Such was the position of matters in the year 1914. The situation to-day is different. A distinction which appeared to four Judges to be substantial and also workable in practice is condemned by Seven Judges (I include the learned Lord Ordinary) as unsubstantial, fanciful, and unworkable. That is a weighty opinion, not only for the reasons adduced in support of it, but also from the number and authority of the Judges who express it. I should be both arrogant and obstinate if I did not admit that the opinion of these Seven Judges—a majority of the Supreme Court of Scotland—suggests to me a serious doubt as to the soundness of the view approved in the case of *Stein*. Moreover, we are told that our brethren of the Outer House have found it impossible to take their stand upon the line of demarcation which was there laid down. The case of *Lang* v. *Lang*, in which we have now to give judgment, affords a striking illustration. If I had been asked six years ago to instance a case where a marriage ought not to be declared void on the ground of fraud, I should have selected the case of a man who contracted a marriage with a woman whom he knew to be pregnant, and who did so upon the faith of a false and fraudulent representation that he was the father of her unborn child. I trust that my reference to what has happened in the Outer House will not be misunderstood. I refer to the topic solely because it throws doubt, from a practical point of view, upon the soundness of the decision in *Stein's* case. For these reasons I think it my duty to express my adherence to the judgment about to be pronounced, in which *Stein's* case will be overruled. I do so all the more readily because I think that the judgment will be a beneficial one, in respect that it will tend to produce certainty in regard to the principles and the practice of our matrimonial law.

LORD ORMIDALE—I have had the opportunity of reading the opinion of Lord Dundas and I concur therewith.

The Court pronounced this interlocutor—

"... In conformity with the unanimous opinions of the Seven Judges, recal the said interlocutor in so far as it allows parties a proof of their averments as regards the conclusion for nullity: *Quoad ultra* adhere to said interlocutor, and remit the cause to the Lord Ordinary to proceed therein as accords. . . ."

Counsel for the Reclaimer (Defender)—MacRobert, K.C. — MacLean. Agent — Herbert Mellor, S.S.C.

Counsel for the Respondent (Pursuer)—Maclaren. Agent—John G. Todd, Solicitor.

Saturday, November 6.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

JOHNSTON *v.* ABERDEEN MASTER PLUMBERS' ASSOCIATION.

Trade Union—Rules in Restraint of Trade—Legality of Association at Common Law.

The rules and bye-laws of an association composed of master plumbers and firms of master plumbers contained certain provisions which curtailed to a large extent the freedom of the individual trader in his methods of conducting business. He was, *inter alia*, forbidden to order goods from wholesale merchants or manufacturers who were not members of the association. He was not allowed to do jobbing work at his own price, but only at rates fixed by the association. He was unable to tender for work unless the plumber's furnishings and fittings were supplied by the plumber-contractor, or to tender for competitive work unless it were measured and scheduled in accordance with the model schedule of the association. In estimating for plumber work he had to add 2½ per cent. as an estimate fee, and hand this over to the association. *Held* that the association was illegal at common law, its purposes being in restraint of trade.

Limitation of Action — Trade Union — Agreement—Enforcement—Declarator of Membership—Competency—Trade Union Act 1871 (34 *and* 35 *Vict. cap.* 31), *sec.* 4 (1).

The Trade Union Act 1871 (34 and 35 Vict. cap. 31), enacts, sec. 4—"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. . . ."

A trade union having intimated to one of the members who had sold his business to a new firm that he had ceased to belong to the union, he brought an action against the union for declarator that he was still a member, and to restrain it from publishing any list of its members which did not contain his name. *Held* that the action was not excluded by section 4 of the Trade Union Act 1871, it not having been instituted with the object of directly enforcing an agreement between members.

Trade Union—Rules—Membership—Construction—"Ceasing to Carry on Business as a Master Plumber or Firm of Master Plumbers"—Sale of Business by Master Plumber.

The rules of a trade union composed of master plumbers or firms of master

plumbers provided, *inter alia*, that upon a member ceasing to carry on business as a master plumber or firm of master plumbers, such member should thereupon cease to be a member of the union. A master plumber who had for several years carried on business on his own account sold his business to a new firm of which he was to be a partner. None of the other partners belonged to the plumbing trade. The union having intimated to him that on the sale of his business he had ceased to be a member, he brought an action against it for declarator that he still belonged to the union. *Held* that on the sale of his business to the new firm he had ceased to carry on business as a master plumber, and that accordingly he was no longer a member of the union.

The Trade Union Act 1871 (34 and 35 Vict. cap. 31), sec. 4, is so far as material, quoted *supra in rubric*.

On 23rd December 1918 Joseph James Johnston, plumber, gasfitter, and bellhanger, Crown Street, Aberdeen, brought an action against the Aberdeen Master Plumbers' Association, 80 Union Street, Aberdeen, in which he craved the Court—(1st) To find and declare that he was a member of the Aberdeen Master Plumbers' Association, that he was entitled to all the benefits and privileges of membership of the Association, and in particular that he was entitled to have his name and address, as being those of a member of the Association, duly entered in the lists of members published or issued by the said Association; and (2nd) to interdict, prohibit, and discharge the defender from publishing or issuing any list of the members of the Association unless the name and address of the pursuer were included therein; and to grant interim interdict."

