judicial factor, and it will be there to answer any demands that may be made on it.

Lord Deas—This Society, constituted by the contract of 1801, was, in my opinion, not a corporation but a friendly society. I am further of opinion that it has now come to an end, and that that circumstance does not entitle the surviving members to divide the funds among them. These are applicable, in the first place, to provide allowances to the widows and children of members, but the balance does not belong to these who may be the survivor or survivors and cannot therefore be divided among them.

I do not entertain any great doubt that when funds are subscribed for a particular purpose, and that purpose fails, the money belongs to those who subscribed it, if you can ascertain who they were, and what amount each of them subscribed. I should be slow to think we could not find machinery in Scotland for determining a case of that sort. But where you cannot trace the funds —*e.g.*, where they consist of collections made at church doors—I do not know of any means of disposing of them by any ordinary judicial procedure.

That is not quite the case here, nor is this a case in which we can ascertain who the original subscribers were. It appears that the Society we have to deal with originated out of an older Society, so old that its origin and original constitution cannot be traced. The contract of 1801 narrates the constitution of the old Society so far. It runs—"Considering that the shipmasters and master shipbuilders of Montrose have, past the memory of man, associated and incorporated themselves under the denomination of the Fraternity of Seamen of Montrose, and have contributed part of their wages for raising a fund for relief of the widows and children of such shipmasters and seamen as have become decayed in their means, whereby a considerable stock has been raised for that laudable purpose." It appears that in 1801 the funds of the old Society were worth about £1200, and that this new Association appropriated that for its own purposes. The narrative of the constitution of the older Society, so far as I have read it, would indicate that the Society had a public object, the relief, namely, of the widows and children of all decayed seamen. That would be a very excellent, and certainly a public object, and if we had sufficient evidence that that did represent the constitution of the old Society I should have been of opinion that it was quite illegal for the new Society to appropriate this fund, and we should have proceeded to set that old Society going again. But we have not sufficient evidence that that was the constitution of the old Society. With the exception of that one clause in the contract all the items of evidence go in the opposite direction, and especially the memorial prepared for counsel in 1774.

In that state of matters, what we find here is that there are funds of a friendly society that has come to an end, and that there are no means of finding the individuals from whom these funds came, or who are their representatives. We are therefore in the position referred to by Lord Cottenham in the case of *Bain* v. *Black*, and the fund must therefore remain where it is until some Act of Parliament shall deal with it. It cannot be divided among the surviving members, I am clear upon that.

Lord Mure concurred.

Lord Shand—I concur. This is a friendly society not of the nature of a Tontine, and therefore the pursuer and the annuitants have no right to divide it. On the other hand, the Court cannot interfere to adjust a scheme as in a society with a general charitable object. The affairs of a friendly society like this must be regulated by their own contract, and the Court cannot interfere.

The Court allowed the pursuer his expenses out of the fund, it having been argued for him that this question was one that must sooner or later have been brought to judicial determination, and that therefore it was not unreasonable that the fund, the constitution of which had given rise to the difficulty, should furnish the expenses.

Authority—*Milne* v. *Fraser*, November 25, 1859, 22 D. 33.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for the defender James Burness against Lord Curriehill's interlocutor dated 20th July 1877, Adhere to the said interlocutor in so far as it decerns for £44 in terms of the third conclusion of the summons: *Quoad ultra* recal the said interlocutor: Sustain the first plea-in-law for the defender: Dismiss the action, and decern: Find the pursuers and defender entitled to expenses out of the funds in the hands of the defender as judicial factor: Allow accounts thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer (Respondent)—Crichton—Rankine. Agent—John Rutherfurd, W.S.

Counsel for Defenders (Reclaimers)—Mackay—Thorburn. Agents—W. & J. Burness, W.S.

Wednesday, June 19.

FIRST DIVISION.

[Lord Rutherfurd Clark.

CAMPBELL *v.* CAMPBELLS (CAMPBELL'S EXECUTORS).

Faculty—Reserved Power to Apportion among Children—Effect of Omission of Deceased Child.

Certain funds were secured by antenuptial marriage-contract to "A and B and to the longest liver of them in liferent for their liferent use allenarly, and to the child or children to be procreated betwixt them in fee," with a provision that the said funds "shall be divided between or among the said children in such way as the said A and B mutually or the longest liver of them shall direct by a writing under their hands, and failing such writing to be divided equally among them, share and share alike." The survivor of the marriage made a deed of ap-

portionment, but failed to make provision for the representatives of one of the sons of the marriage who had died intestate and unmarried before the execution of the deed. *Held*, following *Watson* v. *Marjoribanks*, February 17, 1837, 15 S. 586, that the deed of apportionment was disconform to the terms of the marriage-contract and must be reduced, and the funds divided equally among all the children.

Observations on the case of *Watson* v. *Marjoribanks*.

