Court in *Xenos* v. *Wickham* (L.R., 2 E. and I. App. 296)—that it is beyond the power of a managing owner to cancel the policies; and accordingly when parties contract in this way, and if it is shown clearly that the policies are to be cancelled as between them, I think that shows equally clearly that they are only entering into transactions as between each other, and not looking to the credit of the owners at all. The letter I have read is a mere specimen; but a little further on, on 4th May 1896, we get another letter in which mention is made of the policies in question, that is, the policies on which the premiums sued for were paid. [*His Lordship read the letter supra.*] Accordingly I think these letters show conclusively that Lamont, Nisbett, & Company all along contracted with Neil M'Lean & Company, and did not look to the owners at all, and that this is not a case of a party having bound the principal and thereafter elected to take the agent. I think the case here turns on this, that in the inception of the bargain Lamont, Nisbett, & Company were content to take Neil M'Lean & Company as their debtors and sole debtors; and I am bound to say also that the way in which Neil M'Lean & Company kept their books entirely bears this out. There is no separate account for each ship, and the account sued for is only made up by looking through the general books of Neil M'Lean & Company, and taking out the particular items and putting them together in one account.

On the whole matter I am of opinion that the Lord Ordinary has come to a right conclusion, and that we should adhere to his interlocutor.

LORD M'LAREN—I am of the same opinion, except that I should wish it to be understood that in my view, although Neil M'Lean & Company had contracted as principals, yet from the nature of the contract it must have been known to the brokers that the insurance was for the benefit of owners whose names were undisclosed, and therefore it would have been quite open, as I think, at any time for the owners to come forward and say that they were dissatisfied with the management, and to claim the benefit of the policy. On the other hand, while matters were entire, it might have been open for the brokers to sue the owners for payment of the premiums of insurance.

But then, agreeing with your Lordship as to the authority of *Xenos* v. *Wickham* which is a very important decision in mercantile law, I agree that under that decision a managing owner would be just in the same position as a broker managing for both parties, and would have no authority to cancel his insurance policies and thus leave the ship uninsured. I also agree that the impossibility of doing such a thing must have been known to both parties, and this leads irresistibly to the conclusion that in this matter—at all events at the time when the proposal of cancellation was made—Lamont, Nisbett, & Company elected to take Neil M'Lean & Company as their sole debtors. I think no other construction can be put on their actings, and that accordingly Lamont, Nisbett, & Company are not entitled to sue the owners as principals in this action. To say that the owner can be made liable to be sued for premiums while at the same time the policy is cancelled without his consent, and that he is to pay under a contract from which he gets no benefit, is to my mind absolutely absurd, and contrary to the elementary principles of justice.

LORD KINNEAR and LORD PEARSON concurred.

The Court adhered.

Counsel for Pursuers and Reclaimers—Solicitor-General (Ure, K.C.)—Spens. Agent—Frank M. H. Young, S.S.C.

Counsel for Defenders and Respondents—Clyde, K.C.—R. S. Horne. Agents—Constable & Sym, W.S.

Saturday, March 9.

FIRST DIVISION.

INCORPORATION OF CORDINERS OF EDINBURGH, PETITIONERS.

(See *Allan* v. *Incorporation of Cordiners of Edinburgh*, November 30, 1904, 42 S.L.R. 95.)

Incorporation — Trade Incorporation in Burgh — Friendly Society — Bye-Laws — New Bye-Laws where for Many Years Entry-Money Invalidly Increased—Entry at the Far Hand and at the Near Hand—Entry-Money—Facilities for Those Alleging Exclusion—Application of Funds to Charitable Purposes — Burgh Trading Act 1846 (9 *and* 10 *Vict. cap.* 17), *sec.* 3.

An incorporation, one of the old trade corporations of a city, which under section 3 of the Burgh Trading Act 1846 had had its bye-laws approved by the Court in 1850, presented for approval in 1904 a new set of bye-laws. Subsequent to 1850, in the belief that the rates of entry-money were within its own power, the incorporation had increased the rates in the bye-laws from time to time as increased the prospective benefits of membership with its financial prosperity. The increased rates, which in 1903 had reached a considerable sum, restricted the number of entrants. The Court having decided that they should have been approved, and without approval were invalid, the proposed new bye-laws fixed the rates at the figures to which they had been raised without approval. They were stated to be based for those entering at the far hand, such entry being, as was maintained, purely an act of grace on the part of the incorporation, on the actuarial value of the prospective benefits of membership, and, at the near hand, at one-fourth the far hand rate. Members of the craft objected.

On a remit, a reporter stated that on an examination of the history of the incorporation he was unable to find any ground for distinguishing the power of the incorporation over entry at the far hand from that over entry at the near hand; that in the present position of the incorporation he was unable to suggest a satisfactory basis on which the rates might be fixed; and that he would propose that the rates approved in 1850 should be reverted to until the incorporation should be in more normal circumstances.

