the person adjudged by the editor to be the next-of-kin of any person killed in a railway accident, and having the current number of the paper in his or her possession at the time. I need not refer to the advertisement in *Tit-bits*, because it is practically to the same effect. The advertisements go on to say—"The person or persons who shall be adjudged by the editor of *Answers* to be the next-of-kin of the deceased shall be the only person or persons entitled to receive and give a valid discharge for the money." It is suggested that that only means that it is left to the editor of the newspaper to select from among the next-of-kin one who may give him a good discharge, leaving the question as to whom the money belongs to be settled among the next-of-kin. I am unable to read the contract in such way. The words I have quoted above do not mean that the person selected is to be the only person entitled to give a good discharge, but that the person adjudged by the editor to be the deceased's next-of-kin is to be the only person entitled to claim the money, to receive it, and to give a good discharge. Here the editor, having the whole circumstances before him, including the fact that there were other next-of-kin, adjudged that the defender was the person entitled to claim the money, to receive it, and to give a discharge. I repeat what I said in the case of *Law* v. *Newnes*, 21 R. 1027, that if the editor was proved to have acted in *mala fides* some remedy would be found. But in the present case there is no suggestion of *mala fides;* the editor seems to have acted on intelligible and reasonable grounds. He made full inquiry into the circumstances and found that Miss Hunter resided with her deceased brother, and, as he says, that she had been to a large extent dependent on the deceased man for her support and was the principal sufferer by his death.

I think the Lord Ordinary's judgment here is well founded, and also that it is in entire accordance with the decision in *Law* v. *Newnes*.

LORD MONCREIFF—I am of the same opinion. If the editor of *Answers* had a power of selection there is an end of the question because the narrative of the case published in his paper shows that, in the full knowledge of the existence and claims of other next-of-kin, he selected Miss Hunter not as a trustee but as an individual, and that he favoured her claim because she was the principal sufferer by the death of the deceased. If, on the other hand, the editor acted *ultra vires* and not in good faith, then I doubt whether the pursuers have any claim against Miss Hunter. They may, but I greatly doubt it, have a right of action against *Answers*. But if they have any legal claim it can only be against that paper, because after full inquiry the sums in question were paid to Miss Hunter for her own use alone.

On the whole matter, in accordance with the decision in the case of *Law* v. *Newnes*, my opinion is that the editor had an unqualified power of selection provided he exercised it *in bona fide*, and it is not suggested that he acted otherwise.

The Court adhered.

Counsel for the Pursuers and Reclaimers — Younger — A. A. Fraser. Agent — J. Struthers Soutar, Solicitor.

Counsel for the Defender and Respondent —Hunter—Ross Taylor. Agents—Macpherson & Mackay, S.S.C.

Wednesday, November 30.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ALLAN *v.* THE INCORPORATION OF CORDINERS OF EDINBURGH.

Incorporation — Trade Incorporation in Burgh — Friendly Society — Sanction of Court to Bye-Laws — Entry-Money — Usage — Burgh Trading Act 1846 (9 *and* 10 *Vict. cap.* 17), *sec.* 3.

The Burgh Trading Act 1846, section 3, made it lawful for trade incorporations to make bye-laws relative to the management and application of their funds and relative to the qualification and admission of members with the sanction of the Court of Session, but reserved power to such incorporations to make without the sanction of the Court such bye-laws as they could theretofore have made of their own authority.

In 1850 an Edinburgh trade incorporation obtained the sanction of the Court to bye-laws which stipulated that any alterations should receive the sanction of the Court as required by the statute. These bye-laws included a table of entry-money. The incorporation subsequently increased the entry-money from time to time without obtaining the sanction of the Court.

The practice prior to 1846 was not uniform. In 1729 a decreet-arbitral in a submission between the Town Council and the trade incorporations within the city declared that bye-laws made by the incorporations were of no force unless ratified by the Council. From 1729 to 1812 the incorporation altered its entry-money without obtaining the approval of the Council, but from 1812 to 1840—the date of the last bye-laws prior to 1846—the incorporation obtained such approval.

In an action of declarator brought in 1903 by an applicant for admission against the incorporation, *held* that the bye-laws regulating the entry-money passed since 1850 required as a condition of their validity the sanction of the Court of Session, inasmuch as prior to 1846 the incorporation had not a free hand in that matter, and that therefore the applicant was entitled to be admitted as a member of the incor-

poration on payment of the entry-money fixed by the bye-laws sanctioned in 1850.

Opinion (*per* Lord M'Laren) that the Court having adjudicated upon the matter in 1850, its decision was a decree by a competent authority in execution of a statutory power and could not be reviewed.

By decree-arbitral dated 12th March 1729–1730, following upon two submissions by the Magistrates and Merchant Council and Deacons of Crafts and Trade Counsellors of Edinburgh, it was, *inter alia*, found and declared "that by the sett of the town neither the merchants among themselves nor the crafts and their deacons or visitors can have or make any particular or general conventions as deacons with deacons, deacons with their crafts, or crafts among themselves, without the advice and consent of the provost and council, . . . and that bye-laws made by the incorporations for themselves are of no force unless they are ratified by the magistrates and council, but . . . that the said magistrates and council have no power to make bye-laws whereby the said incorporations and their successors can be bound to admit all such persons as shall request the same and shall appear to the magistrates and council to be well skilled and qualified to occupy and practise in their crafts, upon payment of such valuable consideration as should be rated and determined by the said magistrates and council, and . . . that they had no power to control the management of the several stocks belonging to the said incorporations, or to make bye-laws concerning the same."

