

made in a report by him to a superior officer upon the conduct of an inferior. Again, it may be a hardship that there should be no redress for such suffering, but I think, on grounds of public interest and expediency, when such a report has been made, I should require a much more exceptional statement of malice than what we have here.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK—I concur. I think that in refusing this reclaiming-note we are doing the best thing for the pursuer himself, because it is plain that he could not win even if he did get a trial. On the question of the action against Campbell I have some hesitation. It is averred that no reports such as those which were alleged were in circulation in the district, and what was meant by that was that the defender Campbell, in making his report, invented these charges, and asked for an investigation to be made into them. It is an extraordinary statement, but it may be relevant. But if he wanted to make out that case he ought to have made it clearer. There are no special facts stated here from which we may infer malice. The rule of law as usually laid down is, that special facts and circumstances must be stated from which malice may be inferred—*Scott v. Turnbull*, July 18, 1884, 11 R. 1131—and although I cannot say that I altogether agree with the rule so broadly stated, I think this is a case in which it may be properly applied.

The Court adhered.

Counsel for Pursuers.—Rhind—A. S. Patterson.
Agent—J. D. Macaulay, S.S.C.

Counsel for Defender Campbell.—Forsyth.
Agent—Robert Emslie, S.S.C.

Counsel for Defender MacLulich.—M'Kechnie.
Agent—Thomas Carmichael, S.S.C.

Thursday, May 26.

FIRST DIVISION.

[Exchequer Cause.

THE INCORPORATION OF TAILORS IN GLASGOW v. THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Customs and Inland Revenue Act 1885 (48 and 49 Vict. cap. 51), sec. 11, sub-sec. 3—Corporation Duty—Exemption.

The Customs and Inland Revenue Act 1885 by section 11 imposes a duty of 5 per cent. upon the income of all real and personal property belonging to or vested in bodies corporate or unincorporate, but exempts, by sub-section 3, the income of property "legally appropriated . . . for any charitable purpose."

The property belonging to the Incorporation of Tailors in Glasgow was derived from the accumulations of entry-money paid by the corporators. The bye-laws of the Incorporation provided that its funds were to be applied in maintaining decayed members,

their widows and children, but conferred upon the administrators of the fund a discretionary power as to each application. *Held* that though the property was "legally appropriated" within the meaning of the section, so as to confer a right upon the corporators as a class to demand that it should be applied in terms of the bye-laws, yet, as this right depended upon the consideration given, by payment of entry-money, the purpose was not a charitable one entitling the property to exemption.

The Commissioners of Inland Revenue, acting under the provisions of the Customs and Inland Revenue Act 1885, sections 11 to 20, assessed the property belonging to the Incorporation of Tailors in Glasgow as chargeable to the extent of £2602, 0s. 4d. of income, with duty at the rate of 5 per cent. amounting to £130, 2s.

The Incorporation presented this petition and appeal against the assessment on the ground that their property was exempt under sub-section 3 of section 11.

Section 11 provides—"Whereas certain property, by reason of the same belonging to or being vested in bodies corporate or unincorporate, escapes liability to probate, legacy, or succession duties, and it is expedient to impose a duty thereon by way of compensation to the revenue: Be it therefore enacted, that there shall be levied and paid to Her Majesty in respect of all real and personal property which shall have belonged to or been vested in any body corporate or unincorporate during the yearly period ending on the 5th day of April 1885, or during any subsequent yearly period ending on the same day in any year, a duty at the rate of five pounds per centum upon the annual value, income or profits of such property accrued to such body corporate or unincorporate in the same yearly period, after deducting therefrom all necessary outgoings, including the receiver's remuneration, and costs, charges, and expenses properly incurred in the management of such property. Subject to exemption from such duty in favour of property of the descriptions following (that is say)—. . . (3) Property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts."

The Incorporation of Tailors came into existence in virtue of a charter granted for the protection of trading, in 1546 by the Magistrates and Council of the burgh of Glasgow, and that charter was renewed or confirmed by another in 1569.

The Act of 1846 (9 and 10 Vict. cap. 17) for the abolition of the exclusive privilege of trading within burghs applied to the Incorporation of Tailors. Bye-laws and regulations were thereafter passed by the Incorporation at different times, and were approved of by the Court of Session on 15th July 1880.

The bye-laws made this provision, *inter alia*:—"It is declared and enacted that pensions may be awarded to decayed members, and the widows and children of deceased members in indigent circumstances, or an amount expended for their behoof, to such extent as the Deacon and Masters consider suitable; and this allowance shall be payable only during their pleasure, and no person shall have or acquire a legal title to share the funds of the

Incorporation as a pensioner or otherwise."

The statements in the petition were that there were 282 or thereby members of the Incorporation, and that the pensioners or other poor persons connected with the Incorporation and deriving benefit from its funds numbered 125, who were all in great poverty. That in addition to these there were many children and grandchildren of members in reduced circumstances receiving free education.

