question altogether free from difficulty; but upon the fullest consideration, I have come to be of opinion that we cannot do other than refuse this note. The note alleges that the petition does not contain any statements relevant or sufficient to support the complaint, and that the prayer to have the voting papers recounted is not warranted by the Ballot Act or any other. The first of these grounds must be solved by looking to article 3 of the petition. It seems to me that the sole ground here stated is a mistake in arithmetic. That was about the foundation of the argument on both sides; and had there been grave errors in point of law that might have justified or required a further statement than a mistake or mistakes were made in the counting. Well, we have to consider whether the bare statement that a mistake has been made by the Returning Officer in the counting of the votes is or is not a relevant petition. I do not contemplate the causes that might have led to such a failure; but I think we must suppose the statement to be true; and, in the first place, if it be true, can we possibly say it is irrelevant? Is there anything in the statutes or form of practice that can induce us to say that we have no power to ascertain whether the one party has a majority of votes, while the other who had not a majority was returned? Is there no remedy in the country for such a bad return? It appears to me that this must be a relevant statement. But, in the second place, if it is relevant is there no machinery for ascertaining the truth? Now, an argument has been raised upon that point in which I cannot agree. I think there are materials which the Court can get possession of by which the truth can be completely ascertained, and ascertained without violating the secrecy by which voters are entitled to be protected. I think there is machinery to enable us to ascertain whether, in point of fact, the statement here made is true, that a mistake or mistakes were made in the counting of the votes. I concur with your Lordships in refusing the prayer of the note.

LORD JUSTICE-CLERK absent.

The Court refused the note, with expenses.

Counsel for the Petitioners—Watson and Macdonald. Agent—John Walker, W.S.

Counsel for Colonel Mure — Dean of Faculty (Clark) and Balfour Agents—Morton, Neilson, & Smart, W.S.

Counsel for the Returning Officer—Burnet.

Tuesday, March 10.

FIRST DIVISION.

SHANKS *v.* UNITED OPERATIVE MASONS ASSOCIATION OF SCOTLAND.

[Lord Ormidale, Ordinary.

Trade - Union — Agreement — Implement — Action, competency of—Trades Unions Act 1871, (34 and 35 Vict. c. 31) §§ 3 and 4.

In the rules and regulations of a Trade Union it was provided that a member disabled for life by a real accident while following his employment, should (certain conditions being complied with) receive £80 from the Union. A member who averred that he had been injured for life in the pursuit of his employment, and had fulfilled all the other conditions, brought an action against the Trade Union for payment of the £80. *Held* that the object of the action being to enforce implement of an agreement for the application of the funds of a Trade Union to provide benefit to a member, could not, in terms of section 4 of the Trades Unions Act of 1871, be entertained by the Court.

This was an action at the instance of George Shanks, mason, Greenock, against "The United Operative Masons Association of Scotland," and also against the individual members of the Central Committee as representing the Association. The summons concluded for a sum of £80, which the pursuer alleged to be due to him in the following circumstances—On the 9th August 1871 the pursuer, who at that time had been twelve months a member of the said Association, and of the Helensburgh Lodge or Branch thereof, and was not to any extent in arrears, received a real accident while following his employment as a mason, at or near Clinder, Roseneath, by the falling of a heavy block of stone on his person, whereby his right leg was crushed, and his body was otherwise so severely injured as to disable him for life from following his trade or occupation as a mason.

By Law I, Class IV, of the Rules and Regulations by which the Association was governed, it was provided that "Members disabled for life by any real accident while following their employment as a mason may lay an application before the Society, according to Law 7 of this Class, and if the majority of those voting on the application consider him entitled, he shall receive the sum of £80 sterling."

The pursuer averred that he had complied with all the conditions upon which, according to the further rules of the Association, a member was eligible for the provisions of this class, and that the sum of £80 had been wrongfully withheld from him by the Association.

The defenders denied that the pursuer had been disabled for life by the accident, and averred that the provision of £80 had been refused to him in terms of and in conformity with the said Rules and Regulations.

The pursuer pleaded *inter alia:*—"(1) The pursuer having, while a member of the said Association, been disabled for life by a real accident received while following his employment as a mason, became, in terms of the said Rules and Regulations, entitled to the foresaid sum of £80 sterling."

