I am far from thinking that in every case a workman who has been incapacitated from work by an accident is bound to submit to any medical or surgical treatment that may be proposed, under the penalty, if he refuses, of forfeiting his right to his weekly payments. It is easy to suppose a case where a more or less serious operation is proposed with more or less probability of a successful cure, and in such a case I think it would be out of the question to say that the workman was bound to submit to it. But that is not the kind of case we have to deal with. In this particular case the injury was comparatively slight, and the treatment proposed simple and common and brought within his reach, and the benefit which would have resulted therefrom not doubtful. I think it was such treatment as any reasonable man would have adopted.

I think therefore that the present condition of the appellant's ankle is truly due to his own fault and neglect, and that therefore the question should be answered in the negative.

The second question is, whether the opinion of the medical referee is final, not only as to the physical condition of the workman, but also as to whether that condition is attributable to the injuries received in the accident, in the circumstances in which the reference was made in this case and which I have detailed.

It will be observed that the reference was not made under the 11th clause of the schedule, in which case it is declared that the certificate of the medical practitioner shall be conclusive as to the condition of the workman. It was not made at the instance of the parties, or either of them, but it was made at the instance of the Sheriff himself for his own guidance in order the better to enable him to dispose of the case. There is nothing in the Act directing the Sheriff to take such a report as conclusive. I see nothing to prevent him from taking such a report into consideration with the rest of the evidence, and giving such weight to it as he may think right. I am therefore of opinion that this question should be answered in the negative. But I think that the Sheriff's judgment which gives effect to the report is final, because it is a judgment on a question of fact.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court answered the questions in the case in the negative.

Counsel for the Appellant—Watt, K.C. —Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Campbell, K.C.—C. D. Murray. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Friday, December 19.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

TAIT *v.* MUIR.

Burgh—Trade Incorporation—Appropriation of Funds of Incorporation by Surviving Members—Burgh Trading Act 1846 (9 *and* 10 *Vict. cap.* 17)—*Judicial Factor—Title to Sue—Right of Judicial Factor to Recover Sums Appropriated before his Appointment.*

Held (1) that a corporation recognised by statute must subsist till dissolved by statutory authority, and that its funds can only be administered by the corporators, whether many or few, for the purposes recognised by its existing regulations; (2) that consequently the surviving members of a burgh trade incorporation, whose exclusive privileges were abolished by the Burgh Trading Act 1846, were not entitled to divide among themselves any part of the funds of the incorporation; and (3) that a judicial factor appointed by the Court upon the estate of the incorporation had a good title to sue the members of the incorporation, and the representatives of deceased members, for funds so appropriated prior to his appointment.

In June 1901 John Scott Tait, C.A., Edinburgh, judicial factor on the estate of the Incorporation of Tailors of Edinburgh, conform to act and decree in his favour by the Lords of Council and Session, dated 19th November and 18th December 1900, and 22nd January 1901, and extracted 8th February 1901, raised an action against Robert Gillespie Muir, as an individual, and against the trustees and executors of the late James Dundas Grant, as such trustees and executors. In this action the pursuer concluded, *inter alia*, (1) for decree against the defenders jointly and severally for £2618, 16s., or otherwise for decree against Muir for £1079, 8s., and against Grant's trustees for £1539, 8s.; and (2) for decree against the defenders jointly and severally for £1150, 0s. 10d., or such larger sum as might be found due as interest at 31st March 1901 on the sum mentioned in the first conclusion, or otherwise for decree against Muir for £465, 2s. 10d., and against Grant's trustees for £684, 18s., or for such larger sum as might be found due as interest at said date.

The pursuer averred, *inter alia*, that at the date of his appointment as judicial factor the defender Muir was the sole surviving member of the Incorporation, that from 1891 to 1900 Muir and James Dundas Grant were the only members, and that between 27th October 1886 and 31st March 1901 sums amounting to the principal sum sued for had been illegally withdrawn from the capital funds of the Incorporation by the defender Muir and by Dundas Grant

The defenders did not dispute that payments had been made to Muir and Dundas Grant, but contended that the payments objected to by the pursuer were legal and had been competently made by the Incorporation at meetings at which all the members of the Incorporation were present; that these payments could not be challenged, there being no members, widows of members, or others interested, whose rights had been prejudiced by these payments; that the pursuers had no title to sue at any rate until the resolutions authorising the payments had been reduced, and that the payments having been received in *bona fide* and consumed could not now be recovered.

