£7, os. 4d. for each offence; and in respect it is inexpedient to issue a warrant of poinding and sale, ordain execution by imprisonment, failing payment within fourteen days from this date of said respective penalties and expenses, and grant warrant," &c.

The suspender then brought the present suspension, by which he sought to quash the proceedings upon a variety of grounds. In addition to those which were common to this and the foregoing case, and which, in respect of the judgment therein, were not insisted in.

A. R. CLARK and MACLEAN submitted (1) that the complaint did not relevantly charge any offence under the Acts or Orders in respect it was defective in the specification of the offences said to have been committed. It was not enough to say that the removal had been "unlawful." The illegality should have been condescended upon. The Summary Procedure Act required the particulars of the offence to be set out; (2) that it was not competent to charge the same *species facti* as separate offences; and (3) the proceedings at Dingwall in the above case were a bar to any being had under this complaint.

GORDON and W. MACINTOSH, for the respondent, were not called upon except with regard to the second objection. They argued that under the Acts and Orders in Council it was an offence to remove sheep into a county without a proper license, and a separate offence to remove them into the north-western district of Scotland. The true reading of the complaint in the present instance was that the first charge referred to the part of the county of Inverness not within the north-western district—the second charge to the the north-western district. The Orders in Council said to have been contravened by the two offences were different.

The Court took time to consider their judgment.

At advising—

The LORD JUSTICE-GENERAL, who delivered the judgment of the Court, after narrating the circumstances of the case, said that their Lordships were of opinion that it was not clear upon the libel what the nature of the accusation under the first charge was, that it was difficult to read the complaint as distinctly setting forth two separate offences, if such could be charged under the Acts and Orders in Council; that the second offence was well charged and quite separable from the first, and that the conclusion which had been arrived at by the Court was, that the conviction of the first offence should be suspended, and that the reasons of suspension should be repelled with regard to the conviction for the second offence. The expenses apportioned to the separate offences would be dealt with in conformity with this judgment, and expenses would not be allowed to either party in this Court.

Agent for Suspender—W. Miller, S.S.C.

Agents for Respondent—Mackenzie & Fraser, W.S.

COURT OF SESSION.

Thursday, July 12.

FIRST DIVISION.

BLUE *v.* POLLOCK AND OTHERS.

Reparation—Friendly Society—Liability of Society's Funds—Relevancy. Held (1) that the funds of a friendly society are liable to repair a wrong done by the society to one of its members through violation of the society's rules in regard to expulsion; and (2) that a wrong was relevantly averred.

The West Kilbride Free Gardeners' Society was instituted in 1829 for the purpose of raising a fund for the mutual benefit and support of its members during their sickness or inability for work, and, in the event of death, for contributing towards their funeral expenses. Dugald Blue was an original member, and continued a member until June 1864, paying all that time the weekly payments exigible from him. In the year 1861, when upwards of seventy years of age, he was placed on the roll of "alimenters," and became entitled to a weekly allowance of four shillings. By one of the rules of the society it is provided that "if any member bring trouble upon himself by irregular practices of any kind he shall, upon the same being proved against him, be excluded from the benefit of the society during the continuance of such trouble; and if any person be found pursuing his ordinary employment, or tippling or intoxicated, or out of his own house after ten o'clock at night, while on the sick list, for any of these or similar offences, he shall be suspended from all present benefit, until such time as the committee take his case into consideration, which they are hereby bound to do within eight days." In June 1864, as was averred, the committee of the society expelled him on the ground that it had been proven to their satisfaction that he was intoxicated on 17th June 1864. This was done in absence, and without an opportunity being afforded him of disproving the charge. By another rule of the society it is provided that "the members of the society shall always be judges of their own affairs; and whatever may be the decision of the society or their committee shall be final, unless appealed against; and if any person consider himself aggrieved by the decision of the committee, he may refer it to the first quarterly meeting; and should any dispute still exist between the society, or any person acting under them, and any individual member thereof, or person claiming on account of any member, the same shall be decided by arbitration in terms of the 27th section of the Friendly Society Act, viz., the matter shall be referred to three arbiters balloted from the list appointed for that purpose by the society, who shall not be beneficially interested with the funds of the society, and whose names shall be entered in the society's books at the first meeting after the confirmation of these rules by the Justices of the Peace, and the persons whose names are thereon shall be considered arbiters who shall finally decide the dispute." Blue appealed to the quarterly meeting, and thereafter required the society to enter into an arbitration with him; but nothing was done in regard to the appeal, and the society refused to enter into an arbitration. This action was thereupon raised, in which damages were called for in respect of the defenders' breach of contract. The parties called were three office-bearers, who by the rules were authorised to sue and be sued for behoof of the society.

