

the annuity of £1000 for his daughter. And he carefully provides for the division of this sum on her death or second marriage in the same manner and under the same conditions as he had already directed with regard to the residue of his estate. Now he must have known that the similar annuity of £1000 under the deed of separation of 1895 would have required as large a sum to be set aside out of residue if it was still to subsist. And that he does not make provision for the division of such capital sum, as he is careful to do in the case of the testamentary bequest of an annuity of the same amount, shows, I think, that in his own mind he did not regard it as to be subsisting concurrently with the testamentary annuity.

I find myself able to dispose of the question regarding the double annuity of £1000 provided in favour of the testator's daughter-in-law without having recourse to a consideration which was much pressed upon the Court in argument. There were produced and made part of the case, without further information as to the circumstances in which they were written, a letter of an explanatory character dated 29th September 1897 by the testator to Mr Mosman, the brother of his daughter-in-law, and the reply of the letter dated 24th October 1897. The former of these letters commences—"I promised to let you know what arrangements I had made for Alice." Were I at liberty to consider these letters in determining Mr Campbell's intention as to duplicating, or satisfying by his settlement the annuity of £1000 provided to his daughter-in-law by the deed of separation, the opinion which I have formed and expressed above would, I think, receive the most positive confirmation. But I am aware that your Lordships find some difficulty in interpreting these letters themselves, and are not satisfied that it is competent to regard them at all in determining the question at issue. I do not therefore think that, as it is unnecessary, it would be appropriate, that I should say anything further regarding them, except to express my opinion that it is by no means clear that they are not competent evidence of the testator's intention. This is not a question of interpreting the testator's settlement with the assistance of extraneous evidence. It is a question of ascertaining the effect of that settlement upon another deed which the settlement finds existing alongside of it. It is a very similar question to that which has more than once occurred where it has been necessary to determine whether a general settlement supersedes a special destination. And the letters in question are not only not mere parole evidence, nor are they mere casual correspondence, but are, as regards the former at least, the testator's own holograph explanation of what was in his mind, written with a definite purpose.

Accordingly, applying the above opinion to the questions as put to the Court, I should propose . . . to answer question 3 in the affirmative, and to find it unnecessary to answer question 4.

LORD KINNEAR—I concur. I desire only to add that my opinion, which is in accordance with that which has been read by Lord Johnston, is founded exclusively upon the trust-disposition and settlement of Mr Campbell with its codicils and the other holograph testamentary writings, which are appended to the case upon the one hand, and the contracts which are described as the deed of separation and the deed of compromise on the other hand. As I believe that so far we are all agreed as to the annuity in the will being in substitution of the one in the deed of separation, I agree with Lord Johnston that it is not necessary to decide whether Mr Campbell's letter is admissible for the purpose of explaining or of adding anything to his will; and as we are to hold that we do not require to take that letter into account, I have myself formed no opinion as to what the true meaning or effect of it may be. I go upon the deeds alone, and I express no opinion upon the point, which Lord Johnston also leaves open.

LORD MACKENZIE—I am of the same opinion.

The **LORD PRESIDENT** did not hear the case.

The Court answered question 3 in the affirmative, and found it unnecessary to answer question 4.

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Counsel for Second Parties—Blackburn, K.C.—Maconochie. Agents—Tods, Murray, & Jamieson, W.S.

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Counsel for Fourth Party—Wilson, K.C.—Black. Agents—Forrester & Davidson, W.S.

Counsel for Fifth Party—Maitland. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for Sixth Party—J. H. Millar. Agents—W. & J. Cook, W.S.

Thursday, July 6.

FIRST DIVISION.

INCORPORATION OF CORDINERS OF EDINBURGH, PETITIONERS.

(*Ante*, vol. xlv, p. 495, 1907 S.C. 654.)

Burgh—Trade Incorporation—Entrance Fees—Burgh Trading Act 1846 (9 and 10 Vict. cap. 7), sec. 3.

