

and declares that the defender has forfeited all the rights and privileges of a lawful husband, and that the pursuer is entitled to live single or to marry any free man as if she had never been married to the defender, or as if he were naturally dead, and decerns, &c.

“*Note.*—In one respect this case presents a circumstance of novelty to which I will advert. The parties were in humble life, and it appeared that within a few weeks after the marriage a quarrel arose between them in consequence of the wife having upon a Saturday evening asked from her husband money to pay for the week’s provisions. This he refused, and on the Monday morning, in a fit of anger, the wife left her husband’s house. This conduct on her part was totally unjustifiable. A husband is entitled, if he pleases, to take the management of the household into his own hands; he may not have confidence in his wife’s judgment or prudence; and it is not cruelty or hardship of which the wife can complain that he does so. Therefore the pursuer, the wife, was utterly without excuse or defence when she left her husband’s house merely because he did not trust her with the purse. But then a fault may be atoned for, and the pursuer did certainly take all means within her power to do so. She went back to her husband repeatedly, and begged and beseeched him to forgive her, and to renew cohabitation; but all these entreaties on her part he sullenly rejected, and after such a repulse the wife ceases to be, and the husband becomes, the deserter.

“On one of these occasions the husband’s father told the wife that if she pleased she could come into his (the father’s) house, and there occupy a bedroom. This was said in presence of the husband, who uttered not a word. He then lived with his father, and had no house of his own. The wife—in the hope that her husband would come to a reconciliation with her—accepted the offer, and occupied the bedroom in the house of her husband’s father during a period of five days. These were very miserable days to the poor woman, for neither the husband nor any of his family spoke to her, and at the end of the five days she left the house.

“Now, I will take the case as if the house had been that of the husband himself, and that he had ordered his wife to occupy a room in it, with the intimation that he gave that he did not care for her, and did not want her, and would not cohabit with her by occupation of the same bedroom. I consider this to be non-adherence or desertion justifying divorce within the meaning of the Statute 1573. I am supported in this opinion by the judgment of the Consistorial Court in the case of *Graham v. Buquhanane*, February 27, 1567, and by the opinion of Sir George Mackenzie in his observations on the Statute 1573, cap. 55. Non-adherence is the conjugal wrong for which the Act of 1573 provided a remedy; and if there be non-adherence, according as adherence is understood among Christian nations, there is non-adherence or desertion within the meaning of the Act 1573 so as to justify divorce.

“I therefore grant divorce in this case.”

Counsel for Pursuer—Pearson. Agents—Henry & Scott, S.S.C.

Friday, November 18.

FIRST DIVISION.

[Sheriff of Renfrewshire.

D. & J. MACDONALD v. REID AND OTHERS.

Process — Arrestment — Corporation — Where Arrestment in Hands of Officer, whose Duties do not Relate to Corporation Funds — Police and Improvement (Scotland) Act (13 and 14 Vict. c. 33), secs. 51–58.

The Police and Improvement (Scotland) Act provided—“That all actions, suits, or proceedings in respect of any matter or thing relating to the execution of this Act to be brought by or against the commissioners shall be in the name of their clerk or treasurer or collector for the time being, as the party, pursuer or defender, representing the commissioners.” The duties of the clerk to the commissioners of police in a burgh were confined to “keeping the books and records of the commissioners and their committees;” he had no duty in relation to the funds belonging to the commissioners, which never passed into his hands, but were received by the collector, and thereafter managed by the treasurer. *Held* that an arrestment in the hands of the clerk was not effectual to attach any funds belonging to the commissioners.

This was an action of furthcoming for £37, 17s. 6d. against “James Reid, writer, Johnstone, clerk to the Commissioners of Police of the burgh of Johnstone, and as such on behalf of and representing the said commissioners, arrestee, and William Telford, merchant, Johnstone, common debtor.”

In defence the common debtor pleaded—“The arrestee neither held nor holds, nor has the control of, any funds belonging to the common debtor, either as an individual or in his capacity of clerk to the commissioners. An arrestment in the hands of a clerk to commissioners of police, acting under 13 and 14 Vict. cap. 33, does not, unless repeated or intimated by the arrester to the treasurer appointed and acting under that Act, attach any funds due to creditors of such commissioners.” The common debtor further stated that “The treasurer of the burgh on 30th April and 7th May 1881 paid to the common debtor two sums respectively, £8 and £15, to account of the above mentioned £34—said payments being *bona fide* made in ignorance of the arrestments in Mr Reid’s hands.”

The arrestee expressed his readiness to pay under decree of Court.

The provisions of the Police and Improvement (Scotland) Act (13 and 14 Vict. cap. 33), upon which the question depended, are quoted in the opinion of the Lord President, *infra*.

The Sheriff-Substitute (COWAN) pronounced the following interlocutor:—“Finds that the arrestment founded on in this case was used in the hands of ‘James Reid, writer, Johnstone, clerk to the Commissioners of Police of the burgh of Johnstone,’ and that the clerk to the commissioners of the said burgh, it was admitted in argument, does not hold any funds belonging to the commissioners, these being in the hands

and custody of the treasurer to the commissioners of the burgh: Finds in law that the said arrestment is not effectual to carry any funds belonging to the commissioners: Therefore assilizes the arrestee James Reid from the conclusions of the action," &c.

