person, had in respect of her own state of health a claim of relief in her own right. The child being a proper object of relief in its own right, the question came to be whether its settlement was in one parish or in another. Now, apart from that specialty, with which we have no concern here, the case appears to me to have decided three things. In the *first* place, that when a child has acquired a derivative settlement from its father, that becomes its own settlement to all intents and purposes—that proposition, which had been established by previous decisions, is the first step in the argument of the Lord Justice-Clerk towards the conclusion at which he ultimately arrived. *Second*, that no loss of settlement by an able-bodied father can in any way affect the settlement acquired in its own right by his child; and *third*, that the settlement of a pauper being a proper object of relief, remains his settlement so long as the pauperism is continuous. I do not think that it is possible to find in the opinion of the Lord Justice-Clerk any other legal propositions than these. He begins by considering the special question which I have adverted to—whether the child was a proper object of relief in its own right or not—and then having answered that question in the affirmative, he goes on to ask what was the child's settlement when she first obtained relief? As to that there was no question. Then he says—"But then it is said that further in 1858 and 1859 her father lost that settlement by allowing five years to pass by without residing twelve months in the City Parish." And his answer to the argument founded upon that proposition is, that if the child had followed the father's settlement there might have been a question. Then he says—"No loss of settlement by the father who continues able-bodied can in any way affect the settlement of the child who has become a proper object of relief. Therefore it appears to me that the City Parish was the settlement of the child when she became chargeable, and will remain so as long as she continues chargeable." Then his Lordship goes on in the last sentence of his opinion to lay down the general proposition that the settlement of the pauper when relief is first given remains the settlement so long as the pauperism continues. The interlocutor contains a series of findings to the same effect, and it is quite impossible to extract from any of them any support whatever for the conclusion which the Lord Ordinary rightly enough rejects, that the mere fact of a person recovering parochial relief in one parish is sufficient to prevent the loss of a residential settlement in another.

Now, that decision being out of the way here, I am of opinion with Lord Adam that there can be no question at all as to the proper application of the statute to the circumstances of the present case.

The LORD PRESIDENT concurred.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defender.

Counsel for the Pursuer—J. A. Reid—Lees. Agents—J. & J. H. Balfour, W.S.

Counsel for the Defender — Guthrie — Graham Stewart. Agents—R. R. Simpson & Lawson, W.S.

Tuesday, November 14.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

SADLER AND OTHERS *v.* THE INCORPORATION OF TAILORS OF AYR; AND WEBSTER AND OTHERS *v.* THE INCORPORATION OF TAILORS OF AYR.

Incorporation — Trust — Illegal Administration—Attempt to Exclude New Members —Reduction of Minutes.

Members of an incorporation benevolent scheme fund are trustees for themselves and for future members, and are not entitled to administer the scheme in such a way as to secure to themselves the benefits of the trust to the exclusion of others of the class for whose benefit the scheme was instituted.

Rules for regulating a benevolent Scheme Fund in connection with the Incorporation of Tailors of Ayr were framed in 1805. By these the age for admission was fixed at 40, and it was enacted that "should it be necessary for the advancement of the fund to alter any of the articles," such alteration should be under discussion for three months. After 1846, as a consequence of the passing of the Act which took away the exclusive right of trading from corporations in burghs, applications for admission almost ceased. In 1860 the members, being then only five, in furtherance of a scheme for securing to themselves the whole benefit of the scheme, and for excluding new members, by minute, duly confirmed after three months, reduced the age limit to 30. No new members were admitted between 1855 and 1891, when S., M., and L., all under 30, were admitted after litigation. While their right to admission was under dispute, the only remaining members, two in number, at a meeting in June 1891, suspended the standing orders of 1805, forthwith fixed the age limit once more at 40, and thereafter admitted W., F., and C. as members although all over 30 years of age.

An action was brought by S., M., and L. to have the minutes extending the age and admitting W., F., and C. reduced, and these three persons declared not to be members; while W., F., and C. brought an action to have themselves declared duly admitted, and if necessary to have the minutes of 1860 reduced.

After a proof the Lord Ordinary (Kyllachy) *refused* to reduce the minutes extending the age limit and admitting W., F., and C., *held* that they were duly admitted, and that the minutes of 1860, supposing them not to have been formally abrogated by the minute of June 1891, might be disregarded as having been passed in pursuance of an illegal scheme, and did not require to be reduced. The First Division *adhered*, but by their decree *reduced* the illegal minutes of 1860.

By minute of 5th February 1761 the Incorporation of Tailors in the burgh of Ayr, which was of old standing, framed rules for raising their funds and applying the same for payment of annuities to widows, and for relief of the poor, old, and infirm of said trade. A quarterly contribution out of the pockets of the members of the incorporation was instituted, and the usual annual expenses of drinking at the election of deacon were abrogated. It was, *inter alia*, provided that after twelve months had elapsed no one should be allowed to accede to this scheme who was above the age of 36, and by minute of 4th November 1776 acceding to the scheme was made a condition of joining the incorporation.

