

some light might be thrown on it by another statute, the Master and Servant Act, under which the manager as well as the master may sue for desertion of service and such like offences, but it is clear that the manager sues solely for his employers, and that is analogous to the case of *M'Naughton*, but not to this one.

The other Judges concurred.

The Court pronounced the following interlocutor:—

“Adhere to the said interlocutor, dated 23d December 1872: Refuse the reclaiming note: Find the defenders entitled to additional expenses; allow an account thereof to be given in; and remit the same, when lodged, to the Auditor to tax, and report.”

Counsel for Pursuer—Campbell Smith and M'Kechnie. Agents—Drummond & Mackenzie, S.S.C.

Counsel for Defenders—Solicitor-General (Clark) and Maclean. Agents—J. W. & J. Mackenzie, W.S.

Wednesday, March 19.

FIRST DIVISION.

[Sheriff of Renfrewshire.

M'KERNAN v. GREENOCK LODGE OF UNITED OPERATIVE MASONS ASSOCIATION OF SCOTLAND.

Trades Union—Compensation for injury.

In a case where a member of a trades union brought an action against the local lodge of the union to compel payment of compensation for bodily injury—*held* that the action ought to have been directed against the Society as represented by the Central Committee. *Question* whether the Court might not interfere to make the Society obey its own rules, even though by those rules the jurisdiction of all courts of law was excluded.

This was an appeal from a judgment pronounced by the Sheriff of Renfrewshire (FRASER). The pursuer raised an action against the Greenock Lodge of the United Operative Masons Association of Scotland, concluding for a sum of £80, “being the amount of the provision to members disabled for life by any real accident received while following their employment as a mason, according to the rules and regulations and laws of the said United Operative Masons Association of Scotland.”

The Sheriff-Substitute (TENNENT) pronounced the following interlocutor:—

“Greenock, 12th July 1872.—The Sheriff-Substitute having heard parties' procurators on the relevancy of this cause, in respect that it is stated at the bar that the Association is in course of considering and disposing of the pursuer's claim, and of bringing it before the branches of the Association, who it is stated are, in terms of Law 8, class IV., the parties who are to vote on the claim, and that this will be done in four weeks after the end of July current, continues the cause till the last court day in September.

“*Note.*—By the terms of the rules of the Asso-

ciation of which the pursuer is a member, the Association, according to the rules and procedure laid down, are to determine upon the pursuer's claim. It is stated at the bar that they are at present exercising that power. At all events they do not seem to have over-stepped the time given them to do so. The Sheriff-Substitute will certainly not take that power out of their hands, more particularly in the face of provisions as to voting upon the claim which may exclude the interference of any civil Court. After the lapse of the time to which this case is continued the case may be resumed for consideration on the relevancy, according to the state of matters and what may have been done before that time.”

The pursuer appealed to the Sheriff, who pronounced the following interlocutor:—

“Edinburgh, 9th December 1872.—The Sheriff having considered this process, with the debate thereon, dismisses the action as incompetent; finds no expenses due to or by either party, and decerns.

