where an official holds funds belonging to a corporate body as the mere hand of the corporation, he is not the person who is entitled to represent the corporation in proceedings relating to these funds.

LORDS DEAS, MURE, and SHAND concurred.

The Lords refused the appeal.

Counsel for Appellant—Rhind. Agent—R. P. Stevenson, S.S.C.

Counsel for Respondent—Watt. Agent—A. Clerk.

Friday, November 18.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

MUIR AND ANOTHER *v.* RODGER AND OTHERS.

Incorporation — Trust — Act 9 *and* 10 *Vict., cap.* 17—*Annuities—Exhaustion of Capital.*

In the case of an incorporation regulated by 9 and 10 Vict., cap. 17, the Court will not sanction the payment of allowances and annuities to members, and the widows of members, to such an amount as will materially encroach upon the capital of the incorporation.

The Incorporation of Tailors of Edinburgh was incorporated under seal of cause of the Town Council of Edinburgh at an early period, and at one time enjoyed various privileges and monopolies which were abolished by the Act 9 and 10 Vict., cap. 17, along with those of similar incorporations. The objects of the Incorporation, so far as regards the present question, were to provide annuities to the widows of members, and allowances to such members as were of more than fifteen years standing and fifty years of age. Considerable funds and property were accumulated in the hands of the Incorporation, but from various causes the admission of new members began to decrease, and the number of members had for many years been steadily diminishing. There were at the date of the present action only four members, viz., the pursuers James Muir and R. G. Muir, and the defenders J. Rodger and J. Dundas Grant. Of these R. G. Muir was not, and would not for many years be, a participant in the fund. It was possible, but not probable, that there might be future entrants to the Incorporation.

The affairs of the Incorporation were administered under bye-laws and regulations, which were approved of by the Court, under the authority of 9 and 10 Vict., cap. 17, in 1853. By No. 32 of these bye-laws and regulations it was provided that "at stated periods, and at intervals not longer than seven years from the date of the last investigation, there shall be an investigation made by a professional accountant into the state of the affairs of the Incorporation, for the purpose of showing, *inter alia,* whether and to what extent the funds will then admit of an increase on the annuities and other allowances provided by the foregoing regulations to the members of the Incorporation, and to their widows and families after their death; or whether and to what extent it would be necessary or prudent to diminish the same; and in general, whether, from the experience which shall then have been acquired, it appears to him to be expedient to adopt any other and what regulations respecting the said annuities and allowances, and to report the same to the Incorporation."

Under this bye-law periodical investigations were made by Mr J. M. Macandrew, C.A., the annuities and other allowances being generally increased at each investigation, owing partly to a rise in the value of the property of the Incorporation, and partly to the diminution in the number of members and annuitants being greater than what had been anticipated. From 1852 to to 1859 the expenditure exceeded the income by the sum of £125, 16s. 2½d., or about £18 per annum. From 1859 to 1864 the excess amounted to £12, 3s. 4d., or about £2 per annum. From 1864 to 1873, on the other hand, there was an excess of income over expenditure of £476, 13s. 1d., or about £53 per annum. But from 1873 to 1880 there was an aggregate excess of expenditure over income of £1955, 18s. 3½d., or about £279, 8s. 3d. per annum, to meet which excess with interest it was found necessary to borrow £2237, 9s. 6d. The total debt at Candlemas 1881 was £2590, 11s. 7d., the interest on which amounted to £129, 10s. 6d. This debt was due in part, but not wholly, to the circumstance that certain house property belonging to the Incorporation was unlet during the latter years of the period.

In 1881 another investigation into the funds of the Incorporation was made by Mr David Chisholm, actuary. Mr Chisholm recommended a further increase in the annuities and allowances, which would make their aggregate amount £1016, 8s. per annum. To meet this expenditure the income was estimated to amount to £1040 (including the rent (some £380) of the property above mentioned, which was still unlet), subject to a deduction of £494, 11s. 2d., being the usual deduction of taxes, salaries, interest on borrowed money, &c., leaving a net annual income of £545, 8s. 10d.