By regulations passed 14th January 1805 the age limit was fixed at 40, and article 23 provided that "Should it be found necessary for the advancement of this fund to alter any of these articles or regulations, the proposed alteration or amendment shall be laid before the managers, and, if they approve of the same, it shall be under discussion for three months, after which, if it shall be approved of by a majority of votes at a general meeting, it shall be enacted into a law." These articles with some amendments continue to regulate the administration of the scheme.

From 1846, when the Act 9 and 10 Vict. c. 17, which abolished the exclusive privileges of trading in burghs in Scotland, was passed, until 1852, no applications for admission into the incorporation were received, and in consequence of minute of 30th September 1852, confirmed 11th January 1853, it was resolved to divide the property of the incorporation among the members existing at the passing of said Act, or their heirs, in order to prevent it all going to the longest liver. One of the members, however, dissented, and obtained interdict from the Sheriff against this course being carried out.

In 1856 the entry-money payable by members was increased; in 1859 resolutions were passed giving to each member at the age of 60, without inquiry, the right to the annuity on the ground of old age and infirmity.

In 1860 the members of the incorporation were only five in number, and by minute of 8th March 1860, confirmed by minute of 12th June 1860 they agreed (1) that in future the old age annuity should be conferred upon all members when they reached the age of 56, and (2) that the age limit for the admission of new members should be fixed at 30. No new members were in fact admitted between 1855 and 1890.

William Sadler claimed to have been admitted a member of the incorporation on 1st December 1890, Andrew Cowan and Archibald Rae being then the only other members. This claim was disputed by Rae, but established by decree of Court dated 28th January 1892. In the meantime, A. Cowan and Rae on 30th May 1891 held a meeting to which he was not called. At that meeting these two members unanimously resolved to suspend the standing order of 1805, requiring three months' delay before altering any rule, and there and then raised the annuities for aged members, which were standing at £55, and which they were then drawing, to £90.

Upon 1st June 1891 Matthew Morrison and William Love were admitted members. By minute of meeting of 13th June, at which only Rae and A. Cowan were present, the standing orders were again suspended, and the age of admission forthwith restored from 30, at which it had stood since 1860, to 40 as fixed by the rules of 1805.

On 16th June 1891 Alexander Jamieson Webster and John Finlayson, both being over thirty years of age, were admitted, and on 13th July William Cowan, also over thirty, was admitted.

On 7th and 24th August 1891, by minutes which bore to be passed unanimously by all the existing members of the Scheme Fund, the regulations then existing were approved.

In March 1892, Sadler, Morrison, and Love raised an action against all the members of the Incorporation of Tailors and against Webster, Finlayson, and W. Cowan (1) for the reduction of the minute of 30th May 1891, by which the annuities were raised from £55 to £90; (2) for reduction of the minutes of 13th and 16th June and 13th July 1891, by which the age limit was extended, and Webster, Finlayson, and W. Cowan were admitted members; (3) for reduction of the writ or document titled "Acts and Regulations to be observed from and after 24th August 1891 in managing the Scheme of the Incorporation of Tailors in Ayr;" and (4) for declarator that Webster, Finlayson, and W. Cowan were not members of the Scheme Fund.

The pursuers averred, *inter alia*—"The defender Andrew Cowan joined the said Scheme Fund in 1841, he being then twenty-three years of age. The defender Archibald Rae joined on 5th April 1855, he being then thirty years of age; and on last-mentioned date the deceased James Cunningham also joined the Scheme Fund. . . . There were then, including Rae and Cunningham, the newly admitted members, in all eight members of the Scheme Fund. After the passing of the Act 9 and 10 Vict. cap. 17, fewer persons applied to join the incorporation, and thus qualify themselves to enter the scheme. The defenders Andrew Cowan and Rae, together with the deceased James Cunningham, the three youngest members of the incorporation and scheme, took advantage of this circumstance for the furthering of their

fraudulent and collusive scheme for appropriating to themselves the whole benefits of said Scheme Fund. The alterations on the rules and regulations of said Scheme Fund, which were proposed from time to time by the defenders Cowan and Rae and the said late James Cunningham, were designed and intended by them to aid and assist in carrying out said fraudulent and collusive scheme. . . . By such devices as these, viz., increasing the amount of entry-money to the scheme, putting off all applicants with the false excuse that an accountant was preparing a new scale of entry-money, until after the applicant had passed the proper age for admission, and refusing to give applicants any information as to the regulations for admission, they discouraged applications; and though several persons duly qualified did apply for admission, the said defenders Andrew Cowan and Rae, along with Cunningham, continued to prevent anyone being admitted subsequent to the year 1855. No new member was admitted after Rae and Cunningham became members, which was in that year—thirty-seven years ago—until pursuers were admitted." The pursuers further explained that they had only established their claim to be members of the incorporation by litigation; and they averred that the increasing of the annuities at a meeting to which Sadler, although a member, was not called, the raising of the age limit from thirty to forty at a meeting to which none of the pursuers, although then all members, were called, the suspension of the standing orders, which required three months' delay, and the admission of Webster, Finlayson, and W. Cowan, who were bound not to disturb the rules passed by them, were all steps taken by Rae and A. Cowan with the view of strengthening themselves in their policy of appropriating to themselves the whole benefits of the Scheme Fund. The pursuers were not present at the meetings of 7th and 24th August, although members of the Scheme Fund.

