Thursday July 6.

OUTER HOUSE.

[Lord Kinnear, Junior Lord Ordinary.

OSWALD, PETITIONER.

Entail—Improvements—Telephonic Communication—Act 10 *Geo. III. cap.* 51 *(Montgomerie Act)*; 11 *and* 12 *Vict. c.* 36 *(Rutherfurd Act).*

In a petition by an heir in possession of entailed estates held under a deed of entail dated in 1874 for authority to uplift and apply assigned money, and to charge the said estates with improvement exenditure, the reporters, to whom the Lord Ordinary remitted, reserved for his Lordship's consideration a sum of £218, 6s. 8d. sought to be charged by the petitioner against the entailed estate for fitting up telephonic communication between the mansion-house on the estate and the stables, and between the mansion-house and the factor's house. The petitioner relied mainly on the case of *Earl of Eglinton*, January 31, 1857, 19 D. 346. The Lord Ordinary (KINNEAR) *allowed* the charge.

Counsel for Petitioner—Dundas. Agents—Dundas & Wilson, C.S.

Thursday, July 6.

SECOND DIVISION.

[Lord Fraser, Ordinary.

THE INVERKEITHING MARINE AND FREIGHT ASSURANCE ASSOCIATION AND OTHERS *v.* M'KENZIE.

Contract of Marine Insurance, Constitution of—Agreement and Contract—Tacit Renewal.

By the rules of a mutual marine association it was provided that as to liability for losses "members are bound, jointly and severally, in the amount due, and as to withdrawal from membership, that there shall be no withdrawal from the club allowed but at the close of the club year, and then by giving notice at the special meeting in February, except in case of sale, and all policies will be renewed unless ten days' notice to the contrary be given by the owners before expiry, or a like notice given by the club that they decline to do so." The club year was declared to run from the last day of February in one year to the last day of February in the next year. A member sought reinsurance ten days before the expiry of the club year, making certain proposals which were not accepted. The manager of the association proposed reinsurance upon terms other than those proposed, and offered to deliver new policies upon acceptance of premium bills at six months, in accordance with a new rule of the association subsequently approved at a general meeting. The bills were never accepted.

Held that no express contract had been constituted, and that owing to the proposed change in the nature of the obligation, and of the amount of the sums insured, no contract had been constituted by tacit renewal.

*Mutual Insurance Association—Names of Underwriters—*30 *Vict. c.* 23, *sec.* 7.

Opinion (*per* Lord Justice-Clerk Moncreiff and Lord Young) that policies which bore the subscription of three persons authorised by the rules of the association to bind it, who were members of committee, and of whom one was manager, sufficiently complied with the requirements of this statute.

In this action the Inverkeithing Marine and Freight Assurance Association sued John M'Kenzie, as a member of that association, for the sum of £88, 9s. in name of premiums for two vessels which it is alleged were insured from 1st March 1878 to 28th February 1879, and from the 1st March 1879 to the 29th February 1880.

The defender admitted his liability to the pursuers in a sum of £3, 14s. The liabilities of the members, and the constitution and object of the association, are stated in its rules and regulations.

Rule VI. provides, in regard to liability for losses, that "members are bound jointly and severally in the amount due." In terms of rule IX "The owners of vessels lost shall pay full year's premiums, besides any extra premiums that may be necessary to meet the losses of the year, and shall be entitled to a share of the surplus funds (if any) for that year. No withdrawal from the club allowed but at the close of the club year, and then only by giving notice at the special meeting in February, except in case of sale, and all policies will be renewed unless ten days' notice to the contrary be given by the owners before expiry, or a like notice given by the club that they decline to do so." And Rule XV. declares that the club year is to run from the last day of February in one year to the last day of February in the next year.

The defender had been a member of the association during the years 1875, 1876, and 1877.

On the 18th February 1878 the defender wrote to James Ross, the pursuers' manager, asking for a renewal of the policies, in the following terms:— "*Liverpool*, 18*th Feb.* 1878.

"Dear Sir,—I arrived at this river last night and got docked this morning.

"Please enter the 'Triumph' for £250, and £100 on freight; enter the 'Estramadura' for £200, and £50 on freight, or £100 if the rules carry it. I understood you got all the papers connected with 'Estramadura' average. Let me know which do you want. I am writing the master by this post, also Mr Hammond; Mr Boyd is the Arbroath insurance agent.