The circumstances in which the case arose, as narrated by the Sheriff in his note (*infra*), were as follows—"By minute of agreement, signed in July and August 1918, the pursuer sold his business to a copartnership of six individuals, of whom he himself is one. The agreement provided for the continuance of pursuer's business of master plumber, which he had carried on in Aberdeen for fifteen years. He was taken bound to devote his whole time and attention to the business, and in return was to be paid a salary over and above his stipulated share of profits. It was also provided that so long as he should remain a partner he should represent the firm at the Aberdeen Master Plumbers' Association, of which he had been a member since 1903. The fact that some change had occurred in the pursuer's business reached the Association apparently about the end of August, and on 31st August an inquiry upon the nature of the change was directed to the pursuer by the secretary. The result was that the pursuer attended a meeting of the defenders' committee on 3rd September and explained the new situation; after which, as the minute bears, 'the committee considered the matter, and decided that in their view the old firm had been dissolved and a new firm constituted, and that it would be necessary for the new firm to apply for membership in the Association.' On 5th September the pursuer addressed two letters to the Association—the first on behalf of his firm, intimating disagreement with the committee's view that an application for membership by the firm was necessary, . . .; the second on his own behalf, stating that he desired to withdraw from the membership of the Association on the entry of his firm as members. . . . These letters were taken into consideration by the committee of the Association on 10th September, when it was decided (1) that the new firm was not eligible for membership, and it was accordingly refused admission to the Association; and (2) that pursuer had ceased to be a member of the Association, and that he would therefore be settled with for the amount standing at his credit in the books in terms of the rules of the Association. Some correspondence ensued upon this letter, in the course of which the pursuer maintained that his membership had not ceased, and (being invited to do so) appealed against the committee's determination to a general meeting of the Association—without prejudice to his rights otherwise. On 17th October the committee's view of the matter was upheld by the general meeting, and the present proceedings are the result."

The rules of the Association contained, *inter alia*, the following provisions:—

"RULES.

"I. *Constitution.*—The Association shall be composed of master plumbers or firms of master plumbers in Aberdeen and suburbs, and shall be named 'Aberdeen Master Plumbers' Association.'

"II. *Objects.*—The objects of the association shall be, by mutual counsel and co-operation, to promote and protect the interests of the members, and also as far as possible to secure unity and harmony of action in the settlement of questions arising between members and their workmen, with a view to prevent the occurrence of lockouts or strikes.

"III. *Membership.*—Master plumbers or firms of master plumbers desiring to join the Association shall make application to the secretary in writing and give all required information, and if found eligible and be approved shall be admitted by the committee. Any decision of the committee admitting or rejecting an applicant may be overruled, and the applicant may be rejected or admitted by the Association. . . . . Upon a member becoming bankrupt or granting a trust deed for behoof of creditors, or dissolving partnership, or ceasing to carry on business as a master plumber or firm of master plumbers in Aberdeen, such member shall thereupon cease to be a member of the Association, and the name of such member shall thereafter be deleted from the roll of members; but any member or partner of a dissolved firm whose name is so deleted may, upon making application as aforesaid, and if found eligible, be re-admitted to membership as at such date and upon such payments and conditions as the committee shall consider fair and reasonable. Any decision of

the committee upon any application for re-admission shall be subject to review by the Association as in the case of an ordinary application for membership.

"VII. *Meetings.*—. . . Only one member of a firm shall be entitled to vote at any meeting. A firm may be represented at all meetings and act in all matters relating to the Association by and through any person approved by the committee whom the firm may expressly or by implication authorise to represent and act for them. At least ten days' written notice shall be given to the secretary of any proposed change of representative of a firm. . . . .

"VIII. *Funds.*—All funds of the association not required to meet expenses of management or administration and not allocated to members, or falling to be allocated among the members in accordance with the rules or bye-laws for disposal of the same, may be disposed of as the members resolve or direct at any general meeting of the Association. . . . .

"XV. *Disputes with Members.*—All disputes arising with members or their representatives with reference to the rules or bye-laws of the Association, or to their rights or obligations under the same, shall be submitted and referred to the committee, whose decision shall be final and binding on all parties."

The bye-laws relating to estimates provided, *inter alia*, as follows:—"1 . . . (*d*) *Disposal of Estimate Fees.*—1. As soon as conveniently may be after the annual general meeting in each year after 1912 there shall be allocated equally among the members as appearing on the roll of members, as the same may be approved at such annual meeting, . . . such proportion or part as the Association may fix of the net amount of all moneys received as aforesaid. . . 4. On the expiry of three months after he has ceased to carry on business as aforesaid, the amount previously allocated to a member as aforesaid, but under deduction of all sums due or that may become due or payable by him to the Association, shall be payable as follows:—Either to the member himself, or if he be dead to his executor; or, in the option of the Association, the same may be paid to the member's wife, widow, or children, or any of them. . . ."

The pursuer averred, *inter alia*—"(Cond. 5) It is one of the bye-laws of the said Association that 'members shall not support wholesale merchants or manufacturers who trade with plumbers in Aberdeen who are not members of the Association,' and there is a corresponding agreement or understanding between the Association and such wholesale merchants or manufacturers that the latter shall not supply goods to persons carrying on business as plumbers in Aberdeen who are not members of the Association. There is also an agreement between the said Association and the Operative Plumbers' Association that employees shall not work within the city for anyone who is not a member of the defenders' Association, and that members of the defenders' Association shall not employ non-union men. In accordance with these agreements or understandings and for other trade purposes it is the practice of the defenders to issue from time to time lists of its members to such wholesale merchants and manufacturers, and the said lists of members are made known to the Operative Plumbers' Association. Such wholesale merchants and manufacturers will not supply goods to any persons carrying on business in Aberdeen as a plumber who does not appear on such lists as a member of the Association, and similarly operative plumbers who are members of the Operative Plumbers' Association will not work for anyone who is not a member of the defenders' Association. Unless therefore the pursuer is recognised as a member of the defenders' Association his business will suffer complete extinction and total ruin."

The defenders stated—"(Stat. 12) Defenders believe and aver that the purchasers of pursuer's business who now compose the firm of J. J. Johnston are the partners of the Bon-Accord Acetylene Gas Company, Aberdeen, none of whom is a practical plumber or eligible for admission to membership of the Association."