A proof was led. The result of the proof so far as it relates to the points reported is set forth in the opinion of the Lord Ordinary.

On 17th June 1902 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"Decerns against the defender Robert Gillespie Muir and the trustees of the late James Dundas Grant, conjunctly and severally, under the first and second conclusions of the summons, for payment to the pursuer of the sum of £2518, 16s. sterling and £1134, 12s. 8d. sterling, with interest on said sum of £2518, 16s. sterling at the rate of five per centum per annum from 31st March 1901 till payment," &c.

Note.—"The Incorporation of Tailors of Edinburgh is one of those ancient burgh incorporations whose exclusive trading privileges were abolished by the Act 9 and 10 Vict. cap. 17. This Act provided that, notwithstanding the abolition of their exclusive rights, such incorporations should retain their corporate character, and should continue to be incorporations. Further, on the narrative that their revenues might in some instances be affected and the number of their members might diminish by reason of the abolition of their exclusive rights, and that it was 'expedient that provision should be made for facilitating arrangements suitable to such occurrences,' it was enacted that every such incorporation might from time to time make bye-laws, regulations, and resolutions relative to the management and application of its funds and property in reference to its altered circumstances, and might apply to the Court of Session for sanction of such bye-laws, regulations, or resolutions which, when sanctioned by the Court, subject to such alterations or conditions as the Court might impose, should be effectual and binding on such incorporations. Then followed a proviso that nothing contained in the Act should affect the validity of any bye-laws, regulations, or resolutions that might be made by such incorporation without the sanction of the Court, which it would theretofore have been competent for such incorporation to have made of its own authority or without such sanction. Whatever this proviso may mean, it did not, in my opinion, authorise any such incorporation to dispose of its funds or property in a manner inconsistent with the bye-laws sanctioned by the Court, which, from the moment of sanction, and until altered by the same authority, became the law of the incorporation.

"Bye-laws under the Act were sanctioned by the Court in 1853, which provided (by Art. 32) for the septennial investigation into the state of affairs of the Incorporation, and (by Arts. 9 and 14) for annuities to widows of members, and to members themselves who had attained a certain age. In 1881, the number of members having been reduced to four, an action (*Muir* v. *Rodger*, November 18, 1881, 9 R. 149, 19 S.L.R. 121) was raised in this Court by two of these members against the other two, which resulted in a finding that it was '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 minutes, 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.' In coming to this conclusion the Court of course had in view that the membership was in all probability a vanishing quantity, and they twice ordered intimation to the law officers of the Crown as having the ultimate interest. Lord Deas' opinion shows that the judges considered the question whether the funds of such incorporations might lawfully be eaten up by those who towards the end turned out to be members, and his Lordship called that 'a startling conclusion.' Lord Shand was, I think, the only member of the Court who gave any sort of countenance to that idea, but he went no further than to say that he would have been willing to have sanctioned 'any arrangement on an equitable footing by which, with all due security to the rights of the annuitants,' the affairs of the Incorporation might have been put an end to entirely. He added that he did not see his way to any such arrangement, and I think it may be assumed that he would have disapproved as much as his brethren of the members themselves laying violent hands on the property of the Incorporation. I must say, with all deference, that I do not see how even an equitable arrangement for securing the rights of annuitants, or an agreement with them (which would be the same thing), could ever legalise the appropriating by individual corporators of the funds of a corporation. It may have been sufficient for the decision of the question raised in 1881 to base the illegality of tampering with capital on the rights of present or possible annuitants. But for the purposes of the present question it seems to me a clearer ground to take that a corporation recognised by statute must subsist till dissolved by statutory authority, and its funds can only be administered by the corporators, whether many or few, for the purposes authorised by its existing regulations. If so, it is not necessary for the pursuer to show that the

interests of annuitants are in immediate danger.