Webster, Finlayson, and W. Cowan answered that they had no interest to defend the previous actings of Rae and A. Cowan, but averred that the object of the pursuers, now they had fought their way into the incorporation, was to continue the same illegal policy of exclusion in their own interests, and to prevent new members being admitted.

The Lord Ordinary (KYLLACHY) allowed a proof.

In November 1892 Webster, Finlayson, and W. Cowan raised an action against the Incorporation of Tailors of Ayr and against Sadler, Morrison, and Love (1) to have it declared that they were duly admitted members of the incorporation and of the Scheme Fund by minutes of 13th and 16th June and 13th July 1891, and, if necessary, (2) for the reduction of the minutes of 8th March and 12th June 1860. They practically made the same charges against A. Cowan and Rae as Sadler, Morrison, and Love had made in the previous action, and averred that the reduction of age from forty to thirty was illegally made in fraud of the purposes of the scheme.

Sadler, Morrison, and Love answered that "the resolution to alter the age of admission from forty to thirty was within the rights and powers of the members for the time being, and it was passed in accordance with the regulations in force at the time."

The Lord Ordinary allowed a proof to be taken at the same time as the proof in the previous action.

Before the proof was led, A. Cowan and Rae stated that they no longer opposed the reductive conclusions of the summons at the instance of Sadler, Morrison, and Love, and abandoned their defences.

The import of the proof appears from the Lord Ordinary's opinion, which quotes the material evidence given by Rae and Cowan, and from the opinion of Lord M'Laren.

After the proof the Lord Ordinary on 1st February 1893, in the first action, reduced, decerned, and declared in terms of the reductive conclusions of the summons except as regarded the minutes of the Scheme Fund dated respectively 13th June, 16th June, and 13th July 1891, whereby the age of admission to the said Scheme Fund was altered, and the defenders W. Cowan, Webster, and Finlayson were admitted members of the said Scheme Fund; assoilzied the said defenders W. Cowan, Webster, and Finlayson from said reductive conclusion, and assoilzied said three defenders from the declaratory conclusions. In the second action his Lordship pronounced decree of declarator as craved, and found it unnecessary to pronounce any decree of reduction.

"*Opinion.*—This action has two objects. The first is to cut down certain increased annuities granted by the Corporation Scheme to its older members. The second is to exclude from the benefits of the Corporation Scheme the three defenders Webster, Finlayson, and Cowan. The pursuers are three individual members of the corporation and of the Corporation Scheme, who, if I may use the expression, have fought their way into membership by recent legal proceedings, and the action takes the form of a reduction of certain minutes and regulations by which the annuities in question were increased, and of certain other minutes by which the admission of the three defenders was effected.

"There is now no question as to the first set of minutes—that is to say, as to the first object of the action. The older members, who alone had an interest to defend, have consented to decree as craved, and the other defenders have in this matter the same interest with the pursuers. The controversy is therefore confined to the validity of the proceedings by which the defenders Webster, Cowan, and Finlayson have been admitted to the benefits of the Corporation Scheme.

"The ground of objection to their admission is this, that at the dates of their respective applications they were over thirty years of age, and that according to the then rules of the scheme no member

was eligible who had passed that age. The pursuers complain that this being the rule, the corporation by the proceedings complained of first altered the rule in an irregular manner, and then admitted the defenders as if the rule had been lawfully altered.

"Had the question in my view depended on the regularity of the proceedings by which the thirty years' limit of age was altered, as it bears to be by the minute of 13th June 1891 (being the second minute under reduction), I should, I confess, have had some difficulty. The original rules of the society as established in 1761 provided that the same might be altered at any time by a majority of the members. But by the rules of 1805, which appear to have been in force as from that date, it is expressly enacted that 'any alteration or amendment shall be laid before the managers, and if they approve of the same, it shall be under discussion for three months, after which, if it shall be approved of by a majority of votes at a general meeting, it shall be enacted into a law.' As the facts stand, there is no doubt that this standing order was not obeyed. Before therefore I could sustain the regularity of the proceedings complained of, I should have to affirm (1) that it was open to the members of the scheme by the unanimous vote of any meeting to suspend the standing order; and (2) that it made no difference that the rule was altered in the absence of or without notice to the pursuer Sadler, who, although not a member at the time *de facto*, must be held to have been a member *de jure*, inasmuch as it has been since found by a majority of this Court that he was duly admitted to the scheme as from 1st December 1890. Now, as I have already indicated, I should have hesitated to affirm either of those propositions. I am not sure that I could affirm the first, and I do not at present see how I could in any view affirm the second. The principle upon which it is held that the ordinary acts of public bodies are not affected by disputes as to the election or qualifications of members does, I am afraid, apply to such proceedings as those in question.

