, ad dictam societatem ejusque gubernationem et " administrationem ejus facultatem pecuniarumque, depositarum " spectan. et pertinen. Et quod dictæ societati per nomen titu- " lumque antedictum licitum et ligitimum erit, habere, acqui- " rere, recipere, tenere, possidere, frui, et in perpetuitatem, aut " aliter retinere, terras, tenementa, et hereditamenta cujuscunque " generis, qualitatis, aut naturæ."

And in a subsequent part of the charter the following passage occurred: " Et nos, pro nobis hæredibus et successoribus nostris, " damus et concedimus petitoribus illisque personis quæ nunc " componunt, vel postea dictam societatem component, plenam " potestatem et auctoritatem ad eorum generales conventos " ordinatos de tempore in tempus congregatos constituendi, ordi- " nandi, et faciendi tales et tot leges privatas, constitutiones con- " suetudines et edicta, quæ illi vel major pars illorum pro tem- " pore congregatorum, pro meliore administratione et ordine " rerum et pecuniarum depositarum dictæ societatis attentio- " nunique patrimonialium gubernatione propria et necessaria " judicabunt, dictasque leges privatas, constitutiones, consuetu- " dines et edicta, ullasve earum, mutandi aut abrogandi, ut " dictæ societati vel majori parti illorum tunc præsentium " necessarium esse videbitur; omnes quas leges privatas, consti- " tutiones, consuetudines et edicta uti prædicitur faciend. debite " observanda et tenenda volumus: Providen. semper, quod " eadem legibus regni non adversa vel contraria erunt, talibusque " legibus privatis et ordinationibus ad Judicium Curiæ Sessionis " recognitionem summatim ad applicationem ullius personæ " interesse haben. semper subjectis. Et ulterius, nos, ex gratia " nostra speciali, certa scientia, et proprio motu, dedimus et " confirmavimus, tenoreque presentium, pro nobis hæredibus et " successoribus nostris, damus et confirmamus, dictæ societati, " omnia bona, summas pecuniæ, jura, fœnora, proficua, beneficia, " securitates, commoda, protestates, privilegia, aliaque negotia et

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" res quæcunque, per dictam societatem, vel per ullos ejusdem " socios, pro usu et commodo ejusdem, hactenus habita, recepta, " fruita, exercita, intitulata, facta vel acta: Tenenda et habenda " recipienda, percipienda, exequenda, et fruenda, omnia et singula " dict. præmissa ultimo supra mentionata, per illos eorumque " successores dictamquæ societatem in perpetuum, et in modo " tam amplo et benefico ad omnes intentus et proposita, quam " dicta societas ullusve ejusdem socius, pro usu et beneficio " ejusdem antehac, eadem tenuerent, fruiti fuerunt et exer- " cuerunt."

At a General Meeting of the Incorporated Society, held on the 14th of January, 1817, it was unanimously resolved "that " the establishment of a Scheme for providing Annuities to the " Widows of Members of this Society is a proper and expedient " measure;" and a Committee was appointed to report as to the measures advisable for carrying such a scheme into effect.

The Committee appointed by this Meeting reported to the Society the following resolutions:—

" 1*mo*, That the annuity to the widows of the members of " the Society, contributors to the Widows' Scheme, ought to be " fixed at 30*l.* per annum, commencing at the first term of " Whitsunday after her husband's death, and to continue during " her life, and while she remains a widow only; the annuity " becoming forfeited on her entering into a second marriage.

" 2*do*, That for effectuating this purpose, 1000*l.* of the funds " of the Society should be appropriated to the Widows' Scheme " at the term of Whitsunday next; that one-half of the annual " guinea payable by the members of the Society, should go to " the fund; and two-thirds of the sum payable by future intrants " with the Society.

" 3*tio*, That the Scheme should commence at Whitsunday " next, when each contributor should pay 5*l.* 5*s.*, whether he " be a married man, a bachelor, or a widower, and become bound " to pay the like sum of 5*l.* 5*s.* during his life, at the term of " Whitsunday yearly.

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" 4*to*, That every present member of the Society becoming a " contributor to the Scheme, if married, and if his age exceed " his wife's above five years, should pay at the term of Whitsun- " day next of marriage tax as follows; viz. if he is above forty " and not above fifty years of age, the sum of 5*l.*; and if between " fifty and sixty, 10*l.*; and if above sixty years old, the sum of " 15*l.*; and that he also should pay at said term 3*l.*, if his own " age exceed that of his wife above five years, and does not " exceed it six years; 6*l.* if more than six and not exceeding " seven years; and if more than seven and not exceeding eight " years, the sum of 9*l.*, and so on progressively, at the rate of " 3*l.* for every other year his age exceeds that of his wife.

" 5*to*, That every member of the Society may become a con- " tributor to the Scheme, by declaring his resolution to that " effect by a letter to the Society's treasurer, betwixt and the 1st " day of May next, in which letter he must declare whether his " own age exceeds that of his wife more than five years, and if " so, he must also state his own age, and the difference between " it and that of his wife, so as his marriage-tax, on the principle " above-mentioned, may be ascertained by the treasurer.

" 6*to*, That those members who so declare themselves between " and the 1st day of May next, shall constitute '*the Society of* " '*the Contributors to the Widows' Scheme of the Solicitors of the* " '*Supreme Courts of Scotland*;' and such of the present mem- " bers of the Society as may thereafter declare their accession to " the Scheme before Whitsunday, 1819, shall be received as " contributors on a petition to the Society of Contributors, but " on such terms as a majority of the Society shall agree to " receive them.

" 7*mo*, That on a contributor entering into a second mar- " riage, he shall at the next term of Whitsunday thereafter, pay " the above-mentioned marriage-tax, in respect of his own and " his second wife's age at the time of his second wife's marriage; " and every unmarried contributor shall on a first and second " marriage pay the like marriage-tax.

