legality of the proceedings reported to him is doubtful. But in any case, what he may do in that respect cannot be final, and his certificate therefore is not conclusive. Hence, on this point also, I cannot concur with the Lord Ordinary. But upon the last ground of his judgment I am disposed to agree with him. I think that the theory of the constitution of friendly societies, as conceived by the Legislature, is this, that subject to the certificate of the registrar, the society shall, as far as possible, govern itself; and that failing arbitration within itself (that being a remedy only applicable to certain cases, and not, for instance, to the present one), the jurisdiction of the Sheriff should be admitted, and should be privative, with this reservation, that a case may arise in which it is the duty of the Supreme Court to interfere. If the dispute is one within the society, dividing the society into factions, and not between any simple individual interest and the society as a body, then clearly arbitration is impossible, and is excluded. In such cases the statutory jurisdiction conferred upon the Sheriff is the proper remedy. Such, I think, is the constitution of friendly societies under the existing law; and I agree with your Lordships that it is the result of a long course of legislation all tending in this direction.

Lord Kinloch—The action now before us brings under reduction a certain minute of the Friendly Society of Colinton, altering the rules of the society "to the effect (as the summons bears) that the probationary period of entrants to the said society should be reduced to one year instead of three years," and also brings under reduction the certificate of the registrar sanctioning this alteration. The summons contains conclusions of declarator, consequent on such reduction being obtained, to the effect of the laws of the society being declared binding to their former effects, and all "cards of freedom" inconsistent therewith being declared unauthorised; and the office-bearers interdicted from issuing such cards.

It is pleaded that the Court has no jurisdiction to entertain this action, in respect that by the rules of the society the question raised is one to be submitted to arbitration. I am of opinion that this plea is untenable. When the rules declare "that all disputes between the society or any persons acting under them, and any individual member thereof, or any person claiming on account of any member, shall be submitted and referred to arbitrators," I am of opinion that they have reference to altogether different questions from that now before the Court. What are intended to be submitted to arbitration are the rights and claims of individuals against the Society; such, for instance, as the claim of an individual for a sick allowance, and not general questions touching the administration of the Society. These are not, in any sound sense, "disputes between the society and any individual member thereof."

But it is further pleaded that the jurisdiction of the Court is excluded by the 41st section of 18 and 19 Vict., cap. 63, which sends to the court of the Sheriff "all applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of any disputes that may arise or have arisen in any society, the rules of which do not prescribe any other mode of settling such disputes." I am of opinion that this plea is well founded; and that the pursuers, when desiring the redress at present claimed by them, ought to have raised their proceedings in the Sheriff-court. I think the words of the statute are broad enough to comprehend the present dispute amongst "the disputes which may arise in any society." And what is sought may be given by the Sheriff under a "relief, order, or direction." I think the policy of the statute is to save to such societies the expense of proceedings in the Supreme Court, and to afford to them, for these disputes generally, a ready and economical remedy; the decision of the Sheriff being declared not liable to appeal. It may remain a question whether cases may not arise to which this exclusive jurisdiction is inapplicable, as where things are done which are not in any sound sense things done "in the society," but are destructive of the existence of the society. I do not enter on this controversy, and would indicate no opinion on the subject. The present is clearly a dispute arising "in the society," being simply how far an alteration of the rules could take place without a certain notice being given, and a certain quorum being present, and other formalities observed. I have no doubt that to this question the Sheriff is competent, and under the statutory provision exclusively so. That he cannot in general pronounce a decree of reduction seems to me no sufficient objection. The mere words of style of a reduction are not necessary to give effective relief. There are many different ways of wording a judgment, which may effectually remove from the books and administration of the society the regulation challenged. By the statute the Sheriff is vested in this matter with all the jurisdiction of the Court of Chancery in England; and I have not heard it questioned that this jurisdiction is sufficiently broad to put to right the rules of a village Friendly Society.

