determining the fact should ascertain how the money was actually spent by the association, bearing in mind that the appellants are themselves members of the association, that the association is under the sole control of its members, who may retire from it at any moment, and that the assets belong to the appellants along with their fellow-members. I am not disposed, and I understand your Lordships are not disposed, to sustain the finding of the Commissioners as it stands, and now and here to disallow this payment of £923. I propose that we should remit back to the Special Commissioners to consider the case with the evidence which the appellants are asked to tender, namely, the accounts of the association, which show—and which are the only true evidence by which it can be shown—how the money was actually spent.

LORD JOHNSTON—I concur in the course which your Lordship proposes to take. I think the question is really determined by the passage which I adverted to in Lord Dunedin's opinion in the case of *Moore* v. *Stewarts & Lloyd*, 1906, 8 F. 1129, 43 S.L.R. 811, where he says it all depends on "whether the expenditure was really an outlay to earn profit or was an application of profit earned. Well, that is a question of fact, and it is a question of fact which is not solved by a mere perusal of the document under which the money is claimed." Now the appellants here seem to me exactly to controvert that proposition, because they ask us, and they asked the Commissioners first of all, to hold that the Inland Revenue were bound to determine this question upon perusal of a certain document, namely, the rules and regulations of this association. I refer again to Lord Dunedin in the case of the *Lochgelly Iron and Coal Company*, 1913 S.C. 810, at p. 814, 50 S.L.R. 597, at p. 599, where he points out that the money, when received in that case by the Coalowners' Association, might be applied to purposes some of which "might involve amounts which, if charged in the account of the individual member, would be proper deductions as being expenses undertaken with a view to earning profits, whereas others might not." Now I think it is perfectly legitimate for the Inland Revenue to take up that attitude here. This association has made a levy; it has received payment of it. What has it done with it? Some of the expenditure, it may be, has been made perfectly legitimately towards the increase of profits of these particular appellants, some of it may not, but surely the Inland Revenue are entitled to have some means of judging of that question. The appellants' only answer is that they have by their own act placed themselves in such a position that they cannot satisfy the request of the Inland Revenue. Very well, if they cannot satisfy that reasonable and proper request they must accept the consequence, which is that the assessment must stand. But it seems to me that the appellants are really taking up an unreasonable attitude when they might have quite easily satisfied the Inland Revenue had they taken a different line. This association is a purely voluntary association; the appellants have chosen to tie their hands behind their backs in going into it, and therefore they cannot do directly what the Inland Revenue asks. But it seems to me that with a little reason the information might be given to the Inland Revenue, because it is perfectly certain that the same question will arise between the Inland Revenue and every other member of this association. I accept the situation that the interest of all these parties requires that none of them should have any information about the business of the others. That is quite reasonable. But surely the books of the association can be disclosed, as the books of all companies are disclosed, in confidence to the Inland Revenue, in order that the Inland Revenue may satisfy themselves, not upon the question of what are the profits of the other companies concerned, because that they get from the ordinary returns of these companies, but upon the question of what has been the expenditure of this association. The seal of confidence need not be broken, and yet the Inland Revenue may thus get all the information necessary for determining the question which they perfectly legitimately desire to determine.

LORD SKERRINGTON—I concur with your Lordships.

LORD MACKENZIE was sitting in the Extra Division.

The Court pronounced this interlocutor—

"Refuse the appeal, and remit the case to the Special Commissioners to consider the same with such evidence as may be obtained from the accounts of the association with respect to the manner in which the contributions and levies in question were expended by the association."

Counsel for the Appellants—Macmillan, K.C.—MacRobert. Agents—Martin, Milligan, & Macdonald, W.S.

Counsel for the Respondent—Solicitor-General (Morison, K.C.)—Candlish Henderson. Agent—Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Wednesday, December 2, 1914.

FIRST DIVISION.

[Sheriff Court at Glasgow.

COLLINS *v.* BARROWFIELD LODGE OF ODDFELLOWS FRIENDLY SOCIETY.

Friendly Society—Dispute with Member—Action to Enforce Decision of Superior Court of the Society—Friendly Societies Acts 1896 (59 *and* 60 *Vict. cap.* 25), *sec.* 68 (1), *and* 1908 (8 *Edw. VII, cap.* 32), *sec.* 6.

A member of a friendly society having been expelled by his lodge, but the expulsion not having been sustained on appeal to the district court, brought an action against the lodge for decree

that he was still a member and for payment of the sick benefit he was thereby entitled to. *Held* that the action was competent, and decree *granted.*

Gall v. *Loyal Glenbogie Lodge of Oddfellows Friendly Society*, July 14, 1900, 2 F. 1187, 37 S.L.R. 911, *commented on and explained.*

The Friendly Societies Act 1896 (59 and 60 Vict., cap. 25), section 68 (1), as applied to Scotland by section 102, enacts—"Every dispute between (*a*) a member or person claiming through a member or under the rules of a registered society or branch, and the society or branch or an officer thereof, or (*b*) any person aggrieved who has for not more than six months ceased to be a member of a registered society or branch, or any person claiming through such person aggrieved, and the society or branch or an officer thereof . . . . shall be decided in manner directed by the rules of the society or branch, and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any court of law or restrainable by injunction, and application for the enforcement thereof may be made to the Sheriff Court of the county."