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" 8*vo*, That every future member of the Society shall be " entitled to become a member of the Society of Contributors to " the Widows' Scheme upon the following terms: 1*st*, Upon " paying the annual contribution of 5*l*. 5*s*. from the term of " Whitsunday immediately previous to his declaring his acces- " sion to the Scheme, and becoming bound to pay the same sum " at the term of Whitsunday thereafter, yearly during his life " 2*nd*, If he is married at the time of his accession, and he is " more than five years older than his wife, he should pay the " marriage-tax corresponding to the difference of their ages " according to the scale before mentioned: And further, if he is " above forty, and not above fifty years of age, he should pay " 15*l*., and if above fifty years of age, 30*l*., and that at the first " term of Whitsunday after his accession. And if he is not " married at the time of his accession, but afterwards marries, " besides the foresaid annual contributions from the time of his " accession, he should pay the marriage-tax corresponding to the " excess of his own age above that of his wife, as before-men- " tioned: And further, if above forty and under fifty at the time " of his accession, he should pay 15*l*.; and if above fifty years " of age, 30*l*., and that at the first term of Whitsunday after his " marriage.

" 9*no*, That if any contributor shall die before he has paid " six years' rates or annual contributions, such deduction should " be made from his widow's annuity as shall, with the annual " rates paid by him, amount to six years' contributions; but " there shall be no deduction from the first year's annuity, (unless " the case of widows whose husbands shall die before Whit- " sunday 1818, in which case the deduction shall commence at " Whitsunday 1819). But the deduction shall only be made " from the widow's annuity at the rate of 5*l*. a-year, until the " said six years' annual contributions, with interest thereof, are " fully paid up.

" 10*mo*, That the funds should be vested in the persons of

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" five trustees, viz.: the preses and vice-preses of the Society of " Solicitors, if they are contributors, and three other contributors, " to be chosen by a majority of contributors at a meeting to be " held for that purpose. And at said meeting, the contributors " should also elect a treasurer, who shall find ample security for " his intromissions, whose salary shall be 5*s.* per annum for each " contributor to the fund, at the term of Whitsunday yearly."

At a General Meeting of the Society held on the 17th March, 1817, the resolutions of the Committee were unanimously approved of, with the exception of the second, which was reserved for consideration by a future Meeting.

A General Meeting held on the 13th May approved of a contract by the contributors to the Scheme, and in substitution for the second article of the resolutions, resolved that—

" There should be appropriated from the funds of the Society " of Solicitors to the funds of the proposed Widows' Scheme the " sum of 750*l.* sterling, with interest from the term of Whit- " sunday 1817 until paid, to the collectors of the Widows' Fund, " reserving power to the Society at any future period to vote a " farther sum in aid of the Widows' Scheme, in case the funds " of the Society will admit of it; and that there should be " appropriated to the Widows' Scheme one-half of the annual " sum of 1*l.* 1*s.*, payable by the members of the Society, which " should be payable to the said collector each year upon the " day of ; and lastly, that there should " be appropriated to the Widows' Scheme one-half of the entry- " money payable by every future member of the Society of " Solicitors."

Towards the end of the year 1817, a contract was prepared and executed by such members of the Incorporated Society of Solicitors, as resolved on becoming contributors to the Widows' Scheme. The first article of this contract was in these terms:—

" The subscribers to these presents, and such other mem-

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" bers of the Society of Solicitors as may afterwards become " contributors to the Widows' Scheme, shall constitute a Society, " to be called and known by and under the name of 'THE SOCIETY " 'OF CONTRIBUTORS TO THE WIDOWS' SCHEME OF THE SOLICITORS " 'OF THE SUPREME COURTS OF SCOTLAND.'"

The second article set out in these terms: "The subscribers " hereto, members of the said Society and Corporation of Solici- " tors in the Supreme Courts of Scotland, at the term of Whit- " sunday, 1817, or who shall become members of the said Society " before the term of Martinmas, 1817, and who, by their sub- " scriptions hereto previous to the said term of Martinmas, 1817, " shall become contributors to the Scheme for raising a fund for " a provision to the widows of the members," and bound the subscribers to make an annual contribution of 5*l.* 5*s.*

The third article allowed any member of the Society of Solicitors, who should not before Martinmas, 1817, have declared his intention to become a contributor to the Widows' Scheme, to do so after that time, upon executing a separate bond under this proviso: " But it is expressly provided and declared, that the persons " who shall be members of the said Society of Solicitors at the " term of Martinmas, 1817, and who shall not have acceded to " the Scheme before the term of Whitsunday, 1819, shall be " excluded from the benefit thereof for ever, unless they shall be " admitted by two-thirds of the contributors to the Scheme " present at a general meeting, held in time of Session, upon " their application, and making payment of 10*l.* sterling, over and " above the rates and whole other contributions that would have " been due by them, if they had become contributors under this " contract previous to the term of Martinmas, 1817, with interest " thereon till paid."

The fourth article declared, that "Every person admitted a " member of the said Society or Corporation of Solicitors, after " the said term of Martinmas, 1817, shall be entitled to become " a member of the Society of Contributors upon his declaring

"his accession" to the scheme within twelve months after the date of his admission, upon executing a bond to that effect.

The fifth article declared, that persons admitted members of the Society of Solicitors after Martinmas, 1817, who should not have become members of the Society of Contributors within twelve months after such admission, should "be excluded from "the benefit of the Widows' Scheme for ever," under the same proviso as in the third article.

The eighth article which regulated the contribution by future members, contained the following proviso:—"As also "providing and declaring, that every future member of the "said Society of Solicitors, admitted after Martinmas, 1817, "claiming to be entitled to be a contributor to this Scheme, "shall, previous to admission, produce a certificate signed by "a member of the College of Physicians or Surgeons in Edin-"burgh, or otherways satisfy a majority of the Society of Con-"tributors that he does not, at the time of his application for ad-"mission, labour under any disease particularly tending to shorten "the duration of life. And also providing and declaring, that "after the term of Martinmas, 1817, no member of the Society of "Solicitors shall be admitted to the benefit of this Scheme, who "is above the age of forty-five years, unless upon a petition to the "Society of Contributors, which is to be considered at a meeting "specially called for that purpose; when, if it shall be the "opinion of two-thirds of the members there assembled, that the "petitioner should, notwithstanding his age, be received as a "contributor, he shall be received as such; but not otherwise."