"But the defenders contend that the regularity or irregularity of the proceedings is not really in this case material. They say (what is not disputed) that but for the age limit referred to they were entitled to admission—just as much entitled as the pursuers—and their case is that the age limit, which is said to exclude them, was an unlawful limit—a limit which had been unlawfully imposed, and which the corporation was not only entitled but bound to rescind. In this view the alteration of the rule of which the pursuers complain was, the defenders say, a mere matter of form—the corporation being entitled to disregard the rule, and it being therefore of no consequence whether they repealed it formally or informally.

"Now, I do not all doubt that this reasoning is quite sound if its main premiss be once established, viz., that the rule by which the maximum age for entrants was fixed at thirty years was a rule which had been unlawfully passed. The real question is, whether that proposition can be made good; and that seems to depend upon this—whether certain resolutions passed by the members of the scheme so far back as 8th March and 12th June 1860 were lawful and valid resolutions?

"The history of that matter seems to be this. The original rules of the scheme provided that members might be admitted up to thirty-six years of age. This was altered in 1805 to forty years, and up to 1860 there was no attempt to disturb the limit of age thus fixed. But after 1846, when the exclusive privileges of municipal corporations were abolished by the Statute 9 and 10 Vict. cap. 17, the numbers of this corporation, as similar corporations, began to dwindle. The old members died out, and few new members joined either the scheme or the corporation itself. Consequently, it happened that by the year 1853 there were only about half-a-dozen members in existence, and these members, perhaps not unnaturally, began to consider that the corporation funds were their private property, which, subject to existing claims, they might, if they chose, divide. In this view there was, in the year I have mentioned (the year 1853), an attempt made to divide the funds openly and directly, and this having been frustrated by the action of a dissenting member who appealed to the Sheriff, a second and more artistic plan was adopted for the purpose of securing what I have no doubt the members concerned thought their just rights, or at least the legitimate advantages of their position.

"It is to this chapter in the history of the corporation that the resolutions of March and June 1860, to which exception is now taken, belong. These resolutions were passed, the defenders say, as part and parcel of a concerted plan, which they call fraudulent, but which I prefer to call unlawful, for excluding new members from the scheme, and appropriating its benefits to the one or two old members who by this time formed the corporation. The course which seems to have been followed was this. In the first place, certain additions were made to the entry-money payable by new members. This occurred in 1856. Next, in 1859, resolutions were passed giving to each member at the age of sixty a right to receive without inquiry an annuity on the ground of old age and infirmity. Then followed in 1860 the resolutions in question, which, on the one hand, conferred right to an annuity at the age of fifty-six, and, on the other hand, closed the society to all entrants over thirty years of age. Lastly, there ensued a deliberate and sustained course of action, whereby, from the year 1855 to 1891, all applications for admission were either refused on the ground of age, or staved off on the ground that the corporation was in course of consulting an actuary with respect to the future terms of admission. The result, on the whole, was that during the thirty-six years in question (from 1855 to 1891) no new members were

admitted—the first to be admitted being the present pursuers, who fought their way in, as I have already mentioned, but who now turn round and seek to exclude the defenders, taking up the position that, while everything else during the period in question was unlawful, and even fraudulent, there was one thing which was lawful, viz., the reduction of the maximum age for entrants.

"The defenders, as I have said, contend that the whole of these proceedings, including very specially the reduction of the maximum age for entrants, were truly part and parcel of the same concerted scheme; and that the object in view throughout was the unlawful object which I have already stated. I have come to the conclusion upon the evidence that in this contention the defenders are right. In the first place, the pursuers themselves make the following averment in condescendence 3—'After the passing of the Act 9 and 10 Vict. c. 17, fewer persons applied to join the incorporation, and thus qualify themselves to enter the scheme. The defenders Andrew Cowan and Rae, together with the said deceased James Cunningham, the three youngest members of the incorporation and scheme, took advantage of this circumstance for the furthering of their fraudulent and collusive scheme for appropriating to themselves the whole benefits of the said Scheme Fund. The alterations on the rules and regulation of said Scheme Fund, after narrated, which were proposed from time to time by the defenders Cowan and Rae, and the said late James Cunningham, were designed and intended by them to aid and assist in carrying out said fraudulent and collusive scheme.' They then go on to narrate certain minutes making the alterations referred to, and amongst those minutes are those of March and June 1860, which are now particularly in question. No doubt they do not recite the portions of the minutes which altered the age for entrants. They recite only the portions by which the age for annuitants was reduced. But no reason is given for thus disconnecting the two portions of the minutes, and for assuming the existence of a different motive as determining the one alteration and the other.

"In the next place, Mr Rae, who has been the leading actor in these proceedings, was at the proof examined by the pursuers, and he made no concealment of what had been the views and objects of himself and his friends. He says—'Our privileges as an incorporation had been taken away by Sir Robert Peel's Bill, and we did not wish to admit any more members to the scheme. That was the real truth of it, and the real object of reducing the age. That was my motive and the motive of the others, with the exception of Mr Cowan. Mr Cowan told me over and over again that it was illegal, and we could not do it.' And again—'I thought, as our special privileges had been abolished, the scheme had become a private society. That was my view of it.' Mr Cowan was examined for the defenders, and was to the same effect. He says—'The alteration was carried at a meeting at which Mr Glass, Mr Loudon, Mr Rae, and Mr Cunningham were present. I was against it, but I was outvoted. I think I entered my dissent. The object of the alteration was, I suppose, to shut up the society, and my object was to continue it for the good of old men connected with the trade and their widows.' I am quite alive to the fact that Mr Rae's attitude towards the pursuers is not friendly, and that it is open to suggest that the frankness of his statement may have had some connection with that circumstance. But still the fact remains that what I have read is his evidence, and that of Mr Cowan, and I am bound to say that having heard them examined, I believed them both.