The Friendly Societies Act 1908 (8 Edw. VII, cap. 32), section 6, enacts—"In section 68 of the principal Act [*sup.*] . . . the words 'for not more than six months' shall be repealed in paragraph (*b*) of sub-section (1), and at the end of the section the following new sub-section shall be added:—(8) In this section the expression 'dispute' includes any dispute arising on the question whether a member or person aggrieved is entitled to be or to continue to be a member or to be reinstated as a member, but, save as aforesaid, in the case of a person who has ceased to be a member, does not include any dispute other than a dispute on a question between him and the society or branch or an officer thereof which arose whilst he was a member, or arises out of his previous relation as a member to that society or branch."

In October 1913 Henry Collins, 3 St Margaret's Place, Glasgow, *pursuer*, brought an action in the Sheriff Court at Glasgow against John Morrison and others, trustees appointed by the Barrowfield Lodge No. 24 Branch of the West of Scotland District of the Caledonian Order of United Oddfellows Friendly Society, registered under the Friendly Societies Act 1896, Mile End, Glasgow, *defenders.* The pursuer sought declarator that he was a member of the Lodge and as such entitled to the benefits attaching to membership, and for decree for payment of the sick benefit to which he was entitled, viz., aliment at the rate of 4s. 10½d. per week from 19th October 1912 to the date of citation, with interest, reserving his right to claim further weekly payments until he should cease to be entitled thereto in terms of the rules of the Lodge; *alternatively*, decree for repayment of the sums paid by him into the Lodge between 17th February 1896 and 3rd June 1913, amounting with interest to £35 approximately.

The defenders, *inter alia*, pleaded—"2. The action is incompetent."

The pursuer joined the Lodge on 17th February 1896, signing a declaration as to good health and age. In February 1912 he was asked, owing as averred to the requirements of the National Health Insurance Act 1911, to supply an extract of his birth certificate. This he failed to do, and on 22nd October 1912 he was suspended from benefit. Thereafter an extract of baptism was obtained, on his information, and from it it appeared that he had in his declaration understated his age by two years. The pursuer was expelled at a meeting of the Lodge on 19th November 1912. He appealed to the District Court, which after a hearing sent back his application to the Lodge for rehearing. On 11th February 1913 the Lodge again expelled him. The District Executive sustained an appeal. The defenders appealed to the Grand Lodge, which refused to hear the appeal on the ground that the case was one for arbitration, informing the pursuer that he could take whatever further action he might think right. It subsequently, on June 17, 1913, expressed willingness to hear the appeal if both parties were agreeable, but the pursuer declined to move in the matter.

On December 15, 1913, the Sheriff-Substitute (A. S. D. THOMSON) sustained the defenders' second plea and dismissed the action with expenses.

Note. — "The pursuer craves declarator that he is a member of defenders' Lodge of Oddfellows. He complains that defenders wrongfully expelled him from the Lodge, that on appeal to the District Lodge the expulsion was recalled, and that he is therefore still a member, and entitled as such to sick benefit money, for which also he craves a decree. His ground of action accordingly is that being a member *de jure* the Lodge refuses to recognise him as a member *de facto*, and that the Court therefore should interpose and declare him to be a member and entitled to sick benefit money.

"The Court, however, has clearly laid it down that it will not ordain a society or lodge like defenders' to recognise a party as a member and to treat him as such, the reason being as stated by Lord President Inglis in *Aitken* v. *Associated Carpenters and Joiners of Scotland*, 12 R. 1206, at p. 1212, 22 S.L.R. 796—'What, then, would be the effect of our reinstating the pursuer in his position as a member of this Society? and what would be the effect of our decree? The Court could not enforce it. The Society would simply refuse to recognise the decree of the Court, and that is not a position in which the Court could allow itself to stand towards any person or any number of persons.'

"A later decision supporting this view is *Gall* v. *Loyal Glenbogie Lodge of the Oddfellows Friendly Society*, and the point is apparently now quite settled in Scotland. The result therefore seems to be that the first alternative prayer is incompetent.

"The alternative prayer is, I think, also incompetent. It seeks repayment of all con-

tributions pursuer has made to the Lodge since he became a member in the year 1896. In other words, for an alleged breach of the contract he seeks the equitable remedy of rescission of the contract seventeen years after it was entered into and after it had been entered into by both parties, and without any offer of *restitutio in integrum*. This seems out of the question. His remedy, if he has any, is by way of damages and not for rescission.