Shortly after this contract was executed, viz., in December, 1817, the entrance money to the Society of Solicitors, and the payment to the library, which had previously been 21*l.* and 2*l.* 2*s.*, were increased to 50*l.* and 5*l.* 5*s.* respectively.

In June, 1823, Robert Henderson, the respondent, was admitted a member of the Society of Solicitors, and paid 55*l.* 5*s.* on his admission. He was at the same time asked if he desired

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to become a member of the Society of Contributors to the Widows' Fund, when he answered in the negative. After his admission, he paid 1*l.* 11*s.* 6*d.* annually, being 1*l.* 1*s.* to the general fund of the Society of Solicitors, and 10*s.* 6*d.* to the library. These payments he continued until the year 1834. One half of his contribution during that period, as well as that of the other members, was annually appropriated to the Widows' Fund, in conformity with the resolution of 1817, as appeared from the accounts of the Treasurer of the Society of Solicitors, which were annually exhibited on the table of the Society for the space of a month.

In the year 1834 Henderson ceased to pay further contributions to the Society's funds, for what reasons did not appear.

In the year 1839, Henderson moved a resolution, that in respect the resolution of 1817, appropriating to the Widows' Fund, one-half of the entrance money and annual contributions, was *ultra vires*, it should be rescinded and declared void, reserving to the Society or the members to insist for repetition of the money. This resolution was not carried, but another was carried rescinding the resolution of 1817, as to its future operation.

In the year 1840, at which period the Society of Solicitors consisted of 115 members, of whom forty-two were contributors to the Widows' Fund, Henderson presented a note of suspension against the Society of Solicitors, and its office-bearers, praying the Court of Session to prohibit the respondents from paying over to the Widows' Fund the half of the entrance money and annual contributions to the Society of Solicitors, "reserving to "the Complainer all right and title to insist and sue for repetition "for behoof of the Incorporated Society as a body, of the sums "exacted from him and all other members, and illegally appropriated to the said private Widows' Fund."

Henderson at the same time brought an action of Reduction and Declarator against the Society of Solicitors, and against the contributors to the Widows' Fund, in which he sought

to have it declared, that it was *ultra vires* of the Society to pass the resolution of 2nd June, 1817, or to make such appropriation of the Society's funds as was thereby effected, and to have the resolution, "with all that has followed or may follow thereupon," reduced and declared void and null.

At the time at which the action was raised, there were eleven widows deriving benefit from the Widows' Fund, seven of whom compeared to the action.

A record was made up by condescendence and answers, in which the pleas in law for the pursuer and suspender were,—

"I. The resolutions and proceedings under reduction are "illegal and *ultra vires*, in respect that the intention and effect "of them is to appropriate certain funds belonging to the Incor- "porated Society of Solicitors to purposes not contemplated "in the charter of incorporation, and in which the Incorporation "as such has no interest.

"II. The resolutions and proceedings under reduction being "in themselves null and void, and the resolution of date 2nd "December, 1839, rescinding and making void the resolutions "and proceedings under reduction, being a valid and binding "resolution of the Incorporated Society, the pursuers are entitled "to decree of declarator and reduction, in terms of the conclu- "sions of their summons.

"III. The pursuer and suspender, Mr. Henderson, as a "member of the Incorporated Society, has good title and inter- "est to apply for, and obtain the interdict craved, to prevent "the misapplication of the common funds of the Incorporation.

"IV. The Association or Society of Contributors to the "Widows' Scheme, defenders, having in law no connection "with or claim upon the Incorporated Society, are not entitled "to demand or receive any aid or support from the Incorpora- "tion's funds.

"V. The pursuers have done no act, either jointly or seve- "rally, by which the right of any of them, as members of the

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" Incorporation, to challenge the illegal proceedings under " reduction can be held to have been waived, abandoned or " lost."

On the other hand the pleas in law for the defenders were these:—

" I. The pursuers are now barred, *personali exceptione*, from " challenging the resolutions complained of on any of the grounds " urged in the present suspension and reduction.

" II. The resolution of June, 1817, is now binding and " effectual, as a stipulation or regulation of the Society upon " the principle of usage, as explaining or even altering the terms " of the original contract of the Society.

" III. The resolutions complained of are now valid and " effectual *quoad* the defenders and compearers, and cannot be " questioned by any member of the Incorporation, in respect " these resolutions form matter of contract between the Incor- " poration and the Widows' Scheme, implemented and relied " upon by both parties, and in respect the continuance of imple- " ment is requisite for the stability and existence of the Widows' " Scheme, which was substantially instituted by the Incorpo- " ration."

The cause was then argued upon cases which the Lord Ordinary (*Cunninghame*) reported to the Court, accompanying his interlocutor with an elaborate note, favourable to the views of the appellants, which will be found in 4 B. M. and D. 370, N. S.

The Inner House required of the pursuer to know whether he intended to avail himself of the right to repetition reserved in the prayer of his suspension. The pursuer in consequence put in a minute, stating, that in making that reservation, he did not mean to reserve any right to demand repetition from widows of deceased members of the Society of Solicitors, of sums actually received by them previous to the date of the judgment of the Court, as payment of annuities from the Widows' Scheme, but

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he reserved all action and claim for repetition as against all other defenders, respondents, and compearers.

The Court then, on the 13th January, 1842, pronounced the following interlocutor, "Reduce, decern, and declare in "terms of the conclusions of the libel, and suspend the proceed-"ings complained of, and grant interdict as craved, reserving "to the pursuers and suspenders under the qualification specified "in the said minute, all right competent to them to insist for "further redress in the premises, and to the defenders, their "defences as accords."