The defenders pleaded *inter alia:*—"(1) In so far as directed against 'The United Operative Masons Association of Scotland,' the action ought to be dismissed, in respect that the Association is not incorporated, and has no *persona standi in judicio.* (2) The Association and its laws being directed to support strikes of workmen and in restraint of trade, the said laws cannot be enforced or sustain action in a Civil Court. (3) The pursuer's statements are not relevant or sufficient in law to support the conclusions of the Summons. (4) The pursuer is not entitled to recover, in respect that neither the Central Committee, nor the Association, nor the majority of the Lodges, or of the individual members voting, were or are satisfied that he was disabled for life from following his

trade, or that he was or is entitled to the provision claimed; but that, on the contrary, his claim was negatived by a majority of votes."

The Lord Ordinary pronounced this interlocutor:—

"*Edinburgh, 5th December* 1873.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings,—Finds that the action cannot, in the circumstances in which it has been brought, be maintained in this Court, and therefore dismisses the same, and decerns: Finds the defenders entitled to expenses; allows an account thereof to be lodged, and remits it when lodged to the Auditor to tax and report.

Note.—This is one of several actions which have been lately instituted by members of the Association in question to enforce payment of claims in respect of injuries sustained by them through accidents, the object of the Association being to secure for its members some provision against the consequences of such accidents.

"A former action at the instance of a member of the Association, named M'Kernan, was dismissed by the Court as incompetent, in the circumstances and on the grounds referred to in the report published in the 'Scottish Law Reporter,' vol. x., p. 361, and 'Scottish Jurist,' vol. xlv., p. 351. A second action, at the instance of the same individual, M'Kernan, was on the 29th October 1873 dismissed on the same grounds by the present Lord Ordinary, and now a third action, at the instance of the pursuer George Shanks, has met with the same fate.

"The grounds upon which the Lord Ordinary has proceeded in now dismissing this action are, that the pursuer's allegations are irrelevant and insufficient to support it; and, in particular, that he has not averred or shown any reason why he should be allowed to come into this Court with such an action as this, in place of leaving his claim to be disposed of by a vote of the Association, in terms of its laws; or, in the event of a dispute arising in regard to that or any other matter relating to his claim, allowing it to be determined by arbitration in conformity also with its laws, and the special agreement afterwards referred to, entered into by him and the Association.

"The pursuer himself, in article 6 of his condescendence, sets out the law of the Association, which directs that an application for relief such as the present ought to be made to the Association, and declares that a 'majority of those voting on the application shall be held binding without power of appeal to any Court of civil law or equity.' And in article 10 of his condescendence the pursuer acknowledges that a vote was taken on his claim or application, and that it was adverse to him. Nor has he, so far as the Lord Ordinary can see, made any statement relevant or sufficient to show that this ought not to be held as conclusive against him.

"But, further, it appears that the pursuer having brought an action in the Sheriff Court for the purpose of enforcing his claim, a minute of agreement was, according to his own statement in the 11th article of his condescendence, 'entered into, whereby it was agreed that the said action and the pursuer's claim should be referred to arbitration, in accordance with the rules of the society, and the action therefore was allowed to stand dismissed, in terms of the Act 16 and 17 Vict., cap. 80, sec. 15.'

"Then, in the next article (12th) of his condescendence, the pursuer goes on to set out the law of the Association in accordance with which the arbiters were to be chosen. But in place of conforming himself to that law by getting arbiters appointed by the Association, the pursuer states, in article 13 of his condescendence, that the 'Helensburgh Lodge' has named arbiters, and he maintained in argument that that lodge must be held to be the 'body' referred to in the law quoted in condescendence 11, by whom the arbiters fell to be nominated. The Lord Ordinary, however, can see no ground whatever for that contention. On the contrary, he thinks it quite clear that, by the expression 'the body,' in the law quoted in condescendence 11, is meant the Association. Nor can the Lord Ordinary think it competent for the pursuer to lead evidence, as he said he was ready to do, in order to prove that according to the practice of the Association the expression 'the body,' in the law referred to, meant the local lodge; for it is obvious there can be no practice since 1869, when the laws first came into operation, that could affect the matter. The pursuer, indeed, did not say that there was; but explained that he proposed to enquire into the practice under a prior set of laws, which are not founded on in the present action at all. Clearly, and in any view, such a course is quite inadmissible. The Lord Ordinary has had no hesitation, therefore, in holding that, by the expression 'the body,' the Association, and not the Helensburgh Lodge, is meant. And if this be so, the Lord Ordinary cannot doubt, having regard to the statement of the defenders in article 7 of their statement of facts, that the pursuer has had it all along, and has it now in his power, to get his claim or dispute with the Association considered and determined in the only way in which it can competently be considered and determined under the constitution and laws of the Association.

"Such is, shortly, the explanation the Lord Ordinary has to offer of the ground upon which he has proceeded in dismissing as he has done the present action."

The pursuer reclaimed.