"In the next place, however, and finally, it appears to me that even discarding the pursuers' averments, and rejecting the parole evidence, the case is one in which *res ipsa loquitur*. There is, I am afraid, no getting over the fact that during all those thirty-six years no single individual member was admitted, informal applications being staved off, and all formal applications being on one ground or another delayed. Neither can it be overlooked that during the period in question the annuities of the old members were from time to time largely increased. I cannot, I confess, resist the conclusion that but for the legal proceedings adopted by the pursuers and those acting along with them the various alterations made from time to time on the rules, including very specially the alteration in the maximum age of entrants, must have resulted sooner or later in the absorption of the funds by the surviving members. It was a pretty shrewd anticipation that the number would not be great of master tailors in Ayr desirous to join this scheme, and ready to do so, and to pay the entry money demanded, while still under thirty years of age. Nor does it appear to me to help the pursuers, if, as they say, the real object of the thirty years' rule was to form a complement to the provision that all members should obtain annuities on attaining the age of fifty-six. If that was the object, the pursuers' case, instead of being better, would I think be worse. It might have been lawful to assume that at the age of sixty-five, or even at the age of sixty, members of the scheme were no longer able to work at their craft. But a similar assumption with respect to all persons at the age of fifty-six strikes me, I confess, as somewhat violent.

"But if the fact be that these resolutions of March and June 1860 were of the character and had the objects which I have just described, is there any doubt that they were unlawful? I think not. The corporation scheme constitutes in my view a trust, the members being trustees for themselves and the future members of the scheme; and that being so, it must, I think, be held to have been a breach of that trust so to manipulate the rules and conduct the affairs of the scheme as to exclude or throw obstacles in the way of new members, and thus to appropriate the benefits of the trust

to the trustees themselves. I rather think that this is the principle to which the pursuers themselves appealed when they sought entrance into the scheme. At all events, it is a principle which I am prepared to affirm, and accordingly I propose to hold that *de jure* the age limit stood, and still stands, as it was fixed in 1805; that therefore there was no obstacle to the defenders' admission when they severally applied; that in rescinding the rule of 1860 and admitting the defenders, the corporation did no more than it was bound to do, and therefore that on the whole the defenders are entitled to absolvitor.

"I may perhaps add, that taking this view I have not found it necessary to consider whether the defenders William Cowan and Finlayson have succeeded in showing that they applied, and sufficiently applied, for admission to the scheme prior to their reaching the age of thirty. I think it is proved as matter of fact that applications were made by or on behalf of both of them before they reached that age. But these applications although made to the deacon were verbal and informal, and it is a question perhaps of some difficulty how far such applications can count—that is to say, can serve—to put the corporation in default, and entitle the defenders to admission on the principle *quod fieri debet infectum valet.* In the view I have taken it is not necessary to decide that question. I shall therefore in this case pronounce the following interlocutor:—'Having considered the cause, reduces, decerns, and declares in terms of the reductive conclusions of the summons, except as regards the minutes of the Scheme Fund, dated respectively 13th June 1891, 16th June 1891, and 13th July 1891, whereby the age of admission to the said Scheme Fund was altered, and the defenders William Cowan, A. J. Webster, and John Finlayson were admitted members of the said Scheme Fund; assoilzies the said defenders Cowan, Webster, and Finlayson from the said reductive conclusion; assoilzies also the said three defenders from the declaratory conclusions of the summons, and decerns: *Quoad ultra*, finds it unnecessary to dispose of the remaining conclusions of the summons, and therefore dismisses the same, and decerns: Finds the defenders William Cowan, A. J. Webster, and John Finlayson entitled to expenses against the pursuers, and remits the account thereof to the Auditor to tax and report.'

"In the counter action I shall give the pursuers decree in terms of the declaratory conclusion, and find it unnecessary to pronounce any decree in terms of the reductive conclusions of the summons."

Sadler, Morrison, and Love reclaimed against both interlocutors, and argued—1. The lowering of the age in 1860 was not part of the illegal scheme, and was not done to keep members out, but only to insure that members should contribute for twenty-five years before drawing an annuity at fifty-six. Most members were under thirty when admitted. They themselves were under thirty, and were entitled to rely upon the rule that no one would be admitted after that age. 2. The 1860 rule must stand until formally altered. It would introduce confusion into the administration of incorporations if members were to be allowed simply to disregard a rule upon the ground that it was *ultra vires* of the incorporation to pass it. 3. The minute of 13th June 1891 was informally passed, and could not be defended as an honest endeavour to undo a previous illegal act. By it Rae and A. Cowan sought to strengthen their position against a threathened law suit at the instance of the present reclaimers by introducing Webster, Finlayson, and W. Cowan into the incorporation.