The appeal was taken against this interlocutor by the Society of Contributors to the Widows' Scheme, and by the widows' compearers.

Mr. Kelly and Mr. Anderson, for Appellants.—I. The resolutions under which the Widows' Scheme was framed, and the appropriation of funds for its creation must be presumed to have been perused and acceded to by all members who entered after the date of the resolutions. Prigge *v.* Adams, *Skin.*, 350; Cambridge *v.* Herring, *Lutw.*, 404; Taverner's Case, *Raym*, 446. Moreover, the evidence in the admitted fact of the respondent at the time of his admission to the Society of Solicitors having been asked whether he would become a member of the Society of Contributors to the Widows' Scheme, and in the fact of the yearly appropriation of funds to the Widows' Scheme appearing in the annual accounts of the treasurer to the Society of Solicitors, which, together with the minutes of both societies, were open to the perusal of all the members, is strong to show that the respondent was actually cognisant at the time of his admission to the Society of Solicitors, and from time to time thenceforth, of the appropriation of funds for the Widows' Scheme.

[*Lord Campbell.*—It may be argued that Henderson is in the same situation as if he had been present when the resolution was passed, and had concurred in it.]

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Undoubtedly, for he saw the orders passing on the funds of the corporation, and the application of the half of his own yearly contribution. Persons relying on these resolutions, might come in day after day into the Corporation of Solicitors, for the purpose of gaining to their widows the benefit of the Widows' Fund, which Henderson, by his acquiescence, had led them to rely upon as available. Henderson therefore is barred by personal exception from challenging the resolution. The authorities for this are to be found both in England and Scotland. In the King *v.* Stacey, 1 *T. Rep.* 1.

[*Lord Campbell.*—No doubt, that by law of England, personal exception would prevail. You need not cite authorities for that.]

Then, in the Magistrates of Montrose *v.* Mill, 1 *W.* and *S.* 570, the Court of Session refused to sustain a plea of personal exception; but this House reversed the decision, and sustained the plea. The same plea was recognised by the Lord Chancellor in giving judgment in Fleshers of Glasgow *v.* Scotland, 3 *W.* and *S.* 209. And in Beveridge *v.* Smith, *Mcl.* and *Rob.*, 806, this plea also received effect.

[*Lord Brougham.*—In the revised opinions of the Judges, no notice is taken of this point.]

It seems to have been very lightly dealt with.

II. One of the express objects of the original contract, and of the charter incorporating the Society of Solicitors, was to make a provision for the widows and children of members; it could not therefore, be inconsistent with the objects of the Incorporation to lay aside part of its surplus funds for a similar provision; neither could it be opposed to the general principles or policy of the law in Scotland, for it is a general object of all the Trades' Incorporations in Scotland, and of similar incorporations, to form such provisions. The Courts no doubt have power to regulate the bye-laws of incorporations, but their interference must not be arbitrary and capricious, it must be founded on something relevant

and substantial. Whether the annuities are too great in amount or whether they ought to be fixed or variable, are questions within the powers incident to all corporations and specially conferred upon this. They are mere questions of bye-law, with which the Courts had no right to interfere, so long as the subject of them was not contrary to the professed and real objects of the Incorporation, or to the law and policy of the country, neither of which was the case in the present instance.

III. But it is said, that however it might have been competent to establish a fund of provision for widows, to be distributed at discretion, according to the necessities of each case, it was not competent to establish such a fund in a manner which withdrew it from the control of the Corporation and gave those for whom it was provided a right to insist on its application. There is no authority, however, for such doctrine. The contrary was established in Fleshers of Glasgow *v.* Scotland, 3 *W.* and *S.* 209, where the resolutions of the Incorporation were held to be matter of agreement between it and its members, which the latter had a right to enforce; and even if the application of the fund had been left discretionary, it is all but doubtful whether its application could not have been enforced as a matter of right. Paterson *v.* Skinners of Edinburgh, *Mor.* App. Aliment, No. 6.

IV. It is further said that the contract and charter warranted only a provision for indigent widows and children; the word "indigent" being supplied before each object in the sentence. The contract does not grammatically require such a construction, and the charter specifies only the widows of indigent members. If the circumstances of the party were to regulate, how could a scheme have been framed which could have worked without in each instance the most inquisitorial and offensive inquiries? The member might die indigent, and his widow nevertheless be opulent; or the member might die opulent, and the widow nevertheless be indigent. Again, it is objected that the scheme does not provide for indigent *members*. This may be a

very good reason why the scheme should have been enlarged and extended, but forms no objection against it, so far as it goes.

If this judgment be sustained, the pursuer is left to adopt his ultimate remedy, which will be an account on the principles fixed by the judgment, and than that nothing more alarming or unjust in its consequences can be conceived.

[*Lord Cottenham.*—If I understand the reservation, the respondents, though they abjure any repetition from widows of the sums received by them, they reserve their whole claim against the defenders.]

Exactly. So that they in truth gave up nothing by the minute.

Mr. Attorney-General and Mr. Moir, for Respondents.—The object for which the charter was given to the Society of Solicitors was to bestow permanence and respectability on a body of learned practitioners; to give them a power of action; and enable them to provide a library for their common use and improvement. These are the objects stated in the charter, and it was not competent for the parties to pervert the grant of the Crown to a totally different purpose, the creation of an insurance company for the benefit of the wealthier members, and to levy contributions from the general members for that purpose.

By the contract upon which the charter was founded three-fifths of the free funds of the Society of Solicitors were to be at the disposal of general meetings, "for the relief of indigent "members, widows, and children." Which words, by proper grammatical construction, are to be read as if "indigent" were before "widows" and before "children." This is shown by the recitals of the charter where the words are "proque subsidio "sociorum defectorum et viduarum liberorumque sociorum in "in rebus egenis morientium." The funds under these words then were to be applied for the relief of the widows and children of members generally, who had died in needy circumstances, but

the fund created under the scheme is not for this purpose. The mere fact of being a member of the Society of Solicitors does not entitle the widow of the party to relief, and his circumstances form no part of the consideration determining whether his widow shall have relief. The sole ground of right is the fact of payments made, so that in truth the fund is for the benefit of the wealthy instead of the needy.