The pursuer *pleaded, inter alia*—"1. The pursuer being a member of the said Master Plumbers' Association, and it having been intimated to him by the said Association that the committee thereof has concluded that he is no longer a member of the said Association, having declined to recognise his claims to membership, he is entitled to decree of declarator as craved. 2. The pursuer having reason to apprehend injury to himself and his business on account of his exclusion from membership of the said Master Plumbers' Association, and on account of the omission of his name from the lists of members issued and published from time to time by the said Association, he is entitled to decree of interdict as craved."

The defenders, *inter alia*, pleaded—"1. The defending Association being a trade union the action is incompetent. 2. The dispute between pursuer and defenders having in terms of the rules of the Association been submitted and referred to the committee whose decision as provided in said rules is final and binding, the present application is incompetent and should be dismissed. 3. The committee having in terms of the rules decided that pursuer has ceased to be a member of the defenders' Association, the present application should be dismissed. 4. Pursuer having ceased in terms of the rules to be a member of the defenders' Association is not entitled to the declaration craved."

On 27th June 1919 the Sheriff-Substitute (YOUNG) repelled the first and second pleas stated for the defenders, and granted leave to appeal.

On 29th November 1919 the Sheriff (M'CLURE), to whom the defenders had appealed, adhered to his Substitute's interlocutor.

Note.—[*After the narrative quoted ut supra*]—"The present appeal is taken from a judgment of the Sheriff-Substitute by which he repelled the first and second pleas-

in-law stated for the Association and (without more) granted leave to appeal. These pleas are both in terms directed to the competency of the action, and the second may, I think, be disposed of at once. It is presumably based upon the 15th rule of the Association, which provides that 'all disputes arising with members or their representatives with reference to the rules or bye-laws of the Association, or to their rights or obligations under the same, shall be submitted and referred to the committee, whose decision shall be final and binding on all parties.' It is probably enough to say that there never was any submission or reference to the committee in terms of this rule, nor is it averred that there was. The correspondence and minutes do not suggest it anywhere, and so far from the committee's decision being regarded as final and binding, the secretary informed the pursuer, by letter of 17th September, that if he was dissatisfied with the finding of the committee 'you can, as you are doubtless aware, in terms of the rules, bring the matter before the Association,' I have not succeeded in discovering any rule which gives an appeal to the Association from the committee's 'final and binding' decision under the 15th rule, and the fact that the pursuer was offered and accepted the chance of a revision of the committee's determination by the Association fortifies my opinion that the idea of a submission or reference was in nobody's mind at the time. Under reference therefore to the Sheriff-Substitute's note for additional reasons, I agree that the second plea was properly repelled.

"The first plea is that 'the defending Association being a trade union, the action is incompetent.' The plea is not exact, but the meaning is obvious, and it was developed in argument. It is said that the Association, which in my opinion falls plainly within the statutory definition of a trade union, would but for section 3 of the Trade Union Act 1871 have been an unlawful association by reason of its purposes being in restraint of trade, and that the present proceedings cannot be entertained as they have been instituted with the object of directly enforcing an agreement of the description specified in section 4 of the Act. As regards the first point, I think the rules and bye-laws furnish conclusive evidence. The freedom of the individual trader who joins the Association is greatly curtailed in his methods of conducting business. As before stated, a member cannot order goods from wholesale merchants or manufacturers who supply traders in Aberdeen who are not members of the Association. He cannot do jobbing work at his own price, but only at rates fixed by the Association. He must decline to tender for work unless the plumber's furnishings and fittings are to be supplied by the plumber contractor. He must decline to tender for competitive work unless it is measured and scheduled, and the system of measuring and scheduling must be approved by the Association, and be in accordance with their model schedule for the time being. In estimating for plumber work the member must add 2½ per cent. as an estimate fee, and hand this over to the Association. These are instances of the trade restraints imposed on members; many more could be given, but I think these suffice to show that at common law the Association would have been deemed unlawful—*Glasgow Potted Meat Society* v. *Geddes*, 1902, S.L.T. 481.

"The critical question remains—Are the present proceedings barred by section 4 of the Act of 1871? The actual position has not been very clearly defined, and it requires some explanation. The exclusion of the pursuer from the Association was not an expulsion in the ordinary sense of the term for the breach of any rule or bye-law; it was the result of what the pursuer alleges was a misinterpretation by the committee of his contract with the Association. Rule 3—under which the committee proceeded—is (so far as relevant to the present issue) in these terms—'Upon a member . . . ceasing to carry on business as a master plumber, or firm of master plumbers, in Aberdeen such member shall thereupon cease to be a member of the Association, and the name of such member shall thereafter be deleted from the roll of members.' The question accordingly is whether the pursuer on the sale of his personal business of 'J. J. Johnston' to a firm of the same name, which includes himself as the practical partner, ceased, upon a sound construction of the rule, to carry on business as a master plumber or firm of master plumbers? The rule has not yet been authoritatively construed, and the 'object' of these proceedings (as I understand them) is to have it construed, not to directly enforce an agreement. The validity of this distinction is clearly recognised by the House of Lords in *Yorkshire Miners' Association* v. *Howden*, (1905) A.C. 256; also in *Osborne* v. *Amalgamated Society of Railway Servants*, (1911) 1 Ch. 540; and *Kelly* v. *National Society of Operative Printers' Assistants*, (1915) 31 T.L.R. 631. In the case first cited Lord Macnaghten used words which I consider to be fairly applicable to this case—'Then I come to the question, what was the "object" of the present litigation? Was it to enforce an agreement for the application of the funds of the union to provide benefits to members? I should say certainly not. The object of the litigation was to obtain an authoritative decision that the action of the union which was challenged by the plaintiff was not authorised by the rules of the union. The decision might take the form of a declaration or the form of an injunction, or both combined. But the decision, whatever form it might take, would be the end of the litigation. No administration or application of the funds was sought or desired.' The complaint of the pursuer is that he has been wrongfully deprived of his *status* and position as a member of the association, and I think he is entitled to test in the present action the construction of the rule which led to his exclusion. If he should succeed, a declarator that he is a member, and consequently entitled to all the rights and

privileges of membership, may be competently granted, including even the right to have his name and address in any list of members published by the Association. It must, however, be kept in view that the Court cannot enforce directly by interdict or otherwise any agreement specified in section 4 of the Act."