Argued for Webster, Finlayson, and W. Cowan—1. It did not lie with the reclaimers to attack the administration of the scheme as fraudulent, and then to except the act of lowering the age. They were faced by their own record and their principal witness Rae. 2. The minutes of 1860 being illegal might well be disregarded, as the Lord Ordinary had found. An honest attempt had been made by minute of 13th June 1891 to revert to the rules of 1805, but if that were held insufficient, there was a conclusion for reduction of the minutes of 1860 which should be given effect to.

At advising—

LORD M'LAREN—Your Lordships have now to consider reclaiming-notes in two actions, the first being at the instance of Sadler and others, three members of the Scheme Fund of the Incorporation of Tailors of Ayr, the chief object of which is to reduce certain minutes of the Scheme Fund of the incorporation whereby the defenders Webster, Finlayson, and William Cowan were admitted to the benefit of the scheme. The object of the counter action is to have it found and declared that the three persons last named were duly admitted to the scheme. Both actions contain conclusions for the reduction of previous minutes of the incorporation or scheme, and these are auxiliary to the principal conclusions. In the view of the Lord Ordinary, the parties Webster, Finlayson, and Cowan were properly admitted members of the scheme. I have come to the same conclusion, and on the same grounds, and if your Lordships agree with me I propose that we should adhere to the Lord Ordinary's judgment in the first action, and that in the second action we should also adhere with a variation which only affects the form of the judgment.

The principle which underlies the whole of the reasoning on which the Lord Ordinary's judgment is based is that the corporation scheme is a trust, and that the members are trustees for themselves and the future members of the scheme. I shall consider this proposition first in order, because if it is admitted or established that the schemes of trade corporations for the benefit of aged members are of the nature of trusts for purposes of public utility, it follows that the existing members of such

societies or *quasi*-corporations are not entitled to administer their affairs in such a manner as to secure to themselves the benefits of the trust to the exclusion of others of the class for whose benefit the scheme was instituted. If this be the true principle to be applied to the case before us, it is not difficult to show that the grounds on which the desired exclusion of Webster and others from the Incorporation of Tailors is rested entirely fail.

On the question of fiduciary relation, the fundamental fact is that the Incorporation of Tailors of Ayr, on which this benevolent scheme was engrafted, was one of the ancient burghal trade societies or guilds which by our customary law posssessed exclusive privileges of trading within the burgh. It is evident that such a system of trade organisation could not exist consistently with a right on the part of the members constituting the society at a particular time to close their doors against new applicants, and to appropriate to themselves the monopoly of the trade and custom of their burgh. Accordingly, in the older decisions regarding the constitution and rules of such societies, it is always assumed that qualified craftsmen are entitled to admission to the society or guild on proof of their ability to exercise the craft and payment of the dues of admission. The burgesses had indeed a twofold interest in the due administration of the duties committed to the guilds, an interest that the guilds should be open to themselves and their families, and an interest that the guilds should be open to qualified tradesmen, and should not be allowed to degenerate into monopolies. Here, then, we find two of the elements of a public trust—a definite purpose, being a purpose of public utility, and a body of corporators entrusted with the duty of administration. When to these is added a third element—the existence of a fund appropriated to the relief of indigent members and the families of deceased members—we have all the distinctive marks of fiduciary relation which exist in the case of any ordinary charity or public endowment.

Now, it may be that since the abolition of the exclusive trading privileges of these burghal corporations, it might be difficult for an applicant to qualify an interest to acquire the status of a master tailor in Ayr distinct from the prospective interest which he would take (along with that recognisable social position) in the funds of the scheme. But then that prospective pecuniary interest is in itself a title to a qualified applicant to vindicate his right of admission, as has been repeatedly held with reference to endowed schools and charitable institutions of all kinds, and, as we are informed, in a previous litigation regarding this very institution. Here the persons whose rights are in dispute have been admitted, and there is also a title to maintain their position by an appeal to the purpose of the trust or scheme as expressed in its articles and regulations.

Passing to the constitution of this particular trust, we find that so early as the year 1761 it is set forth in the acts and minutes of the Incorporation of Tailors "That the original and sole intention of paying in money to the common stock of said incorporation at the entry of freemen, journeymen, and apprentices was and is for the relief of the necessitous or poor of said trade." On this narrative, and for the relief of the widows and orphans of the members, and also of those who may be disabled through sickness or old age—by means of small quarterly contributions, "and abrogating the usual annual expenses of drinking at the election of a deacon"—the incorporation cheerfully and unanimously agreed that its common stock, with the yearly interest thereof, and what should be contributed by the members, should be combined into a fund for these benevolent purposes. It is unnecessary to examine the details of the scheme, which is in substance and effect what would now be termed a trade insurance fund. But I note further that in 1805 the membership of the guild, having meantime increased in numbers, this scheme was revised and put into the form of an articulate paper consisting of 23 articles, which paper is subscribed by the office-bearers as the "articles and regulations" of the scheme. The 23rd article is important. It is in these terms—"Should it be found necessary for the advancement of this fund to alter any of these articles or regulations, the proposed alteration or amendment shall be laid before the managers, and if they approve of the same it shall be under discussion for three months, after which, if it shall be approved of by a majority of votes at the general meeting, it shall be enacted into a law." The articles of 1805, with some amendments, constitute the existing laws of the scheme.