From the date of this decree-arbitral to 1812 the Incorporation of Cordiners fixed the entry-money for admission to the craft as it pleased without obtaining any sanction. From 1812 to 1840 it submitted its bye-laws, which contained the table of entry-money, to the Town Council for approval, and when approved these were observed till superseded by a later set. The bye-laws approved 7th July 1840—the last set prior to 1846—contained the following provision:—"*Alterations and Amendments.* The present members of this Incorporation and all who may hereafter enter bind and oblige themselves to conform and adhere to to the foregoing regulations, reserving to them the power . . . to alter or amend the same as exigencies may require, but any alteration or additional regulation must be laid before the Incorporation in writing at a quarterly meeting, and if the motion shall appear worthy of further consideration it shall lie over till next quarterly meeting, when it shall be fully discussed. If the motion be then approved of, it shall be inserted into the minutes of the Incorporation and shall be binding upon all concerned." . . .

The Burgh Trading Act 1846 (9 and 10 Vict. c. 17), which abolished the exclusive trading privileges in burgh of trading incorporations, enacts:—Section 3—"And whereas the revenues of such incorporations as aforesaid may in some instances be affected, and the number of the members of such incorporations may in some instances diminish by reason of the abolition of the said exclusive privileges and rights, and it is expedient that provision should be made for facilitating arrangements suitable to such occurrences, be it therefore enacted that it shall be lawful for every such incorporation from time to time to make all bye-laws, regulations, and resolutions relative to the management and application of its funds and property, and relative to the qualification and admission of members in reference to its altered circumstances under this Act, as may be considered expedient, and to apply to the Court of Session by summary petition for the sanction of the said Court to such bye-laws, regulations, or resolutions; and the said Court, after due intimation of such application, shall determine upon the same, and upon any objections that may be made thereto by parties having interest, and shall interpone the sanction of the said Court to such bye-laws, regulations, or resolutions, or disallow the same in whole or in part, or make thereon such alterations, or adject thereto such conditions or qualifications, as the said Court may think fit, and generally shall pronounce such order in the whole matter as may to the said Court seem just and expedient; and such bye-laws, regulations, or resolutions, subject to such alterations and conditions as aforesaid, shall be, when the sanction of the said Court shall have been interponed thereto, valid and effectual, and binding on such incorporations: Provided always that nothing herein contained shall affect the validity of any bye-laws, regulations, or resolutions that may be made by any such incorporation without the sanction of the said Court which it would have been heretofore competent for such incorporation to have made of its own authority or without such sanction."

In 1849 the incorporation submitted to the Court of Session for its approval a set of bye-laws which contained a table of entry-money. These bye-laws as approved by the Court on 20th July 1850 provided by article 43—"The present members of this incorporation and all who may hereafter enter bind and oblige themselves to conform and adhere to the foregoing regulations, reserving to themselves the power . . . to alter or amend the same as exigencies may require; but any alteration or additional regulation must be laid before the incorporation in writing at a quarterly meeting, and if the motion shall appear worthy of further consideration, it shall lie over till next quarterly meeting, when it shall be fully discussed. If the motion be then approved of it shall be inserted into the minutes of the incorporation and shall be binding upon all concerned, after duly receiving the sanction of the Court of Session, as required by the Statute 9 and 10 Vict. c. 17."

The entry-money required by these bye-laws of 1850 from an applicant for entry at the far hand between the ages of 35 and 40 was £160. The incorporation, however, thereafter without obtaining the sanction

of the Court, increased from time to time the entry-money until in 1903 for a similar applicant it was £1500.

Upon the 9th July 1903 James Allan, shoemaker, Edinburgh, raised this action against the incorporation and its deacon and its treasurer, as representing the said incorporation, in which he sought to have it found and declared "(*First*) That the pursuer, upon proving his qualifications and satisfying the conditions required by the bye-laws and regulations of the defenders' incorporation, dated 1850, or by any other bye-laws and regulations which may be found to be applicable to the said incorporation, is entitled to be admitted as a member of the said incorporation in the character . . . of an entrant 'at the far hand;' (*Second*) . . . that the defenders are not entitled to exact as a condition of admitting the pursuer as a member of the said incorporation any higher dues of entry than those prescribed by the said bye-laws and reglations, dated 1850, or by any previous bye-laws and regulations which may be found to be applicable to the said incorporation; and (*Third*) the defenders ought and should be decerned and ordained . . . to admit the pursuer as a member of the said incorporation as at 24th June 1903, or at such other date as may be determined by our said Lords, on payment of such sum, not exceeding £160, as may be determined to be the dues of entry legally exigible by the defenders from an applicant for membership in the said incorporation entitled to apply as an entrant 'at the far hand.'"