Thereafter on 22nd January 1920 the Sheriff-Substitute repelled the remaining pleas stated for defenders, granted decree in terms of the first crave of the initial writ, and found it unnecessary to deal with the conclusion for interdict.

The defenders appealed.

[At the hearing on the appeal counsel for the defenders stated that he did not now contend that the action was excluded by rule 15, no reference to the committee in terms of that rule having taken place. He also stated that he did not found on section 4 (3) (*a*) of the Trade Union Act 1871.]

Argued for appellants—(1) There was no doubt that this society was illegal at common law. That was clear from the cases of *Aitken* v. *Associated Carpenters and Joiners of Scotland*, July 4, 1885, 12 R. 1206, 22 S.L.R. 796; *Rigby* v. *Connol*, 1880, L.R., 14 C.D. 482; and *Chamberlain's Wharf, Limited* v. *Smith*, [1900] 2 Ch. 605, which were all applications of the rule laid down in *Hilton* v. *Eckersley*, (1855) 6 E. & B. 47. That being so, the action except in so far as sanctioned by the Trade Union Act 1871 (34 and 35 Vict. cap. 31) would not be entertained by the Court. (2) The action was incompetent, as section 4 of the Trade Union Act 1871 struck at any legal proceedings for the enforcement of agreements between members—*Smith* v. *Scottish Typographical Association*, November 7, 1918, 1919 S.C. 43, 56 S.L.R. 46; *Rigby*; *Chamberlain's Wharf, Limited.* All disputes between members relating to the method of carrying on the business of the union, or as to their patrimonial rights in the funds of the union, or as to the interpretation of the rules of the union, were for the union itself to decide, and could not be submitted to the jurisdiction of the Court—Trade Union Act 1871, sec. 4. The object of the present action was to enforce, directly or indirectly, the patrimonial rights of the pursuer under the agreement, and the action therefore was incompetent—*Aitken*; *G. & J. Rae, Limited* v. *Plate Glass Mercantile Association*, March 18, 1919 S.C. 426, 56 S.L.R. 315; *Rigby.* What the Court had to consider was not the form of the action but its object, and if the real object of the action was to obtain any personal interest for the pursuer whether by declaration or injunction, then the action was incompetent—*Aitken.* To allow this action would be to enforce the pursuer's view of the agreement, to give him the advantage of membership, to allow him to assume partners, and to enforce the conditions of the agreement in a certain way. Membership meant a change from free to tied trading, and the Court could not determine the conditions under which business was to be carried on without trespassing on the forbidden area. The case of the *Yorkshire Miners' Association* v. *Howden*, [1905] A.C. 256, relied on by the respondent, was distinguishable, the object of that action being not to apply but to prevent misapplication of the funds of the union. The case of *Osborne* v. *Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, was also distinguishable, as that action was not instituted with the object of directly enforcing an agreement to pay benefits to members. It was merely declaratory of membership. The case of *Kelly* v. *National Society of Operative Printers' Assistants*, (1915) 31 T.L.R. 632 (also reported in 84 L.J., K.B. 2236), did not help the respondent, for it went no further than the case of *Osborne.* (3) *On the Merits.*—The pursuer having ceased to carry on business as a master plumber was no longer a member of the Association. The Association was limited to master plumbers or firms of master plumbers, and the pursuer was neither. He had ceased to be a master plumber when he sold his business to the new firm. *Esto* that the firm might be an eligible unit for membership, the firm had not been admitted to membership. So neither the pursuer nor his firm was now a member of the Association.

Argued for respondent—(1) The Association was not illegal at common law. Whether an association was legal or illegal depended not on special bye-laws but on the main objects of the Association. The question was one of degree, and not every rule in restraint of trade made an association illegal. The restraint must be unreasonable. The standard was a very high one. The restraint must not be disproportionate to the benefits received, and must not be contrary to public policy—*Swaine* v. *Wilson*, (1889) L.R., 24 Q.B.D. 252; *Gozney* v. *Bristol Trade and Provident Society*, [1909] 1 K.B. 901; *Russell* v. *Amalgamated Society of Carpenters and Joiners*, [1912] A.C. 421, *per* Lord Macnaghten at p. 430. (2) The pursuer was not seeking to enforce the agreement. All he asked was a declarator of his rights under it, viz., that he was a party to the agreement as a whole. The question really turned on the interpretation of section 4 (1) of the Trade Union Act 1871. The authorities cited showed that if the action was merely declaratory of membership, then it was legal; that if it involved a discussion of alternative views of the agreement and the enforcement of either view, then it might be excluded by the Act; that each case depended on the real object of the action, viz., whether it was or was not to directly enforce the agreement; and that the *onus* of showing that the action involved direct enforcement lay on the party pleading the Act—*Osborne*; *Rigby*; *Chamberlain's Wharf*; *Howden* (*cit. sup.*); *Wilkie* v. *King*, July 22, 1911 S.C. 1310, 48 S.L.R. 1057. Reference was also made to *Wolfe* v. *Matthews*, (1882) L.R., 21 C.D. 194, referred to judicially in *Howden.* The case of *Aitken* was distinguishable, for that case really turned on title to sue. In so far as Lord President Inglis went beyond the necessities of that case his words were *obiter.* *Smith's* case was also different, for the object of the action there was the enforce-