The Court (1) *approved* the bye-laws as suggested by the reporter; and further (2) *refused* to insert, as desired by the objectors, (*a*) a bye-law granting exceptional facilities as to entry to members of the craft between certain ages based on the ground that they were now too old to join and had been excluded by the invalid rates of entry-money, and (*b*) a bye-law authorising the incorporation to give money to distressed members of the craft not being members of the incorporation, or their widows or families, or for charitable or benevolent objects, &c.

On 28th April 1904 the Incorporation of Cordiners of Edinburgh, one of the ancient trading incorporations of the City, and Robert Smart, deacon, and Walter Park, treasurer, as representing it, presented a petition under the Burgh Trading Act 1846 (9 and 10 Vict. cap. 17), section 3, for the sanction of a new set of bye-laws. James Allan, bootmaker, 123 Princes Street, Edinburgh, and others, objected, *inter alia*, to certain alterations of the rates of entry-money which were proposed.

The Incorporation had had a set of bye-laws approved in 1850, and since then had from time to time increased its rates of entry-money; but that having been done without obtaining approval, such increased rates were invalid (*Allan* v. *Incorporation of Cordiners*, 42 S.L.R. 95), and it now submitted similar rates for approval. Since 1850 its members, who were either (*a*) sons or sons-in-law of present or former members, *i.e.*, "entrants at the near hand," or (*b*) persons not falling under that category, *i.e.*, "entrants at the far hand," had become reduced from 25 to 6, and the widows entitled to annuities from 12 to 1; while on the other hand its funds had largely increased in capital value and in annual return.

The rates of entry-money under the 1850 bye-laws, and as proposed, were:—

	Under 1850 Bye-Law.	Under proposed Bye-Law.
1. *By entrants at the far hand.*		
Not exceeding 25 years of age .	£110	£720
Exceeding 25 & not exceeding 30	125	960
„ 30 „ „ 35	145	1200
„ 35 „ „ 40	160	1500
„ 40 „ „ 45	165	1620
2. *By Freemen's sons and sons-in-law.*		
Not exceeding 21 years of age .	£31, 10s.	£189
Exceeding 21, additional for each year of excess . . .	£2, 2s.	£12, 12s
3. *By sons and sons-in-law of members on the Roll at 11th November* 1849.		
Not exceeding 30 years of age .	£21	£178, 10s.
Exceeding 30, additional for each year of excess . . .	£1, 1s.	£11, 11s.

The benefits of membership under the 1850 bye-laws, and as proposed, were:—

1. To members of 15 years' standing and 50 years of age an annuity of	£10	£90
Rising by annual increments of .	2	18
To a maximum of . . . at the age of 55.	20	180
2. To widows of members an annuity of commencing, however, not sooner than seven years after the date of the member's admission.	£20	£180

On 29th November 1904 the Court remitted to Sir Charles B. Logan to examine and report in regard to the bye-laws and regulations of the Incorporation and the regularity of the proceedings, with power to take the assistance of an actuary.

Sir Charles B. Logan reported—" . . . The rates of benefit under the proposed bye-laws represent the rates enjoyed by the present members drawing benefit and by the widow annuitant. The rates of entry-money for 'entrants at the far hand,' which your Lordships are now asked to approve, represent approximately the actuarial value of the benefits to be derived by the entrant and those acquiring right through him, on the footing that the scale of the benefits remains constant at the amounts above stated. The scale of benefits, however, it is to be observed, has always been subject to periodical revision, and since 1850 the revision has been quinquennial in terms of the bye-laws then approved, and that practice is to be continued under the proposed bye-laws.

"The rates of entry-money for 'entrants at the near hand' are not calculated on any actuarial basis, but are fixed so as to amount roughly to one-fourth of the sum payable by an 'entrant at the far hand' of the same age, that being a proportion which has been preserved approximately for a long time past.

"To the proposed changes on the rates of entry-money strong objection is taken by the respondents. . . .

"The ground of the respondents' objection to the proposed alterations is that, after the Act of 1846 abolishing its trading privileges was passed the Incorporation became a purely charitable trust, existing for the benefit of present and future members of the trade in Edinburgh, and that the policy of coincidently raising the rates of benefit and the rates of entry money for membership in the Incorporation is unfair in its operation and illegal and inconsistent with the trust purposes for which the funds of the Incorporation are held, because the necessary result is to raise the rates of entry-money until they become impossible for outside members of the trade, and thus to make the Incorporation a monopoly for a privileged class of existing members. The petitioners, on the other hand, not only maintain that the principle of proportion-

ing the entry-money of an 'entrant at the far hand' to the prospective benefit to be received is in accordance with the long-established practice of the Incorporation, but they also contend that the Incorporation is in effect a 'close' one, the members of which from time to time have the untrammelled right of declaring upon what terms they will receive others to their company. If the petitioners' contention be the sound one, then the rates of entry-money proposed will fall to be accepted as they stand, since they are in accord with the rules which the petitioners have laid down for themselves. If, however, the respondents' contention be well founded, the rates of entry-money proposed by the petitioners call, I think, for serious revision.

"The opposing contentions of the parties rest upon fundamentally divergent views of the nature of the Incorporation, and in order that your Lordships may be in a position to deal with these contentions it is necessary that I should now advert to its history.