Upon 5th March 1904 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor—"Finds that the alterations on the rules of the defenders' incorporation, including the rules as to entry-money made subsequent to the rules sanctioned in 1850 by the Court of Session, require as a condition of their validity the sanction of the Court of Session: And with this finding continues the cause for further procedure."

Opinion.—"The pursuer, who is a master bootmaker in Edinburgh, seeks in this action to declare his right to be admitted to the ancient Incorporation of Cordiners upon payment of a certain entry-money, being the entry-money specified for intrants at the far hand in the rules and regulations of the incorporation approved in the year 1850 by the Court of Session in terms of the Act of 1846. Apart from the question of entry-money there is no dispute as to the pursuer's qualifications or as to his right to admission. He is not a freeman's son in the sense of the rules. That is now conceded. But he is a burgess of Edinburgh and a member of the trade who has made an approved essay; and, assuming the rules and regulations upon which he founds to be still in force, there appears to be no doubt that the entry-money which he tenders is all that is exigible.

"The answer made by the corporation, which now consists of six members and one annuitant, is simply this:—That the rules and regulations in question are, as regards at least the matter of entry-money, no longer in force, having been altered from time to time since 1850 by resolutions of the corporation passed in the prescribed manner, and altered ultimately to the effect of raising the entry-money payable by intrants at the far hand, of the pursuer's age, to £1500.

"The reply of the pursuer is, that the alterations in question were and are ineffectual, inasmuch as they were not at the time, and have not yet been, sanctioned by the Court of Session; such sanction being, as he contends, required under the rules sanctioned in 1850, by the 43rd article of which it is provided. . . . [*His Lordship quoted the article, supra.*]

"The pursuer says, and so far I agree with him, that although elliptically expressed, the fair meaning of these words is, that while the rules may, so far as the corporation is concerned, be altered after certain procedure, all alterations so made require, as a condition of their validity, to be submitted to and approved by the Court of Session.

"To this, however, the defenders again answer that, assuming the above restriction on the autonomy of the corporation to have been imposed by the said rules, the result only is, that the said rules were to that extent *ultra vires* of the Court, being so on the ground that prior to the Act of 1846 the corporation had power to make bye-laws and regulations of its own authority, and that the last clause of section 3 of the Act provided with regard to all rules approved by the Court 'that nothing therein contained shall affect the validity of any bye-laws, regulations, or resolutions that may be made by any such incorporation without the sanction of the said Court, which it would have been heretofore competent for such incorporation to have made of its own authority or without such sanction.'

"So far the controversy seems to be brought to what might be thought a comparatively narrow point, the defenders' case depending on the corporation's alleged power prior to 1846 to make bye-laws, &c., of its own authority, and the pursuer's case resting upon the two propositions—(1) that prior to 1846 the corporation, according to the sett of the burgh, as interpreted by usage, could only make bye-laws subject to ratification by the Town Council, and (2) that, supposing this to be otherwise, the corporation having submitted to the Court of Session in 1850 a set of rules and regulations, and having proposed or accepted without objection as one of those rules the requirement above expressed, cannot now at this distance of time dispute that the requirement in question is part of the law of the corporation. I should perhaps add that the pursuer has also a third point which raises a large and general question with which I do not propose to deal, viz., that, assuming everything else in the defenders' favour, the amount to which they have now raised the entry-money at the far hand, although in accordance with a principle upon which they have always acted, constitutes practically a breach of

trust, as being in fact prohibitory of the entry of members of the trade, and having the effect of confining the benefits of the corporation (which are now very large) to one or two persons and their respective families. As I have said, however, I do not think it necessary, in the view which I take of the case, to do more than notice this point. I shall accordingly proceed to consider the pursuer's other points, taking first that second above mentioned, viz., that the defenders are now barred from contending that the rules of 1850, as sanctioned by the Court of Session, were to the extent in question *ultra vires* under the statute.

"I must say that I should have some difficulty in sustaining the suggested bar. In the first place, I do not think that the lapse of time makes here very much difference. For although fifty years have now elapsed without any challenge of the rules of 1850, there appears to be no doubt that during all that time the matter of entry-money has been in fact dealt with as if it had been entirely in the hands of the corporation. In other words, as regards entry-money, the requirement as to the sanction of the Court has been since 1850 entirely ignored. The question must therefore, I apprehend, be taken, as if, for instance, it had been raised by an action of reduction brought, say, in the year 1860, when the entry-money was first raised. And in that view it is, I think, difficult to say that by reason simply of acquiescence the corporation could in 1860 have been held bound for all time to accept restrictions on its autonomy which *ex hypothesi* it was *ultra vires* to impose. I rather think that if the question had been raised in 1860 there must have been inquiry. —inquiry into the question whether at the date of the statute the corporation had in fact the autonomy claimed. Not that I doubt that the absence for fifty years of any assertion of the supposed autonomy must have been then, as it must be now, an important element in the inquiry. But that, as it appears to me, is the extent to which the pursuer's argument can be fairly pressed.