When the question of the approval of Mr Chisholm's report came before the Incorporation, the meeting was equally divided, and thus matters came to a deadlock. In consequence this action was raised by James Muir and R. G. Muir, two of the members, against the remaining members Rodger and Grant, and also against the Incorporation, and Rodger and James Muir, its deacon and treasurer respectively. The pursuers concluded that "it ought and should be found and declared by decree of the Lords of our Council and Session that the time has now arrived when according to the bye-laws and regulations of the said Incorporation at present in force, and approved by our said Lords on the 10th day of June 1853, there must be an investigation made by a professional accountant into the state of the affairs of the said Incorporation for the purpose of showing whether and to what extent the funds will now admit of an increase on the annuities and other allowances provided by the said regulations to the members of the Incorporation, and to their widows and families after their death; or whether and to what extent it will be necessary or prudent to diminish the same; and in general, whether,

from the experience which has now been acquired, it appears to him to be expedient to adopt any other and what regulations respecting the said annuities and allowances, and to report the same to the said Incorporation; and it ought and should be found and declared by decree foresaid that it is illegal to pay or apply any material part of the capital funds, stock, or estate of the said Incorporation in or towards satisfaction of any annuities or annual sums to members of said Incorporation, or widows, present or future, of members of said Incorporation entitled to annuities or annual sums, in accordance with said regulations; and the defenders, the said James Rodger and James Dundas Grant, ought and should be decerned and ordained by decree foresaid, as members foresaid, to concur with the pursuers, as members foresaid of the said Incorporation, in remitting to some professional accountant to make the foresaid investigation for the purpose foresaid, and to report to the said Incorporation as aforesaid; or otherwise our said Lords should remit to some professional accountant to make such investigation and to report; and upon such report being approved by the Incorporation, or in the event of the same not being approved of by them, upon the same being approved of by our said Lords, with such alterations thereof or amendments thereon as our said Lords shall consider proper on the application of any member of said Incorporation, the result and recommendations of said report should be declared to be binding upon the members of said Incorporation, present or future, and upon all persons interested in the funds thereof as recipients of the said annuities or allowances or otherwise, until the next investigation which shall be made in terms of said rules and regulations as aforesaid for the purposes foresaid; and the said defenders ought and should be interdicted, prohibited, and discharged from paying, or authorising or directing the payment, to widows, present or future, of any member of the said Incorporation and entitled to participate in the widows' fund thereof, of annuities or annual sums exceeding in amount the annuities or annual sums which the state of the funds can at the time afford, according to the results shown by the foresaid investigation to be made as aforesaid, or by any subsequent investigation duly made in terms of said rules and regulations; and from paying or authorising or directing the payment to members of said Incorporation, present or future, who shall be entitled to an annual sum or annuity in terms of said regulations, of annual sums or annuities exceeding in amount the annual sums or annuities which the state of the funds of said Incorporation can at the time afford according to the results shown in the investigation to be made as aforesaid, or in any subsequent investigation duly made in terms of said regulations as aforesaid."

The pursuers pleaded, *inter alia*—"(2) The said defenders by their actings have caused, and threaten to cause, material encroachments upon the capital funds of the Incorporation, to the loss and injury of the pursuers, and the latter are entitled to decree in terms of the conclusions in that behalf."

The defenders pleaded, *inter alia*—"(4) The administration of the funds and affairs of the Incorporation having been in all respects conducted according to the bye-laws and regulations, the action is unnecessary, and should be dismissed."

The Lord Ordinary (CURRIEHILL) pronounced the following interlocutor:—"Finds that it is illegal to fix the annuities or annual sums payable to members of the Incorporation of Tailors of Edinburgh, or to widows, present or future, of members of said Incorporation, entitled to annuities or annual sums in terms of the regulations mentioned in the summons, at rates so high as to render it probable that the same cannot be paid (taking one year with another) without materially encroaching upon the capital funds, stock, or estate of the said Incorporation; and appoints the cause to be enrolled for further procedure."