The whole estate of the Incorporation was estimated to be worth £65,736, 1s. 5d. The gross annual value was £2760, 6s. 3d., and taking from this the sum of £158, 5s. 11d. as deductions allowed by the Act for outgoings, there was left £2602, 0s. 4d., which the Commissioners contended was chargeable with duty.

The Incorporation averred in their petition that these funds were all destined and appropriated, after defraying necessary expenses of management, to charitable purposes, including relief against want of the means of livelihood, provision of medical relief, and of education, for poor persons—being members of the Incorporation or their widows or children, or, in some cases, grandchildren; that all allowances, of whatever nature, to the poor of the Incorporation were left to the charitable discretion of the Deacon and Master Court, and were payable and paid only during their pleasure, it being specially declared by the bye-laws of the Incorporation that no person should have or acquire a legal right to share the funds of the Incorporation as a member, pensioner, or otherwise; that the greater part of the estate of the Incorporation was originally derived, it was believed, from entry-moneys; and that the destination of the corporate funds to charitable purposes was settled, not only by the charters of the Incorporation and prescriptive usage thereon, but also by Acts of Parliament.

The Commissioners of Inland Revenue lodged answers, in which they stated that the whole property or capital belonging to the Incorporation had been derived from entry-moneys or contributions payable by members at the time of their admission; and that the revenue was mainly applied for providing annuities or allowances to decayed members, or their widows and children.

They denied that the property or income of the petitioners had been legally appropriated for any charitable purpose, as provided by section 11, sub-section 3.

It was admitted that a sum of £320, part of the capital of the Incorporation, was exempt under sub-section 7 of section 11, as being a legacy upon which duty had been paid within the last thirty years.

Argued for the petitioners—This was a society whose funds were dedicated to charity, for it was in this way that they were laid out after the necessary expenses had been met. There was this vital distinction between a society like the petitioners' and a prudential assurance company, that none of the corporators had any share in the funds by right. Nor were the benefits derived in any way commensurate with the entry-money, for while the latter was about £11, 10s., the average annual payments amounted to about £40 to each beneficiary. Though no individual had the right to claim an allowance, yet the funds as a whole were dedicated to decayed members of the Incor-

poration, their widows and children, and as there was no sick fund in the Society its funds might properly be said to be "legally appropriated" to a charitable purpose.

Authorities—*Paterson v. Incorporation of Skinners*, February 10, 1803; *M. voce Aliment*, Appx. No. 1; *Muir v. Rodger*, November 18, 1881, 9 R. 149; *Incorporation of Skinners of Glasgow*, December 4, 1857, 20 D. 211; *Fleishers of Glasgow*, June 20, 1828, 3 W. & S. 209; *Society of Writers to the Signet v. Commissioners of Inland Revenue*, November 3, 1886, 14 R. 34.

Replied for the respondents—This Incorporation was nothing but a benefit society, and was not within the exemption. If its members had no right to demand an allowance, then the fund could not be said to be "legally appropriated" to charity; while if there was an obligation on the Incorporation to make payments to its members, this took the fund out of the category of charities. It was just a prudential assurance company, on joining which each member contributed a certain sum in order to secure a future benefit. The fund was compulsorily created, and was administered by the corporation, and was subject to duty.

At advising—

LORD PRESIDENT—This is a question arising under the 11th section of the Customs and Inland Revenue Act 1885, under the authority of which the Commissioners of Inland Revenue have assessed the property of the petitioners, the Incorporation of Tailors of Glasgow, as chargeable to the extent of £2602 of annual income, with duty at the rate of 5 per cent. The notice of assessment was duly served upon the petitioners, and they bring this petition and appeal under the authority of the Succession Duty Act of 1853, for the purpose of having the question of their liability determined by the Court.

The petitioners, being an incorporated body, and having an annual income of considerable amount, are *prima facie* chargeable under the 11th section of that statute, because the object is to levy a duty at the rate of 5 per cent. upon the annual value, income, or profits of property belonging to bodies corporate or unincorporate, and the usual deductions have been made of all necessary outgoings, including receiver's remuneration, and all charges and expenses properly incurred in the management; so there is no dispute about the amount of revenue on which the charge is to be made, except in so far as regards one sum, I understand, of £320, the income or profits of which will fall to be deducted from the amount of the revenue upon which the charge has been made before finally adjusting the amount of the assessment.

The ground upon which the petitioners object to this assessment is not that their case does not fall within the operative and leading enactment of the 11th section, but because it is within one of the exemptions appended to that section. In the third sub-section, property is exempted, the income or profits of which shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts. The property is said to be exempted under that sub-section, because it is legally appropriated and

applied for a charitable purpose.