"Inquiry being thus open, how stood the matter in 1846 when the Act passed? Had the corporation of their own authority—that is to say, as I read the statute, without the sanction of the Town Council or of any outside body—power to alter their entry-money, and in particular their entry-money at the far hand. And here the defenders' first argument is a short one, and it is this. They concede that from about 1812 to 1846 the matter of entry-money was regulated by bye-laws of the corporation made from time to time, and submitted to and sanctioned by the Town Council. But they say that by the latest of these bye-laws made in 1839, and sanctioned by the Town Council in 1840 (being the bye-laws in force when the Act of 1846 passed), the matter of future additions and alterations was specially dealt with, and the power to make additions and alterations was declared to be fettered only by certain requirements as to procedure, and not at all by any requirement as to the sanction of the Town Council. They say, in short, that the Town Council in 1840 either waived for the future their right of ratification, or recognising that they in truth had no such right, acknowledged as from that date the autonomy of the corporation.

"Now, as to this, I should doubt very much whether, if it be once assumed that under the sett of the burgh the sanction of the Town Council was required, it was in the power of the Town Council of 1840 to divest themselves and their successors of a function which involved both the exercise of a right and the performance of a duty. Such a delegation of function by a public body would, I apprehend, raise rather a large question. But this at least seems clear, that the presumption is, and must be, against such a construction of the rules of 1839, and particularly such a construction of the article founded on. The matter of sanction is not, it will be observed, dealt with expressly, as it subsequently was, in the regulations of 1850. In other words, the review of the Town Council was certainly not excluded in terms. And that being so, I must say one would hardly expect so important a change to be left to mere implication. The presumption is, I think, against the implied finality. And altogether I am of opinion that the more reasonable construction of the rules of 1839 is that the sanction of the Town Council is not mentioned simply because its necessity was assumed as a matter of course.

"The question therefore comes back to this —What in 1846 were the powers of the corporation under the sett of the burgh, interpreted of course *in dubio* by the usage which followed? And on that question the first observation is that there is at least no dispute as to the documents which constitute the sett of the burgh. These are enumerated in the joint-minute of admissions. And the important documents are, it is I think admitted, (1) the submission to, and (2) the decreet-arbitral by, the Earl of Ilay dated in 1729-1730, of which passages are printed.

"There was at the recent hearing much argument upon the construction of those passages. The pursuer founded specially upon the general assertion of what may be called the visitorial power of the Town Council over its subordinate corporations, and on the express finding and declaration 'that bye-laws made by corporations for themselves are of no force unless they are ratified by the Magistrates and Council.' The defenders, on the other hand, founded on the immediately subsequent clause, which forbade the making of bye-laws by the Town Council with respect to the affairs of the corporations, and particularly on the last clause of the decree, which 'likewise finds that they (the Magistrates and Council) have no power to control the management of the several stocks belonging to the said incorporations or to make bye-laws concerning the same.' What I have to determine is, what is the fair reading of these passages, read of course in connection with the decreet-arbitral as a whole?

"I have come to be of opinion that with respect to all bye-laws (that is to say, all rules and regulations laid down by the

corporations as binding until lawfully altered) the enactment which I have quoted is absolute. The instance must be with the corporation, but the Town Council must ratify. And while with respect to their 'stocks' (whatever that expression covers) the corporations are to be free, it seems enough for the present purpose to say that 'management of stocks,' while it may cover the investment and application of capital, or even also of revenue, can hardly be held to cover such matters as conditions of entrance—conditions which in these days involved not only pecuniary considerations but considerations of civic policy. In short, if the decreet-arbitral had had to be construed as at its date, I should have, I confess, thought it fairly clear that, in such matters as the conditions of entry, the corporations must have been held bound to proceed by bye-laws, which bye-laws were to be of no effect until ratified by the Town Council.

This, however, brings us to the question of usage; and as to that I must acknowledge that, if the present dispute had arisen, say, in the year 1810 (when a somewhat similar dispute did in fact nearly arise), it would have been rather difficult to say what, having regard to the usage since 1729, must have been taken as the law of the corporation. For whatever was the just construction of the decreet-arbitral, it is quite certain that the corporation acted on the assumption that in fixing its entry-money—at least its entry-money at the far hand—it was bound by no rules and required no sanction. For what it in fact did was to make in each case as it arose the best bargain it could with the applicant. It is true that the number of entries at the far hand was very limited—about 30 in all for eighty years. It is true also that, although the rise of the entry-money (from £5 in 1729 to £40 or £50 in 1810) was very substantial, it was never so increased as to be prohibitory; while as regards the entry of freemen's sons and apprentices there was really no change during the eighty years. Still the corporation seem to have charged all stranger craftsmen very much what they chose; and perhaps I might go further and say that they plainly enough considered that, even apart from any question of entry-money, they were not bound to admit at the far hand any applicant who was not 'agreeable to the corporation.'