An ancient trade incorporation whose exclusive trading privileges had been taken away by the Burgh Trading Act 1846, had obtained in 1850, approved by the Court, a set of bye-laws sanctioning certain rates of entry for relatives of members, "entrants at the near

hand" and for strangers, "entrants at the far hand." Thereafter the incorporation had increased the rates from time to time without the sanction of the Court; and these increases had been held by the Court to be invalid. In 1904 the incorporation presented a petition for the approval of the Court of new bye-laws, which fixed the rates of entry at the figures to which they had been raised without approval. After a report, the Court decided that the rates in the bye-laws of 1850 should stand until the society reverted to a normal condition, as it was impossible owing to the invalid increases, which tended to exclude new entrants, to judge of the pecuniary benefits. Thereafter in February 1910 the incorporation presented a new petition under the Burgh Trading Act 1846. The difference in the position of the petitioners in 1910 from 1904 was (1) the number of members had increased from six to twelve; (2) the percentages of increase over the 1850 rates as proposed in 1904 and 1910 were, respectively, by entrants at the far hand, 750 per cent. as against 420 per cent.; by freemen's sons and sons-in-law, 500 per cent. as against 266 per cent.; by sons and sons-in-law of members on the roll at 11th November 1849, 750 per cent. as against no increase; (3) the benefits in the form of annuities to widows and old members, which were £20 in 1850 and had increased to £180 in 1904, were £220 in 1910.

The Court (Lord Johnston *doubting*) sanctioned bye-laws altering rates.

(See *Incorporation of Cordiners of Edinburgh, Petitioners*, March 9, 1907, 44 S.L.R. 495.)

On 26th February 1910 the Incorporation of Cordiners of the City of Edinburgh, and Charles Wilfred Allan, deacon, and Joseph Park, treasurer thereof, as representing the Incorporation, presented a petition under the Burgh Trading Act 1846 (9 and 10 Vict. cap. 17), sec. 3, for the sanction of alterations in the bye-laws.

The facts as to the presentation of a former petition by the Incorporation appear from the former report (44 S.L.R. 495).

The facts as to the presentation of the present petition appear from the following report of Mr Robert Addison Smith, Registrar of Friendly Societies in Scotland, to whom, on 15th March, the Court remitted the petition for report:—"Since the judgment of the Court in 1907 the membership of the Incorporation has risen from six to twelve, including one member who has been admitted since the present petition was presented to your Lordships, three members being in benefit, and the number of widows entitled to annuities has risen from one to two. The petitioners maintain that the Incorporation must be dealt with on the footing that its position as one of the ancient trading incorporations of Scotland is in no way abnormal when compared with other incorporations whose rules have been amended and approved by the Court. As regards the benefits, the

amount of the respective benefits payable to those in benefit is not stated in the rules, although the amount of entrance moneys payable is fixed and stated in the rules. The practice has been to alter from time to time the benefits payable to those in benefit by resolution of the Incorporation following upon the report of a professional accountant, without obtaining the sanction of the Court in accordance with the following bye-laws dealing with benefits, viz.— . . . In accordance with the provisions contained in these bye-laws the Incorporation obtained a report from the late Mr J. A. Robertson-Durham, C.A., Edinburgh, on the state of its affairs as at 7th June 1909, with a view to the raising or diminishing of the annuities payable to those in benefit. He reported as follows:—"If there is no further litigation or legal expenditure, and if the sums spent on repairs during the next five years do not exceed the sums spent on repairs during the past five years, and the accountant is assured that there is no probability of their doing so, the net income of the next five years may be estimated at not less than £6450. The accountant therefore sees no reason why the Incorporation should not increase the annuities for the next five years. If the maximum annuity is increased by £30 per annum, from £180 to £210, the liabilities for the next five years calculated in the same manner as in appendix No. II. would amount to £6050. If the maximum annuity is increased by £40 per annum—from £180 to £220 per annum—the liabilities calculated in the same manner as in appendix No. II. would amount to £6400. The accountant has no hesitation in recommending an increase by £30 from £180 to £210, but if the Incorporation wishes to increase from £180 to £220 in all probability they will be safe to do so, but with such a comparatively small number of lives to deal with, there is a risk—a very slight one, however—of the expenditure exceeding the income." The Incorporation at a meeting held on 3rd August 1909 unanimously resolved to increase the annuity payable for the following five years to members and widows entitled to full annuity from £180 to £220, subject to deduction of income tax, the payments to those entitled to partial annuity being increased in the same proportion. . . .

"The proposed increases in the entrance fees are as follows—

"1. *By entrants at the Far Hand.*

Not exceeding 25 years of age, -	from £110 to £440	0	0
Exceeding 25 and not exceeding 30, "	" 125 "	536	13 4
" 30 "	" 35 "	145	733 6 8
" 35 "	" 40 "	160	916 13 4
" 40 "	" 45 "	165	990 0 0

"2. *By Freemen's Sons and Sons-in-law.*

Not exceeding 21 years of age, -	from £31 10/- to £115 10/-
Exceeding 21, additional for	
each year of excess, -	" 2 2/- "
	7 7/-

"These increases are a considerable advance upon the entrance fees imposed in 1850, but they are very much less than the entrance fees proposed in the petition of

1904, which were disapproved of by the Court and its sanction withheld.