"The Incorporation is, as above stated, one of the ancient trading incorporations of the city of Edinburgh. It is said to have been constituted under certain Seals of Cause obtained from the Town Council of Edinburgh in 1449, 1479, and 1586, and by Royal Charter granted by King James VI, dated 6th March 1598, ratifying the Seal of Cause of 1586. The Incorporation was at all events in existence in 1509, when it obtained a Seal of Cause from the Town Council of Edinburgh, which is in the print in the recent case of *Allan* v. *The Incorporation of Cordiners*.

"From an examination of the documents included in the print it is plain, and is not, I think, disputed by the petitioners, that the Incorporation owed to municipal sanction not only its existence, but also its powers both of external control of trade affairs and of internal regulation. It is also plain that these powers were not given once and for all, so that, once created, the Incorporation became independent of municipal control. From time to time, as occasion arose, the Incorporation applied to the Town Council for its sanction and authority to rules and regulations dealing with its relations with its own members as well as with outsiders. So far as regards rates of entry-money, it has already been decided by your Lordships, in the case of *Allan* above referred to, that the Incorporation had, and has, no power to fix these at its own hand, such rates requiring, prior to the Act of 1846, the sanction of the Town Council, and since that Act the sanction of your Lordships.

"What is thus true of rates of entry-money appears to me to be true also of other things. The rules for which the sanction of the Town Council was sought from time to time cover the whole field of the Incorporation's activity. They commence in 1509 and 1513 with rules which are to a great extent concerned with the religious observances, and the supervision of materials and workmanship, which then bulked largely in the life of trade incorporations or guilds, and they are gradually developed until in 1828 we find a code not greatly differing from the rules in force at the present time, to which the sanction of the Town Council was sought and obtained. It seems to me, therefore, that the Incorporation was at the outset, and continued to be, under the control of the Town Council in all its relations, external and internal, though it is no doubt also true that the Town Council could not itself force the Incorporation to accept as members, at any rate of entry-money the Council might fix, any persons whom the Council thought qualified to practise the craft. The initiative in all cases lay with the Incorporation, but it was necessary that the Town Council should ratify.

"The petitioners, however, do not claim that the Incorporation is, or has at any time been, entirely free from control, but they do claim, as I understand, that from the outset it had, or at all events in accordance with ancient custom having the force of law now has, the absolute right of refusing to admit to its membership any person other than a son or son-in-law of an existing or former member. There was also formerly another privileged class, viz., apprentices taken by members 'for the freedom of the Incorporation,' but that class was abolished in consequence of the loss of the exclusive trading privileges of the Incorporation, and the rules approved by the Court in 1850 gave effect to this abolition by providing that members should no longer be entitled to take apprentices for the freedom of the Incorporation. There are now therefore only two classes—sons and sons-in-law of members—who it is said have in their own persons any right to require entry to the Incorporation. As regards strangers—*i.e.*, persons not related to a member in either of the ways mentioned—the Incorporation maintains that its admission of them is entirely an act of grace, and that they must be content to obtain admission on such terms as the Incorporation chooses to fix.

"The question which this argument presents for consideration is essentially different from that raised in the case of *Allan*. In that case the pursuer (who was a stranger) claimed and obtained entry under the rules of the Incorporation providing for the entry of strangers at certain rates, the question being simply whether, in the absence of approval by the Court, these rates had been validly raised from the figures at which they stood in the 1850 bye-laws.

"The argument addressed to me on behalf of the petitioners went no further than I have stated above. But if good to that extent, I see no reason why the argument should not be valid to the extent of excluding, not strangers only, but every one, with the result of appropriating to the members for the time the whole benefit of the funds. For I have been unable to find in the documents any good ground for drawing the distinction suggested between the rights of strangers, and the rights of sons or sons-in-law of members, to require entry to the Incorporation.

"When the documents bearing on the matter are looked at it is seen that in 1509 the 'Artikillis, Statutis, and Reulis' approved by the Town Council, after providing for a seven years' apprenticeship, with power to the principal masters of the craft to give a dispensation of this requirement 'and specialie in favouris of the sonis of the said craft,' go on to enact that 'nouthir thir prentisses nor nane vthir persoun of the said craft be sufferit to sett up buith within this said burgh without he be fundin sufficient habill and worthi thairto in practick and vther wayis, and admittit thairto first by the sworne maisteris of the said craft, and maid freman and burges of the said burgh, and than for his upsett to pay four merkis, except burges sonis of this toune to pay twa merkis to the reparatioun and vphalding of divine seruice at our said altar.' Again in 1536 provisions in substantially the same terms as those quoted are repeated, the entrance fee, however, being £5, 'except burges sonis of this toune to pay fyfty schillingis.'

"In the Seal of Cause of 1586 by the Town Council, ratified by King James VI in 1598, no entry-money is specified, but there is this provision—'Item, that none be made master of said craft except he have been ane prentice five years and served ane freeman for meat and fee three years thereafter, or else married ane burgesses daughter.'