ment of a rule of the Association which had been admittedly broken. *Rae's* case was also inapplicable. The pursuer here did not ask the Court to give him any pecuniary benefit. *Esto* that he would have a vote in the disposal of the "estimate fees," there was no agreement as to their disposal. They might be disposed of anyhow. (3) *On the Merits.*—The pursuer had not contravened the agreement and was still a member of the Association. The *onus* of showing that he had contravened it lay on the defenders. The "cesser" clause must be read strictly. There was no provision in the rules for the case of a member assuming a partner. The pursuer was still a master plumber in the sense of the agreement. "Master plumber" meant one who was not in a subordinate position in his trade, *i.e.*, neither as apprentice nor a journeyman. The fact that the pursuer had assumed as partners persons who were not plumbers was immaterial. "Master plumber" did not necessarily mean one who employed servants. The words "firm of master plumbers" showed that what was to be looked at was the composition of the firm, not the firm as a separate legal *persona*, and if the firm contained a master plumber that was enough. The sale of his business to a firm of which he was to be a partner did not disentitle the pursuer from carrying on business as a master plumber, and there was no averment that it did. Both the pursuer and his firm could be members at the same time, although a formal application for membership might have to be made by the firm, and though the firm and its members might have to be content with one vote.

At advising—

LORD PRESIDENT—The first question is whether the defenders' Association—a trade union—is an illegal combination at common law. I agree with the learned Sheriff, who differed from his Substitute, in thinking that it is.

The second question is whether the present action is, within the meaning of section 4 of the Trades Union Act 1871, a "legal proceeding instituted with the object of directly enforcing an agreement" of any of the kinds described in that section. The pursuer carried on a plumbing business in Aberdeen on his own account until August 1918, when he sold his business to a newly formed partnership of which he is himself a member. The defenders' committee thereupon pointed out to him that in parting with his business he had lost his qualification for membership of the Association, and that if the purchasing firm wished to become a member it would be necessary for them to apply for admission. The Association accordingly refuses to recognise the pursuer as a member; and the object of the pursuer's action is to have it declared that this refusal is wrong, and that he is still a member entitled to all the benefits and privileges of membership, and particularly to have his name included in the trade lists issued by the Association. He also asks interdict against the issue of any such lists which do not contain his name. A decision on the merits of the pursuer's claims—if it be competent to deal with them—turns on the construction of Rules i (headed "Constitution") and iii (headed "Membership"), which define the membership qualifications. In the course of the debate the defenders gave up their second and third pleas-in-law founded on the finality of the committee's decision under Rule xv. I think the defenders were right in this course. For the committee allowed the pursuer an appeal from their own determination to the Association itself, and the pursuer availed himself (unsuccessfully) of this permission. The committee's decision was either entitled to be regarded as final, or it was not. If it was, its finality was waived by allowing the appeal; for the Association could have sustained the appeal and overruled the committee's decision. The defenders rested their case against the competency of the action on the first subsection of section 4 alone, and expressly disclaimed any argument on the third subsection. Members' interests in the Association's funds are regulated by Rule viii, and also (as regards the estimate fees) by bye-law 1 (*d*). In accordance with their disclaimer the defenders presented no argument to the effect that the regulations amounted to an agreement for the application of the Association's funds to provide benefits to members within the meaning of section 4 (3) of the Act. Further, although nothing is averred by the pursuer on record with regard to patrimonial interests, the defenders waived any objection to the pursuer founding—as he did in the debate before us—on the regulations referred to—and particularly Rule viii—as giving him a substantial patrimonial interest in the Association's funds. The point for decision under the second question is therefore narrowed to this—Do Rules i and iii, separately or together, contain an 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?"

Now the dispute is as to the loss or the retention by the pursuer of his qualification for membership. A dispute as to compliance or non-compliance with membership qualifications is a matter antecedent to any question as to the enforceability—or as to the enforcement—of any agreement between the members as such (once they are ascertained) which may be set out in the rules or bye-laws and define the conditions on which the members agree to transact the business of their trade. Adverting to the terms of Rule i, it cannot be contended, for example, that because the qualification requires the *locus* of a member's business to be "in Aberdeen and suburbs," therefore the rule is an agreement that members shall conduct business somewhere within these limits, and thus is an agreement of the kind which is unenforceable under section 4 (1). This ground of judgment is free from any embarrassment flowing from either the decisions or the dicta in any of the reported

trade union cases in this Court, in which questions of membership have been concerned. *Aitken's* case (1885, 12 R. 1206) was decided on the ground that the circumstances, as these were averred, disclosed no interest in the pursuer except the enforcement of benefit rights (section 4 (3) (*a*)). In view of the defenders' concession of the pursuer's right to make out a case of substantial patrimonial interest in the Association's funds (*e.g.*, under Rule viii), *Aitken's* case has no application to the present, although the record might require formal amendment in this respect before proof could be allowed on it. The questions in *Smith* (1919 S.C. 43) and in *Rae* (1919 S.C. 426) turned, not on the qualification for membership, but on the enforcement by the trade union of agreements, about strikes in the one case, and about fines for breach of trade rules in the other. Nor do the cases in the English Courts which were fully cited to us appear to me to throw any doubt on the ground on which the opinion I have expressed is founded. I therefore agree with the judgments appealed from so far as the jurisdiction of the Court to entertain the present action is thereby affirmed.

It thus becomes necessary to consider the case on its merits. The pursuer maintains that he is still a "master plumber in Aberdeen and suburbs" (within the meaning of Rule i), because he is himself one of the partners of the purchasing firm; and he further maintains that he has not ceased to "carry on business" as such (within the meaning of Rule iii), because the business which is continued by the purchasing firm was formerly his, and the partnership articles bind him to devote his whole time to it.