His Lordship added the following note:—"The Incorporation of Tailors of Edinburgh, incorporated at an early period under the seal of cause of the Town Council of Edinburgh, now consists of four members, two of whom are the pursuers of this action, the other two being the defenders. The Incorporation possesses considerable property, the gross annual revenue of which exceeds £1000 per annum, but from various causes the admission of new members to the Incorporation is of rare occurrence, although it is possible, but not probable, that there may be future entrants. The affairs of the Incorporation are administered under certain bye-laws and regulations which were approved of by the Court of Session on 10th June 1853, in pursuance of the Act 9 and 10 Vict., cap. 17, entituled 'An Act for the Abolition of the Exclusive Privilege of Trading in Burghs in Scotland.' By No. 32 of the said bye-laws and regulations it is, *inter alia*, provided that—[*His Lordship here quoted the bye-law*].

"Along with the application to the Court of Session in 1853 for approval of these regulations, there was presented to the Court a report by Mr J. M. Macandrew, accountant in Edinburgh, showing the funds and liabilities of the Incorporation, and the rates of annuities and other annual allowances which might, in his opinion, be fixed for the septennial period 1852 to 1859. Since 1859 various periodical investigations were made by Mr Macandrew, the annuities, &c., being generally increased at each investigation, owing partly to the rise of the value of the property of the Incorporation, and partly to the diminution in the number of the members and annuitants. Mr Macandrew's last report was made in 1873, and the rates therein suggested were the rates at which the annuities, &c., were paid from 1873 to 1880.

"The result of the experience of the Incorporation as to its annual income and expenditure from 1852 to 1880 has been, as I am informed, something like the following:—From 1852 to 1859 the expenditure exceeded the income by the sum of £125, 16s. 2½d., or about £18 per annum. From 1859 to 1864 there was an excess of expenditure amounting to £12, 3s. 4d., or about £2 per annum. But from 1864 to 1873 the income exceeded the expenditure by the sum of £476, 13s. 1d., or about £53 per annum. The expenditure from 1873 to 1880 has, it is said, considerably exceeded the income, especially in the latter years of that period, owing partly to the circumstance that house property belonging to the Incorporation in St Andrew Street, from which about half of its estimated revenue was expected,

was wholly or partially unlet. The result has been that to a large extent encroachment has of late years been made on the capital of the Incorporation by contraction of debt to meet the annuities and otherwise. The debt to the bank, it is stated, is now upwards of £1500, besides which there is a debt of £729 borrowed from Miss Janet Rodger on 5th January 1880.

"A new investigation into the affairs of the Incorporation has recently been made, under the directions of the Incorporation, by Mr David Chisholm, actuary, who has recommended a further increase to the annuities. The pursuers, who, as I have said, are one-half of the members of the Incorporation, object to the increase of the annuities, in respect that the income of the Incorporation available for paying the annuities, &c., after deducting taxes, expense of management, interest of debt, and other charges, is quite inadequate to meet even the existing annuities, and that these ought rather to be reduced than increased; and they allege that if the annuities are paid on the scale recommended by Mr Chisholm the inevitable result will be that to a large extent the capital of the Incorporation will be encroached upon and divided among the members and annuitants, and that this course, if persevered in, will in course of time lead to the division of the whole funds among the members who may survive.

"The defenders, who are the other half of the members of the Incorporation, do not substantially dispute the statement that under the system recommended by Mr Chisholm there will be a material encroachment upon the capital, but they maintain that the principle of such division of the funds is justified by the rules approved of by the Court in 1853, and is in itself, looking to the state of the Incorporation, actual and prospective, equitable and expedient.

"Before pronouncing any opinion upon the matter, I thought it right to ascertain from Mr Chisholm whether, in fixing the annuities at the rate specified in his report, he had in view that the capital seemed to be encroached upon, and if so, to what extent there might be such encroachment during the next septennial period; and I recommended him to make that report by the second box-day in the vacation. Mr Chisholm, however, having made his report at once, I am now enabled to deal with the question on the merits. He states, in the first instance, that his original report to the Incorporation was 'based upon the footing that the annuities to be paid during the same period may exceed the estimated income, and encroach on the capital to a slight extent — the loss, if any, being rectified at the succeeding investigation.' The annuities recommended by him amounted altogether to £1016, 8s. per annum, while the gross annual income was assumed to be about £1040 per annum, subject to the usual burdens of taxation. Mr Chisholm, however, had not taken into account any other deductions, and in another supplementary report, dated 19th March 1881, he says—'Referring to my report anent the remit from the Lord Ordinary in this case, I beg to explain that the gross revenue of £1040 therein referred to is subject to the usual deduction of taxes, treasurer's salary, interest on borrowed money, and repairs during the currency of the next septennial period.' The precise amount of these deductions I cannot at present ascertain; but the parties were substantially agreed that they would exceed £300 per annum, and according to the pursuers the excess would be more than double that sum. It is thus evident that not a slight but a very serious encroachment will be made upon the capital of the concern during the next septennial period if the annuities are paid at the rates recommended in Mr Chisholm's report. In other words, a considerable part of the capital will be divided among the members and annuitants. Pending the decision of this question, however, and in respect that it is admitted that the property in St Andrew Street is at present almost wholly unlet, and may remain so for some time, the parties have agreed that the annuities to be paid at and after Whitsunday next shall be paid under deduction of twenty per cent.