"So far there is no trace of any privilege as regards right of entry being conferred on sons or sons-in-law of members, and it is not unimportant to observe that the powers of inspection and regulation of goods and markets, and the various rules for the government of the Incorporation, were sought and were granted by the Town Council on the plea that they were for the 'wirschip and proffet of this guid toun,' and for 'the incresment of the common weil of this burgh.'

"The effect of the various Seals of Cause and Charters granted to the Incorporation of Cordiners has already been made the subject of judicial observation, if not of decision, by the late Lord President (Lord Kinross) in the case of *Allan* (42 S.L.R. 100), where his Lordship says—'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.' The opinion thus expressed by his Lordship appears to me to confirm the view of these documents which is above suggested.

"Further, by the decreet-arbitral of King James VI, dated 22nd April 1583, upon a reference to him by the merchants of Edinburgh on the one side and the craftsmen on the other, it was decerned that entry-monies, upsetts, and such like, to be received in all time coming of all merchants and craftsmen indifferently should be put into a common purse 'and employit be the advice and command of the Provest, Baillies, and Counsell for support and relief of the failyiet and decayit burgesses, merchants, and craftsmen, their wyffes, bairnes, and auld servants, and uther poor indwellers of the town.' This decision also seems inconsistent with any such absolute rights in the members of the Incorporation from time to time, as it is now contended they have all along possessed.

"The petitioners, however, point to the facts as disclosed by the minute-books of the Incorporation (excerpts from which are contained in the print already referred to) as supporting their contentions. The first notice in the minutes, so far as printed, of the entry of a stranger is in 1759, when one David Ireland, late Deacon of the Cordiners in Potterrow, applied for and obtained admission to the Incorporation. It is said that as the Incorporation had in 1759 been in existence for almost 300 years without any strangers having been admitted to the membership, it is to be inferred that strangers had no right to admission. Looking to the well-known fact that in those days fathers and sons through several generations continued to follow the same craft, and to the comparatively small size of the community then, I should hesitate to draw the inference suggested, even if it were the fact, that David Ireland was the first stranger to enter the Incorporation. But it appears from the very minute which records Ireland's entry that it was objected to on the ground of illegality, and that the then Deacon of the Incorporation stated that other incorporations in the city had received strangers, and that he could instance two already received by this (the Cordiners') Incorporation.

"From 1759 onwards the minutes show that strangers continued to be received without question, and from that time down to the present strangers form almost 50 per cent. of the total entries. It seems to me, therefore, that the state of matters as regards the actual entries to the Incorporation does not assist the petitioners to establish what, as I have already said, is not apparent on the face of the documents constituting the Incorporation, that any distinction can be drawn between the right to require entry of those who are and those who are not sons or sons-in-law of members.

"If no such distinction existed prior to 1846, I do not think it was created by the Act of that year abolishing the trading privileges of the Incorporation. The power given to the Incorporation by section 3, subject to the approval of the Court, to make new bye-laws and regulations relative to the qualification and admission of members in reference to its altered circumstances under the Act, does not appear to me to confer a power to exclude persons who at the passing of the Act had a right to entry. In any case no bye-law to that effect has been sanctioned or is now proposed.

"The petitioners brought specially under my notice a considerable number of cases of other incorporations which have—in several instances very recently—obtained

the sanction of the Court to rules under which either (*a*) none but sons, or sons and sons-in-law, of members—and these though they be not craftsmen—are eligible for membership, or (*b*) strangers are eligible, but with an absolute right to the incorporation to refuse any application. But these cases do not in my view assist the petitioners to make out the distinction between the rights of strangers and the rights of sons and sons-in-law of members, for which they contend. For, assuming—what I do not know—that the circumstances of these other incorporations are so similar to those of the Incorporation of Cordiners that a decision of the Court regarding them would be applicable to the present case, all these cases are I think deprived of any value they might have had as authorities by the fact that in none of them was the question which is now raised ever suggested either before the Court or before the reporters. For that reason I have been unable to give any weight to these cases as against what appears to be the true view of the constitution and history of this Incorporation, and as against also the decision and the opinions expressed by the Court in the cases of *Sadler and Others* v. *Webster and Others*, and *Webster and Others* v. *The Incorporation of Tailors of Ayr*, reported together at 21 R. 107. . . . . .

"The Incorporation of Tailors of Ayr differs, so far as I can see, in no essential point from the Incorporation of Cordiners of the City of Edinburgh, and all that is said by the learned Judges might, it seems to me, be with equal propriety applied to the latter Incorporation with which we are now concerned. I am accordingly of opinion that no distinction can be drawn between the right of one member of the craft and the right of another to require entry to the Incorporation. If that be so, the mainstay of the petitioners' case is gone, and they can no longer be said to be in a position at their mere pleasure to fix what sums they choose, however prohibitive, as the price of a stranger's entry to the Incorporation.

"But if it be taken as established that strangers have right to require entry to the Incorporation, what effect, if any, ought that to have upon the rates of entry-money which the petitioners propose to levy upon strangers under the rules to which they seek your Lordships' approval? I have found this question to be one of considerable difficulty.