On appeal the Sheriff (MONCREIFF) adhered.

The pursuer appealed, and argued—The arrestment was valid, because it was used in the hands of an officer in whose name the corporation might sue or be sued. As to the difficulty that the treasurer might pay away in ignorance of the arrestment, the corporation was one, and it was the duty of each officer to know what the other was doing.

Replied for respondent—The provision with reference to suing and being sued must be understood with reference to the respective duties of the several officers, and as the clerk had nothing to do with the funds, an arrestment in his hands was incompetent, and was practically inconvenient, as the treasurer might, and in this case actually had paid away *bona fide* the funds arrested.

Authorities—*Keir v. Creditors of Menzies*, January 10, 1739, M. 738; *Mitchell v. Hepburn*, January 15, 1830, 8 S. 319; *Ormiston v. Redpath, Brown, & Company*, February 24, 1866, 4 Macph. 488; *Ersk. Inst.* iii. 6, 5; *Bell's Prin.* 2276.

The Lords made avizandum with the case.

At advising the following opinions were pronounced:—

LORD PRESIDENT—This is an action of furthering directed against William Telford, merchant, Johnstone, as common debtor, and the arrestee is described as "James Reid, writer, Johnstone, clerk to the Commissioners of Police of Johnstone, and as such on behalf of and representing the said commissioners." Among other defences it is pleaded that "The arrestee neither held nor holds, nor has the control of, any funds belonging to the common debtor, either as an individual or in his capacity of clerk to the commissioners;" and further that "An arrestment in the hands of a clerk to commissioners of police, acting under 13 and 14 Vict. cap. 33, does not, unless repeated or intimated by the arrester to the treasurer appointed and acting under that Act, attach any funds due to creditors of such commissioners." The interlocutor of the Sheriff-Substitute gives effect to these defences, and holds that the arrestment was not validly laid on. The debt due to the common debtor is in the hands of the Police Commissioners of Johnstone, and the question is whether the action is validly laid against that body as arrestees?

Now, this depends entirely on the provisions of the Statute 13 and 14 Vict. cap. 33, and it is necessary to attend somewhat carefully to these provisions, because the arrangement of the appointment of the officials of a body like these Police Commissioners is a little peculiar. The 51st section directs the commissioners to appoint a clerk, who is to keep the books and records of the commissioners and their committees, and to give certified copies or extracts of these books and records, and so far his duty is entirely confined to keeping books—in short, to act exclusively as a clerk. Then the 53d section directs the

commissioners to appoint a treasurer and collector, who are to grant bond with sufficient sureties for their intrusions and the faithful execution of their office. The 54th section gives the commissioners power to allow reasonable salaries to be paid to these three officials. The 55th section provides that the "collector shall be obliged to lodge all money received by him in a chartered or other bank, or in one of the branches of such bank in the burgh to be fixed by the commissioners, upon an account to be opened in the name of the commissioners, and to be operated upon by the treasurer for the time." Then the 57th section provides that the same person may be appointed both treasurer and collector but not clerk. Lastly, the 58th section provides that "all actions, suits, or proceedings in respect of any matter or thing relating to the execution of this Act to be brought by or against the commissioners shall be in the name of their clerk or treasurer or collector for the time being, as the party, pursuer or defender, representing the commissioners."

Now, under most statutes of this kind there is one official, and one only, in whose name bodies of commissioners are to sue or be sued, but under this Act either the clerk or the treasurer or the collector may represent the commissioners, and looking to the duties devolving on each of these officials, it seems to me that it depends on the nature of the proceeding which is the proper official to represent the commissioners. Now, the object of the present proceedings is to attach funds in the hands of the commissioners which they are due or owing to the common debtor. But the way in which funds belonging to the commissioners are to be treated is quite clear. They are to be lodged in a bank or branch bank in Johnstone, upon an account in the name of the commissioners. Arising as they do from assessments, they are to be lodged in that bank by the collector, and once there they are to be operated on only by the treasurer. Now, what has been done in the present case is to arrest funds belonging to the commissioners in the hands of the clerk. But the clerk has nothing to do with these funds, and never can have any money in his hands belonging to the commissioners. And the effect of arresting funds in the hands of the clerk would be that the treasurer might pay away the sums arrested without the slightest knowledge of the arrestment. That will not do. I think, therefore, for the reasons given by the Sheriff-Substitute, that the pursuer has mistaken his remedy. He ought to have arrested in the hands of the treasurer as representing the commissioners—not certainly as treasurer to the commissioners (that would be an entire mistake), but as representing the commissioners. He is their proper representative in a matter of this kind. It is necessary to explain this distinctly, because in certain circumstances a different rule might prevail. If the only person in whose name the corporation could sue or be sued had been the clerk or the secretary, there would be no choice. The only way to arrest would then be in the hands of the only person entitled to represent the body, and to arrest in the hands of a person not entitled to represent the body would be an entire mistake. He is their mere hand, and the case would fall under that series of decisions which show that

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 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,