"But the question upon which the parties are at issue is, in my opinion, a very serious one. It is impossible for the Incorporation to maintain, after the decisions in the case of *The Incorporation of Wrights of Leith*, 18 D. 981, and various other cases both before and since, that it is competent for them to divide the funds among existing members and annuitants, either directly or indirectly, in whole or in part. Indeed, in the Leith case referred to, the Court of Session refused to sanction bye-laws proposed to be passed under the Statute 9 and 10 Vict., because the effect of doing so would be to lead to the gradual extinction of the funds of the Incorporation by payment to the members and the annuitants. The Incorporation of Tailors of Edinburgh stands, in my opinion, in no better position than the Incorporation of Wrights of Leith, and I therefore think it would be improper to fix the annuities at the rates recommended by Mr Chisholm, who has plainly proceeded on a misapprehension as to the net income of the Incorporation.

"The defenders indeed maintain that the annuities must be fixed irrespective altogether of the income, and that if the capital of the concern, on a proper valuation, is found sufficient to serve the regular payment of the annuities it is immaterial whether to any further extent the capital is encroached upon. But, as I have already indicated, that argument is quite untenable, because if the principle contended for is acted upon it must sooner or later lead to the future distribution of the capital of the concern among the members and annuitants. The rates, in my opinion, should be so adjusted as, on the one hand, to prevent any material encroachment on the capital, and, on the other hand, to lead to no further accumulation of capital.

"The case is therefore ordered to the roll, with an order affirmative generally of the principle contended for by the pursuers, in order that the parties may state whether they wish the matter remitted to Mr Chisholm to revise the annuities and rates with reference to said finding, or whether they wish a remit made to some other professional accountant.

"Since the above note was written, and just as it was about to be issued, the parties have lodged in process a state, admitted by both to be correct, showing that during the past septennial period the annual expenditure has exceeded the income by an average sum of £279, 8s. 3d. per annum, and that to meet that excess there have been

borrowed sums amounting together to £2237, 9s. 6d. It is evident that unless the annuities are reduced the payment thereof and of the interest of the debt and other charges will speedily result in the extinction of the fund."

The defenders Rodger and Grant reclaimed.

The Court, after the case had been partly heard, ordered intimation to be made to the Lord Advocate on behalf of the Crown. The Lord Advocate stated that he did not desire to compear.

The defenders argued—It was equitable that the scheme proposed by Mr Chisholm should be adopted. It no doubt involved an encroachment on capital, though not probably to the extent alleged, but provided the interests of the annuitants and other allowances were duly secured, it was better that the capital of the Incorporation should thus be gradually used up. Otherwise the junior pursuer, who was by much the youngest member of the Incorporation, and would probably survive the other members and the annuitants, would on their death get the whole funds of the Incorporation. The previous practice was to allow the annuities larger than the estimated income. This had been done on the first occasion with the direct sanction of the Court. In *The Wrights of Leith* it was proposed to divest the funds from their legitimate object.

Replied for the pursuers—The Lord Ordinary's interlocutor was sound. The case was ruled by the *Incorporation of Wrights of Leith.*

Authorities—*Incorporation of Wrights, &c., of Leith*, June 4, 1856, 18 D. 981; *Incorporation of Skinners of Glasgow*, December 4, 1857, 20 D. 211; *Guildry of Arbroath*, July 5, 1856, 18 D. 1207; *Howden* v. *Incorporation of Goldsmiths*, June 2, 1842, 2 D. 996; *Mitchell* v. *Burness*, June 19, 1878, 5 R. 954.