"Please let me know if they are accepted at the above.—Yours truly,

"JOHN M'KENZIE, 'Triumph.'"

On the 21st February 1878 Mr Ross sent the following letter to the defender:—

Inverkeithing, 21st *Feb.* 1878.

"Dear Sir,—I have your note of the 18th in reference to club. The number of vessels has been reduced by withdrawals and sales, and few new ones entering that the meeting yesterday reduced the risks to be taken on one bottom; therefore instead of last year's, say £250 on ship and

freight per 'Triumph,' for 1878, and £200 on ship and freight per 'Estramadura,' for 1878, same values as before. Policies to be delivered when premium bills are accepted. Ships continue until intimated off. The papers required for 'Estramadura' average is copy of protest or extracts from log-book, and vouchers for all the money laid out by the master on account of cargo, and general average. I have only got note of assistance slip to harbour, so if you have disbursed more you cannot recover after statement is made up. You will require to state the weight of cargo per bills of lading, and advance got on freight, the cargo having been taken into harbour and allowed to lie on board for some days that allowed it to get more damage than it would have got if it had been discharged at once; whatever the sum the merchant must pay the freight.—Yours truly, JAMES ROSS.

"*P.S.*—1877 is expected to turn out better than 1876. This tests the reduction on risks."

In this letter the words "policies to be delivered when premium bills are accepted," refer to a new rule adopted at a general meeting held on 27th February 1878, a few days after the above letter was written. By this rule "policies are to be delivered on acceptance of premium bills at six months."

The bills never were accepted. The remainder of the facts are narrated in the opinions of the Lord Ordinary and of the Lord Justice-Clerk.

The Lord Ordinary found that a contract of insurance for the year 1878–1879 had been entered into between the pursuers and defender; but that "the policies of insurance and the obligations to pay the premiums thereunder are null and void, in respect that the insurer's names are not therein set forth in terms of the Act 30 Vict. cap. 23, sec. 7;" and assoilzied the defender. His Lordship subjoined the following note:—"The Inverkeithing Marine and Freight Assurance Association is an unincorporated and voluntary association, its object being, as stated in its rules and regulations, 'to raise and maintain a fund by the mutual contributions of its members for the purpose of securing themselves against losses arising to their vessels from the dangers of the sea,' &c. In regard to liability for losses, the 6th rule provides that 'members are bound jointly and severally in the amount due.' The surplus funds are (according to rule 9) to be divided amongst the members each year. With regard to withdrawal from and ceasing to be a member of the association, the same rule declares that 'no withdrawal from the club allowed but at the close of the club year, and then only by giving notice at the special meeting in February, except in case of sale, and all policies will be renewed unless ten days' notice to the contrary be given by the owners before expiry, or a like notice given by the club that they decline to do so.' The club year is declared by rule 15 to run from the last day of February in one year to the last day of February in the next year. The special meeting referred to in rule 9 appears from rule 12 to be in February, eight days before the third Wednesday of that month in each year.

"The defender is here sued for premiums on two vessels belonging to him which it is alleged were insured from the 1st March 1878 to 28th February 1879, and from the 1st March 1879 to the 29th February 1880. The grounds upon which it is said the insurance was effected for each of these years, with consequent liability for premiums, are different. It is said that the defender expressly ordered the insurance upon his two ships for the year from 1st March 1878 to the end of February 1879, but with regard to the year from 1st March 1879 to the end of February 1880 he is said to have continued the insurance in virtue of the rules of the association without any express agreement. This is rested upon the ground that he did not give notice, as required by rule 9, at the special meeting held in February 1879, that he withdrew from the club, and that he did not wish his policies renewed.