A third plea was maintained before us, to the effect that the certificate of the Registrar of Friendly Societies conferred on this new rule a validity which rendered it free from challenge. This seems to me to be not a plea to the jurisdiction. It is a plea importing that the new rule is unchallengeable in any Court whatever,—being in itself protected against impeachment by any member of the society. The plea assumes jurisdiction, for without jurisdiction the plea could not be disposed of by judgment. When I hold that I have no jurisdiction, I think that I hold *eo ipso*, that I cannot consider this plea. I have formed a very clear opinion on the plea; but I do not mean to tell what it is.

I agree with the Lord Ordinary in thinking that the present action should be dismissed; but only on the one ground, which I have now mentioned.

The Court accordingly recalled the interlocutor reclaimed against, and found that the Court had no jurisdiction to entertain the present action, in respect that section 41 of the Friendly Societies Act, 1855, excludes this Court, and confers jurisdiction upon the Sheriff in such cases; therefore dismissed the action.

Agent for Pursuers—Alex. Morison, S.S.C.
Agent for Defenders—William Traquair, W.S.

Thursday, November 10.

SECOND DIVISION.

STEUART *v.* STRACHAN.

Commissioner — Haver — Contumacy. ***Held*** that where a defender had been required under a

diligence to produce certain documents, upon which the pursuer relied, before a commissioner appointed by the Court, and refused to do so, or showed contumacy, the proper course was not to decern in terms of the conclusions of the action in respect of the refusal, *but* to hold him confessed on the pursuer's statement of the contents of the said documents, and, holding copies as equivalent to the originals, to proceed with the action.

This was an appeal from the Sheriff-court of Banffshire, at the instance of Mr Steuart of Auchlunkart, in an action by one of his tenants, Strachan, against him. In the course of said action in the Sheriff-court, a commission was granted to examine Mr Stewart as a haver, for the purpose of recovering certain documents upon which the pursuer relied to prove his case. It appeared from medical certificates that Mr Steuart was in such a state of health "that a judicial examination would be very injurious to his mental health," and that it "ought to be conducted with great care," and "should not be permitted to extend beyond one, or, at the utmost, two hours."

The commissioner reported as follows:—"It is perhaps proper that in reporting the discharge of the duty committed to him by the Sheriff, the commissioner should say that the deposition before-written was emitted and taken down under such circumstances as to render it not to be wondered at if the deposition should be found to exhibit errors in point of grammar or connection, or contain things which would not have appeared in any other case, the marvel being that it was found possible to obtain or take down any deposition at all. This will be more readily believed when it is stated that Mr Steuart, the deponent, refused to give to either the commissioner or clerk a chair or seat of any kind, unless the commissioner would expressly order him to do so, the consequence being that they were both obliged to stand during the whole of the three hours in which they were engaged in the deposition, the clerk having to write as he best could at a low table, in a posture of much bodily discomfort, and even pain. Added to this, Mr Steuart, though he repeatedly and distinctly said that he had no conscientious scruples to take an oath, for some time refused or declined to be sworn, and, both before and after he was sworn, poured out such an incessant flood of words as to render it exceedingly difficult to follow him, the difficulty being greatly increased by the fact that these words were for the most part entirely irrelevant to the question at issue, and accompanied by, or rather composed of, abuse of the Sheriff and Sheriff-Substitute, commissioner and clerk, his opponent, and his agents, and every one connected, or supposed to be connected, with them in any way. And though the commissioner did his best to put into words all that fell from Mr Steuart that he considered at all pertinent to the inquiry in progress, he is sensible that this was done not at all as he could have wished; and he may add that while he took down much that he considered irrelevant to endeavour to please Mr Steuart and keep him quiet, if he had attempted to take down all that Mr Steuart actually did say, and insisted with threats should be minuted, three days instead of three hours would not have sufficed for the task, and if it had been accomplished, the result would have been a mass of unintelligible confusion, altogether unfit to be presented to any court of justice. When the deposition was concluded, Mr Steuart declined to hear it read, and refused to subscribe it unless the commissioner would say that he was compelled to do so; and the commissioner having declined to say more than that Mr Steuart could subscribe or not as he pleased, and could not be compelled to do so, Mr Steuart did not subscribe it, and it was thereupon subscribed by the commissioner and clerk in his presence."