The Lords, after having made avizandum with the case, delivered the following opinions at advising—

Lord President—The Incorporation of Tailors of Edinburgh is a very ancient body, as may naturally be expected from the trade they carry on. But it has dwindled down very much indeed, there being now only four corporators in existence, two of whom are the pursuers of this action and the other two the defenders, and it is the object of one set of corporators to eat up the funds of the Corporation as fast as possible, while the other corporators desire to defend them and to prevent that from being done. The question is, whether the Lord Ordinary has taken the right view of the case when he finds "that it is illegal to fix the annuities or annual sums payable to members of the Incorporation of Tailors of Edinburgh, or to widows, present or future, of members of said Incorporation, entitled to annuities or annual sums in terms of the regulations mentioned in the summons, at rates so high as to render it probable that the same cannot be paid (taking one year with another) without materially encroaching upon the capital funds, stock, or estate of the said Incorporation."

The Incorporation was originally possessed of considerable property, and when the exclusive privileges of corporations of this kind were abolished by the Act 9 and 10 Vict. cap. 17, this Corporation came to the Court under the authority of the Act in order to have certain bye-laws and regulations approved of, and among other things these bye-laws provide for a periodical investigation into the affairs of the Corporation by a professional accountant, so as to show to what extent the funds would admit of an increase of the annuities and other allowances provided by the regulations. Under the operation of these bye-laws the Corporation has been going on from time to time making alterations in the way of increasing the annuities and allowances. In doing so, there has, no doubt, at each septennial period, been some encroachment on the capital of the Incorporation, but that result was justified by the increase in the capital, which was due in part to the diminution in the number of members and annuitants, and in part also to an increase in the value of the Corporation property. But it is now obvious that if this practice goes on it will result not merely in an encroachment on the capital for the time, but in its exhaustion altogether.

For the period from 1852 to 1859 the expenditure exceeded the income by a gross sum of £125, 16s. 2½d., but that amounts only to an average of £18 per annum. From 1859 to 1864 there was excess of expenditure of only about £12 in all. From 1864 to 1873 there was an excess of income over expenditure amounting to £476, 13s. 1d. in all, or about £53 a-year. So that to 1873 there had been no material encroachment, in the ultimate result, on the capital of the Incorporation. The last period, which came to an end in 1880, presents a very different result, and shows that there has been average excess of expenditure of £279, 8s. 3d. per annum, and in order to meet that excess it has been found necessary to borrow on security of Incorporation property to the extent of £2237, 9s. 6d. Now, it is plain that if that goes on the property will very soon disappear altogether, and I agree with the Lord Ordinary that this is not a legitimate proceeding. I think that the mode in which the affairs of the Incorporation have been administered in the earlier periods of investigation is probably quite unobjectionable, but the annuities have now been raised, and it is proposed to raise them to such a further extent that if the Court does not interfere, the Incorporation, as an Incorporation possessed of funds, will soon come to an end altogether. I agree with the Lord Ordinary that no scheme which shall materially encroach on the capital of the Incorporation can receive the sanction of the Court, and as that is the whole extent to which the judgment goes, I am for adhering and remitting to the Lord Ordinary to proceed further with the cause.

Lord Deas—It is a very startling conclusion to which this case leads—that its funds may all be eaten up by those who happen at the end to be its members. The only question before us is, whether that is to be done less or more gradually? I think if we had parties here who were raising the question whether the funds can be eaten up at all, that point might be very well worth considering. Probably the only party who could have raised such a question is the Crown, and we appointed intimation to be made to the Lord Advocate, but he has declined to interfere, so that that question is not now before us. The only matter for decision therefore is, whether the

funds shall be eaten up more or less gradually? and being tied down to give the one answer or the other, I am of opinion that the more slowly it is done so much the more reasonable and the better. On that ground alone I am of opinion that the Lord Ordinary's judgment is right and ought to be adhered to.