“It is urged by the petitioners that the increases are justified in respect (1) of the usages of this and other similar incorporations; (2) of the largely increased benefits; and (3) that the Court has sanctioned increases as large in the case of other incorporations.

“In regard to these propositions, the reporter begs to say that while it is a fact that a number of other incorporations have carried through alterations of their rules for securing an increase in the entry-moneys payable by entrants both at the near hand and the far hand, in none of the alterations of rules which were sanctioned by the Court was any compereance made to oppose the prayers of the respective petitions.

“A petition at the instance of the Baker Incorporation of Perth was presented to your Lordships of the First Division on 26th January 1906 (subsequent to the decision in *Allan's* case), for sanction of increase of rates of entry-money. The rate in the case of entrants at the far hand was relatively much higher in proportion to benefits than the rates proposed in the present petition. The increases proposed by the Incorporation were sanctioned by your Lordships.

“The Aberdeen Shoemakers' Incorporation petition was presented to their Lordships of the Second Division on 15th October 1909 (subsequent to the decision in *Allan's* case), for an increase of the dues payable by entrants. The increase of dues proposed by the society was sanctioned. They were relatively higher in proportion to benefits than the rates proposed in the present petition in proportion to benefits.

“In the case of some incorporations there is in the rules an absolute power of admission or rejection of entrants at the far hand. The Incorporation of Maltmen in Glasgow is an instance of this, its rules, including such power, having been sanctioned by the Court on 25th May 1852, again on 27th June 1885, and again on 11th July 1905.

“With the approval of the petitioners the reporter has consulted Mr Thomas Wallace, actuary, Edinburgh, who was also consulted by Sir Chares Logan in 1906, and Mr Wallace reports as follows—

“The benefits which were payable in 1850, and those which are payable now, are as follows—

	Benefits payable in 1850.	Benefits now payable.
1. To members of 15 years' standing and 50 years of age an annuity of - - -	£10 0 0	£110 0 0
Rising by annual increments of	2 0 0	22 0 0
To a maximum of - - - at the age of 55.	20 0 0	220 0 0
2. To widows of members an annuity of - - -	20 0 0	220 0 0
Suspended during the subsistence of a second marriage—the widow of a second marriage receiving only two-thirds of this benefit		
3. To each fatherless child under 13 years of age, a yearly allowance of - - -	2 13 4	29 6 8

	Benefits payable in 1850.	Benefits now payable.
4. To each orphan child under 14 years of age, a yearly allowance of - - -	£6 13 4	£73 6 8
Restricted to a total per family of Benefits 2, 3 and 4 commencing not sooner than 7 years after date of member's admission.	20 0 0	220 0 0
5. Funeral money payable on death of member - - -	15 0 0	15 0 0
6. Funeral money payable on death of member's wife or widow -	15 0 0	15 0 0

“It is important to note in regard to the annuities payable by the Incorporation that—(1) They are not of fixed amount which each beneficiary may rely upon receiving without variation. On the contrary, the amount is subject to increase or decrease from time to time as circumstances require. (2) They are payable entirely out of income, sec. 27 of the bye-laws and regulations expressly providing that “the capital stock belonging to the Incorporation shall not be encroached upon, and that with this view the annuities and allowances shall be calculated at the periodical investigation so as to be met by the annual revenue.” (3) The entrance fees received by the Incorporation from new entrants are allocated to capital, and are not themselves available to meet the future benefits which may become payable—not even the future benefits which may become payable to the new entrants themselves. The income from the existing funds, augmented as it will be by the income from the entrance fees, is only available for that purpose.

“Under these conditions there is a possibility that by a decrease in the number of annuitants or an increase in the annual income produced by the accumulated funds of the Incorporation, there may be hereafter an increase in the amount of the benefits, but there is also a possibility that by an increase of the number of annuitants, or a decrease in the annual income, there may be hereafter a decrease in the amount of the benefits.

“The actuary, having perused the documents submitted to him, and having made the necessary calculations and given due consideration to the points hereinbefore mentioned, is of opinion that, making ample allowance for a possible reduction in the amount of the benefits hereafter payable, the proposed increased dues of entry, being substantially less than the value of these benefits, are moderate in view of the pecuniary advantages likely to be obtained by an entrant member and his family.”