"The facts, as the Lord Ordinary holds them to be proved, are as follows:—The defender is the owner of the two ships 'Triumph' and 'Estramadura,' and being a member of this Inverkeithing Association he had these ships duly insured for at least the years 1875, 1876, and 1877. When 1878 arrived he took the subject of the renewal of the policies into consideration. On the 18th of February of that year he wrote the letter to James Ross, the manager of the association, in which he gave this order—'Please enter the "Triumph" for £250 and £100 in freight, enter the "Estramadura" for £200 and £50 on freight, or £100 if the rules carry it. . . . Please let me know if they are accepted at the above.' Ross answered this letter on the 21st, and told the defender that owing to the number of vessels being 'reduced by withdrawals and sales, and few new ones entering, that the meeting yesterday reduced the risks to be taken on one bottom; therefore £250 on ship and freight per "Triumph" 1878, £200 on ship and freight per "Estramudra" 1878.' On the 1st of March Ross again wrote to the defender, sending a statement of accounts of the association, repeating the information that the risks were to be reduced in consequence of the losses which the association had sustained, and intimating that 'your vessels are placed agreeable to this.' He further stated that he had forwarded the bills for the premiums for the defender's acceptance.

"The defender did not repudiate the renewal of the assurance, although several letters followed from him, which, however, had reference entirely to a dispute which had arisen in regard to a claim of average by the defender against the association in consequence of the 'Estramadura' having stranded in entering the harbour of Kirkcaldy. In the absence of further evidence by writing, reference must be made to the parole testimony. The defender, examined as a witness, had this question put to him, 'You had been insured in the ordinary way in the end of February 1878?—(A) Yes.' The defender, however, says that he subsequently withdrew from the club in consequence of not having got a settlement of his claims for average on the 'Estramadura.' This, however, he could not do upon such a ground, and Ross, the manager, expressly denies that the defender ever made such withdrawal. There is certainly no writing to that effect under the defender's hands until the 16th of September 1881, when he wrote to Ross in answer to a demand to pay up—'You are well aware that I was clear of the Inverkeithing Club years ago. You are also aware I went to Edinburgh about Inverkeithing business before now. I am as ready to go again, so you are at liberty to proceed at once. I never

will pay any more cash.' The going to Edinburgh here indicates the defender's willingness to meet his opponents in the Court of Session.

"As regards verbal intimation of withdrawal, Ross speaks to a conversation he had in February 1879, at which the latter intimated that he would not pay the premiums until the claim for average was settled. 'This conversation,' says Ross, 'took place in February 1879. Between February 1878 and that time nothing whatever had occurred to make me think that the defender was not a member of the club. . . . Defender did not withdraw from the club in the beginning of 1878 or of 1879. He never wrote me any letter to put me on my guard against continuing him a member.'

"Accordingly the defender's ships are entered in the books of the association as insured during these two years, and accounts were sent to him containing entries of the premiums claimed by the pursuers. A bill for the premiums of the two years was sent to Mr Gauld, banker at Balmacara, along with the policies of insurance, the former for the acceptance of the defender, and the latter to be delivered to him upon such acceptance being made. It was through this banker that the defender had conducted his transactions with the society in former years. Mr Gauld, after keeping the bill for six months, returned it along with the policies on 20th June 1879 by a letter, in the following terms:—'I return herewith bill on Capt. J. Mackenzie, Kyle, Loch Alsh, p. £83, 3s., for insurance on his vessels. Mr Mackenzie for various reasons declines to sign it. The four policies sent us are also enclosed.'

"The Lord Ordinary is of opinion upon the evidence—1st, That the defender gave express instructions to insure his two ships for the year from 1st March 1878 to 28th February 1879; 2dly, that he did not give express instructions for the insurance of his ships from 1st March 1879 to 29th February 1880, but that he gave no notice of withdrawal from the club at the special meeting in February 1879, nor of any resolution not to renew his policies for the year from 1st March 1879 to 29th February 1880; and therefore it must be held that for this latter year the case is the same as if he had given express instructions to insure.

"If therefore the case were to be determined upon the above facts, there can be no doubt that there was a valid and sufficient contract entered into between the pursuers and the defender, which a court of law would be bound to enforce by compelling the defender to accept the policies or (the period of insurance being now expired) to pay the premiums, were it not that there are statutory provisions which render such contract nugatory.