In October 1812 James Campbell and Sarah Jean Forbes, daughter of Dugald Forbes, entered into an antenuptial contract of marriage in which there occurred the following clauses—"The said Dugald Forbes binds and obliges himself, and his heirs, executors, and successors whomsoever, to give and provide to the said Sarah Jean Forbes and James Campbell and to the longest liver of them in liferent for their liferent use allenarly, and to the child or children to be procreated betwixt them in fee, whom failing to the said James Campbell and his heirs and assignees, an equal share along with his other children of the whole means and estate, real and personal, of which he shall die possessed," . . . . "which share of the funds of the said Dugald Forbes so provided to the said Sarah Jean Forbes and James Campbell in liferent and to their children in fee as aforesaid shall be divided between or among the said children in such way as the said James Campbell and Sarah Jean Forbes mutually, or the longest liver of them, shall direct by a writing under their hands, and failing such writing to be divided equally between or among them, share and share alike."

Four sons and two daughters were born of the marriage, and they all survived their father James Campbell, who died in 1830. Mr Campbell left a deed of settlement, dated 1st November 1830, which contained an apportionment of the fund in question; but as his wife did not give her assent, and as she survived him, it was never regarded or acted on as being an effectual division. On 16th February 1870 Mrs Campbell executed a trust-disposition and deed of settlement which purported to make an apportionment among her children of her share of her deceased father's estate, in exercise of the power to that effect contained in the antenuptial contract, but she apportioned nothing to the heirs or representatives of her son Alexander Campbell, who had died unmarried and intestate on 8th January 1870, before the execution of the deed. In these circumstances the question arose, whether the apportionment in Mrs Campbell's trust-disposition was a good one, or whether the estate did not fall to be divided equally among all the children?

This was an action at the instance of Dugald Forbes Campbell, eldest surviving son of the marriage, against James Campbell junior and others, executors-nominate of the deceased John Campbell, the eldest son of the marriage. The summons concluded for reduction (1) of the deed of settlement by Mr Campbell, and (2) of that by Mrs Campbell, both mentioned above. It was not disputed that the first deed was not a good apportionment.

The Lord Ordinary granted decree as asked.

The defenders reclaimed.

At hearing before the First Division it was stated that the Lord Ordinary had made it understood that the ground of his judgment was that the case was ruled by that of *Watson* v. *Marjoribanks*, Feb. 17, 1837, 15 S. 586.

Reclaimer's authorities—*Crawcour* v. *Graham*, Feb. 3, 1844, 6 D. 588; *Baikie's Trs.* v. *Oxley*, Feb. 25, 1862, 24 D. 589; *Moir's Trs.* v. *Moir*, June 17, 1871, 9 Macph. 849; *M'Donald's Trs.* v. *Macdonald*, March 10, 1874, 1 R. 794.

Respondent's authorities—*Watson* v. *Marjoribanks* (*supra*); *Sivwright* v. *Dallas*, Jan. 27, 1824, 2 S. 543; *Stein* v. *Stein*, Dec. 8, 1826, 5 S. 93; *Murray* v. *Borthwick*, M. 3237.

At advising—

LORD PRESIDENT—It has not been contended that the deed made by Mr James Campbell during his lifetime, which was made without the assent of his wife, was a good exercise of the power of apportionment provided in the marriage-contract between Campbell and his spouse, and therefore the reduction is not opposed so far as that deed goes. After his death his spouse executed another deed, and the question is, whether that deed is a good exercise of the power of apportionment? The family consisted of four sons and two daughters, all of whom survived their father, and therefore there is no doubt that each of the children had a vested right in the provisions made for them in regard to their mother's fortune. The objection to Mrs Campbell's deed is, that while she divided the fund among those children who were in life at the time the deed was made, she omitted to provide anything for her son Alexander, who died unmarried and intestate before its execution. This raises a question of much importance, and if it had been a new one it would have required serious consideration, but I agree with the Lord Ordinary that it is ruled by the case of *Watson* v. *Marjoribanks*.

No doubt there is this difference between this case and that of *Watson*, that there one of the parties who had died, and to whom no share of the fund was given, was represented by executors-nominate, and the other by his creditors, whereas here Alexander having died unmarried and intestate before the execution of the deed of division he was really represented by his brothers and sisters. So that the fund in fact comes to the same persons who would have taken the whole even if a provision had been made for Alexander and his representatives. That is a point of difference as to facts, but it is not sufficient to affect the principle upon which *Watson* was decided, and on which this case follows. That principle is, that the omission from the deed of apportionment of one of the objects of the power is fatal to the exercise of the power.

It has been said that the authority of the case of *Watson* has had doubt thrown upon it. To that I cannot assent. It is true that in the case of *Crawcour* v. *Graham* Lord Cuninghame did express certain views adverse to the decision in *Watson*, but that was merely the expression of opinion of one Judge, and no other member of the bench concurred with him. On the contrary, they expressed themselves in such a way as to show that they regarded it as a final authority. Looking at the eminence of the Judges who decided the case of *Watson*, and the length of time

during which it has been regarded as a leading authority, I cannot think that we can go against it.