At advising—

Lord President—I do not think it necessary to go elaborately into the grounds of this action. Mr Brand brought the case very fairly under our notice, and conceded that this case, so far as it raises questions of competency and jurisdiction, is on all fours with the case of *M'Kernan* against the same defenders (Jan. 30th, 1874, 11 Scot. Law Rep., 219), decided by the Second Division.

If we entertained doubts as to the soundness of the judgment of the Second Division we would not be bound to follow it. But if we see no reason to doubt the soundness of that judgment we are not only bound but very willing to follow it. Now it appears to me that a Trade Union as defined by the Statute was unlawful before the Act, in the sense that an action of this sort could not be entertained by a Court of Law.

This is clear from the Statute itself. In the 23d section of the statute Trades Unions are defined in the following terms:—

"The term 'Trade Union' means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not passed,

have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

It is not disputed that this is a Trade Union, and therefore falls within that definition, and would have been unlawful before the Act. That being so, what is the object of the Statute? The object is, to give relief to associations of this kind, to give them certain rights, to save them from liability to criminal prosecution. So the 2d section of the Act provides:—"The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise."

And the 3d section says:—"The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement of trust." That is to say, that agreements made by or trusts made for the benefit of trade associations may be enforced in a Court of Law. Then the immediately following provision in the Statute comes in really as a proviso to the 2d and 3d sections. It is as follows:—"Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely:—

"1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed:

"2. Any agreement for the payment by any person of any subscription or penalty to a trade union:

"3. Any agreement for the application of the funds of a trade union,—

"(*a*) To provide benefits to members; or

"(*b*) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or

"(*c*) To discharge any fine imposed upon any person by sentence of a Court of Justice; or

"4. Any agreement made between one trade union and another; or

"5. Any bond to secure the performance of any of the above-mentioned agreements.

"But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

Thus the agreements specified here are not absolutely unlawful, but a Court of Law cannot entertain legal proceedings in regard to them. Of the expediency of these provisions in regard to some of the agreements specified there can be no doubt, as, for example, an agreement to discharge the sentence of a Court of Justice; and this agreement and one for the application of the funds of the trade union to provide benefits to a member, are placed in the same category.

This action concludes for £80, which it is averred the union agreed to provide to the pursuer in the event which has, he avers, happened, of his being disabled for life by an accident in the pursuance of his employment. Now, it is obvious that that was an agreement to provide benefits to a member of a trade union, and is excluded both by Statute and at Common Law. So this action must be dismissed.

Lord Deas concurred.

Lord Ardmillan—I concur in the opinion of your Lordship, and I also agree with the judgment of the Second Division as explained in the opinion of the Lord Justice-Clerk.

It is unnecessary for me to add anything, but I may suggest, as an additional ground of judgment, that the pursuer suing the Society founds on the the laws—especially law 8th—of the Society. These laws on which the pursuer is founding declare the decision of the Society final, and they expressly exclude the Courts of Civil Law. The laws also provide for settlement of disputes by arbitration. If there be a wrong here, it is not a wrong without a remedy; for the remedy of arbitration is provided by the laws of the Society. These laws form the contract, and I think that the remedy which the contract gives must be preferred to the remedy which the contract excludes.

Lord President—I may add that I rather think that the Statute did contemplate that there might be a breach of agreement without a remedy.

Lord Jerviswoode concurred.

Counsel for the Pursuer—Brand and M'Kechnie. Agent—Tho. Lawson, S.S.C.

Counsel for Defender—Balfour and Pearson. Agents—Rhind & Lindsay, W.S.

Tuesday, March 17.

FIRST DIVISION.

DUNCAN AND OTHERS, *v.* SALMOND AND OTHERS.

(*Ante*, p. 169.)

Expenses—Fees of Counsel and Agent.

Where there were a number of defenders to an action whose interest was identical with reference to the conclusions of that action:—*Held* that from the date of the case being heard in the procedure roll, at which date the identity of their interest was ascertained, the defenders were entitled to the expense of only one set of counsel and agent. *Opinion* as to the stage at which such a question ought to be raised.

In an action of multiplepoinding certain of the claimants were found entitled to the fund *in medio* in preference to the present pursuers. Thereupon the latter raised an action of reduction of the judgment of the Lord Ordinary (which had been allowed to become final) against the present defenders, who were the successful claimants, and the judicial factor, the holder of the fund—in which action the pursuers were unsuccessful, and the defenders found entitled to expenses.

The present question arose on the motion of the defenders to approve of the Auditor's report.

The pursuers objected to the report in so far as it allowed fees of counsel and agent to each of four different sets of defenders, and argued that the interest of all the defenders in the present