"*First*, It is said that the pursuers are not entitled to sue upon the policies for the premiums, because the policies were not accepted, and no bills were granted for the premiums, and that the only contract upon which the pursuers can sue is that contained in the letters passing between Ross and the defender, which not being stamped cannot be sued on. A stamp is required by 30 Vict. cap. 23, sec. 9, the provision there being that 'no policy shall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or in equity, unless duly stamped.' Whatever might have been the effect of this statutory provision had the fact been that the pursuers must rely only upon the letters, yet, as the case is not so, the Lord Ordinary holds that the objection is not well founded. There was here a valid agreement between the parties, on the one hand to give and on the other to take out a policy. The policy was duly tendered, and acceptance thereof was wrongously refused by the defender, and the case therefore must be dealt with as if he had performed what was his legal obligation, viz., to take delivery of the policy; and that document being duly stamped, the objection of want of stamp is obviated.

"*Secondly*, But there is another and a more formidable objection, one which can be maintained although the defender had accepted the policies. It is founded upon the 7th section of the Act 30 Vict., cap. 23, that 'no contract or agreement for sea insurance (other than such insurance as is referred to in the fifty-fifth section of "The Merchant Shipping Act Amendment Act 1862") shall be valid unless the same is expressed in a policy; and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured; and in case any of the above-mentioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes.'

"The Lord Ordinary, in the face of this express statutory provision, is obliged to hold that the policies (which were delivered upon the above assumption) are null, and therefore that no legal obligation lies upon the defender to make payment of the premiums. The policies bear to be subscribed by three persons who are members of the committee, and one of whom is also manager. But they subscribe not for themselves alone, but 'for ourselves and the other members of the Inverkeithing Marine and Freight Assurance Association.' The names of the other members are not given, and the case comes therefore within the purview of the Act of Parliament. Mr Arnould in his 'Treatise on Marine Insurance,' vol. i. p. 151, gives a history of the insurance clubs, of which the Inverkeithing one is an example, and refers to the section of the Act of Parliament in question, in reference to the transactions of these clubs, with this remark—'As neither the sum insured nor the names of the underwriters are capable of being ascertained, the provision of the statute threatens to prove fatal to these clubs, probably without any intention of so affecting them on the part of the Legislature.' The sum insured is ascertained under the policies in the present case, but the names of the underwriters are not. On the face of the document they are not merely the three persons who sign, but these persons along with a number of others not named. The present case cannot be distinguished from that of *Arthur Average Association*, L.R., 10 Ch. 542, 20th June 1875.

"The objection in law here given effect to ought to have been stated in the outset, and so saved the leading of a proof which has turned out to be useless. The Lord Ordinary has given his opinion upon the import of that proof, in case a court of review may differ from him upon the construction of the statute. But holding that the proof has been thrown away, in consequence

of the plea not being stated *tempestive*, he has limited the award of expenses in favour of the defender."

The pursuers reclaimed, and argued—As regards the year 1878, there was a continuing contract; further, there was an express contract in virtue of the letters of the pursuers and the failure of the defender to reply. As to the year 1879, the contract was continued by tacit renewal. The *Arthur* case is to be distinguished from the present case upon four grounds—(1) There there was a special rate policy; (2) no rules as here; (3) no one personally bound; (4) it was impossible to say who were the assured, or what their liability. Moreover, the statute is a revenue statute, and its object is accomplished if the stamp-duty is secured.

The respondents argued—That admitting the letter instructing insurance, the defender before the completion of the contract refused to accept the bills or take delivery of the policies until the average on the "Estramadura" was adjusted and paid by the club. If his letters instructing insurance were not carried out the defender had *locus pœnitentiæ*. A new rule was introduced. The policies were not delivered, and a new term was introduced into the contract which excluded tacit renewal without acquiescence. The sums insured were different in amount. As regards 1879 the pursuers were in bad faith in continuing the defender's insurance without his approval, and after his refusal to accept the bills.

Authorities—*In re Arthur Average Association*, 10 L.R. (Ch. App.) 542; Arnould, Marine Insurance, i. 151; *in re Teignmouth and General Mutual Shipping Association*, 14 L.R. (Eq.) 148; Marshall, Marine Insurance, p. 228, note *a*; *Xenos* v. *Wickham*, 33 L.J. (Ex. Ca.), C.P. 313—*rev.* 2 L.R. (Eng. and Ir. App.) 296; *Somerville* v. *Rowbotham*, June 27, 1862, 24 D. 1187; *Dowell* v. *Moon*, 4 Camp. 166; Bell's Prin. sec. 465; *Mills* v. *Albion Insurance Company*, May 13, 1826, 4 S. 575, 3 W. & S. 218; *Gray* v. *Gibson*, 2 L.R., C.P. 120.