Having obtained a charter for certain purposes, the parties apply the grant of the Crown to a totally different one, the creation of a society distinct from the Society of Solicitors, which has no one of the objects of the charter to the Solicitors in view, the members of which, in order to become members of the one must be members of the other, but being members of the one are not necessarily members of the other, although the funds of the one are appropriated to and dealt with by the other. As to members of the Society of Solicitors, prior to the scheme, they were to be excluded by the 6th article, unless they gave their adhesion by a particular day. And as to future members, the entrance money, on the payment of which their admission to the Society of Solicitors depended, was increased, in order to provide this fund of relief; and the half of their annual contributions was applied to the same purpose, without either of these circumstances entitling the party to any benefit from the fund created. The Society of Contributors is in truth no other than an Insurance Society, formed for the benefit of the members of the Society of Solicitors, who were able to contribute to its funds, and having appropriated to it part of the funds of the Society of Solicitors, and of the contributions of its members, but this was quite beside the objects for which the charter was given to the Society of Solicitors. The charter was intended for charity, but charity is not discoverable in the objects of the scheme, which in fact confers a bounty out of the funds of the Society upon those who are able to insure their life, to the exclusion of those who are unable, but who nevertheless are obliged to go on contributing annually to the scheme.

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[*Lord Brougham.*—Article 3 operates no exclusion of members, it merely operates to prevent fraud by hindering parties lying by till ill of a mortal disease and then joining.]

Whether it operates as an exclusion or not depends on the circumstances of the party. Having obtained the grant of the Crown the parties apply so much of the existing funds of the corporation to the creation of another.

LORD BROUGHAM.—My Lords, in this case we did not think it necessary to call upon the learned counsel for the appellants to reply. I have no doubt whatever in my own mind that this case has been wrongly decided; that there has been a great miscarriage in the Court below in dealing with this important question. I can see no reason to doubt upon either of the points, but it is unnecessary to dispose of the second point, the question of the *personalis exceptio*, in order to overturn this judgment, though it would be necessary to dispose of that question with the respondent, in order to affirm and support that judgment.

The first question which arises, and the most important question beyond all doubt, is the legality of the proceeding taken by the Society of Solicitors. Now the ground upon which this proceeding of theirs is sought to be set aside by a declaration which is the foundation of the whole proceedings,—a declaration that the scheme for providing a fund for the widows and members of the Solicitors' body was illegal, contrary to the constitution of that body, and beyond and inconsistent with the power granted to that body by their charter of incorporation,—the ground upon which that is sought to be set aside, and which raises indeed the whole of the more material part of the question now before this House, is that it was inconsistent with the objects and purposes of the Society and of the Corporation.

My Lords, if any application had been made of the funds of the Corporation, other than that which is within the scope of the purpose for which that corporation was created, past all doubt

that would have been an illegal act, which they were not entitled to do by their corporate power, and by the constitution to which they owed their existence. Let us ask in the first place, therefore, what is the nature of this body, and what must be deemed and taken to be the purposes of its creation? It is for the purpose, says the charter, by reference at least to the articles of agreement,—for the purpose of following out and giving effect to the two Acts of Sederunt, regulating the admission of solicitors, and for certain other purposes which are specified in the original articles of agreement. And by reference to those articles, with the gloss put upon them, which possibly may not be the necessary construction, but which, nevertheless, I am inclined to think, for one, is the reasonable construction, though perhaps not the inevitable construction, of those articles, they are these, namely the formation of a library; the providing for decayed members, "*defectorum*," as they are called; and the providing also for the widows and children; the articles of agreement only saying, "Indigent members, widows, and children." The charter of incorporation construing those words as if "indi-" gent" applied to the whole three members of the sentence, to the widows and children, as well as to the members "in rebus egenis morientium," the widows and children of members deceased in poor or needy circumstances.

Now I most certainly do not hold that, because a particular purpose is specified, and because a particular fund is described as having been collected for that purpose, which is all that the articles of agreement say, and which is all that the charter of incorporation, by reference to those articles, says: I do not at all see, that because there is this specification of one purpose, or say three purposes, the library, the widows, and the children, there is, therefore, of necessity an exclusion of all other objects and all other purposes; and that because they are supposed to have in their view to do the one thing, they are therefore to be supposed not only not to have in their view to do any

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other thing, but are excluded from doing any other thing. Consequently it becomes, on this account, very immaterial whether you construe it in the one way or in the other; whether you take "indigent" as the appellant contends you are to take it, as confined to the first word following, namely, "members," or whether you take it as the charter of incorporation takes it, as riding over the other two, and as belonging to the widows and children as well as to the members; because though they might have a fund to provide for the widows and children of poor members, as well as a library, and though they might have that purpose and object, yet they might very well have other objects and purposes, namely, to provide a fund generally for widows, not confined to those of members deceased in *rebus egenis*.

It must be observed, that wherever a widow's fund is formed and established, and happily that is very often an object of associations of this description, from that of the clergy in Scotland, which is the most remarkable and beneficial instance of its application which perhaps has ever been known, and which has been most admirably managed from its first formation, under the most venerable, and learned, and able professor and great political arithmetician Dr. Webster, who was the original founder of it, and afterwards superintended and most ably administered and improved by my late venerable friend Sir Harry Moncrieff, as long as he was a distinguished Father and Minister of that Church;—from that down to very inferior bodies, these foundations are very much to be commended for their object; they are eminently useful, and they are, generally speaking, framed on exceedingly sound principles. They all proceed upon this,—they are for the widows and children, particularly widows, of professional men, whose income, never very large, never such as to enable them to make ample provision for their successors and their widows, dies with them; and therefore all these plans proceed upon the assumption that the death of the person, or the

coming into existence of the widow, to which his death is a necessary condition precedent, will leave that widow somewhat in embarrassed circumstances, for there will be of course withdrawn from her means of support all the professional income which was only for the life of her husband. Therefore that is the general presumption of fact, though one no doubt to which there will be exceptions in some cases, but very rarely, that the widow will be in poor circumstances, even although the person did not himself die in poor circumstances.