Thereafter the Sheriff-Substitute, holding that the deposition of the defender had been evasive, ordained him to produce the documents called for, under certification that if he did not do so decree would go out in terms of the conclusions of the libel. He remarks in his note—"In the report of commission, No. 65 of process, the defender is interrogated 'if he has any documents falling under the first head of specification' (p. 6). The answer to that question is given on p. 11,—'depones, That he has no other paper to produce except the one he has already referred to, and which he produces, and the same is now signed by the deponent, commissioner, and clerk as relative hereto of this date.' That document is No. 66 of process, and has nothing to do with the question put. The answer being evasive, the question is again put by the pursuer's procurator—'depones, That he considers the answer already given an answer to the question put' (p. 12). This is not an answer to the question put. 'Interrogated, Had you ever any document or documents falling under the first head of the specification? depones, That is a legal question which must be decided by the House of Lords, but that in his opinion he never had any.' This again is no answer to the question put."

The defender having failed to produce the documents, the Sheriff granted decree in terms of the libel.

The Sheriff-Depute (BELL) adhered on appeal.

Mr Steuart appealed to the Court of Session.

R. V. CAMPBELL (DEAN OF FACULTY with him), for him, quoted the following cases in support of his argument—*National Exchange Company* v. *Drew & Dick*, 19th May 1858, 20 D. 837; *Caledonian Railway Compang* v. *Orr*, 17 D. 812; *Stewart* v. *Grant*, 5 Macph. 736.

ASHER and MONCRIEFF, in answer, quoted—Shand Pract., 1, 369; *Napier* v. *Douglas*, 4 S. 325.

The Court sustained the appeal; recalled the interlocutors of 13th May and 29th June 1870, and previous interlocutors; held the defender confessed on the statements 3, 4, 6, and 7 of record, and that copies should have the same effect as original documents: allowed the parties a week to close the record, and proceed with the action.

The majority of their Lordships were of opinion that the Sheriff had gone a little too far in decerning in terms of the conclusions of the action in respect of the contumacy of the defender. The proper course for him to take was that if the party contumaciously refused to obtemper an order of Court, and produce a document which he held, he might be punished by imprisonment or otherwise. But all that the opposite party was entitled to ask was that he should not suffer by his opponent's refusal to produce, and that he was entitled to all the benefits which he could have derived if he had acted as he was bound to do. Thus, in an action of reduction, for example, if a defender refused to produce a document which he had in his possession, that document would be reduced. In the present case, however, all that he could

claim was that the defender should be held confessed on the statements made by him with reference to the documents, and that copies of them should be held to be equivalent to originals.

Agents for Appellant—Maitland & Lyon, W.S.
Agent for Respondent—Wm. Officer, S.S.C.

Saturday, November 12.

FIRST DIVISION.

DOUGLAS *v.* THOMSON.

Process—Summar Roll—Debts Recovery Appeal.

This was a case brought originally in the Debts Recovery Roll of the Edinburgh Sheriff-court. It was remitted by the Sheriff to the Ordinary Roll as not suited to summary decision, and there decided. It was appealed to the Court of Session upon a question of expenses.

The case was put out in the Summar Roll, and on its coming before the Court the Lord-President objected to its being in that roll, and said that it had got there on false pretences, and that though it had been remitted to the Sheriff's Ordinary Roll, and decided there, it had been treated as still a Debts Recovery case, and put out in the Summar Roll. Now, when remitted to the Sheriff's Ordinary Roll it became an ordinary case, and appeal to the House of Lords became possible, which was not the case with Debts Recovery cases. It was now in the same position as many poor-law cases, which, from the importance of the question involved, have been remitted to the Ordinary Roll and gone ultimately to the House of Lords. In these circumstances it should have been put out in the Short Roll and not in the Summar Roll in this Court.

Counsel for the Pursuer—Burnet. Agent—J. A. Gillespie, S.S.C.
Counsel for the Defender—Mair. Agent—

Tuesday, November 15.