“At several meetings which the reporter had with the agents for the petitioners it was urged upon him that although in the course of the proceedings in the petition of 1904 and in the case of *Allan v. The Incorporation* (1907 S. C. 654 and 665) the question whether the power of the Incorporation to raise the rates of entry-money was subject to the general condition that the rates should not be increased to such a figure as to make entrance of new members into the Incorporation prohibitive was discussed,

no indication was given by the Court as to what amount would be considered prohibitive other than what was to be inferred from the general statement by Lord M'Laren in the case of *Allan, supra*, viz.—‘That there should be a proper table of fees which on the one hand would not be so low in amount as to tempt so large a number of members to enter as to make it unworkable, and again would not be so high as to keep people out altogether.’

‘The reporter ventures respectfully to say that those incorporations which in old times were described as ‘close corporations’ still remain close corporations excepting in so far as the rights of exclusive trading are concerned; and the conditions of skilled craftsmanship remain to a considerable extent an obstacle to an increase in numbers as well as the money conditions imposed on joining.’

‘The difference in the position of the petitioners to-day when compared with their position when they last petitioned your Lordships in 1904 may be stated thus—

“1. The number of members has increased from six to twelve.

“2. The percentages of increase on the proposed entrance fees are—

	Proposed under this Petition.	Proposed under 1904 Petition.
1. By entrants at the far hand (average) - - -	420 p.c.	751 p.c.
2. By freemen's sons and sons-in-law - - -	266 p.c.	500 p.c.
3. By sons and sons-in-law of members on the roll at 11th November 1849 -	No increase	750 p.c.

“3. The benefits have increased thus—‘Annuities to widows and old members £220, as compared with £20 in 1850 and £180 in 1904.’”

At advising—

LORD PRESIDENT—I do not need, I think, to detail the facts upon which this petition arises, because they have already been fully before us in the reports in a prior petition which was presented by the same parties in 1907 (44 S.L.R. 495), and in a case which went before, that of *Allan*, which is there referred to. In 1907 your Lordships followed the views of the reporter, the late Sir Charles Logan, who had reported that it was inexpedient at the moment to make any alteration in the rates of payment of membership of the society, because owing to its illegal proceedings in the past years the society could not be considered as in a normal condition, and that the old legal rates must be continued until the society had settled down into a normal condition. At the end of the opinion which I there delivered, and in which your Lordships who were then present concurred, I said this—“Sir Charles Logan suggests that the bye-laws fixed in 1850 should be allowed to stand till the society has reverted to its normal condition. After that the petitioners can present another petition to your Lordships, when they will be in a position to say what the pecuniary benefits really amount to, and what is a proper sum to charge for entrance.” Accordingly that

has been done, and since then there has been a period of four years, which has given ample time to all those to apply who consider themselves unduly excluded by the high rates which in the illegal laws had been settled forentrants to enter the society, and I think we may fairly take it that the condition of the society now is as normal as it can ever be, if it is left alone. We remitted this petition to Mr Addison Smith, and we have got a very clear report from him.

The petitioners now come before us, and they do propose considerable advances upon the fees charged for entrants, especially entrants at the far hand. There is not any very great difference for entrants at the near hand, but the fees that they proposed are still far short of the fees which they had fixed under their illegal actings, and for which they asked sanction in the prayer of the petition of 1906-7. Upon a consideration of the whole circumstances of the case I think that your Lordships may sanction the fees which are now asked, and I think so upon two grounds. In the first place, so far as authority is concerned, it is the fact, as brought before your Lordships' notice by the reporter, that both Divisions of this Court have already in analogous cases sanctioned increases of fees which bear a higher proportion to what I may call the actuarial benefit which is to be secured than do the fees proposed on the present occasion. But further, I think that a certain increase of fees is in accordance with proper principle. This society, which is a relic of one of the old trading incorporations, is now truly a benefit society and nothing else, and I quite agree that the present members of the society have a sort of double position. They are the beneficiaries, but they are also the trustees for the body of those who are to succeed them. But when I consider who are the body who are to succeed them, I think I am not only entitled but really bound to look at the history of the society from the earliest times. Now if I look at that I find that it is distinctly brought before my notice that all along there has been a marked difference between the privileged class represented by the sons and sons-in-law of actual members, or in their phraseology the “entrants at the near hand,” and strangers who enter the society for the first time and are denominated in the same phraseology as “entrants at the far hand.” Now the crucial fact which really is at the bottom of any change whatever is the enormous appreciation in the funds of the society. The growth of the funds has been very marked and large. I do not think we have got the absolute figures at this moment, but the figures in the last petition will do well enough to bring out what I mean. In the last petition Sir Charles Logan pointed out that whereas the funds in the Incorporation at 1850 were of the value of £12,000, they had in 1903 a capital value of £30,000. It is a fact therefore that anybody now being admitted to the society will get very much larger benefit than if he had been admitted at an earlier date—in other words, he will partici-