“*Note.*—It is with regret that the Sheriff finds himself obliged to pronounce the foregoing interlocutor, because he thinks the pursuer is entitled to the money he asks, and that the Masons Association are bound in common honesty to pay him. To refuse payment of a just demand like this will do far more damage to the Association by shaking confidence in its management, than the Association would lose though they paid down the money. At the same time, after the judgment of the Second Division of the Court in *Manners v. Fairholme*, 6th March, 1872, 10 Macph. p. 520, no other course is open to a Court of law than to dismiss this action. The pursuer is a member of a voluntary club, which is managed by a central committee, and locally by lodges, of which there are 83 in Scotland. Each member is entitled in case of accidents to a certain provision under class IV. of the Society's rules and regulations. It is there said that ‘members disabled for life by any real accident received while following their employment as a mason, may lay an application before the Society according to Law VII. of this class, and if a majority of those voting on the application shall consider him entitled, he shall receive the sum of £80 sterling.’ Law VII. enacts that three months must elapse from the time of accident before any member can make such an application, and after six months it is incompetent. Then comes Law VIII., which is as follows,—‘When any application is made, the lodge applied to shall appoint a doctor and delegate to examine the applicant, and if satisfied that he is disabled for life from following his trade, to send such information to the central committee, who, if not satisfied, may authorise a lodge, or appoint a delegate, to investigate the case,—the delegate to send a full report to the C.C., who shall submit the same to the Society. A majority of those voting on the application shall be held binding, without power of appeal to any court of civil law or equity; but should any dispute arise between a member and the Society, the same shall be submitted to arbitration, as in Law 14, class III., each party to pay one-half of the expenses, the C.C. to pay over the amount within one month after the decision of the Society is known. Any delegate sending a false statement shall pay a fine of £1.’

“Now the pursuer duly complied with all these regulations. He sent in his application in time to his lodge, and the lodge forwarded it to the central committee. He was examined by doctors, and by

delegates from the lodge, and from the central committee, and then the central committee put the matter through what are called the 'Fortnightly Returns,' and the vote was taken as to whether or not the application should be refused or granted. This vote is that, not of the lodge to which the applicant belongs, nor even of the central committee, but of all the lodges in Scotland who chose to vote. Of these there are, as already stated, 83; and of that number 39 only have voted, and the pursuer's application was refused by a majority of votes.

"Complaint was made to the Sheriff that the lodges who voted against the application did so under error, that they were misled by a misprint of a medical certificate, for which the central committee was responsible. The Sheriff cannot give effect to these complaints. He has no power to ordain the lodges in Scotland to take another vote, and in order to make his claim relevant the pursuer must aver that the money was voted to him by a majority of those who did vote. It is said that the Greenock Lodge, since this action was in Court, have sympathised with the pursuer, and have come to the conclusion that he is entitled to his money. This may be quite true; but unfortunately the Greenock Lodge is not the society, and has no power to vote away money. The very same speciality existed in the case of *Manners v. Fairholme*; but it was found practically to be of no avail in supporting the claim. The Sheriff has also followed that case in finding neither party entitled to expenses."

The pursuer appealed to the Court of Session.

Argued for him—The Society, in dealing with the pursuer's application, have been acting under a new set of rules, which differ in certain important particulars from the old ones. The new rules, however, were only passed two days before the accident occurred, and a copy was not sent to the pursuer as it ought to have been; and, in any event, the new rules were not finally passed, being still subject to amendment.

Argued for defenders—(1) This is an attempt to enforce a contract which is illegal, being in restraint of trade—(This argument was given up, there being no averment in support of it on record); (2) The action is brought against the wrong parties, viz., the Greenock Lodge, instead of against the Central Committee; (3) a majority of the Society are the only judges.

At advising—

LORD PRESIDENT—It appears to me that the title of the pursuer to make this claim is that of a member of the United Operative Masons Association, and that the claim properly understood is against the Association. The Association, for the purposes of his claim, is represented by the Central Committee, because that is the only body which has it in its power to pay money. The pursuer has called, not the Association or the Central Committee, but a local body, and they are not the parties against whom the action should be directed. That is the defence raised, and there is great weight in it, and I see no relevant answer. There are portions of the laws of the Association under Class IV. which provide that members disabled for life may lay an application before the Society, according to the rules set forth in Law 7, which is as follows:—"Three months must elapse from the time of accident before any member makes application for

the provision in Law 1 of this class (except in cases of amputation of leg, hand, or arm by accident—the application to be made to the Society without restriction to time, and the C.C. to pay over the provision as soon as convenient after the decision of the Society is known). Members neglecting to make application within six calendar months after the date of accident shall have no claim, and their application shall not be entertained by any lodge whatever."