The first question on which these contentions turn is—What does carrying on business as a master plumber mean? There are no averments of practice or accepted understanding in the trade or in the Association which throw light on this question, and we were asked to determine it on the pleadings as they stand and on the documents in process. We were informed at the outset that there are two plumbers' unions in Aberdeen which divide the trade between them. One is the defenders' Association, known as "The Aberdeen Master Plumbers' Association"; the other is the Aberdeen Lodge of "The United Operative Plumbers' Association of Great Britain and Ireland," whose bye-laws are No. 6 of process. Having regard to the nature and objects of these Associations, and of the defenders' Association in particular, I am led to conclude that the defenders' Association is—as its name would naturally infer—the masters' or employers' union, and the operatives' lodge is the men's or employees' union. This conclusion is fortified by the fact that No. 6 of process, which contains a number of rules affecting the relations between masters and men, is signed on behalf of the defenders' Association precisely because it represents the masters or employers. There is no reference to any grade of craftsmanship in the word "master." Indeed, it seems that the widow of a "master plumber," who carried on her late husband's business, would herself be eligible for membership as a "master plumber." This view is in accord with the declared willingness of the committee to entertain an application for membership by the purchasing firm as a "firm of master plumbers" although the only one of the partners who had any knowledge of plumbing craftsmanship is the pursuer. In short, a "master plumber" means a person who carries on a plumbing business, and is not in the service of a master. Such a person may be his own "master" if he does the practical work himself without hired assistance.

The second question involved in the pursuer's contentions now under discussion is—Did the pursuer cease to carry on business as a master plumber when he sold his business to the firm? In my opinion he did. It clearly appears from rules i and iii that the qualifications for membership are two only, and that each is separate and distinct from the other. Of these the first applies to the case of a plumbing business carried on by an individual on his own account. The second applies to the case of a plumbing business carried on by a firm. I find confirmation of this view in the character of the rules and bye-laws, and of the rights and obligations respectively conferred and imposed on the members. The rules and bye-laws are largely concerned with the conditions under which plumbing businesses in Aberdeen and suburbs are to be carried on—they cannot apply to people who have no plumbing business of their own. They confer rights of participation in funds, and in sundry advantages which would become inextricable if any but the actual owners of plumbing businesses—individuals in the one case and firms in the other—were admitted to share in them. Finally, every member must be answerable for conforming to the rules and bye-laws, and in the case of a firm the firm alone is in a position so to answer.

I think, therefore, that the fourth plea-in-law for the defenders must be sustained, and the defenders assoilzied.

LORD MACKENZIE—The question of whether this Court has jurisdiction was brought to a narrow point by the concession in Mr Moncrieff's argument that he did not found on section 4 (3) (*a*) of the 1871 Act. It is therefore not maintained that the action is a legal proceeding instituted with the object of directly enforcing an agreement for the application of funds of a trade union to provide benefits to its members. The case is therefore different from that of *Aitken* v. *Associated Carpenters and Joiners of Scotland* (12 R. 1206), and cannot be said to be ruled by the judgment of the Lord President (Inglis) in that case. Nor is it ruled by the cases of *Smith* v. *Scottish Typographical Association* (1919 S.C. 43) and *G. & J. Rae Limited* v. *Plate Glass Merchants' Association*, 1919 S.C. 426. The argument was put upon section 4 (1) of the Act. It is said the action is excluded because its object is to directly enforce an agreement concerning

the conditions on which the members "transact business." The point only arises on the assumption that the Association is a combination illegal at common law. We heard argument upon this point into which I do not consider it necessary to enter. I have no doubt that the rules of the Association are of such a character that it is an illegal combination at common law.

The question, however, remains whether the object of the present action is to directly enforce a rule which falls under section 4 (1). I am of opinion that it is not. The object of the present action is to determine the fundamental matter of qualification for membership. The pursuer comes into Court to have his title established — to have it determined that he is a party to a contract. That is the object of the action, and it is therefore in a different category from those cases in which the Court threw the action out because the pursuer had contravened one of the rules of the Association which came within one of the sub-sections of section 4. The judgments of Lord Macnaghten in *Howden's* case ([1905] A.C. 256) and those of Fletcher Moulton and Buckley, L.JJ., in the second *Osborne* case ([1911] 1 Ch. 540) recognise and explain the principle which distinguishes the present from such cases as that of *Chamberlain's Wharf Limited* v. *Smith* [1900] 2 Ch. 605. Reference may also be made to the case of *Kelly*, 31 T.L.R. 632. The preliminary pleas ought therefore, in my opinion, to be repelled.

The question on the merits is the simple one whether, having ceased to carry on business as an individual, the pursuer lost his qualification. Though simple to state, the answer is not free from difficulty owing to the way the rules, especially rules i and iii, are worded. I have come to be of opinion that the pursuer did lose his qualification when he sold his business. A perusal of the rules shows that it was intended there should be a complete separation of the qualification of (1) individuals and (2) firms. This is emphasised by the provision that there shall be an equal distribution among (1) individuals, and (2) firms. The pursuer's argument, if sound, would go directly to an equal distribution of the funds among individuals, for his contention was that master plumber means a person regarded as a master of his craft and not in a subordinate position. There is this further consideration which tells conclusively against the pursuer's contention. Under the agreement every member must be in a position to carry out its terms. But when the pursuer transferred his business to a firm of which he was only a partner it was thereafter the firm alone that was in a position to execute the agreement. There is no doubt an awkwardness in the wording of rule i, and the pursuer urged that if he ceased to be a master plumber when he took in partners, then under rule i there never could be a firm of master plumbers. It is, however, clear that a member must be in a position to obey the bye-laws, and in the case of a firm it is only the firm that can undertake to obey the bye-laws.