In common with some of your Lordships, I may regret that such was the rule so established, and I may think that the opposite decision would be the better. At anyrate, it is some consolation to know that what we cannot do has been done to some extent by a recent statute (37 and 38 Vict. cap. 37), but that statute does not apply here.

On these grounds I think we are bound to adhere to the Lord Ordinary's interlocutor.

Lord Deas—I have come to the same conclusion as your Lordship, but very unwillingly. As Counsel and Judge, I have considered many cases on this point subsequent to that of *Watson*, but I cannot say that I have ever heard doubts thrown on its authority. I confess that I am very glad to see that a Statute of 1874 (37 and 38 Vict. c. 37), now excludes some of the technical objections which have been found inconvenient in dealing with cases similar to this, but the statute is not applicable here, and I think we can do nothing but adhere.

Lord Mure concurred.

Lord Shand—If the point had been open, I should have been of opinion that the deed here in question was a good exercise of the power of apportionment, because, although no share is specially given to the representatives of the lady's son Alexander Campbell, who predeceased his mother, and in whom a share of the fund no doubt had vested, yet the fund has been divided amongst the whole parties really interested, whether as being themselves directly entitled to a share as objects of the power, or indirectly as representatives of their deceased brother Alexander. The same division could admittedly have been effectually made if a sum, it might be of small amount, had been left as Alexander's share to his representatives, and a corresponding reduction made on the sums given to each of the surviving sons. The pecuniary result would have been precisely the same if Mrs Campbell had allocated £200 as Alexander Campbell's share and fixed the amounts apportioned to each of her two surviving sons at £250 in place of £300 as fixed by the deed, because in that way each son would receive £50 as representing his late brother and £250 in his own right, being £300 in all, and the two daughters would have the same right to residue as the deed now gives them. This being so, I cannot help feeling that the pursuer's objection to the deed is founded more on the form which the deed has taken than the substance of the deed, or any true excess of power on the part of Mrs Campbell, and I think it is satisfactory that the statute of 1874 will obviate all future objections of this kind.

But, with your Lordships and the Lord Ordinary, I am of opinion that the question is concluded by the authority of the case of *Watson* v. *Marjoribanks*. In that case the lady had divided the fund amongst the children surviving her only, and these children were all parties, and were the only parties to the litigation. David Marjoribanks, who was the leading objector to the division, was the executor and beneficiary under the will of Charles his brother, to whom he maintained a special share should have been allocated. The Court held that in order to make an effectual appointment it was necessary to allocate a special share in favour of Charles, so that David, the survivor, should have the benefit of that particular share, and the same principle applied to the share of the other brother Edward, who had died intestate, and who was represented by his brothers and sisters. The argument maintained in support of the deed was the same as that here pleaded by the defenders, and the circumstances were substantially the came as occur in this case. There were no creditors parties to the litigation, and although creditors' interests were mentioned in the argument, it ws nevertheless a acase the same as the present, in respect it was a litigation truly amongst the children and in reference to the division of the fund amongst the children. That case has been regarded as the leading authority in our law from 1837 downwards, and the main —perhaps the only substantial—point on which I have ever understood that the case of *Crawcour* v. *Graham* threw doubt on it had reference to the rights of creditors to come in and claim a share of the fund to be divided, rather than to such a question amongst surviving children as we have here.

Concurring as I do, then, in thinking that this case is ruled by the case of *Watson* v. *Marjoribanks*, I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The Court adhered.

Counsel for Pursuers (Respondents)—Dean of Faculty (Fraser)—Rutherfurd. Agents—Gibson Craig, Dalziel, & Brodies, W.S.

Counsel for Defenders (Reclaimers)—Gloag—Kinnear. Agents—Ronald & Ritchie, S.S.C.

Friday, June 21.

FIRST DIVISION.

SPECIAL CASE—GREIG (INSPECTOR OF POOR OF CITY PARISH OF EDINBURGH) *v.* YOUNG (INSPECTOR OF POOR OF PERTH PARISH).

Poor—Relief—Settlement of Illegitimate Pupil Child, Born while Mother in Jail.

An Irishwoman with no settlement in Scotland, when living in the City Parish of Edinburgh was sentenced to nine months' imprisonment, and in Perth General Prison, within Perth Parish, gave birth to a child. When released she returned to Edinburgh, but on her being shortly thereafter sentenced to seven years' penal servitude, her child was left destitute and became chargeable to the City Parish. *Held* (proceeding on the decisions in the cases of *Macrorie* v. *Cowan*, March 7, 1862, 24 D. 723, and *Adamson* v. *Barbour*, 13 D. 1279, 1 Macq. 376) that the parish which afforded relief had no claim of relief against the parish of Perth, in which the child was born.

On 18th May 1870 a female pauper named Eliza-