"While there is, as already pointed out, no trace in the constitution of the Incorporation of any difference in the right to entry of the stranger and of sons or sons-in-law of members, there has, practically throughout the history of the Incorporation, so far as the documents disclose it, existed a practice of differentiating the rates of entry-money in favour of the sons and sons-in-law as against the strangers, the entry-money for the latter being roughly four times that for the former. That practice does not appear to be in itself unreasonable, and I would not suggest to your Lordships any general levelling up or down of the rates of entry-money for all classes.

"But the present position of the Incorporation's affairs—in which there is a membership of half-a-dozen and an established rate of annuity to members of £180 a year, with corresponding benefits to widows and children, and upon which the calculations of the proposed rates of entry-money are based—is I think abnormal, and has been produced by the concurrence of two causes. In the first place, there has been since 1850, when bye-laws were last approved by the Court, a great increase in the income of the Incorporation, due chiefly to the largely increased annual return from certain properties in Princes Street and Waterloo Place, which were acquired by the Incorporation in 1800 and 1819, and also from other property in Waterloo Place acquired in 1862. The funds of the Incorporation at 1850 are estimated to have been of the capital value of £12,846, and yielded an annual income of £642, while in 1903 the capital value of the funds was £30,143, yielding an income of £1471. In the second place, the rates of entry-money have been continuously raised by a series of resolutions beginning in 1860 and ending in 1899, all now found by your Lordships in the case of *Allan* to have been invalid, by which, *e.g.*, the entry-money for strangers not exceeding twenty-five years of age was increased from £110 to £720, and the entry-money for strangers between forty and forty-five years of age from £165 to £1620—sums far in excess of the entry-moneys exacted by any other similar incorporation. At the same time, the rate of annuity has been increased from £20 to £180. While this is so, several cases have been brought to my notice, extending back over a considerable period, in which it is said that inquiries were made by persons qualified for membership with a view to applying for entry to the Incorporation, but that it was found that the rates of entry-money were prohibitive. It is, at all events, the fact that no one has entered the Incorporation as a stranger since 1867, and only five members in all (excluding Mr Allan) have entered since that time.

"It would thus appear that the unauthorised increases in the rates of entry-money have had the effect of excluding qualified persons from the membership of the Incorporation. It also appears to me that if it be true that the Incorporation is in the nature of a trust, it would be proceeding on an unsound footing to calculate the rates of entry-money, as the petitioners propose, on the basis of the benefits enjoyed from the largely increased funds by the present unduly attenuated membership. So to calculate would be in effect to assume the right of the present members to the whole benefit of the increase in value of the Princes Street and Waterloo Place properties belonging to the Incorporation, an assumption which, looking to the views expressed in the *Ayr Tailor Incorporation* cases already mentioned, I do not think would be well founded.

"But if the present position of matters and the method of calculation based upon the benefits enjoyed by members at the

time are not to be taken as a basis of calculation now, the question arises upon what basis are the rates of entry-money to be now fixed? and I do not readily find an answer to that question.

"I find myself unable to suggest any principle upon which your Lordships might proceed in fixing the rates of entry-money, but I am relieved to observe that these rates, although no doubt fixed according to a *rule*, have not, so far as I can see, been hitherto ascertained upon anything which can be called a *principle*.

"It is alleged by the petitioners that the entry-money payable by a stranger has for a long time been ascertained with reference to the value of the benefits to be received by the entrant and those taking right through him, but I am unable to see that in any true sense that is so.

"What has been done from time to time is to take the benefits received by members at the date when the calculation is being made; to ascertain the value of such benefits actuarially; and to fix a rate of entry-money corresponding to the value of the benefits so ascertained. This would be an excellent way of fixing a rate of entry-money, if entry implied a contract to provide benefits at the rates on which the calculation was based. But that is not so. A member is only entitled to such benefit as the revenue of the Incorporation will afford, and the rules of the Incorporation provide for a quinquennial revision of the rates of benefit so as to make these accord with the revenue from time to time. And as the benefits provided include not only annuities to members, but provisions to the widows and children of deceased members, and as no member joining can receive benefit until he has been a member for at least fifteen years and has attained the age of fifty, it is plain that the rates of benefit in force during the period of his enjoyment of benefit may be very different from those in force at the time the calculation which fixed his entry-money was made.

"The way in which the method adopted works out shows that the sum paid on entry has no real relation to the benefit received. For instance, Robert Smart, who entered in 1867 at the age of thirty-four and who was the last stranger to enter, paid £225 of entry-money, and becoming eligible for benefit after sixteen years' membership, he drew from the funds of the Incorporation before his death at the age of seventy-one a total sum of about £2800.

"The rule which at present regulates the rates of entry-money being thus entirely arbitrary, I have the less hesitation in suggesting that your Lordships should fix the rates in another way, also arbitrary, but which I think more nearly meets the equities of the case, and which might, I think, be adopted.

"My suggestion to your Lordships is that the rates approved by the Court in 1850 should be adhered to. For while, as I have said, the state of matters since that year has been in my view abnormal, the history of the Incorporation down to that year may, I think, fairly be called normal, and the rates then fixed were those proposed by the Incorporation in view of its altered circumstances in consequence of the passing of the Act of 1846. It seems to me therefore that if it be necessary—as I think it is—to reject the rates of entry-money proposed by the petitioners, a continuance of the rates of 1850 has more to commend it—or perhaps, I should say, has less to be said against it—than any other course which can be suggested.