At advising—

Lord Justice-Clerk—I do not think it necessary to hear counsel further in support of the judgment of the Lord Ordinary, because I have come to the conclusion that there is no sufficient proof that there ever was a contract of insurance for the years 1878–79. The defender therefore is entitled to absolvitor. I do not think it necessary to go into detail. It seems that this association, which is a kind of co-operative company—the company consisting entirely of persons who must be both insurers and insured, and who mutually assist each other—has among its rules a provision to the effect that a member unless he intimate his intention of withdrawal within ten days before the expiry of the club year shall be held to have renewed his policies.

In the present case the year expired on the 28th February 1878. On the 18th of that month Mr M'Kenzie, who had two vessels insured—the "Triumph" and the "Estramadura"—wrote a letter suggesting some alterations, and certainly intending to insure provided that these terms were agreed to; for I see no reason to suppose that he intended to quit the association provided he got what he wanted. The terms, however, were not granted. As I have already said, he wrote well within the 28th February. He was therefore quite free to go on or not with the contract, and he remained thus free unless he did something to bind himself. In the meantime the association altered one of the most important of its rules, by which alteration they provided that no policy of insurance should be binding unless bills had been granted. This was an important provision which effected a fundamental alteration in the former contract, and I should certainly have great doubts whether after this alteration tacit renewal could be operative unless the alteration was within the knowledge of parties. At all events, that provision as to the presumption of the renewal of the policy is one to be very strictly interpreted. Moreover, a letter was written on the part of the company suggesting some alterations, and it is said that because the defender did not repudiate these suggestions he must be held bound. I am not prepared to hold this, in the first place, because the period which elapsed was only two months, and we do not in the least know where Mr M'Kenzie was during this time. He was a seafaring man, who was often abroad with his vessel. His silence is merely an element in the case, and would be valuable only if other considerations had pointed to the conclusion that he intended to enter into the contract. By itself it is entirely insufficient, seeing that the demand of Mr M'Kenzie was for something entirely different from the company's proposals. But things were brought to a point by the company sending bills to M'Kenzie in accordance with the new rule. M'Kenzie did not sign the bills, and Ross wrote in terms which appear to me to be almost conclusive of the question of tacit renewal. He wrote—"If anything happen to your vessel you cannot claim unless you pay premiums. I have sent both last year's and this year's policies to Mr Gauld. He will give you these when you sign the bills." Now, if this was the footing on which the policy was executed, and on which the company acted, it is out of the question to plead that mere acquiescence will raise up a contract contrary to the only writing which we have under M'Kenzie's hand. Things go on; the bills are sent for signature, but are never signed. That seems to me conclusive of the question as to tacit renewal for the second year. If the policy was never completed for the year 1878 by signing the bills there could not possibly be tacit renewal for the year following. Therefore that M'Kenzie declined is quite clear apart from the oral evidence. But we have M'Kenzie's own evidence that he was not bound for either of the years 1878 or 1879.

If we had to decide the other question I have a very clear opinion. I do not see what the mischief was against which the statute was intended to provide, and I am not prepared to say that I should give effect to the Lord Ordinary's view. It is a Stamp Act exclusively. If there are individuals who sign their own names, that provides sufficiently for the requirements of the Stamp Laws, even although they say that they have signed on behalf of certain parties who have not themselves signed.

It is not necessary to go into the question of a separate *persona*. I think there is here an individual obligation, and that the policy is entirely unexceptionable under the statute. But it is not necessary to decide this point, and I should be sorry to express a positive opinion after having

read that of the Master of the Rolls in the case cited in the Lord Ordinary's note.