"It is not, however, in my opinion necessary to consider what would have been the situation if this state of matters had continued, not down to 1810, but down to 1846. For about 1810, or even earlier, it seems to have been brought home to the then members of the corporation that they had been acting irregularly; and that instead of wrangling over the entry-money to be charged in each individual case, they behoved to have rules or bye-laws dealing with that and with similar matters. They also seem to have assumed or been advised that according to the sett of the burgh they were bound on making such rules or bye-laws to submit them to the Town Council. At all events for that or some other reason they did about this time begin to adopt that course. For in 1812, and again in 1817, there were prepared and passed by the corporation and submitted to the Town Council, in professed obedience to the sett of the burgh, successive tables of entry-money, which, being sanctioned by the Town Council, were observed until superseded by other tables similarly sanctioned. Again in 1828 (when, the funds having greatly increased, annuities to members at a certain age irrespective of poverty were first introduced), formal bye-laws were prepared and similarly sanctioned—bye-laws of which new tables of entry-money were an important part. And then lastly, in 1839, as already mentioned, those bye-laws were superseded by another set of bye-laws dealing with the same subjects, and, *inter alia*, increasing the rates of entry-money—bye-laws which were, as already said, submitted to and sanctioned by the Town Council.

"In short, the history of the matter was in substance just this. For about eighty years from its date the decreet-arbitral was, I will not say ignored, but treated as if it did not apply, at all events to the matter of entry-money. Then for about thirty-five years, and down to the statute of 1846, there was a contrary usage—a usage in entire conformity with the decree-arbitral as I am disposed to construe it.

"The ultimate question is whether in that state of the facts the Court can fairly affirm that in 1846 the defenders' corporation had according to the sett of the burgh in the matter of entry-money an absolutely free hand. On the whole, having given the matter my best consideration, my conclusion is that they had not. I think the usage up to 1810 is more than balanced by the usage from 1810 onwards; and that, apart from usage, and also taking the usage as a whole, the sanction of the Town Council was in 1846 still required. The result of course is that the corporation were not when the Act of 1846 passed, in the matter in question, autonomous; and not being so, their rules became from 1846 onwards subject to the sanction of the Court of Session.

"Whether the defenders may now by application to the Court have the alterations made by them since 1850 sanctioned, and what will be the effect of that sanction if obtained, I do not, at least at present, propose to consider. Something may depend on what the Court do, and particularly on whether they may see their way to make their sanction retrospective."

The defenders reclaimed, and argued—The decree-arbitral of 1729-1730 was quite clear in excluding from the Town Council altogether all questions connected with finance. These were for the incorporation alone, and among such questions was that of the amount of the entry-money. To increase the entry-money was a power naturally in such incorporations—*Reid* v. *United Incorporations of Mary's Chapel*, May 27, 1790, M. 1977; *Duncan* v. *Magistrates of Aberdeen*, July 21, 1786, M. 2003,

Following upon the decree-arbitral there was the invariable usage down to 1812 of the incorporation altering its entry-money without any outside sanction. Usage for so long a period would have been sufficient to entitle the incorporation to ignore the Magistrates and Council even had the sett of the burgh provided for their sanction — *Gardiner* v. *Magistrates of Kilrenny*, March 5, 1828, 6 S. 693; *Gray* v. *Smith*, June 30, 1836, 14 S. 1062. In 1812 therefore the incorporation's right to alter its entry-money was undoubted, and it could not be lost by its having submitted to the Town Council for sanction during the short period 1812-1840 three or four different sets of bye-laws which happened to contain tables of dues. The Act of 1846 brought in approval of Court where approval was then required, but specially reserved to the incorporations freedom where they then had it, and the Court in granting its sanction in 1850 and stipulating for such sanction to alterations did not intend and could not impose any restriction to which the incorporation was not already liable—*Incorporation of Wrights, &c., of Leith*, June 4, 1856, 18 D. 981. It was its duty to adjust the annuities, &c., and it must also regulate the entry-money so as to keep a balance of funds—*Muir* v. *Rodger*, November 18, 1881, 9 R. 149, 19 S.L.R. 121. The action of the incorporation towards the pursuer was merely following lines laid down long ago and followed ever since. The incorporation's power was good in 1845, and nothing had been done since to affect it.

Argued for the pursuer and respondent—These entry-dues were illegally imposed, because they had not received the sanction of the Court. (1) The regulations which were sanctioned in 1850 were quite clear on the matter, for they required the sanction of the Court to any alterations. The matter was before the Court then, and its decision amounted to *res judicata* as against the defenders. (2) But if that was not enough, and they had to look at the question prior to that date, they found undoubtedly at first alteration of entry-money required sanction. It was not a matter of small importance, and did not come within the term "management of stocks." Up to the Act of 1846 the conduct of the incorporation had not been uniform, for while during the later years it had obtained the sanction of the Town Council to alterations of the entry-money, during the earlier it had not done so. But in such a matter it would not be sufficient that sanction was not obtained; it would be necessary to prove the Town Council was deprived of power. Nothing short of positive waiver could be of any use, and a town council could not waive such powers for its successors—*Incorporation of Tailors in Glasgow* v. *Trades House of Glasgow*, November 21, 1901, 4 F. 156, 39 S.L.R. 109.