The property which belongs to this Incorporation has been created, and is kept up by contributions of members of the Incorporation. In short, the whole property of the Incorporation, I understand—at least so far as the history of that property can be ascertained—is the accumulation of entry-money paid by corporators to the Incorporation. Now, the first thing that the petitioners have got to establish is that this property so created is legally appropriated to charitable purposes; and these words “legally appropriated” seem to have a very clear and distinct meaning—a meaning which has been given effect to in a previous case. They mean that the property is so appropriated as to create a legal obligation upon the part of the administrators of the property to apply it in a particular manner. If the property is so legally appropriated, it follows of necessity that the administrators of the fund are under a legal obligation to apply the funds in their hands in a particular way; and so, in order to bring the case within the meaning of this exempting clause, the petitioners must make out that the funds in the hands of the corporation are so appropriated that the corporation is legally bound to apply them in a particular way. When there is a legal obligation, it follows again as a matter of necessity that there must be somewhere a legal right to enforce the obligation. It may be that the legal right to enforce the obligation may belong to individuals, or it may be that the legal right belongs to a class; and I think it will be found, from the terms of the bye-laws of this Incorporation, that the legal right to enforce this obligation belongs to a class. But in that I am anticipating, because the next question is whether the purpose to which this fund is legally appropriated and must be applied is a charitable purpose. Now, charity generally means—I mean the application of a charitable fund generally means—that the object of the charity has no right to demand anything from the party who administers the fund. But still further, it generally means that he has given nothing for it—that the bestowal of the charity is entirely gratuitous on the part of the administrator of the fund. In the present case the fund is legally appropriated, within the meaning of this section, to the maintenance of decayed members of his Incorporation, and of their widows and children. Therefore the body, the corporators generally, have a right to demand that this fund shall be so applied, and shall not be applied to any other purpose whatever, and their right to require this depends upon the consideration they have given for the right; and that consideration is the payment of entry money. Now, these different considerations seem to me to exclude the notion of charity altogether. The corporators and members of the body generally contribute, upon becoming members, to the funds and property of the Incorporation, and these funds and that property are applied to one purpose and one only, namely, providing for decayed members and their widows and children, and so there is, so far as I can see, a complete obligation on the one hand and a complete right on the other. There is an obligation on the part of the administrators of the fund to apply it in a particular way, and no other way, and there is a right on the part of the whole members of the corporation to insist that it shall

be so applied—and it does not seem to me to interfere with that view of the case, that according to the bye-laws of the society, an individual has no legal title, as it is called, to insist on the fund being so administered as to give him a permanent right. The bye-laws contain this provision among other things, and it is the most important of all:—“It is declared and enacted that pensions may be awarded to decayed members and the widows and children of deceased members in indigent circumstances, or an amount expended for their behoof, to such extent as the Deacon and Masters consider suitable; and this allowance shall be payable only during their pleasure, and no person shall have or acquire a legal title to share the funds of the Incorporation as a pensioner or otherwise.” There is a very large discretion undoubtedly left in the hands of the Deacon and Masters of the Incorporation. They have an entire control, in so far as regards each particular individual applying for the benefit of this fund. The amount to be given is in their discretion, and it is also in their discretion to say whether a particular individual shall not have the benefit of the funds at all, for reasons which of course must not be capricious or unreasonable, but for fair reasons. The discretion is a very large one, but like the discretion vested in almost all administrators, it is not to be abused, and if it is abused the administrators will be subject to the control of this Court, but, notwithstanding that large discretion, it is here made abundantly clear what is the destination of the annual income of the property.

It is to be awarded in the shape of pensions to decayed members and the widows and children of deceased members in indigent circumstances. There is no other lawful application of the money. There is no other purpose for which this corporation now exists, and therefore it appears to me that notwithstanding the wide discretion vested in the Deacon and Masters as regards each individual case, this is nothing else in its real character, in its present circumstances, since it ceased to have any privileges of exclusive trading, than a provident society, and therefore it cannot answer the description of the exempting clause of the statute as being a corporation whose funds are legally appropriated to charitable purposes. I think the decayed members and their widows are not receiving charity when they get the benefit of this fund, but, on the contrary, are receiving benefit in consequence of the payment by either the members themselves who are now receiving aid, or by the husbands and fathers of the widows and children who are receiving aid. It differs from most provident societies of the same description in respect of that peculiarly large discretion which is vested in the Deacon and Masters; but I can see no other distinction, and that distinction is not sufficient to take it out of the category of a provident society, or to make the pensions and allowances payable under it charitable in any proper sense of the term.

I am therefore for confirming the assessment.