The defenders pleaded, *inter alia*:—

1. The averments of the pursuer are irrelevant, and insufficient as grounds of action, and the defenders should be assoilzied, or the action dismissed.

5. Farther, and even on the assumption that the decision complained of was erroneous, damages are not recoverable from the society, all which could be awarded in a question with the society being the pursuer's restoration to his former posi-

tion as a member, with its accompanying benefits, and therefore absolvitor from the conclusions of the action should be pronounced.

The Lord Ordinary (Ormidale) pronounced the following interlocutor :—

Edinburgh 23d December 1865. — The Lord Ordinary having heard counsel for the parties, and considered the argument, the summons, record, and other proceedings, —Finds that this action, being one for damages in respect of alleged wrongous acts of certain persons, office-bearers and in the management of the affairs of the friendly society in question, committed in breach of their duty and abuse of their powers, is not maintainable as directed against the defenders as trustees of and as representing said society: Therefore to that extent and effect sustains the first and fifth pleas in law for the defenders, assoilizes them from the conclusions of the action as laid, and decerns: Finds the pursuer liable in expenses of process to the defenders : Allows an account thereof to be lodged, and remits it when lodged to the Auditor to tax and report. (Signed) R. MACFARLANE.

Note.—The pursuer's ground of action amounts to this, that he has been expelled from the friendly society in question, and has consequently sustained loss and damage by being deprived of the allowances which he would have been entitled to as a member of the society. It is not distinctly averred, however, that the society itself, or its members generally, were implicated in the alleged wrongous acts which led to this result. On the contrary, the pursuers avers (Cond. 7 and 8) that he was improperly expelled, not by the society at any meeting of its members, but by a committee; that (Cond. 9) he appealed, without effect, by letter to Mr Robert Dunn, the president of the society, to its next quarterly meeting, but whether this letter was ever submitted by Mr Dunn to the society, or any meeting thereof, is not said; that (Cond. 10) he then wrote, also without effect, to the president demanding an arbitration, but he does not state that the society was cognisant of the demand; and, finally, that (Cond. 11, 12, and 13) some correspondence took place, having for its object to obtain redress, betwixt his agent on the one hand, and Mr Dunn and the commitee on the other, but even this correspondence is not said to have been laid before the society.

Such averments as these are obviously defective, and would probably not be considered relevant and sufficient to subject in damages any corporation or society, however constituted, and are certainly not sufficient, in the Lord Ordinary's opinion, to subject in damages the friendly society in question.

By article first of the constitution of the society, of which the pursuer must be presumed to have been all along perfectly cognisant, having been on his own showing a member for many years, it is expressly declared "to be established for the purpose of raising a fund for the mutual benefit and support of its members during sickness, inability to pursue their respective employments, and, in the event of any of their deaths, to grant a small sum towards defraying their funeral expenses," . . . . and that "the whole funds of the society shall be exclusively applied to these purposes, which are hereby declared, in terms of the Act, to be the sole purposes for which the society is constituted"

The Lord Ordinary thinks it clear, therefore, that on the principle of the House of Lords' decision in the case of Heriot's Hospital *v.* Ross, 19th March 1846, 5 Bell's Appeal Cases, p. 37, as well as others to the same effect, the present action, directed as it is against the friendly society in question, and in which it is sought to recover damages out of the funds of the society in respect of the tortuous or wrongous acts of its trustees, or other officials, is not maintainable. Whether the pursuer might not be entitled, in some competent process brought for the purpose, to get restored to his position as a member of the society, and also to redress otherwise against the persons through whose alleged wrongous and illegal acts he has been injured, is a question with which the Lord Ordinary cannot at present deal, and in regard to which he is not to be understood as offering any opinion. (Intd). R. M'F.