The pursuer's right to receive the sum concluded for depends on 1st, disablement; 2d, on his making application; 3d, on a majority voting in his favour. Without the fulfillment of these conditions he cannot get his £80. Law 7, as we have seen, provides that three months must elapse before the application is made, except in the case where there is amputation of a limb. Then follows Law 8, which is most important:—"When any application is made, the lodge applied to shall appoint a doctor and delegate to examine the applicant, and if satisfied that he is disabled for life from following his trade, to send such information to the Central Committee, who, if not satisfied, may authorise a lodge or appoint a delegate to investigate the case—the delegate to send a full report to the C.C., who shall submit the same to the Society. A majority of those voting on the application shall be held binding, without power of appeal to any court of civil law or equity; but should any dispute arise between a member and the Society, the same may be submitted to arbitration, as in Law 14, Class III., each party to pay one-half of the expenses—the C.C. to pay over the amount within one month after the decision of the Society is known. Any delegate sending a false statement shall pay a fine of one pound."

In the course of the proceeding it is obvious that the applicant must apply to his Lodge, and if they are satisfied, they are to send information to the Central Committee, but the Central Committee are not bound to be satisfied with the report of the Lodge, and may appoint a Lodge or a delegate to investigate the case, and "a majority of those voting on the application shall be held binding, without power of appeal to any court of civil law or equity." Parties are agreed that this means that a majority of the whole members must vote in favour of the application; unless they do, it is refused—if they are in favour of it the central committee must pay. Then follows a clause providing for arbitration. Now the course of proceeding is plain enough, and if the vote has been taken, I do not see how the local Lodge can be answerable. The matter passes out of their hands as soon as they have reported to the Central Committee. In short, it passes into the hands of the Society, which takes a vote upon it. I think the parties who have been called as defenders are not answerable, and further, a vote having been taken of the whole lodges, and a majority having voted against the claim, I think the jurisdiction of the Court is excluded.

A question of another kind might have arisen in regard to the status of the Society, but we need not deal with that here. I cannot help saying that I fully concur with the Sheriff in the sympathy which he expresses for the pursuer, who seems to me to have a good claim, but I can see no ground for disturbing the Sheriff's judgment.

The other Judges concurred.

The Court pronounced the following interlocutor:—

“Refuse the appeal, and decern: Find the appellant liable in expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report.”

Counsel for Pursuer—Brand and M'Kechnie.
Agent—T. Lawson, S.S.C.

Counsel for Defenders—Watson and Balfour.
Agents—Rhind & Lindsay, W.S.

Wednesday, March 19.

FIRST DIVISION.

[Lord Jerviswoode, Ordinary.]

KIRKPATRICK v. KIRKPATRICK'S TRUSTEES.

Heir-at-law—Dispositive clause—Express and implied revocation—Heritage—Intestate succession—Deathbed.

A husband and wife conveyed the latter's heritage to themselves jointly and the survivor, whom failing to trustees for certain purposes, excluding the right of their only son; a year later they executed another deed, which, proceeding on the narrative that the property was the wife's own, varied the trustees, altered the beneficial interest of the beneficiaries and limited the husband's right to a liferent—this deed did not contain the word “dispone” in the dispositive clause. *Held* (*diss. Lords Deas and Benholme*), that the second deed, though inoperative as a conveyance of heritage, effectually revoked the first deed, and that the son was entitled to succeed to the heritage as his mother's heir-at-law, she having thus died intestate.