Lord Young—On the first question I entirely agree with your Lordship. It is, whether or not the pursuers have established a contract of insurance for the years 1878–79 as alleged on record? I think that the evidence is insufficient; and that, in the best judgment I can form, there was no contract of insurance for those years. Therefore so far the defender is entitled to absolvitor, leaving some few pounds over, which are not in dispute. That is sufficient for the decision of the case. But I am unwilling that the discussion of an important legal question, extending over so long a time, should be altogether barren of result, especially as there is a judgment of the Lord Ordinary with a note explanatory of his views. I incline to the opinion which your Lordship has expressed, and I incline pretty decidedly. I think the statute was not contravened but obeyed by the policies before us. I notice that Sir James Park in his treatise on the Law of Insurance, at p. 15, notices the introduction of the rule of which the statute cited by the Lord Ordinary is the last example. I mean that the rule has been continued through a series of statutes of which this is the last. Baron Park says—"It was formerly very much the practice to effect policies of insurance in blank as it was called, that is, without specifying the names of the persons for whose use and benefit or on whose account such insurances were made—a practice which has been found in many respects to be mischievous and productive of great inconveniences"—"inconveniences," for instance, the policies might be handed over to enemies. In this statute provision has been made against blank policies, following the examples of Genoa and France; and the remedy seems to have passed a step beyond the mischief—I mean, of course, if the argument is sound, that it requires the names of all the obligants to be inserted in the policy, for that they had not all been inserted had never been productive of mischief. A policy with one name is a perfectly good policy, and will bind that one individual unless he is acting for another person, in which case he will bind himself or that person in accordance with the general rules of law. These rules of the common law, as to disclosed and undisclosed principals, apply to all classes of cases, unless they are excluded by considerations of a more powerful kind or by express enactment of the Legislature. An agent may act for his principal, and will bind him if disclosed, and if he has not disclosed him, then he will be bound himself, and will have such remedy against his principal as the case admits of. Indeed, he will bind his principal if the other party should come to know of the existence of the principal. All these considerations operate universally unless specially excluded.

Here the policy was signed by three gentlemen who profess to subscribe for others. In so far as those three gentlemen had authority to bind those others, they will bind them in accordance with the principles of the common law. These others were quite capable of being ascertained. It is not disputed that these policies were in accordance with the rules of the association. The association printed and made them part of the policy, and accordingly the obligation in the policy is an obligation in pursuance of the association. It was intended by the signature to bind the association. I say "intended" because there may be some principle which prevents effect being given to the intention. If three gentlemen say they subscribed for themselves and for other members, of course they do so according to the rules. That they had authority is not here disputed. This policy is not then of the nature of a blank policy. The provisions of the statute seem to me completely satisfied. The extent of the obligation which the insured obtained is not a question under the statute at all. If he got only three, he got a good legal obligation, though it might be of little practical value. If A B signs a policy for C D, having C D's authority, he will bind him as ordinary principal. If he had not his authority he will bind himself according to the common law. Whether three or more, or if more how many more, of the members are bound is not a question under the statute. The only question under the statute is whether this is a good legal obligation independent of its extent. The statute is expressed, as your Lordship remarked, in a very striking manner. It requires "that every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured." It was not suggested that the names should be both specified and described. How to subscribe a name without specifying it I do not understand. I should suppose the names are sufficiently specified by the subscription. It is of no significance what the name is so long as you ascertain who the person is—*dummodo constet de persona.* Whether subscription is by the party himself or by another, the *nomen* is specified. This question we may have to examine more particularly at another time.

Lord Craighill—(After stating his concurrence with the Lord Justice-Clerk on the first question, observed)—Upon the second question we are not at present called on to give judgment. In my view, it will be soon enough to decide the question when it shall arise, and until it does arise I wish to reserve my opinion. I may, however, say, for my own part, I should in all probability have concurred in your Lordships' judgment.

Lord Rutherfurd Clark—I have experienced more difficulty than your Lordships in regard to the question of fact, but I do not wish to express my dissent. As to the second question, I wish entirely to reserve my opinion, and to keep myself perfectly free upon the whole matter.

The Lords recalled the Lord Ordinary's interlocutor, and found there was no concluded contract of insurance for the years 1878 and 1879, granted decree for the sum of £3, 14s. admitted to be due, and *quoad ultra* assoilzied the defender.

Counsel for Pursuers (Reclaimers)—Mackintosh—Shaw. Agent—P. Morison, S.S.C.

Counsel for Defender (Respondent)—Goudie—Armour. Agents—Beveridge, Sutherland, & Smith, S.S.C.