The only objection to the construction indirectly put, but clearly put by the charter, upon the words "indigent members "and their widows and children," in the articles, is this: that a person may not have been indigent and may not have died *in rebus egenis*, and yet his widow and children, from his removal and the withdrawal of his income from them, may be in want, though he could not, strictly and correctly speaking, be said to have been an indigent person himself. I think it is very possible that that may be the view taken of it, that it meant indigent members and the widows of indigent members, though I do not quarrel with the construction in the charter, for it is not necessary to dispose of that in the view I take of the matter, that it may mean indigent members and indigent widows and children, though not the widows and children of indigent members, but indigent widows and children in consequence of their being deprived of the professional income of the parent, and consequently more or less generally, with few exceptions, placed in circumstances to warrant such a provision.

Now, my Lords, could anything be more within the scope of this Society of Solicitors and Procurators than to provide for their widows and children, if indigent, when they themselves should be removed from the scene of their labours and their profits? It appears to me to be the most natural and simple view that can be taken of it, and that this was just as obvious a subject of their consideration, as tha having a library, or the

having a hall to meet in, a hall, indeed, not being specified, but it was said in the course of the argument more than once, that they had a right to provide for themselves that accommodation out of such a fund.

Now it is said, and much stress is laid upon that, both at the bar and by one of the learned judges, Lord Fullerton, in the judgment, that this is neither more nor less than an insurance. To be sure it is,—no doubt it is. But there is no magic in the word "insurance." It seems to be argued, that the moment you find out that it is an insurance, there is an end of the question, because it is an insurance, and this body had no right to become insurers. But why had they not? It is an insurance within itself. If they had opened a shop for insuring other people, and had let all strangers come among them in order to take the benefit of their fund, and by insuring their own lives to provide for their widows, it would have been a totally different question. I do not say that they had no right to do such a thing, that it is beyond the scope of their articles, and beyond the scope of the charter incorporating them as a body; but this is merely an arrangement which they make *intra parietes* of their own Society, within the body corporate which they themselves composed by the charter creating them a body corporate. It is all within themselves, and they make that arrangement, some arrangement of that sort being absolutely necessary, in order to accomplish that object, because they cannot say, We will raise a fund to provide for the widows of all, whether they subscribe to it or not.

It is said that this is a Society within a Society; you may say the same with respect to a committee of a Society. Every committee of a corporate body, formed by itself for the purpose of pursuing conveniently the objects of its incorporation, is a society or corporation within itself. No corporate body could ever carry on its business without forming some such committees. They may form a committee for one purpose and a committee

for another purpose. Here they have not a committee, but they have a plan by which they say, Every member of this Society who chooses to become a subscriber to this fund, shall have the benefit of this fund.

But it is said if the members are in bad health they are not allowed to subscribe, and that if they do not subscribe immediately they are not to be allowed to lie by. To be sure; there must be some limit in both those views; it is self-defence, the fund must be protected by the Society, otherwise what would happen? A man would lie by and let other people subscribe and raise the fund, and when he thought he was likely to leave a widow after he had lived so many years and become an old man, portion his widow out of that fund, having, when he was in good health, kept his money and spent it in other things, perhaps in providing for his widow in other ways, but the moment he fell into bad health and had the prospect of leaving a widow, subscribing to the fund. To provide against those two obvious frauds, it is quite clear some such regulation must be adopted, and accordingly a regulation has been adopted, and I can see no impropriety in it. On the contrary, it is an exceedingly just and equal regulation, and I profess myself totally unable to understand what one of the learned Judges says, namely, that it is against the laws of equity; that is a code with which I am not acquainted, probably. If the learned Judge means that it was contrary to fairness, I must say that in my opinion it is perfectly fair dealing, and that it would be foul dealing, in my opinion, to take any other course, and very improvident and indiscreet. This appears upon the whole, to be a very reasonable and fair, or if we choose to use the word in the common and popular sense of it, and not with a technical meaning, a very equitable mode of proceeding, and it seems to me this is a proceeding clearly within the scope of the Society; and that something of this kind they must have had in view when they were seeking to be incorporated. I venture to say, that hardly any

one ever thought of the formation of such a Society or Incorporation for the purpose of providing for decayed members, and for their widows and children after the father should cease to support them by his professional labours, who would not, as a matter of course, make such regulations.

Cases have been mentioned,—that of the Fleshers of Glasgow is a very strong case indeed,—but the view I have taken does not appear to me to require the support of other cases.

With respect to the second point as to the *personalis exceptio*, it turns out that Mr. Henderson is the only actor here, that the others are only concurrents. I do not see how Mr. Henderson, upon any principle of Scotch or English law, (we are now upon Scotch law,) could lie by and do as he did in this case, and then come forward afterwards and object to all that had been done. But, however, that has not been the ground taken or disposed of by the learned Judges in the Court below, and I may dispense with any necessity of disposing of it here, in my opinion, because it does not arise unless I should be of opinion with the respondent and against the Society of Solicitors upon the first point, which I do not happen to be. Therefore, though entertaining great respect for the judgment of the Court below, the learned Judges do not appear to me to have given in this case, the same careful attention which they almost always do to important subjects coming before them; and I agree with the Lord Ordinary, who has given a most able and elaborate opinion, though it is not a judgment, for the satisfaction of his learned brethren. On these grounds I am of opinion that this judgment ought to be reversed.

We cannot give costs here, we never do that in case of reversal; but the present appellants have been condemned in costs in the Court below, and they must not only be relieved from that, but they must have their costs in the Court below. The *personalis exceptio* comes in very strongly there upon the question of costs.