The pursuer reclaimed. But before the reclaiming-note was put out for debate he died. His son having been sisted as his father's executor.

SOLICITOR-GENERAL and BURNET, for him, argued—The pursuer was improperly and illegally expelled. He was entitled to have the dispute referred to arbitration. The society's refusal to enter into an arbitration was a breach of their contract with the pursuer. This refusal was the act of the society acting through its committee, which had authority to manage the whole business of the society. The pursuer might have raised a reduction of the minute expelling him, and claimed specific implement. But that was not his only remedy. An action of damages is always open to a party against those who have invaded his legal rights. This is not an action for being improperly accused of drunkenness. Such an action for *solatium* might not have been competently directed against the society. The cases of Ross *v.* Heriot's Hospital, and of Findlater *v.* Duncan, do not apply. In the first of these cases the fund was a charitable one, and in the other it was a statutory one. This is just a private mutual insurance society. Besides, in the recent case of the Mersey Docks and Harbour Board Trustees *v.* Gibbs and Others (5th June 1866, 1 Weekly Notes, p. 216), Lord Westbury expressed doubt whether Lord Cottenham had not, in the case of Findlater, carried too far the doctrine of the non-liability of trust-property for the acts of trustees constituting a public body.

(The LORD PRESIDENT—We must hold the case of Findlater to be good law until it is altered by the House of Lords in a Scotch case).

MILLAR and A. R. CLARK, for the defenders, argued—This action is not relevant. A member of the society is not entitled under the rules to obtain an arbitration, unless he has first exhausted the remedy of appeal to the quarterly meeting. The pursuer does not say he lodged an appeal. All he says is that he wrote a letter to the president, but it is not said that the letter was laid before the society. Further, the expulsion was not the act of the society. It was the act of the committee, and the general funds of the society cannot be made answerable for the illegal acts of some of the members.

At advising—

The LORD PRESIDENT (after narrating the facts) —The pursuer complains that, having been in receipt of four shillings a week, he was all at once thrown destitute, contrary to the rules of the society. The Lord Ordinary has sustained certain pleas stated in defence—the first and the fifth. That is all we have at present before us. The Lord Ordinary's view is, that the statements are not relevant, and that there is no good legal ground for demanding the sum sued for; at all events, that the funds of the society cannot be

made available for the payment of damages. In regard to the manner of appeal, I am not much moved by the objections that were taken to that part of the pursuer's case. The Lord Ordinary says that the action is directed against an act of the committee of the society and not of the society itself. I do not see that. As I gather from the rules of the society, the committee had power to pronounce the decision they did pronounce, if there were grounds for it. Accordingly, the defenders themselves do not take this ground on the record. In their second plea-in-law, they speak of what was done as "the decision of the society," and in the same way throughout the record. Then again, it is said Dugald Blue did not take the right course in order to obtain review of the decision. I was very anxious in the course of the debate to know what was the right course, but I could get no answer on the subject. I do not know, in reference to an institution of this kind, the laws of which prescribe no special form of appeal, any better plan than that which was adopted of addressing the president. But there is a broader question raised in this case, and one of far more importance, which indeed is at the foundation of the Lord Ordinary's judgment—namely, whether a demand for damages, or rather for reparation, of the wrong complained of, is competent against the society, or whether it should be directed against the individual wrongdoers, and the cases of Findlater *v.* Duncan, and Ross *v.* Heriot's Hospital were referred to. Now, in the first place, this society itself states the thing done as having been done by itself. The defenders so represent it on the record. But further, I think the nature of this case, and the character of this institution, take them out of the rule of Findlater *v.* Duncan. In that case, the matter did not undergo much discussion in the Court here. I was counsel for the trustees, and tried hard to be heard on the point, but I did not get much encouragement. In the House of Lords, however, the question did undergo some discussion, and was made the ground of judgment. But what is the nature of this institution? It is formed for the purpose of managing funds which are contributed by its members for the benefit of the members, and the result of expelling this man was to enrich themselves, and to put into the coffers of the society what ought to be in the pursuer's pocket. That is quite a different case from that of Heriot's Hospital, and I am therefore of opinion that the Lord Ordinary's interlocutor cannot be sustained. I may state also that this claim is one for reparation. Suppose the pursuer to be right, reinstatement as a member, which the defenders say is all he is entitled to, is not sufficient, because since the pursuer's expulsion he has been deprived of his allowance.