"As time went on the number of members became further reduced—in 1885 to three, in 1891 to two, and in 1900 to one member, the present defender Mr R. G. Muir. He had been one of the pursuers who in 1881 vindicated the sanctity of capital. But he seems to have become converted to the view that at least one form of encroachment on capital was permissible—that, namely, by which the entry-monies paid by the surviving members should be repaid to them; and in 1886 he entered into a formal agreement for that purpose with his two fellow members (who had been defenders in the action of 1881), whereby he renounced and discharged all benefits from the decree which he had obtained. From that moment onwards the encroachment on capital by bonding and selling properties, and dividing the proceeds among the surviving members was constant and undisguised. At last in 1900, a judicial factor was appointed, on the petition of Mrs James Muir, one of the remaining annuitants, and the judicial factor now brings this action against Mr R. G. Muir and the trustees of the late Mr Dundas Grant to recover the sums which he says Muir and Grant illegally withdrew from the funds of the Incorporation. In Grant's case there are also sought to be recovered sums uplifted by him as treasurer of the Incorporation and not accounted for.

"Taking the items specified in states 9 and 10 as sums illegally withdrawn from the funds of the Incorporation by Muir and Grant respectively, and allowing for a deduction of £50 from each of these states which the pursuer concedes, I see no answer to his demand either as regards the sums themselves or interest thereon at 5 per cent. It is admitted that, if these sums are due, decree must be given for both principal and interest, jointly and severally, against both sets of defenders." . . [*His Lordship then dealt with matters not pertinent to the present report:*]

The defender Robert Gillespie Muir reclaimed, and argued—(1) The division of funds belonging to an incorporation among the surviving members was legal so long as it was authorised by regularly-passed resolutions of the incorporation and the rights of beneficiaries were unaffected. In any event, the payments to members could not be challenged until the resolutions were reduced. (2) The pursuer had no title to sue for repayment of sums divided among themselves by the members of the Incorporation before he was appointed judicial factor—*M'Grigor* v. *Beith*, May 24, 1828, 6 S. 853; *Gordon* v. *Williams' Trustees*, July 16, 1889, 16 R. 980, 26 S.L.R. 750. The pursuer would require to get the authority of the Court if he desired to sue for such sums. (3) These sums had been *bona fide* paid and consumed, and there was no case in which sums so paid had been ordered to be refunded.

No reply by the pursuers on these points was called for by the Court.

LORD JUSTICE-CLERK—Upon the main question with regard to the capital belonging to the Incorporation appropriated by members of the Incorporation we did not think it necessary to call for a reply. I am of opinion that there is no real ground for holding that the Lord Ordinary was wrong in the conclusion at which he arrived, viz., that these sums were wrongly appropriated and must be replaced, and that the judicial factor on the estate of the Incorporation has a good title to sue for the sums so appropriated. I think that the judgment of the Lord Ordinary is right and ought to be affirmed—[*His Lordship then dealt with matters not pertinent to this report*].

LORD YOUNG and LORD TRAYNER concurred.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—W. C. Smith, K.C.—Grainger Stewart. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender and Reclaimer—Kincaid Mackenzie, K.C.—Chree. Agents—Wishart & Sanderson, W.S.

Wednesday, January 7, 1903.

SECOND DIVISION.

[Lord Low, Ordinary.

THE EDINBURGH RAILWAY ACCESS AND PROPERTY COMPANY, LIMITED *v.* JOHN RITCHIE & COMPANY.

Process—Proof — Proof or Jury Trial — Damages for Injury to Buildings by Operations of Neighbouring Proprietor—Legal Questions Raised—Fault—Form of Issue—Property—Support.

R. & Co., the proprietors of urban property, in the course of certain building operations made extensive excavations which were conducted by means of blasting operations where rock was encountered. Certain neighbouring proprietors raised an action of damages against R. & Co., in which they averred that the defenders' blasting operations had shaken the whole of the pursuers' buildings and had caused serious damage thereto, and that the defenders could have removed the rock without blasting, or at anyrate in such a way as not to injure the pursuers' property, but that they had culpably failed so to remove it. The defenders in answer alleged that their operations were conducted with all proper care and in such a manner as to do no damage to the pursuers' property; that the damage to the pursuers' property was due to certain operations of their own which had given rise to subsidence; and that