The matter in controversy, as explained by the Lord Ordinary, is confined to the validity of the proceedings by which the defenders in the first action, Webster, Finlayson, and Cowan, have been admitted to the benefits of the scheme. The objection to their admission is this, that at the dates of their respective applications they were over thirty years of age, and that according to the then existing rules of the scheme no member was eligible who had passed that age. The pursuers complain that the corporation first altered the rule in an irregular manner, and then admitted the defenders as if the rule had been lawfully altered. The defenders reply that according to the articles and regulations of 1805 the age limit for admission was forty; that the reduction of the age limit from forty to thirty by the minutes passed in 1860 was a proceeding *ultra vires* and unlawful, which the incorporated society was entitled if not bound to disregard. Hence it is argued a resolution of the society to disregard the minutes of 1860, and to revert to the age limit fixed in 1805, is sufficient to displace the illegal enactment of 1860, and it is not necessary, in order to restore the age limit of forty, that the forms required in the case of a new law should be gone through, because,

it is said, as soon as the illegal minutes of 1860 are rescinded the regulation of 1805 revives, and with it the right of admission to the scheme within the age of forty.

Now, on the main question, the illegality of the resolutions or minutes of 8th March and 12th June 1860, the case of the defenders, as stated in their 18th answer, and more fully developed in the 5th condescendence of their counter action, is this—That the resolution in question was passed and confirmed in pursuance of a fraudulent design, devised by the members who were then in the administration of the affairs of the society, to appropriate the benefit of the funds to themselves, and to prevent the admission of new members. As to the intention to appropriate the corporate funds there can be no doubt. It is recorded in the minute of meeting of 30th September 1852 that a motion was then submitted by Mr William Gunn, narrating that no person had entered into the incorporation scheme since the passing of the Act 9 and 10 Vict. cap. 17, entitled "An Act for the abolition of the exclusive privileges of trading in burghs in Scotland," and that after having provided for the present aged members and widows and orphans, the whole heritable properties and others of the incorporation scheme will in time fall to the longest liver of the present members. It is thereupon proposed to vest the property of the society in "the whole living members and their heirs, share and share alike," and that the clerk should get the necessary deed of conveyance prepared. This motion was approved of by the managers present, and at subsequent meetings held in January and August 1853 the proposed resolution was confirmed; and thereafter deeds of conveyance in favour of the members of the incorporation and their heirs—said to be revised by an eminent Glasgow conveyancer—were submitted, and ordered to be executed and recorded. These proceedings were stopped in consequence of an application to the Sheriff for interdict at the instance of a dissentient member.

It is alleged by the defenders that the members who failed in this direct attempt to appropriate the property of the society set themselves to attain the same result indirectly by closing their doors against new applications. The Lord Ordinary has held that this allegation is proved, and that the reduction of the age limit was an incident of the illegal design. It does appear that in the year 1855 two new members were admitted. In 1856 the entry-money payable by new members was raised, and in 1859 resolutions were passed giving to each member at the age of sixty a right to receive, without inquiry as to health and circumstances, an annuity on the ground of old age and infirmity. In 1860 resolutions were passed, the first of which conferred right to an annuity at the age of fifty-six, and this proceeding is not defended, the second being the resolution in question altering the age limit for admission to the society. What followed may be stated in the words of the Lord Ordinary—"Lastly, there ensued a deliberate and sustained course of action, whereby from the year 1855 to 1891 all applications for admission were either refused on the ground of age, or staved off on the ground that the corporation was in course of consulting an actuary with respect to the future terms of admission. The result, on the whole, was that during the thirty-six years in question (from 1855 to 1891) no new members were admitted—the first to be admitted being the present pursuers, who fought their way in, as I have already mentioned, but who now turn round and seek to exclude the defenders, taking up the position that while everything else during the period in question was unlawful, and even fraudulent, there was one thing which was lawful, viz., the reduction of the maximum age for entrants."

I do not propose to enter more minutely into the documentary evidence in support of the Lord Ordinary's conclusions, because I concur unreservedly in his Lordship's view of the evidence. It is the less necessary that I should examine the proceedings very critically, since two of the members, Rae and Cowan, who took the chief share in the management of the society's affairs during the long period in which the society intercepted all voluntary admissions to its privileges, state with perfect distinctness what was the object of the resolution of 1860. Mr Rae was in favour of making the society a close corporation. Mr Cowan (who seems to have been in a minority of one in this question) was in favour of keeping the society open, as he says, "for the good of old men connected with the trade and their widows;" but they both agreed that the motive of the resolution was, as it is put, "not to admit any more members to the scheme." The parts of their evidence which bear on this question are quoted in the Lord Ordinary's judgment, and the statements amount to a substantial admission of the truth of the defenders' averments.