LORD CURRIEHILL—I am of the same opinion, and I may state that, having examined carefully the rules of this society, I am satisfied that its funds are in a totally different position from those of the Road Trustees in Findlater *v.* Duncan, and those of Heriot's Hospital. I am clear that this society may incur liability, either *ex contractu* or for reparation.

LORD DEAS—The Lord Ordinary bases his interlocutor mainly on the cases of Findlater *v.* Duncan, and Ross *v.* Heriot's Hospital, as preventing this action lying against the funds of the society. I am very clear that so to apply these cases is a total misapplication of the doctrine which they contain. This is a society—in other words a company—but over and above that, it is defending a claim made on its own funds. The office-bearers, in what they did, were acting within their powers, and protecting the funds from a demand made on them, and it would be very extraordinary to hold that the funds of the society are not liable to meet the present claim, if it is well founded.

Lord ARDMILLAN—Whether Dugald Blue was rightly or wrongly expelled is not the question now before us; he was in either case entitled, under the rules, to the arbitration which he demanded. And I have no doubt that where such a wrong as is here complained of is done by a society, consisting of contributors, in the administration of funds which the members contribute, the funds of the society must be answerable.

The Court therefore recalled the Lord Ordinary's interlocutor, repelled the pleas in law which he had sustained, and found the defenders liable in expenses since the date of closing the record.

Agent for Pursuer—John Thomson, S.S.C,

Agents for Defender—Patrick, M'Ewan, & Carment, W.S.

JENKINS AND OTHERS *v.* MURRAY.

Road—Right of Way—New Trial. Verdict for the pursuers in a right-of-way case set aside. Observations as to the evidence required to support such an action.

This was a motion to set aside the verdict of a jury and grant a new trial in a declarator of right of way, raised by certain inhabitants of Stirling and the neighbourhood against Colonel Murray of Polmaise and Touchadam; and the question was as to a path over the hill known as the "Gillies' Hill," situated in the neighbourhood of Stirling, and overlooking the field of Bannockburn. This path was some time ago closed by Colonel Murray, who is in the course of erecting a new mansion-house in the vicinity; and the present action was brought for the purpose of having it opened up. The issue sent to the jury was as follows:—

"Whether, for forty years and upwards, or for time immemorial prior to 1864, there existed a public right of way for foot-passengers from a point on the public turnpike or statute-labour road leading from Stirling to Glasgow, marked C on the copy Ordnance Survey map, No. 4 of process, through the defender's lands, as delineated by a line coloured green on the said map, to another point marked D on the said map, also situated on the said public turnpike or statute-labour road, and near to the Murrayshall Lime Works?"

The trial of the case commenced on Wednesday the 7th March last, and was concluded on the Saturday following. Evidence was led at great length on both sides.

The jury returned a unanimous verdict for the pursuers, and the defender having obtained a rule to show cause why the verdict should not be set aside as contrary to evidence,

MILLAR, for the pursuers (with him BALFOUR and W. MACKINTOSH) showed cause, and

YOUNG (with him GIFFORD and JOHNSTONE) was heard in reply.

At advising,

The LORD PRESIDENT—This case was fully and very anxiously argued to us, and the question which we have to deal with is, whether we are to set aside the verdict of the jury. That is always a grave matter, unless it be very palpable that the jury had gone grievously wrong; and we have always a leaning to support the verdict of a jury, if there are fair grounds for supporting it. There may be conflicting evidence, but that there is mere