"Even apart from this objection there remains the argument for defenders that his dismissal was warranted by the terms of the written contract between the parties in the admitted circumstances of the case. The soundness of this argument seems established by the authorities cited by the defenders, but I have felt some doubt whether the defenders are entitled to state this point, seeing it has been decided against them by the tribunal before which they appeared—that is to say, the District Lodge of their Society—and therefore I prefer to base my judgment on the other grounds which I have stated."

The pursuers appealed to the Court of Session, and in argument cited the Friendly Societies Act 1896 (59 and 60 Vict. cap. 25), sec. 68; the Friendly Societies Act 1908 (8 Edw. VII, cap. 32), sec. 6; *Aitken* v. *Associated Carpenters and Joiners of Scotland*, July 4, 1885, 12 R. 1206, 22 S.L.R. 796; *Swaine* v. *Wilson*, (1889) 24 Q.B.D. 252; *Willis* v. *Wells & Others*, [1892] 2 Q.B. 225; *Glasgow District of Ancient Order of Foresters* v. *Stevenson*, October 19, 1899, 2 F. 14, 37 S.L.R. 12; *M'Gowan* v. *City of Glasgow Friendly Society*, 1913 S.C. 991, 50 S.L.R. 783; *Andrews* v. *Mitchel*, [1905] A.C. 78; and distinguished *Gall* v. *Loyal Glenbogie Lodge of the Oddfellows Friendly Society*, July 14, 1900, 2 F. 1187, 37 S.L.R. 911.

The defenders cited *Paterson* v. *Presbytery of Dunbar*, March 9, 1861, 23 D. 720; *Crichton* v. *Dalry Myrtle Lodge of Free Gardeners Friendly Society*, February 18, 1904, 6 F. 398, 41 S.L.R. 337; *Winans* v. *Mackenzie*, June 8, 1883, 10 R. 941, 20 S.L.R. 640; and *Gall* v. *Loyal Glenbogie Lodge of the Oddfellows Friendly Society* (*cit. sup.*).

LORD PRESIDENT—I cannot agree with the conclusion reached by the Sheriff-Substitute, for in holding this action incompetent he has in effect held, that although the pursuer is confessedly a member of this Friendly Society, yet a court of law is powerless to aid him to vindicate his rights as a member. Now such a confession of impotence is not readily given by any court of justice, and it is satisfactory to find that in this case we are not driven to it by any statutory enactment.

The pursuer joined the Society in the year 1896, and since that date, throughout a long series of years, he has paid his weekly subscriptions. In the month of February 1912 a dispute arose between him and the Society, turning on the question whether or no he had deceived the Society in a certain statement which he made regarding his age, and if so whether that did not disentitle him longer to continue a member. His Society, in terms (I assume) of the rules, decided that he was not entitled to continue longer a member, and accordingly expelled him. But in accordance (again I assume in the absence of any statement or plea to the contrary) with the rules the pursuer appealed to the district committee, which considered his case, and on 4th April 1913 sustained his appeal and held him to be still a member of the Society.

With that decree in his hand the pursuer now maintains—and I think rightly maintains—that he is a member of this Friendly Society.

The Lodge (once more I assume) in terms of the rules appealed against the decision of the district committee to the grand executive, which, for a reason with which we are not here concerned, refused at first to entertain the appeal. Subsequently they changed their minds and intimated to the Lodge and to the pursuer that they were willing, if both parties consented, to hear and to decide the appeal, for that is the correct interpretation, in my opinion, of the letter of the 17th June 1913, which was read to us from the bar. In that state of mind, for aught that I know, the grand executive still remain. But, at all events, it is too late now to ask us to sist this case in order that the grand executive may have an opportunity of considering whether they ought to proceed to decide this appeal in the absence of the consent of both parties. The pursuer very naturally refused his consent. He was a member of the Society, holding a decision to that effect, and was not called upon therefore to litigate further upon a question which, so far as he was concerned, was finally decided. Accordingly he now asks, in terms of the right conferred on him by the 68th section of the Statute of 1896, to have the decision of the district committee enforced in the appropriate Court.

In the long run Mr Aitchison felt constrained to contend that the only reason why he should not have the decision of the domestic tribunal enforced was that the case of *Gall* v. *Loyal Glenbogie Lodge of Oddfellows Friendly Society*, 2 F. 1187, 37 S.L.R. 911, was decisive against it. Now that case at first sight bears a close resemblance to the present case. There the pursuer, a member of a friendly society, sought, in terms of the 68th section of the statute, to have a decree of a district executive enforced, and the Court refused his demand. But the ground on which the Court refused the demand was that to grant it would be to grant an inoperative decree. That appears quite plainly from an examination of the opinions of the learned Judges who pronounced the decision. Says the Lord Justice-Clerk—"The procedure not being taken in such a form that any operative judgment could be pronounced," decree must be refused. Says Lord Trayner—"The Sheriff could not, I think, enforce his own order if the respondents refused obedience to it; and, in my opinion, he is not bound to pronounce any decree which may be disobeyed without his having the means of enforcing obedi-

ence to it." And says Lord Moncreiff—"Even if decree in terms of the prayer were pronounced, I do not at present see how, or against whom, it can be enforced if the defenders refuse to obtemper it."