"If your Lordships should adopt my suggestion, the rates would then be those set out as leviable under the bye-laws of 1850.

"No doubt the continuance of these rates of entry-money, which have been since 1860 ostensibly though not legally inoperative, may lead, in the present state of the funds, to a considerable addition to the number of members of the Incorporation. Such an addition would have no immediate effect on the benefits payable to members. But in fifteen years when, assuming their age at entry to have been not less than thirty-five, the new members would become entitled to benefit, a considerable increase in the membership now would have the effect of reducing the rates of benefit payable, as the new members receiving annuity would more than replace any of the old members who might have died during the fifteen years. . . . . .

"In the whole circumstances it appears to me that no plea either of legal right or of hardship can with any force be put forward by the present members against a possible reduction of the rates of benefit, and that the practice of the Incorporation presents no obstacle to the continuance of the rates of entry-money approved in 1850. These rates are substantial in amount, and appear to satisfy the conditions laid down by Lord M'Laren in his opinion in the case of *Allan*, viz.—'That there should be a proper table of fees, which on the one hand would not be so low in amount as to tempt so large a number of members to enter as to make it unworkable, and again would not be so high as to keep people out altogether'; and, as already indicated, I would suggest to your Lordships that these rates of 1850 should be continued. . . . . .

"The respondents desired me to include, in the bye-laws and regulations as adjusted by me, articles providing for the entry to the Incorporation, upon some terms of increased entry-money or reduced benefit, of persons now over the ordinary maximum age of 45, who had been prevented from entering by the unauthorised high rate of entry-money demanded. It seems to me, however, that I should be travelling beyond the scope of your Lordships' remit if I were to attempt to legislate for these special cases, and I have accordingly not done so. In any case it seems very doubtful whether such persons are entitled to have made for them such provisions as are asked. It was at any time open to them to have vindicated their right to entry to the Incorporation by action, as Mr Allan has done. . . ."

Both the petitioners and respondents lodged objections to the report. The peti-

tioners maintained that the proposed alterations making the rates the same as those approved of in 1850 would refuse due effect to the usage of the Incorporation. They averred—"In accordance with that usage, which extends back for a period of about 150 years, the rate of entry-money payable by an entrant at the far hand or stranger has always been fixed according to the pecuniary advantages which such entrant member and his family are likely to obtain on the basis of the rates of benefit existing at the date of his admission, and the rate of entry-money for an entrant at the near hand has always been about one-fourth of the rate of entry-money for entrants at the far hand."

The respondents objected to the report mainly on the ground that the proposed regulations would exclude from the Incorporation all entrants at the far hand over forty-five years of age, which was the age limit for applicants sanctioned in 1850. While not claiming the total deletion of the age limit, they asked that in view of the illegal actings by the Incorporation since 1850, some special provision should be made for themselves and others who had been debarred by these actings from entering the Incorporation sooner.

Argued for petitioners (objectors)—The entry-money payable by entrants at the far hand had always been proportionate to the benefits received. That was why the petitioners now proposed to raise the entry-money. The prevailing usage was the law of the Incorporation, and existing members would suffer if any other principle were now adopted. The Court was not sitting to frame a scheme for the administration of a trust. This was a trading incorporation not a public trust. It was not even a trust for the trade. There were no *termini habiles* for such a trust. That being so, this Incorporation was entitled to manage its own affairs. It had only to satisfy the Court that its actings were not illegal. Outsiders could only obtain admission on payment of a fair equivalent of the benefits they would receive. No other criterion of eligibility for membership was possible.

Argued for respondents (objectors)—The respondents objected to (1) the proposed increase in entry-money, and (2) the proposed age limit. With regard to the entry-money the history of the Incorporation showed that prior to 1850 no actuarial principle had been followed in fixing the entry-money. There had in fact been no fixed rate and no fixed scale of pension. The analogy of other incorporations showed that entrants at the far hand received much more than the actuarial equivalent of their entry-money, and that entrants at the near hand never had to pay anything like an actuarial equivalent of the benefit received. Such incorporations were for the benefit of the trade and such of its members as had qualified for admission. The proposed increase in entry-money would defeat that object, and ought not to be sanctioned—*Incorporation of Wrights of Leith*, June 4, 1856, 18 D. 981; *Muir* v. *Rodger*, November 18, 1881, 9 R. 149, 19 S.L.R. 121; *Tait* v. *Muir*, December 19, 1902, 5 F. 288, 40 S.L.R. 242. Members of this trade who had done the "essay" should have the right to enter on payment of a reasonable sum, otherwise the Incorporation would become a close one. The Court would prevent that taking place—*Webster* v. *Incorporation of Tailors of Ayr*, November 14, 1893, 21 R. 107, 31 S.L.R. 89. The Court should take a rough axe and fix a reasonable rate, looking to the benefits obtainable, the undue decrease of members, the desirability historically for members of the trade to enter, and the large increase in the value of the investments. (2) With regard to the limit of age, provision ought to be made for the case of such of the respondents as were now over forty-five, as they had been prevented from entering sooner by the illegal actings of the petitioners. The respondents would submit clauses giving effect to that contention (*vide infra*).