I am therefore of opinion that the defenders' fourth plea-in-law ought to be sustained.

LORD SKERRINGTON—Owing to the want of precision in the pleadings on both sides the debate ranged over a very wide area, but the points in dispute were reduced to a very few by certain admissions made by the senior counsel for the defenders and appellants in the course of his speech. He stated, in the first place, that he did not argue that the committee had already decided in terms of the rules that the pursuer was no longer a member of the defenders' Association—in other words, he conceded that his clients' second and third pleas-in-law had been rightly repelled. Further, he admitted that the pursuer has a patrimonial interest to prosecute the action, and he admitted that the action cannot be correctly described as one which has for its "object" to enforce an agreement for the application of the funds of a trade union "to provide benefits to members" within the meaning of section 4 (3) (*a*) of the Trade Union Act 1871. He argued, however, that the main purpose of the Association, as appearing from its bye-laws, was to create an unreasonable restraint of trade, and that the Association would consequently have been an unlawful one but for the enactment in the third section of the Act of 1871. He further argued that the "object" of the action was "directly" to enforce an agreement between the members of a trade union as such concerning the conditions on which they should "transact business" within the meaning of section 4 (1) of the Act of 1871. If these points were established, it would follow, as the result of the two sections, that such an agreement, though not void or voidable, is not legally enforceable. Having regard to the course which the action took before the two Sheriffs, I think that it was open to the defenders' counsel to maintain that the main purpose of the Association was to create an unreasonable restraint of trade notwithstanding the absence of any averment or plea to that effect. If necessary, I should have agreed with the Sheriff (differing in this respect from the Sheriff-Substitute) that the Association would have been unlawful at common law. Where I dissent from the argument of the defenders' counsel is in his contention as to the "object" of the action, and the nature of the agreement contained in the rules which the pursuer seeks to enforce. Rule i declares that "The Association shall be composed of master plumbers or firms of master plumbers in Aberdeen and suburbs, and shall be named 'Aberdeen Master Plumbers' Association.'" Rule iii enacts that "Master plumbers or firms of master plumbers desiring to join the Association shall make application to the secretary in writing, and give all required information, and if found eligible and be approved, shall be admitted by the committee. Any decision of the committee admitting or rejecting an application may be overruled, and the applicant may be rejected or admitted by the Association." It then proceeds—"Upon a mem-

ber becoming bankrupt, or granting a trust deed for behoof of creditors, or dissolving partnership, or ceasing to carry on business as a master plumber or firm of master plumbers in Aberdeen, such member shall thereupon cease to be a member of the Association, and the name of such member shall be deleted from the roll of members; but any member or partner of a dissolved firm whose name is so deleted may, upon making application as aforesaid, and if found eligible, be re-admitted to membership as at such date and upon such payments and conditions as the committee shall consider fair and reasonable. Any decision of the committee upon any application for re-admission shall be subject to review by the Association as in the case of an ordinary application for membership." The defenders interpret this rule as meaning that an individual ceases to be a member of the Association if he ceases to carry on business as a plumber on his own account even though he continues to carry on his former business as partner of a firm to which he has sold that business. In such a case the defenders maintain that the firm and no one else is the master plumber, and that if the firm wishes to have the benefits of membership it must present an application for admission, which the committee and the Association have an option either to grant or to refuse. The pursuer, on the other hand, maintains that an individual does not cease to carry on business as a master plumber merely because he ceases to do so exclusively for his own behoof, but continues to do so for behoof of a firm of which he is a partner. He concedes that it is optional on the part of the Association to admit the firm as a member, but he maintains that the selling partner retains his membership unless and until he chooses to resign it, which he may voluntarily elect to do if the firm is admitted as a member. Whatever may be the correct construction of Rules i and iii, they do not, so far as I can see, intend or attempt to regulate the manner in which the members shall carry on business. They merely define the qualification for membership in the case of individuals and of firms. Accordingly I think that the Sheriffs were right in holding that the Court has jurisdiction to dispose of the action on its merits.

On the merits I think that the defenders' construction of the rules is the right one, and that they ought to be assoilzied. Upon a perusal of the rules as a whole the position would, I think, be unworkable if the former owner of the business were regarded as continuing to be a member of the Association although he had sold the business which constituted his qualification as a member. I express no opinion as to how matters would have stood if the pursuer had, with the consent of his copartners in the old business, started a new plumbing business which he carried on exclusively on his own account.

LORD CULLEN—Assuming the defenders to be right in maintaining that their Association is an unlawful combination at common law, they are not, in my opinion, well founded in their contention that the present action is one which the Court has no jurisdiction to entertain. The pursuer seeks to have it declared that he is a member of the Association and entitled to all the benefits and privileges of membership, and seeks also to have the defenders interdicted from publishing or issuing any list of members not containing his name. The defenders' said contention is sought to be rested on the cases of *Chamberlain's Wharf Ltd.* v. *Smith* ([1900] 2 Ch. 605), *Smith* v. *Scottish Typographical Association* (1919 S.C. 43), and *G. & J. Rae Ltd.* v. *Plate Glass Merchants' Association* (1919 S.C. 426). It appears to me that these cases do not apply. The questions raised in them turned on particular rules which fell within one or other of the categories defined in the five heads of section 4 of the Act of 1871, and which the Court was asked to use and apply as the ground of a judicial decree and so to enforce. Here no such rule is in issue. The defenders disclaim the contention that the crave of the pursuer to be declared "entitled to all the benefits and privileges of membership" brings the case within sub-head (*a*) of head 3 of section 4. They seek to bring the case within head 1, and in this way. They say (1) that the question on the merits is whether under the rules of the Association there is a condition which disqualified the pursuer from continued membership in the event of his entering into partnership, so that his membership ceased when he did so by the deed mentioned on record; (2) that the rules do, on their true construction, contain this condition; and (3) that the condition represents an agreement among the members concerning the conditions on which they shall "transact business." I am quite unable to adopt this view. The assumed condition does not seem to me to bear upon the conditions (or terms) on which members are to transact their business to one effect or another. It is something antecedent to the transacting of business, its function being to define the transactors themselves who are eligible for membership of the Association. Any conditions of transacting business which membership makes obligatory on those who are eligible and who are admitted must be sought elsewhere in the rules.