GRAHAM'S TRUSTEE *v.* GRAHAMS.

(*Ante*, v, 402, 539.)

Trust — Accounting — Interest — Effect of Family Understanding— Interest on Sums in Trustee's hands Uninvested. Circumstances in which a family understanding, not committed to writing, but clearly acted upon for a period of years, was held to overrule a clause in a written deed, to the effect of preventing parties going back upon and claiming under it. *Held* that in family accountings such understandings must be given effect to by the Court. *Opinion* intimated that a liferenter has not the same claim as a fiar to a higher or penal rate of interest, upon funds allowed to lie uninvested in the hands of a trustee or agent.

This multiplepoinding was before the Court on two previous occasions, in March and May of 1868 (see *ante*, vol. v, 402 and 539), when the Court disposed of certain legal questions which had arisen between those beneficiaries in the trust estate who were claimants in the action. Mr Ralph Erskine Scott, the accountant, to whom a remit had been made in the case, had meantime issued his first report on March 17, 1868. Objections to this report were lodged for the different parties, and were all disposed of by the Lord Ordinary in June of the same year, excepting the second objection for Mr Humphrey Graham, on which the Lord Ordinary made a farther remit to the accountant to report. Mr Humphrey Graham reclaimed against the interlocutor of the Lord Ordinary disposing of the objections to the report, and on October 29, 1868, the Court pronounced an interlocutor in the following terms:—"Recall the interlocutor, so far as it repels the first objection stated by Humphrey Graham, and finds that any debts due to the said Humphrey Graham by the late Mrs Isabella Farquhar or Graham, however chargeable against Mrs Graham's own liferent interest, are not chargeable against the fee of the trust estate or any part thereof; and, with reference to the said objection, before farther answer, remit to the accountant to examine the accounts to which the said objection refers, and report in like manner as in regard to the second objection stated by the said Humphrey Graham, and direct the accountant to report to the Court *quam primum*, instead of reporting to the Lord Ordinary," &c.

The two objections for Mr Humphrey Graham referred to in this interlocutor of the Court are as follows:—(1) "That the balance due by the late Mrs Isabella Farquhar or Graham to the claimant (Mr Humphrey Graham) has not been deducted from the fund for division, the said balance amounting to the sum of £4898, 4s. 2d., as specified in the accounts Nos. 93, 94, and 95. (2) That the accountant has not given effect in the accounting to the sums paid by the claimant to the several beneficiaries, or for their behoof, as specified in accounts lodged in process in the conjoined actions of multiplepoinding and count and reckoning between the same parties, in reference to the estate of the late George Farquhar. The claimant (Mr Humphrey Graham) accordingly claims that the said sums should be deducted from the whole amounts now payable to the said several beneficiaries, in respect of their shares, both of the estate of the said Colonel and Mrs Graham, and of the estate of the said George Farquhar."

In accordance with these directions from the Court, the accountant, in June 1870, made his supplementary report, in which he says:—"The objections Nos. 1 and 2 for Mr Humphrey Graham above narrated have involved the examination of the following accounts—

"*Under Objection No.* 1.—The account between the claimant and Mrs Colonel Graham in respect of one-sixth share of the annual produce of the estate of the late Mr Farquhar from Whitsunday 1830 to Whitsunday 1853 inclusive, being £19 half-yearly, and amounting, with interest to 31st Dec. 1865, to £2294, 7s. 8d. Mr Humphrey Graham supported this claim to the one-sixth of the produce of the Farquhar estate during his mother's liferent by reference to the following clause of the mutual trust-disposition and settlement of Colonel and Mrs Graham:—'And I, the said Isabella Graham, in case I shall survive the said Humphrey Graham, my husband, and in case any one or more of our children before named shall marry, do hereby, with advice and consent foresaid, bind and oblige myself to renounce my right of liferent over such share of my said deceased father's estate and effects as I have by these presents appointed to belong to such child or children respectively, so that such child or children so marrying may receive and enjoy such share or shares upon their entering into such marriage, if the same shall be contracted after the decease of the said