On 5th February 1907 the Court, without pronouncing any interlocutor, delivered the following opinions:—

LORD PRESIDENT—This is a petition at the instance of the Incorporation of Cordiners of Edinburgh and certain of the members for the sanction of proposed bye-laws. The affairs of the Incorporation have already been before the Court in the case of *Allan*, so that it is not necessary to go over again the history of the Incorporation. It is sufficient to say that it is one of the old trading corporations which had their origin at a time when the close corporation of certain trades meant something valuable in the way of monopoly. Accordingly it fell under the legislation which was passed when the monopolies of trading societies were abolished, and in terms of that legislation its power to make bye-laws was subjected to revision by the Court. Originally the bye-laws of this Incorporation were revised by the Town Council, but the members—after coming to the Court in 1850 for sanction of their rules, which sanction they got—took the erroneous view that they were entitled to make rules and bye-laws altogether at their own hand, and in that erroneous belief they continued to live from 1850 to 1904. In the latter year the question was directly raised in an action by Mr Allan, a gentleman from the outside, trying to gain admission to the Incorporation in terms of the rules sanctioned by the Court in 1850. The Court—Lord Kyllachy first, and afterwards the Inner House—decided that the contention of Mr Allan was right, and that he was entitled to regard as null the rules made after 1850 without the sanction of the Court. The members of the society, who at that time (1904) had very much dwindled, proceeded to alter their rules, or rather to re-enact the bye-laws as they had done between 1850 and 1904, but with the view of coming to the Court to have these bye-laws sanctioned, and they have accordingly come to the Court with the present petition.

Against the petition answers have been lodged both by Mr Allan—who was the successful litigant in the last litigation—and certain others, who imagine that they have the right to get into this society on better terms than the bye-laws proposed will allow. Their principal objection is this. The old scheme of the society was, that there were two classes of people admitted. They were called "entrants at the near hand" and "entrants at the far hand." The former were relations of members while the latter were outsiders, and the fees demanded as entrance money from the outsiders amounted to a great deal more than those demanded from relations. As I have already mentioned, the members of this society had very much dwindled between 1850 and 1904, and during that period, owing to well-judged—and also if one may say so—lucky investments, the funds of the society have enormously increased, with the result that the present income enables the society to pay a very large dividend—and by dividend I mean pension—to its existing members.

The result is that the present petitioners propose such large entrance fees for outsiders as to make admission to the society practically prohibitive for the class of persons for whom it was originally intended. They justify this by saying that outsiders should pay in proportion to the benefits they would derive from admission, while the objectors reply that the pensions would not have been so large if the membership had not been unduly diminished owing to the operation of the illegal bye-laws by which the society fenced itself in. That really is the whole question.

The matter was remitted to Sir Charles Logan, and he has presented an exhaustive report and a most satisfactory argument in support of the course he proposes. I have come to the conclusion that the view taken by the reporter is right. The case is not one which can be disposed of on strict calculations of interest, but rather on considerations of what is fair and reasonable in the circumstances, for the situation into which this society has got is really an abnormal one. Sir Charles Logan suggests that the bye-laws of 1850 should be allowed to stand till the society has reverted to its normal condition. After that the petitioners can present another application to your Lordships, when they will be in a position to say what the pecuniary benefits really amount to, and what is a proper sum to charge for entrance. That is both a practical way of getting out of the difficulty and a reasonable course for us to follow. As matters stand at the present moment no one knows what the benefits received by members would have been had this society been allowed to continue in its normal condition.

LORD KINNEAR and LORD PEARSON concurred.

LORD M'LAREN was absent.

On 7th March 1907 the respondents submitted the following proposed additions to the bye-laws of the Incorporation:—"VIIA.—Any person exceeding forty-five and not exceeding fifty-five years of age, and who complies with the other requirements of article 1, shall be eligible for admission to the Incorporation provided that he lodges his petition for admission not later than 31st December 1907, and the dues of entry payable by such applicant shall in the event of his being an entrant at the far hand be the same as the dues payable by an entrant at the far hand exceeding forty and not exceeding forty-five years of age. XLIA.—The Incorporation may make such donations or allowances as they shall think fit from the funds of the Incorporation to distressed members of the craft residing in Edinburgh, or to the widows or families of such members of the craft, although such members of the craft may not have been members of the Incorporation; and the Incorporation may also subscribe or guarantee money from the funds of the Incorporation for charitable or benevolent objects or for any exhibition or for any public, general, or useful object."

Argued for the respondents—1. The circumstances here were exceptional. The age limit was not part of the permanent law of the Incorporation, as it dated only from 1818. The Burgh Trading Act 1846, section 3, conferred ample power on the Court to make new regulations. 2. Power to make grants to distressed members of the craft and other charitable purposes was in keeping with the objects of the Incorporation and ought to be sanctioned.