As regards the question on the merits, I am of opinion that the defenders are in the right. I think that the rules contemplate that a member may be either (1) an individual carrying on business as a master plumber, or (2) a firm carrying on such business, and that in the case of a firm it is the firm itself which is alone eligible for membership and not a particular partner thereof. The reason for this is, I think, plain enough. Membership involves obligations and duties regulative of the mode in which members are to conduct their business dealings. In the case of a firm it is the firm alone which can undertake, on admission to the Association, such obligations and duties, and be responsible for their fulfilment, inasmuch as it is the firm which enters into contracts and conducts the business which is carried on in its name. Now the pursuer, by the

transfer of his business to the new firm in which he is a partner, ceased to belong to the first of the two classes of members—that is to say, individuals carrying on business as master plumbers—and in my opinion he thereby ceased "to carry on business as a master plumber" within the meaning of Rule iii. The business in question is not now carried on by him. It is carried on by the new firm, and if it is to continue to be represented in the Association, that must, I think, be by the admission of the firm which owns and controls it.

I accordingly concur in the judgment which your Lordships propose.

The Court sustained the appeal, recalled the interlocutor of the Sheriff-Substitute dated 22nd January 1920, and also the interlocutor of the Sheriff dated 29th November 1919, in so far as it found the appellants liable to the respondent in the expenses of the appeal, sustained the fourth plea-in-law for the defenders, and assoilzied them from the conclusions of the action.

Counsel for Pursuer (Respondent) — Mackay, K.C. — Gentles. Agents — R. C. Gray & Paton, S.S.C.

Counsel for Defenders (Appellants) — Moncrieff, K.C.—A. R. Brown. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, November 6.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

GREIG *v.* TRUSTEES OF WIDOWS' FUND OF MERCHANT COMPANY, EDINBURGH.

(Reported *ante* March 8, 1919, 56 S.L.R. 292.)

Insurance—Presumption of Life at Common Law—Proof of Death—Proof Required in Cases of Contract and Cases of Succession.

The wife of a contributor to a widows' fund sued the trustees of the fund for declarator that her husband, who had not been heard of for eighteen years, and who would have been sixty-one years of age at the date of the action, must be held to have died on the date he was last heard of, and for payment of an annuity which was contingent on his death.

Circumstances in which the Court (*diss.* Lord Dundas and *rev.* the judgment of the Lord Ordinary (Blackburn)) *granted* decree of declarator that the pursuer's husband must be presumed to have died on a date ten years after that on which he was last heard of, and *ordained* the defenders to make payment of the annuity as from that date.

Opinions per the Lord Justice-Clerk, Lord Salvesen, and Lord Ormidale that there is no distinction as to the proof necessary to establish the presumption of death in cases of succession and in cases of contract. *Opinion per* Lord Dundas *reserved.*

Interest—Widows' Fund Annuity—Judicial Determination of Date of Death of Contributor — Interest on Arrears of Annuity.

Circumstances in which *held* that a pursuer who had been successful in an action to determine the fact and date of the death of a contributor to a fund, and for payment of an annuity contingent on his death, was not entitled to interest on the arrears of the annuity prior to the date of decree.

Mrs Agnes Douglas or Greig, *pursuer*, brought an action against the Trustees of the Widows' Fund of the Company of Merchants of the City of Edinburgh, *defenders*, (1) for declarator that her husband David Greig junior, a contributor to the defenders' Widows' Fund, "must be presumed to have died prior to 31st December 1900, that he must be held to have died on that date, and that the pursuer, his widow, is entitled to an annuity out of the said Fund of £40 sterling, and (2) for decree ordaining the defenders to make payment to the pursuer of the annuity of £40 as from Whitsunday 1901."

The pursuer's averments and the pleas-in-law of the parties are set forth in the previous report.

On 8th November 1918 the Lord Ordinary (BLACKBURN) dismissed the action as irrelevant. His Lordship's opinion is reported *ante ut supra.* The pursuer reclaimed, and after hearing parties the Court on 8th March 1919 recalled the Lord Ordinary's interlocutor and allowed a proof before answer.

The following narrative of the *facts* and of the import of the evidence is taken from the opinion *infra* of the Lord Justice-Clerk: — "The question in this case is whether David Greig is dead or alive, and if dead, when he must be held to have died. The issue is one of fact. David Greig was born in 1857, and if still alive would now be about sixty-three. He was born in a respectable position, and ultimately became a partner with his father in his business as a builder. He married the pursuer in 1879 and there were four children of the marriage. About 1893 Greig gave way to drink, and this led to his ruin. His father dissolved the partnership, and the son soon thereafter executed a trust deed and was sequestrated. He was convicted more than once of assaulting his wife and of police offences. He had *delirium tremens* on two occasions, for I cannot accept the Lord Ordinary's view when he speaks of 'alleged' attacks of *delirium tremens*, and suggests that the evidence as to this has been exaggerated. I think they are sufficiently proved, and I cannot find any appearance of exaggeration. I think it is also proved that David Greig's heart was affected. His mother died of consumption. For while the Lord Ordinary says that he does not think there is any evidence 'to support the statement that the pursuer's husband's mother had died at the age of fifty of consumption,' there is, it seems to me, certainly some evidence, and there was no cross-examination on this point. Greig seems to have lost caste completely in Edin-