The following authorities were also referred to—*Ritchie* v. *Cordiners of Edinburgh*, December 9, 1823, 2 S. 565; *Tait* v. *Muir*, December 19, 1902, 5 F. 288, 40 S.L.R. 242; *Webster* v. *Tailors of Ayr*, November 14, 1893, 21 R. 107, 31 S.L.R. 89; *Incorporation of Tailors in Glasgow* v. *Inland Revenue*, May 26, 1887, 14 R. 729, 24 S.L.R. 516; *Kesson* v. *Aberdeen Wrights and Coopers' Incorporation*, November 2, 1898, 1 F. 36, 36 S.L.R. 38.

At advising on 15th November—

LORD PRESIDENT—The question in this case is whether the Lord Ordinary is right in holding that certain alterations on the rules of the defenders' corporation, including the rules as to entry-money, made subsequent to rules sanctioned by this Court in 1850, required as a condition of their validity the sanction of this Court.

The following are the circumstances under which the question arises:—

The pursuer is a master shoemaker in Edinburgh, where he has been engaged in that business all his life. He is a burgess or freeman of the city of Edinburgh, and is the son of Charles Allan, shoemaker, Princes Street, Edinburgh, who is also a burgess of Edinburgh. The pursuer is thirty-nine years of age.

The defenders are one of the old trading corporations of Edinburgh, and the existing deacon and treasurer of the corporation.

The defenders' corporation was constituted by a charter from the Town Council of Edinburgh, dated 28th July 1449, and their title was ratified by an Act of Council intituled a "Seal of Cause" in February 1586, and was confirmed by a royal charter dated 6th March 1598. The incorporation obtained another Seal of Cause from the Town Council on 17th September 1533, and on 23rd September 1536 the Town Council granted to them another charter. The effect of these various instruments appears to have been to provide that all persons who complied with the requirements of the craft, and who were either burgesses or freemen, or the sons of burgesses or freemen, of the city of Edinburgh, were entitled to be admitted to the corporation upon making a proper essay and paying the dues of entry in force at the time.

While the original and primary object of such incorporations was to secure exclusive privileges of practising certain trades within burgh for their members, it was usual to combine with this other objects of a charitable nature, including the relief of distressed members and the provision of allowances to widows and children of deceased members.

By the Act 9 and 10 Vict. cap. 17 (entitled "An Act for the Abolition of the Exclusive Privileges of Trading in Burghs in Scotland") all such exclusive privileges were abolished, and since the passing of that Act the incorporation appears to have existed chiefly, if not entirely, for charitable and benevolent purposes.

By section 3 of that Act it was enacted—[*His Lordship quoted the section supra.*]

The latest code of bye-laws and regulations of the incorporation which was approved of by this Court in terms of the statute was framed in 1849, and sanctioned by the Court on 20th July 1850. By the 43rd of these it is declared that alterations

or additional regulations made by the corporation in the manner prescribed "shall be inserted in the minutes of the corporation, and shall be binding on all concerned, after duly receiving the sanction of the Court of Session as required by the statute 9 and 10 Vict. c. 17." This affirmative proposition appears to me to imply the further proposition that if an incorporation applies to the Court of Session and does not obtain its sanction to the rules so made they (the rules) are ineffectual in law; and probably also the further proposition, that application to the Court for its sanction of such rules is a condition-precedent to their validity; so that unless and until the alterations receive the sanction of the Court of Session they are not valid or binding.

The defenders maintain that if or in so far as these rules required the sanction of the Court of Session as a condition of the validity of any rules which they might thereafter make, they were *ultra vires* of the corporation and therefore invalid. I am, however, unable to accept this view as applying to rules made fifty-four years ago and never since abrogated or challenged.

According to these rules application for admission to the incorporation may be made in three characters, one of them being "at the far hand," and the others as a freeman's son or as a freeman's son-in-law, and the dues of entry prescribed to be payable in respect of entrance "at the far hand" vary from £110 to £165 according to age. The pursuer not being a freeman's son or son-in-law required to enter "at the far hand."

The incorporation now consists of six members, three of whom belong to one family and two to another, only one member appearing to have entered at the far hand in 1867, and it is stated that since then the dues of entry have been increased fivefold.

None of the resolutions by which the dues of entry have been increased since 1849 have ever been submitted to or approved of by the Court of Session, and the pursuer maintains that they are therefore invalid under section 3 of the Act of 1846, and article 43 of the Regulations of 1849, as also that they were passed in pursuance of the policy of excluding new members and so securing the whole benefits of the funds for the existing members *in fraudem* of the proper trust administration of the incorporation.

The pursuer made the requisite essay, and it is not disputed that he possesses all the qualifications for admission to the incorporation, except that he declines to pay £1500 claimed by the defenders as the dues of entry, while the amount which he would require to pay under the rules sanctioned by the Court in 1850 would be £160, and the question comes to be whether the incorporation was entitled to make the payment of £1500 a condition of his entry. This again depends upon whether the alterations on the rules upon which the defenders rely were effectually made, and the pursuer maintains that they were not, inasmuch as they have not been sanctioned by the Court of Session, such sanction being according to his contention required by the rules sanctioned in 1850 as already mentioned, by the 43rd article of which it was provided that alterations or regulations made by the incorporation in the prescribed manner shall be inserted in the minutes of the incorporation, and shall be binding upon all concerned after duly receiving the sanction of the Court of Session as required by the Statute 9 and 10 Vict. c. 17.