This was an action of declarator and reduction at the instance of Mr John Kirkpatrick, Advocate, and its object was to have it found and declared that the late Mrs Kirkpatrick, his mother, had in effect died intestate. The facts of the case were as follows. The late John Kirkpatrick, Advocate, formerly Chief-Justice of the Ionian Islands, married Miss Jean Glas in 1820, and in 1821 she succeeded to the heritable estates of her aunt Miss Janet Semple as heir-at-law. There was no antenuptial contract of marriage; the issue of the marriage was eight daughters and one son, the pursuer. On June 18, 1866, Mrs Kirkpatrick executed a trust disposition *inter vivos*, whereby she disposed her whole estates heritable and moveable to herself and husband and the survivor, whom failing to certain trustees for certain specified purposes. On March 4, 1867, she executed another trust-disposition with consent of her husband, whereby her estates were to be conveyed to different trustees, the interest of the beneficiaries under the deed of 1866 was altered, and the husband's right of fee limited to a liferent. The dispositive words in this deed were “give, grant, assign, convey and make over,” the word “dispone” being omitted. Mrs Kirkpatrick died on November 10, 1867. On June 26, 1868, Mr Kirkpatrick executed a trust-disposition and settlement of his late wife's property, on the narrative that he was sole fiar thereof. By it he disposed her whole heritable and move-

able estates to the trustees therein named, for purposes identical with or similar to those of Mrs Kirkpatrick's deed of 1867. He died February 10, 1871. The defenders, Miss Annabella Kirkpatrick and Sir James Alexander, were the accepting and acting trustees under the last named deed.

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

“*Edinburgh, 20th July 1872.*—The Lord Ordinary having heard counsel and made avizandum, and considered the debate, productions, and whole process, including the joint minute, No. 19 of process, for the pursuer and the defenders, the Trustees of the Clyde Navigation, finds (1st) That the late Mrs Jean or Jane Glas or Kirkpatrick, mother of the pursuer, and spouse of the deceased John Kirkpatrick, advocate, formerly Chief-Justice of the Ionian Islands, and latterly of No. 39 Moray Place, Edinburgh, died on 10th November 1867; (2d) That no antenuptial contract of marriage was entered into between Mrs Kirkpatrick and her said husband, and that the pursuer is the only surviving son of their marriage, and heir-at-law of his said mother; (3) That Mrs Kirkpatrick succeeded as heir-at-law to the whole heritable estates of her aunt, Miss Janet Semple of Finnieston, Glasgow, and made up a title thereto in the year 1821, all as set forth in the record; (4) That by disposition and settlement (containing also a conveyance in trust) dated 18th June 1866, and with relative codicil of same date, recorded in the books of Session 10th May 1871, Mrs Kirkpatrick, with the special advice and consent of her said husband, and he for himself, his own right and interest, and they both with joint consent and assent, ‘for certain good and onerous causes and considerations,’ alienated and disposed, and gave, granted, assigned, conveyed, and made over to and in favour of them and the survivor of them, whom failing to Colonel Sir James Edward Alexander of Westerton, and the other parties therein named, in trust, for the uses, ends, and purposes therein mentioned, all and sundry the property, means, debts, and estates, heritable and moveable, real and personal, then belonging to Mrs Kirkpatrick, or which might belong to her at the time of her death; and the said disposition and settlement also contains a clause in the following terms, viz., ‘Reserving always full power to me at any time of my life, and even on deathbed, with consent of my said husband, and to us both with joint consent and assent, and to the survivor of us, to add to, alter, or revoke these presents either in whole or in part, and to sell, burden, or dispose of the whole subjects, heritable and moveable, hereby conveyed, or any part thereof, at pleasure.’ (5th) That by trust-disposition and settlement, executed by Mr and Mrs Kirkpatrick of date the 4th of March 1867, she, with the special advice and consent of her said husband, and he for himself, his own right and interest, and they both with joint consent and assent, ‘in order to regulate the management and distribution of the means and estate of me, the said Mrs Jean Glas or Kirkpatrick, after my death,’ did ‘give, grant, assign, convey, and make over’ to and in favour of Miss Annabella Kirkpatrick, their eldest daughter, and the other parties therein named, in trust for the uses, ends, and purposes therein mentioned, and to the assignees of the said trustees, heritably and irredeemably, all and sundry the property, means, debts, and estates, heritable and moveable, real and personal, then belonging to