LORD MURE—I am of the same opinion. It appears to me that your Lordship has very distinctly explained the position of this society as regards the creation and application of its funds. The fund in question was created by the contri-

butions of the members of the association, paid in terms of the regulations applicable to these matters, and it is distributed by the managers of the Incorporation in terms of the bye-laws among decayed members, or the widows and children of deceased members, but the extent to which relief is to be given is to be entirely in the discretion of the managers. Strictly speaking, therefore, it is a benefit conferred upon the poorer families of the Incorporation in return for the money which they and the other members of the Incorporation have contributed towards the creation of the fund. In these circumstances I agree with your Lordship in thinking that it is not a charitable purpose in the sense in which that word is used in cases of this description. Reference was made to the case of the Fishers' Incorporation of Glasgow, but there the rules were different, and the case has no direct bearing here. Because by those rules a fixed sum of money was provided for each widow when she became poor. There was, moreover, no discretion as to the amount to be paid, but an absolute right given to the widow, if she was poor, to have a certain fixed annuity paid out of the funds; and her title to sue was sustained on that ground. There was no question raised in that case similar to that which is here in dispute; and I do not think we are in the least degree trammelled by that decision.

LORD SHAND—I am quite of the same opinion, and your Lordship has so clearly and exhaustively stated the ground upon which my opinion rests, that I should be guilty of repetition if I added a word to what your Lordship has said.

LORD ADAM—I am entirely of the same opinion.

The Court disallowed the assessment to the extent of 5 per cent. upon the income of the sum of £320, and *quoad ultra* refused the petition and appeal, with expenses.

Counsel for Petitioners—R. V. Campbell—Ure. Agents—Maitland & Lyon, W.S.

Counsel for Respondents—Lord Adv. Macdonald, Q.C.—Darling—Young. Agent—David Crole, Solicitor of Inland Revenue.

Saturday, May 28.

SECOND DIVISION.

[Lord Fraser, Ordinary.]

PENDER v. LIQUIDATORS OF THE BATHGATE OIL COMPANY, LIMITED.

Company—Lease—Landlord and Tenant—Fixtures—Power of Liquidators to Sell.

The liquidators of a company who were tenants under a lease of minerals, in connection with which works had been erected, having failed to dispose of the subjects as a going concern, presented a petition for power to dismantle the works and sell the buildings and machinery. The landlord objected, on the ground that what the liquidators proposed to sell were fixtures belonging to him. Held (*rev.* Lord Fraser) that the rights of

the liquidators as in a question with the landlord were no higher than those of the tenants, and petition *refused*.

In 1884 John Pender of Seafield and Blackburn, let to the Bathgate Oil Company, Limited, for thirty-one years, the whole shale, coal, ironstone, and other minerals in and under the estates of Seafield and Blackburn, in the county of Linlithgow.

The *eighth* clause of the lease provided that at the natural or earlier termination of the lease the landlord should have right, at his option, to take the whole engines, machinery, plant, &c., belonging to the tenants, and connected with the working of the minerals, at a fair valuation to be made by arbiters. The tenants were taken bound to offer the engines, machinery, plant, &c., to the landlord six months before the termination of the lease, and if the landlord did not accept the offer, then the tenants were to be entitled to remove the engines, machinery, plant, &c. If the landlord accepted the offer, then when he paid the value of the machinery he was to be entitled to set-off against the price all rents and admitted or liquid claims for surface damages that might be due to him at the time. Further, at the end of the lease, the landlord was to have the option of taking over the moveable plant on payment of its value, and in the event of his not taking it over the tenants were to be entitled to remove it.

The *thirteenth* clause provided as follows—“In the event of the said company, or the tenants for the time, including any liquidator or trustee or adjudger, wishing to sell or assign the tenant's interest under this lease to any third party, and of their receiving a *bona fide* offer to purchase the same, they shall be bound first to make offer in writing to the landlord to assign the same to him for the same consideration and on the same terms as they propose to assign the same to such third party; and on the landlord's acceptance of such offer within thirty days after receipt thereof, they shall be bound to assign such lease to him in terms of such offer, without prejudice to his then outstanding claims against the tenants . . . and in the event of the said company being wound up, or the tenants becoming insolvent, or their rights attached by adjudgers or creditors, then in the event of a sale of the tenants' interest (after previous offer to the landlord as herein provided) not being effected within one year from the date of the commencement of such winding-up or declared insolvency or attachment, it shall be lawful to the landlord, should he not himself have accepted an offer to assign to him as aforesaid, to declare this lease at an end, and to remove or otherwise deal with the tenants and enter into possession, all as if this lease had come to its natural termination.”

The lease was recorded under the Registration of Leases Act in the Register of Sasines. The following securities were granted over it—(1) Bond and assignation in security by the company in favour of the Union Bank of Scotland, Limited, for £3500; (2) Bond and assignation by the company in favour of Anderson & Co., ironfounders, Musselburgh, for £3500.

The company went into liquidation, Mr David Nicolson Cotton and Mr William Veitch Turnbull being appointed liquidators. On 2d June