I concur with the Lord Ordinary in thinking that upon a reasonable construction of the words quoted they import that the rules may competently be altered by the incorporation after certain procedure, provided that where rules have been submitted to and approved of by the Court of Session any alterations upon them require, as a condition of their validity, to be also submitted to and approved of by that Court. The approval of the Court of Session is in my judgment a condition of the validity of the rules, and I agree with the Lord Ordinary in thinking that the contention of the pursuer to this effect is right.

With respect to the argument founded by the defenders upon the rules of 1839, I concur with the Lord Ordinary in thinking that the sanction of the Town Council was not mentioned because the necessity for it was assumed, and the question would then have been, What in 1846 were the powers of the incorporation under the sett of the burgh as interpreted by usage? I agree with the Lord Ordinary in thinking that in any such matters as the conditions of entry the incorporation would have required to proceed by bye-laws, and that these bye-laws would not have had a binding effect unless and until they were ratified by the Town Council and sanctioned by the Court of Session. The proper conclusion from the whole facts appears to me to be that in 1846 the defenders had not, according to the sett of the burgh, the power to deal as they pleased with the matter of entry-money, and that in so far as the question depended on usage the sanction of the Town Council was still required after the Act of 1846 was passed, and further that rules or alterations upon rules made after the passing of that Act required the sanction of the Court of Session.

For these reasons I am of opinion that the Lord Ordinary's interlocutor of 5th March 1904 should be adhered to.

LORD ADAM—I agree with your Lordship in thinking that the Lord Ordinary's interlocutor should be adhered to, and his Lordship has so carefully and exhaustively treated the case that I have really nothing to add.

LORD M'LAREN—While concurring generally in the opinion of your Lordship in the chair I should wish also to point out—what in my judgment offers a satisfactory solution of this question—I mean that it may be regarded as a question affecting the exercise of the powers conferred on the Court of Session by the Act 9 and 10 Vict. cap. 17. That Act of Parliament was, I believe, founded upon the report of a Royal Commission appointed to inquire into the

usages and administration of the royal burghs of Scotland. It was found that in the larger burghs there existed trading corporations created or constituted by the municipality in which they carried on their trade, and to a certain extent under the control of these municipalities. In consequence of the legislation by which trade was thrown open in all royal burghs, instead of being confined to members of crafts, it was found that to a large extent these trading corporations were falling into a condition of decay and that their constitution might require revision. Under the Act 9 and 10 Victoria, cap. 17, these trading corporations were empowered to apply to the Court of Session for amendments of their rules and constitution, and there was added a saving clause that all such rules and regulations as these corporations might previously have made without outside authority might still be made without the authority of the Court of Session. Under that Act the Incorporation of Cordiners applied to the Court of Session for amendment of their rules, and amongst the points for which power was asked and given was the settlement of a table of fees for the admission of members. Now, in itself that seems a rather important element in the constitution of such a body. These bodies after the cessation of their powers of exclusive trading existed only as insurance and old age pension societies, and therefore it was a matter of very great importance—on which their future success and prosperity depended—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. I cannot conceive a rule of such a society more important than this or suited to the adjudication of an outside authority such as the Town Council in the old time and the Court of Session after the passing of the statute. If it were necessary that I should offer an opinion, I may say that I have no doubt whatever that the fees of members was one of the matters which by statute the Court of Session had power to fix on the application of the incorporation. But it is quite unnecessary that I should express an opinion on that question, because the Court of Session within a few years of the passing of the Act adjudicated upon the very point when they settled what the fees were to be, and provided that no alteration in that table of fees should be made except by authority of the Court of Session. Now, are we, the same judicature, after the lapse of fifty years, going to review a decree of our predecessors? No doubt it is not a *res judicata* in the technical sense, because there was no issue joined between the parties, but it is a decree by a competent authority executing a statutory power, and I cannot see, even if we thought they were in the wrong, that we have any right to review the decision of our predecessors in this matter. We must take it that the amendment of the table of fees is a matter for regulation by the Court of Session, and that being once fixed under statutory authority it is just as binding upon us as if it were embodied in the Act of Parliament. That being so, it follows that the Cordiners had not the power to raise their fees without the authority of the Court. I am also of opinion that they have not established their right to do so by evidence of custom. The various instances that are disclosed in the proof amount to nothing more than this, that when individuals applied to be admitted by what in the picturesque language of old times is called "the far hand"—that is, admission of strangers—the corporation fixed in each case what they thought a suitable fee. But apparently they had doubts about their powers in doing so—at all events they had doubts as to the expediency of continuing this system. Eventually they came to a decision that there should be a uniform table of fees, and a uniform table was prepared and settled by the authority of the Town Council, and thereafter by that of the Court of Session. On these grounds I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD KINNEAR—I also agree with the Lord Ordinary. He has examined the case with great care, and I think his Lordship's reasons are entirely satisfactory.

The Court adhered.