pate in the increase of value which has taken place at a time during which he was not a member of the society. Now as I have said, I think the proposed change in the fees of the entrants at the near hand is quite small. I think that is quite right, because I look upon it that the body for whom the present holders are trustees—a body in the future—certainly includes entrants at the near hand, because the present persons represent the future participants, who may be in the character of sons or sons-in-law, but when the stranger comes in his position is rather different. It is not only that he comes in for the benefit of himself, but he also comes in, if I may use the phrase, as a creator of future sons and sons-in-law, and therefore I think that it is quite fair that he, who is not only coming in to get a benefit for himself which up to this moment he has not been in any way entitled to, but is also in his own person to introduce a new privileged class, should pay something commensurate to the enhanced value which he is receiving. Anything else would really be tantamount to holding that the trust was for all the world instead of for a privileged class. Of course the exact amount is a question of degree. The matter has been gone into by a skilled actuary at the instance of the reporter, and I think that the increases proposed now are in the circumstances fair enough; therefore I am of opinion that your Lordships should grant the prayer of the petition.

LORD JOHNSTON—I regard this matter as very much of an executorial nature, and therefore I do not think that I am justified in dissenting from the course which your Lordship proposes to take. At the same time I cannot but say that I acquiesce in the conclusion with reluctance. I think that anything which is done to perpetuate or increase the close burgh or tontine which the present members of the corporation seek, intentionally or unintentionally, directly or indirectly, to compass, is to be reprehended. They have done nothing to create this great fund, the benefits of which they now enjoy. They have each and all received back in benefits much more than they have contributed. They have entered into the fruition of results due to the thrift and prudence not merely of previous generations but of previous centuries, and they have done nothing to occasion that great increase in the property of the incorporation which apparently has taken place since 1850 and to which your Lordship has referred. I cannot with propriety say that they are knowingly intent upon closing the door to new entrants to the corporation, but I do say that anything which tends to raise the entry-money to this corporation will in fact close the door even more effectually than it has been closed hitherto to such new entrants, to the advantage of the present members, and if I were sitting in this matter alone I should repeat without hesitation the words of Sir Charles Logan, where he said in his report of 1906—"It seems to me therefore that if

it be necessary, as I think it is, to reject the rates of entry-money proposed by the petitioners, a continuance of the rates of 1850 has more to commend it—or perhaps I should say has less to be said against it—than any other course which can be suggested."

LORD MACKENZIE—I concur with your Lordship in the Chair. I think that the interlocutor which is proposed by the reporter is the one which should now be pronounced. The Incorporation is not now in an abnormal position, and therefore the circumstances are different from what they were at the time when Sir Charles Logan reported and expressed the opinion referred to by my brother Lord Johnston. I regard the matter very much as an actuarial one. The actuary who has gone into the matter expresses the opinion which is printed in the report, that "making ample allowances for a possible reduction in the amount of the benefits hereafter payable, the proposed increased dues of entry, being substantially less than the value of these benefits, are moderate in view of the pecuniary advantages likely to be obtained by an entrant member and his family." I see no justification in point of principle in admitting entrants at the far hand for a payment which is less than that which in the opinion of the actuary is moderate. In giving effect to the views stated by the reporter we are really only applying principles which have been already laid down in this and the other Division of the Court. I notice in regard to the Baker Incorporation (the authority which is referred to by the reporter) that increases were sanctioned by this Division of the Court, the rate in the case of entrants at the far hand being relatively much higher in proportion to the benefits than the rates proposed in the present petition. I think that the reason why both Divisions of the Court have recognised that principle and have given effect to it are those already stated by your Lordship in the Chair, which it is not necessary for me to repeat.

The LORD PRESIDENT intimated that LORD KINNEAR, who was absent at advising, had authorised him to say that he concurred.

The Court pronounced this interlocutor—

"Approve of the said report: Interpone their sanction to the bye-laws and regulations (as from the date of the extract of this interlocutor) as altered, adjusted, and signed by the reporter; and the Lords direct that the said print of bye-laws and regulations shall be signed by the Clerk and shall remain permanently in the process, and decern."

Counsel for the Petitioners—M'Lennan, K.C. — Chree. Agents — Cumming & Duff, S.S.C.