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LORD COTTENHAM.—My Lords, I am also of opinion that the interlocutor of the Court of Session ought to be reversed, and I come to this conclusion without thinking it at all necessary to enter into the consideration of how far the terms of the charter depart from the terms of the original articles. Looking at either the one or the other, there was undoubtedly power in the Society to appropriate a portion of their funds to the relief of the widows and orphans of members. There is no rule prescribed either in the one or the other, as to the test by which the qualification of an individual claiming the benefit of that provision shall be ascertained. That was necessarily left to the regulation of the Society itself. Now all that the Society have done is this. They have said, We will appropriate a certain portion of our funds actually realized, constituting 750*l*., and a certain portion of the funds hereafter to be realized, either by the payment on the entrance, or by the annual contribution of members of the Society, towards the relief of widows of members; but we will establish this test; we will give it to those widows whose husbands shall have become subscribers to the Widows' Fund. The question is whether that was a test which the Society were not at liberty to adopt. Now, my Lords, I confess it appears to me to be one of the very best tests which they could have adopted. It is a test, in the first place, of the widow being in circumstances which made it, in the opinion of the husband at least, expedient that a fund should be secured out of his annual income for the maintenance of that widow after his death. It is also a desirable arrangement, because it is an encouragement to the husband in his lifetime to save out of an income, which, if he has any, is probably an income which will determine with his own life, the means of providing for his family after his death. It is, therefore, adopting a test which, though very likely not universally applicable, yet is likely to meet the generality of the objects which may occur, and at the same time affording a very wholesome encouragement to economy and good management by

the husband during his lifetime. It is no objection to the scheme that it does not include all the members. Adopt what test you will as to those who are to take the benefit of this fund, it does not apply to all the members. Take any other test of indigence, those who were not indigent would not claim the benefit of it; those who do not come under the description of indigent, would not be entitled to its benefit. So that in no possible way of applying this fund, can you make it applicable to all the members. All the members have an interest in it beyond all doubt, for all the members may come under circumstances which would entitle them to the benefit of it; but the actual recipients of the benefit must necessarily be confined to a certain class of those who constitute the whole Society.

Now, my Lords, alluding to what has been so much urged, and with so much apparent earnestness as if it was really decisive of the whole case, namely, that this was an Insurance Company, it is not necessary for me to give an opinion of what the result would be if it were so. I apprehend it would be very difficult to question an arrangement of this sort. Suppose the rule had been, We will give a certain portion of this fund to every individual who, by his own subscription to any Insurance Company, shall have realized a certain sum for the benefit of his widow, we will not open it to any strangers, but we will make the act of the husband in providing for his widow after his death the test by which the right of the widow to aid from the Society shall be tried, I do not at this moment see any possible objection that there could have been to that test. Here the whole Society is within itself; the insurance is among the individual members of the Society. It is not, therefore, open to any objection as to applying the funds of the Society to the profit of any but those who contribute themselves, or who, by becoming members of the Society, have become interested in the general funds of the Society. The Court of Session have declared that this arrangement, and the rules which have been laid down and made by the

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Society for the purpose of carrying that arrangement into effect, are illegal, meaning that they are beyond the powers of the Society. I cannot view it in that light; but these appear to me to be very wholesome regulations by which the application of the fund is provided for. On the merits of this case, therefore, I have no doubt that the judgment of the Court of Session is not supported by the document on which it professes to have proceeded.

My Lords, being of the opinion I have stated, it is not necessary for me to say anything on the other part of the case, namely, how far, assuming this law not to be within the power of the articles or the charter, the present plaintiff has a right to come to the Court of Session to ask for the interposition of the Court. He asks nothing for himself. If he were to succeed in that part of the summons which seeks a repetition of the sums paid either by the widows, or by those into whose hands the money has passed from those widows, that money so to be received again could only come into the funds of the Society. Individually he asks nothing; he is sueing the corporation in his individual character, he having for many years been a member of that Society; not when the Act was passed; not when the order was made which is now in question; but when it was in active operation, having permitted every member who has been a member during that period to contribute his money, those who have become members since by the payment of the entrance money, and those who were members before by their annual contributions; he has permitted those funds to be accumulated, and he has permitted persons to go on subscribing to those funds, in the expectation of their widows and orphans in case of their death deriving a benefit from them; but during the whole of that time he has not complained. He comes at last, and seeks by the Interlocutor of the Court of Session to deprive all those members who have so contributed to the fund of the benefit for which they have paid by their contribution, and obtains an order

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stopping the future application of the fund for that purpose. If it were necessary to express an opinion upon that subject, which it is not, I should have thought it very difficult for a person standing in the situation of Mr. Henderson, after what has taken place, to be permitted to obtain an Interlocutor for those purposes which he has in view. However, upon this proceeding, taking the first ground, I have no hesitation in expressing my opinion that the Interlocutor of the Court of Session should be reversed.

LORD CAMPBELL.—My Lords, your Lordships have been put into full possession of this case by the able arguments on both sides of the bar, and I am sure that Mr. Moir need have made no apology at all, because he treated the subject in a very lucid and able manner, and we heard him with great satisfaction, as we have done on former occasions when we have had the advantage of his assistance at the bar.

My Lords, I have gone through these papers with very great attention, and the result is that I cordially concur in the opinion expressed by my noble and learned friends, that the Interlocutor complained of must be reversed. It seems to me that the Lord Ordinary took a just and sound view of the subject, and I rather regret that having so clear an opinion, he did not act upon it, and pronounce an Interlocutor, which I am sure would have been looked to with great respect when it came before the Judges of the First Division, and which might have saved us the necessity of hearing the appeal.