Argued for the petitioners—1. The respondents had no right to exceptional treatment. They could have sued for entry like Mr Allan—*Allan, cit. supra.* 2. The power to make grants to non-members and to charitable and public purposes was quite outwith the objects of the Incorporation, and was not asked for by it.

At advising—

LORD PRESIDENT—The respondents ask that two new articles should be added to the bye-laws and regulations of the Incorporation.

The first addition is a temporary rule to provide for the admission for a limited period of time, viz., till 31st December 1907, of persons exceeding forty-five but not exceeding fifty-five years of age. The respondents say in effect—"Some of us are persons who are now beyond the age limit. The reason that we did not join the society was that we were frightened"—because that is really what it comes to—"we were frightened by the wrongful asseveration on the part of the officials that we should have to pay the large entrance fee. Accordingly we did not join. It has been found by the decree of this Court in *Allan's* case that there was no right to charge that high fee. And inasmuch the Court has now signified its intention not in the meantime to sanction a change in the bye-laws—that is to say, simply to keep the bye-laws as they were in 1850—we are in this unfortunate position, that we have allowed the years to go by and we have got beyond the

limit of age. We therefore want a special clause put in for our benefit, to restore us to the position that we would have been in if all along we had known that the bye-laws of 1850 were to be the regulating bye-laws." I do not say that I have not got some sympathy for the objectors here, but I do not think that this is a thing the Court should do. After all they had the matter in their own hands, because they might have forced their way into the society by an action, as Mr Allan did; and it is getting into regions far too speculative to say that, if it had not been for this attitude taken up by the officials of the society, these people would have joined. I do not know whether they would have joined or not, and I cannot take it from them—who are now wise after the event—that they would have joined. On the whole matter I do not think that the Court can put in a rule of that sort against the wishes of the society in general.

The second addition to the rules is an addition that allows the funds to be given to widows of members of the craft who were not members of the society. That may be a very worthy and charitable purpose, but I think it is sufficient for us to say that it is not a purpose that is put forward by the general members of the society; and although I am not doubting the actual power of the Court, under the section of the statute that has been quoted, to put in what additions to the rules it pleases, yet I think your Lordships agreed with me in the last discussion when I said that *prima facie* we are not here settling a scheme, but we are here seeing if a scheme settled by the society themselves is a proper scheme. Now the society themselves do not propose any such rule, and I do not think that it is for your Lordships to force a rule of this sort upon them, which certainly, however estimable in itself, is a different disposition of the funds of the society from the disposition as it was in the past.

Accordingly I do not think we can make either of these additions. The result seems to be to approve of the bye-laws as adjusted by Sir Charles Logan.

LORD KINNEAR and LORD PEARSON concurred.

LORD M'LAREN was absent.

The Court interponed authority to the bye-laws as adjusted by the reporter, and allowed the respondents their whole expenses as between agent and client out of the funds of the Incorporation.

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

Counsel for Respondents--Dean of Faculty (Campbell, K.C.) — Constable — Hon. W. Watson. Agent—Thomas Liddle, S.S.C.

Saturday, March 9.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

FENTON LIVINGSTONE *v.* FENTON LIVINGSTONE.

Husband and Wife—Donation—Revocation —Sums of Money—Sums Given to be Applied and Consumed.

In an action by a wife to recover as donations sums of money gifted by her to her husband, said to be out of capital, the Court *allowed* a proof *quoad* such of the sums as *ex facie* of her statement did not bear to have been applied and consumed; but *quoad* such as *ex facie* bore to have been so, *repelled* her claim as irrelevant.

Per Lord President—"A donation between husband and wife may, of course, be revoked, but the thing to be revoked must, I think, be a thing which is in the proper sense of the word extant."

On 27th September 1904 Mrs E. M. M'Dougall or Fenton Livingstone, wife of J. N. E. Fenton Livingstone, of Westquarter, Stirlingshire, raised an action against her husband for payment of £2187, 2s. 1d., the amount of sums which she alleged she had either lent or given to her husband, and which, as she had revoked all donations made during the subsistence of the marriage, now fell to be repaid. She averred that the sums lent and given were realised funds from a trust estate of which, subject to a liferent, she was sole beneficiary; lodged in process (No. 65) a statement of the different sums claimed; and pleaded—"The various sums of money detailed in the statement referred to in the condescendence being of the nature either of donations *inter virum et uxorem*, which have been revoked, or of loans by the pursuer to the defender, decree ought to be pronounced in terms of the conclusions of the summons."

The defender in answer averred that the payments in the statement (No. 65) so far as not individual debts incurred by the pursuer, were payments for family expenses and for the joint welfare of the pursuer and defender and their family and the maintenance of their position in the world. He pleaded—"(1) The pursuer's statements are irrelevant. . . . (3) The pursuer's averments can only be proved by the writ or oath of the defender."

On 24th October the Lord Ordinary (MACKENZIE) ordained the pursuer to lodge a minute specifying which of the sums claimed were loans and which donations. In compliance with this interlocutor the pursuer lodged two statements, one (No. 75) setting forth the alleged loans, and the other (No. 76) containing the alleged donations. The statement of donations (No. 76) was:—