Lord Mure—The only point decided in the interlocutor under review is the question of law. [*His Lordship here read the interlocutor*]. That is the whole judgment, and in that general finding of law I entirely concur. It is to be gathered from the rules laid down in several cases that were before this Court, and more particularly in the case of the *Incorporation of Wrights of Leith*, 18 D. 981, in which the Court refused to sanction certain bye-laws substantially on the ground that the funds of the Corporation would thereby be exhausted. It is unnecessary to go into the question whether the proposals here will end in the extinction of the fund. The parties on the one side have disputed that, but there has been for several years an excess of expenditure over income of £279, 8s. 3d., and in order to meet that loss it has been necessary to borrow. It is clear that this Court cannot sanction such a course of proceedings.

Lord Shand—Looking to the fact that this Incorporation is so reduced in numbers, and is no longer serving the purpose for which it was instituted, I should have been very willing to have sanctioned any arrangement on an equitable footing by which, with all due security to the rights of the annuitants, the affairs might have been put an end to entirely. But on mature consideration I do not see my way to do this, and I do not think that the pursuers' counsel have been able to suggest any arrangement by which this might be done consistently with the interests of those who are still to benefit by the fund. It is true that the proposals in the former cases were objected to because they lead to a direct diversion of the funds from the purposes pointed out in the charters of the corporations. Here it is proposed to encroach on the capital in order to extend the benefits of the Corporation in the line of its charter. But, as the Lord Ordinary has pointed out, this will lead to the exhaustion of the fund. If the present system goes on, it may soon happen that the annuitants, who are dependent on the capital, will be left without adequate provision. I am therefore for adhering.

The Lords adhered.

Counsel for Reclaimers (Defenders) — Mackintosh—Wallace. Agent—Lindsay Mackersy, W.S.

Counsel for Respondents (Pursuers)—D.-F. Kinnear, Q.C.—J. P. B. Robertson. Agents—Macandrew & Wright, W.S.

Friday, November 18.

SECOND DIVISION.

[Sheriff of Lanarkshire.

RAMSAY *v.* THOMSON & SONS.

Reparation — Personal Injuries — Damages— Tramway Car—Want of Ordinary Care on Part of Person Injured—Rule of the Road.

A person travelling in a tramway car which had stopped to allow passengers to alight, was knocked down as he was in the act of crossing the street to the pavement by a waggonette which was attempting to pass the car on the left side. In an action of damages for personal injuries laid against the owners of the waggonete, the Court, on a consideration of the proof, while of opinion that there was (*diss*, Lord Young) fault on the part of the defenders' servant, were unanimously of opinion that there was also proved on the part of the pursuer such want of ordinary precaution and care as barred his action.

Observations per Lord Justice-Clerk and Lord Young on the rule of the road.

Sheriff—Proof.

Observations per Lord Justice-Clerk on the duty of keeping proof taken in inferior courts within the limits of relevancy.

William Ramsay, ironmonger, residing in Crosshill, was returning home on the afternoon of 8th October 1879 by tramway car. It stopped at Victoria Road, nearly opposite Dixon Avenue, to allow passengers to alight. Ramsay accordingly stepped off the car on the left-hand side, and as he was crossing the street was knocked down by a waggonette belonging to Thomson & Sons, wholesale cabinetmakers, Ritchie Street, Glasgow, which was attempting to pass the car on the left in the space between it and the street, and one at least of the wheels went over his ankle. The result was that he sustained severe personal injuries, his legs being severely bruised, and his nervous system so shattered that he had been prevented from attending to business ever since. In these circumstances he raised the present action of damages against Thomson & Sons for £250, his ground of action being that the accident had happened by and through the fault, culpable negligence, and gross carelessness of the defenders' servant, who had driven in a careless, reckless, and culpable manner.

He pleaded—"(2) The pursuer having, in consequence of the foresaid injuries, caused by the fault, culpable negligence, and gross carelessness of the defenders' servant, sustained loss, injury, and damage to the amount of £250 sterling, decree ought to be pronounced therefor against the defenders, jointly and severally, or severally, in name of damages, and as *solatium* due to the pursuer."

The defence was that the accident was the result of the pursuer's own carelessness; or, at all events, that it was no fault of defenders' servant, who was driving in a proper place, and in a proper and careful manner.

The pleas in defence were:—"(1) The defenders were not liable in the sum sued for, in respect that the accident occurred entirely