My Lords, I feel bound to say that on both grounds the Interlocutor must be reversed. With regard to the personal exception, I look with great surprise at the opinions delivered by the learned Judges. I find that they seem entirely to have overlooked it, although before deciding in favour of the pursuers, they were bound to overrule that plea, though according to the view taken by my noble and learned friends who have preceded me, it is not necessary to express an opinion upon that point if

you decide in favour of the present appellants the defenders below; but if you decide in favour of the pursuers, it is indispensable to overrule that plea. I find, however, when I look at the opinions of the learned Judges, that they expressly confine themselves to the merits, and seem studiously to avoid grappling with that question. Now, my Lords, I must say that I entertain no doubt at all that Mr. Henderson, the pursuer, is barred by personal exception, both with respect to suspension, and the action of reduction. In the suspension he prays that this bye-law may not be acted upon in future, "reserving to the com-"plainer all right and title to insist and sue for repetition for "behoof and benefit of the Incorporated Society, as a body, of "the sums exacted from him and all other members, and illegally "appropriated to the said private Widows' Fund." Therefore, he expressly reserves to himself, and by the decree of the Court as it now stands, that is reserved to him, that he shall bring an action for repetition, contending that all that has been done under the bye-law shall be considered as null and illegal, and shall be entirely altered and reversed.

Then when you come to look at the action of reduction, he prays "that the aforesaid pretended bye-law, minutes, and reso-"lutions now called for of the Incorporated Society, being seen "and considered, the same, with all that has followed or may "follow thereupon, ought and should be reduced, retreated, "rescinded, cassed, annulled, decerned, and declared to have "been from the beginning, to be now, and in all time coming "null and void, and of no avail, force, strength, or effect in "judgment or out with the same in time coming, and the pur-"suers reponed and restored thereagainst *in integrum.*" Well, now, my Lords, who is Mr. Henderson who makes this prayer in his suspension and this action of reduction? It is not supposed, nothing so preposterous is argued at the bar, as that if a person has submitted for a certain time to an illegal act, he may not afterwards resist it; but what has Mr. Henderson done? He

joins the Society in the year 1823, with the full knowledge of this bye-law, and instead of resisting it, he yields to it. He pays annually his subscription; he knows how it is applied; and he holds out an inducement to others to join this Society upon the footing of this bye-law. Then how unjust would it have been for him in the year 1839 to be allowed to come and say "All this is illegal. I have induced many members to enter "and now they shall be deprived of the benefit which I held out "to them as an inducement to become members of this Society." I know not what Mr. Henderson's domestic circumstances may be. He may be an old bachelor who has determined never to marry; or he may be a widower, and he may think that neither he nor any of those dependent upon him may derive any benefit from the system which has been acted upon, and therefore he may desire to deprive those who have been contributing for years upon his recommendation of the power of deriving, through their widows, any benefit from their subscription. It is not enough to say that he wishes only to put an end to it in future; if he did put an end to it in future, those who have contributed to it hitherto would not receive the benefit which they had reason to expect, for there would be no fund continued to be created from which the annuities could be paid to the widows of those who have contributed. My Lords, there can be no doubt that by the law of England this personal exception would prevail. I am glad to find that there are authorities expressly in point to show that the law of Scotland is the same; and I apprehend that such a principle must be acted upon wherever law has been considered and cultivated as a science.

Then, my Lords, upon the merits, I entertain the opinion, that the funds of this Society certainly cannot be capriciously disposed, they cannot be applied to any purpose beyond the scope of the original constitution. There cannot be an application of them to any patriotic fund, or for the building of churches, or the carrying on a railroad between Edinburgh and London, or

anything of that kind. But, my Lords, any purpose that is within the scope of the original undertaking, which may fairly be considered as within the contemplation of the members when they formed this institution, or when they joined it, seems to be *intra vires*, and to be allowable and perfectly justifiable. When we look to the articles under which this Society was instituted, we find one of the purposes expressly mentioned in them is, the relief of indigent members, widows, and children, and such other purposes as shall appear proper. There the sustentation of widows was one of the original purposes for which the Society was instituted. The charter, which was obtained in the year 1795, did not in the slightest degree mean to interfere with any of the purposes which were in contemplation when the Socicty was formed. There is in the recital of the original articles what I should consider to be a mistranslation, but supposing that it were putting a just meaning upon the words in the original article, that they must be considered as meaning widows of indigent members, I apprehend that it would not at all be beyond the power of the Society to make this alteration, because they might have found that it was extremely inconvenient to consider, when a member died, whether he was indigent or whether he was wealthy, it would lead to very distressing and very humiliating inquiries, and it was much better to resort to some other test with regard to the widows, who should have the benefit of this fund. That being so, I apprehend that this bye-law of 1817 was perfectly justifiable, either under the original articles or under the charter.

My Lords, it was intimated, I think, by the Attorney-General, that this regulation had been found to be inconvenient, that it had worked badly, and had reduced the Society to poverty. If that be so, then the body may alter it; the power that they had to frame this belongs to them still, and they may rescind it, or they may alter it in any manner in which they may think it most expedient, so that the purposes of this Society may be fully carried out.

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For these reasons, my Lords, I am clearly of opinion that the view taken of this subject by the Lord Ordinary was the sound and correct one, and that the Interlocutor complained of ought to be reversed, and that the costs of the defenders below (the appellants before your Lordships,) ought to be reimbursed, because it seems to me, in every point of view, to be an extremely improper proceeding on the part of Mr. Henderson, and those who have joined him in the suit.

Ordered and Adjudged, That the Interlocutors complained of in the appeal be reversed. And it is further ordered and adjudged, that the reason of suspension in the said appeal mentioned be repelled; that the reasons of reduction be repelled, and that the appellants (defenders) be assoilzied from the whole conclusions of the said action of reduction and declarator; and that the said respondents do pay to the said appellants the costs found due and decerned for by the said Interlocutors appealed from, if paid, by the said appellants under such Interlocutors. And it is further ordered, that the said respondents do pay to the said appellants costs incurred by them in the Court of Session in the said process of suspension and reduction and declarator. And it is also further ordered, that the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

DEANS, DUNLOP, and HOPE—SPOTTISWOODE and ROBERTSON, Agents.