The defenders had on 28th April 1904 presented a petition to the Court in which they asked, *inter alia*, the sanction of the Court to the different sets of amended bye-laws adopted by the incorporation since those sanctioned on 20th July 1850, and for a finding that such bye-laws were valid and effectual "as from and after the dates of the minutes of the incorporation adopting such amended bye-laws, regulations, and resolutions respectively." At the hearing of the petition on November 29, 1904, the defenders dropped this part of the prayer of the petition, and the petition was remitted to a reporter.

On 30th November the pursuer presented a note to the Court, in which he narrated that an operative decree had not been pronounced until their Lordships should have considered the petition, and that having now been done he asked a decree in terms of the conclusions of the summons.

The defenders opposed such a decree, on the ground that while the bye-laws since 1850 being outwith the sanction of the Court were not of full effect, it did not follow that the pursuer should be admitted on the terms of those of 1850. The bye-laws of that date were now in desuetude (*Gardiner* v. *Magistrates of Kilrenny*, quoted *supra*), and the pursuer should only be admitted on such terms as the Court might find in accord with present circumstances, otherwise the incorporation would be flooded with applicants before it could obtain a new set of bye-laws duly sanctioned, all of whom it would require to admit on the same terms as in 1850.

LORD PRESIDENT—It seems to me to be clear that the applicant is entitled to the decree for which he here asks. His just claim to be admitted a member of the incorporation has been obstructed and baffled for a considerable time; but now that we have given our decision as to the invalidity of the alterations which were made upon the conditions of entry, we should not allow the applicant to be any longer hindered from enjoying his just rights.

LORD ADAM—I concur.

LORD M'LAREN—I am of the same opinion, and for the reasons stated by your Lordship, namely, that Mr Allan's right to be admitted a member of the incorporation has been judicially affirmed, and that the applicant is not to be deprived of his right to become a member of the incorporation by the refusal or delay on their part to entertain his application.

But what I say now does not apply to the case of any other applicant who may apply pending the determination of the petition for our sanction to new regulations. This would raise a very different question.

LORD KINNEAR—I agree. I also agree with Lord M'Laren that the case of future applicants is not before the Court, and with regard to it I express no opinion. As to the present applicant, his rights are determined in the action at his instance.

The Court pronounced this interlocutor:—

"(First) Find that the pursuer was on 24th June 1903 entitled to be admitted a member of the said Incorporation of Cordiners of the city of Edinburgh in the character of an intrant at the far hand, upon payment of the entry-money fixed in the bye-laws and regulations of the defenders' incorporation sanctioned in 1850: (Second) Find that the defenders are not entitled to exact as a condition of admitting the pursuer as a member to the said incorporation any higher dues of entry than those prescribed by the bye-laws and regulations: and (Third) Ordain the defenders forthwith to admit the pursuer as a member of the said incorporation on payment of the sum of £160."

Counsel for the Pursuer and Respondent — Campbell, K.C. — Constable. Agent — Thomas Liddle, S.S.C.

Counsel for the Defenders and Reclaimers — Ure, K.C. — Clyde, K.C. — M'Lennan. Agents—Cumming & Duff, S.S.C.

Thursday, November 17.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

JOSEPH EVANS & SONS *v.* JOHN G. STEIN & COMPANY.

Reparation—Slander—Conflict of Laws—Lex loci delicti—Defamatory Letters and Telegram Sent from Scotland to England — Publication of Slander — Actionable Wrong.

A firm of engineers carrying on business in England brought an action of damages against a firm carrying on business in Scotland for defamation contained in two letters and a telegram sent by the defenders from Scotland to the pursuers in England. The pursuers averred that the letters and telegram were "published" in the sense of English law, in respect that the letters were dictated by the defenders to and typewritten by clerks in the employment of the defenders, and that the telegram passed through the hands of the telegraph officials in telegraph offices both on its despatch from Scotland and on its arrival in England.

Held (*rev.* the judgment of Lord Kincairney) (1) that the *locus delicti* was in England; (2) that the *locus delicti* being in England, no action lay in a Scots court unless there was an actionable wrong by English law as well as by Scots law; and (3) that there was no actionable wrong under English law, in respect that there was no publication of the slander, and action *dismissed*.

On 13th January 1904 Joseph Evans & Sons, hydraulic and general engineers, Culwell Works, Wolverhampton, brought this action against John G. Stein & Company, Ganister and Fireclay Works, Bonnybridge, concluding for £1000 damages for defamation.

On 16th May 1903 the pursuers, in answer to an inquiry made by the defenders, forwarded to the defenders two complete estimates for pumping plant. On 28th May 1903 the defenders, by telegram addressed to the pursuers' agents in Glasgow, Messrs W. B. & J. Bain, accepted one of these estimates, and requested the pursuers to send them the pump specified therein with appurtenances, all as quoted for.

The pursuers averred that owing to the defenders delaying to accept the estimate till 28th May, the acceptance was received by the pursuers just at the time when their works were about to close for the Whitsuntide holidays, and the works were not reopened until 8th June. They further averred that the works of other manufacturers, who supplied the pursuers with chains and other appurtenances of pumping machines, were also closed during that period.

The defenders, on the other hand, averred that the pursuers' agents had represented, contrary to fact, that the pump was in stock and ready for delivery.