Now whether the decision of the Second Division in the case to which I have just referred is in accordance with the statute or not, it is quite clearly inapplicable to the present case, because no one disputes that if we grant decree in terms of the crave of the first alternative of the initial writ here we shall be granting an operative decree.

I hold therefore (first) that there is here before us a dispute within the meaning of the 68th section of the statute; (second) that that dispute has been decided by the rules of the Society, and that the decision so given is binding and conclusive on all parties; and (third) that this is the appropriate statutory method of enforcing the decision of the district executive. Accordingly I am for recalling the interlocutor of the Sheriff-Substitute and granting decree in terms of the first alternative crave of the initial writ.

LORD MACKENZIE—I am of the same opinion. The pursuer here holds a decision of the domestic tribunal in his favour. His Lodge expelled him on the 19th November 1912. He appealed to the district committee against that decision, and they on 4th April 1913 sustained the appeal. The result was that the pursuer was reinstated in his position as a member of the Society. That is the only operative decision and the only one to which we can look.

Now in these circumstances he applies to the Sheriff-Substitute, under the provisions of the 68th section of the 1896 Act, for enforcement of the finding in his favour. In my opinion he was entitled to get from the Sheriff-Substitute the necessary order, because this, I think, is clearly a dispute within the meaning of the 1908 Act, section 6.

The argument to the contrary was that the matter was still *sub judice* before the domestic tribunal, because it was said an appeal had been taken by the defenders to the executive committee and that that had not been exhausted. If that matter is not exhausted by the executive, the responsibility rests with the defenders themselves. There is no duty whatever upon the pursuer, who was successful and holds the judgment, to take any proceedings at all for having the judgment set aside. There are no proceedings at present pending before any other Court. Looking to the way in which the case has been presented by the defenders, I think it is too late now to take up a position that they are entitled to have the present proceedings sisted in order that they may take steps for having the matter further heard and disposed of by the grand executive committee.

The next point that was argued by the defenders was that the actings of the district committee were *ultra vires*, that they had pronounced their decision as if in the exercise of a discretionary power, and that the statute conferred no discretion upon them. As I understood the point, it was this, that under the rules a misstatement upon a matter of fact necessarily disentitles the pursuer from remaining a member. In regard to that I can only say that it is not raised upon record; there is nothing about that—there is no plea, and the question is not one that is before us. Accordingly the only point which requires attention is that the remedy is incompetent. That argument was founded upon the case of *Gall*. For the reasons explained by your Lordship in the chair, I think that this case is distinguishable from the case of *Gall*. What we are here asked to do is not to pronounce a decree *ad factum præstandum*, but to give a declaratory finding preliminary to the operative conclusion which asks for a decree for payment of money. There is no difficulty in working out that decree. Accordingly the present cannot be considered as ruled by the case of *Gall*. That being so I think the judgment of the learned Sheriff-Substitute is wrong and should be recalled.

LORD SKERRINGTON—I agree with your Lordships. The pursuer's case seems to me a very plain and simple one, and my only difficulty has been to understand why such an experienced Sheriff-Substitute dismissed the action. The two decisions which he cites do not really apply to the circumstances of the present case. With reference to the case of *Gall*, I do not think that the Court can have intended to decide as a matter of general principle that there is no jurisdiction to restrain the officials and members of a voluntary association from illegally excluding an individual member from the association if such member has a patrimonial right which would be prejudiced by his exclusion.

LORD JOHNSTON was not present.

The Court recalled the interlocutor of the Sheriff-Substitute, and decerned in terms of the first alternative claim of the initial writ.

Counsel for the Pursuer (Appellant)—Christie, K.C.—Lowson. Agent—W. M. Urquhart, S.S.C.

Counsel for the Defenders (Respondents)—Wilson, K.C.—Aitchison. Agents—Balfour & Manson, S.S.C.

Thursday, February 25, 1915.

SECOND DIVISION.

[Sheriff Court at Dumfries.

SCOTT *v.* SANQUHAR AND KIRKCONNEL COLLIERIES, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule* (9)—*Agreement—Genuineness—Terms of Receipts for Payments and Terms of Memorandum—Total Incapacity or Incapacity under the Act.*

Where the receipts for payments under an agreement entered into between an employer and a workman