On 13th June 1891 the members of the society having been brought to a more just conception of their duties and obligations towards the younger craftsmen of their trade, rescinded the resolution of 1860, by which the age limit was fixed at thirty. I think that the members of the society are entitled to the credit of having performed this act of justice spontaneously, and I sympathise in the Lord Ordinary's suggestion that their past course of action is to be attributed rather to mistaken notions as to their individual rights than to any wilful design to defraud the objects of the scheme. The only objection taken to the resolution of 13th June is, that it is prefaced by a resolution "that the standing order that three months' notice of an alteration in printed articles and regulations of 1805 of the incorporation scheme be suspended at this meeting." The objection is at best a very technical one, because the standing order in question (Art. 23 of 1805) does not prescribe three months' notice, but only that the resolution shall be "under discussion" for three months, after which, if approved, it shall become law. Now, it

is not alleged that at any time within three months a motion was made to disapprove of the resolution of 13th June, and I observe from the minutes that not only was the minute of 13th June read and approved at the next meeting, but within the period of three months, viz., on 7th and 24th August, when the revised articles and regulations were under consideration and approved, the opportunities presented themselves on which motions disapproving of the resolution in question might legitimately have been proposed. Moreover, the proceedings on these three occasions—13th June, 7th and 24th August—bear to be unanimous, and on the last of these occasions the minute bears that the revised articles and regulations were read over and signed by the deacon and other members present, being the whole members of the scheme. I do not find these revised regulations in the printed papers, but if they do not expressly include the resolution of 13th June, they do so by necessary implication, because no benefit scheme could have any meaning or effect which did not fix, either directly or by reference to other documents, so important a point as the age at which the right of admission should cease. Thus, as I have said, the proceedings were throughout unanimous; and there is authority for the proposition that a corporation, acting for a legitimate purpose and within its powers, may dispense with formalities, provided the members are unanimous. If this principle be good for anything, it ought at least to cover the case of a society or corporation rescinding an unlawful resolution, which it is their duty to put out of the way at the first opportunity when its illegality is brought to their notice.

Now, if I have rightly judged the facts of this case, there cannot be the smallest doubt that the resolution of 8th March 1860, reducing the age of limit to thirty years, was an illegal act in the sense of being an abuse of the powers of the then existing members of the body corporate. It may here be observed that the 23rd article of the scheme, to which I have already more than once referred, gives only a qualified power of altering the rules. It begins with the significant phrase—"Should it be found necessary for the advancement of this fund to alter any of these articles." But by the admission of the gentlemen who assisted at the passing of the resolution of 1860, this resolution was not passed with any view to the "advancement" of the scheme, but in the hope of putting an end to the scheme and appropriating the revenues to their own purposes. The attempted alteration of the scheme was therefore not within the powers conferred by the 23rd article, and while it may be that an action would be necessary to set it aside at the instance of an outside party, it appears to me that if the corporators themselves, who knew the motive of the resolution, and were aware of its illegality, and were unanimous in their wish to return to the path of legitimate administration, chose to treat the resolution as a proceeding *ultra vires*, they were justified in doing so without waiting the expiration of the period of three months which is prescribed as requisite in the case of passing a new law or an alteration or amendment of the old laws. I do not look upon the proceedings at the meeting of 13th June 1891 as being of the nature of an amendment of the scheme falling within the provisions of the 23rd article, but rather as the fulfilment of a necessary duty incumbent on the corporation, which is to be performed in the same way as any other corporate act, viz., in this case by a unanimous resolution recorded in the minute-book, and approved at a subsequent reading of the minutes.

For these reasons I propose that the interlocutor brought under review in the action at the instance of Sadler and others be adhered to. With respect to the counter action, the Lord Ordinary has found it unnecessary to pronounce a decree reducing the minutes of 8th March and 12th June 1860. While I do not dissent from the reasons which resulted in this finding, yet as the rescission of these minutes was challenged by Mr Sadler and the two other pursuers, I think it was a proper step of procedure to bring these minutes under reduction, and that the minutes ought now to be reduced in order that there may be no dubiety regarding your Lordships' opinion as to their essential nullity. With this variation I propose that the interlocutor in the action at the instance of Webster and others should also be adhered to.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered to the Lord Ordinary's interlocutor, but also reduced the minutes of 1860.

Counsel for Sadler and Others — W. Campbell—James Reid. Agents — Macpherson & Mackay, W.S.

Counsel for Webster and Others—H. Johnston—C. N. Johnston. Agents—Henderson & Clark, W.S.

Wednesday, November 15.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

HAMILTON & BAIRD *v.* LEWIS.

Contract—Compromise of Action—Joint-Minute—Proof of Agreement Varying Terms of Compromise in Joint-Minute.

After decree had been pronounced disposing of an action in terms of a joint-minute, the defender reclaimed, and lodged a statement of *res noviter veniens ad notitiam*, averring that before the decree was pronounced the parties concluded a verbal agreement varying the terms of the joint-minute.

Held that as the joint-minute was a written contract, parole proof of an