1886, 14 R. 161; *Solicitors before the Supreme Courts* v. *Officer*, July 20, 1893, 20 R. 1106, *per* Lord President at p. 1108; *In re Incorporated Law Society and Four Solicitors*, July 20, 1891, 7 T.L.R. 672. (2) The facts disclosed at least a *prima facie* case for inquiry, especially when the rider added to their verdict by the jury in the criminal trial was considered. The plea of *res judicata* was absurd, because in the criminal charge Colquhoun was tried for embezzlement; here he was charged with professional misconduct, which would be sufficiently established if it were proved that he knew of his brother's embezzlement and failed to warn his clients.

Argued for the respondent—The Faculty of Procurators had no title to present the petition. They had dismissed Colquhoun from the Faculty, and their rights and duties in the matter were thereby ended. Title to present a petition must depend on interest, and the Procurators had no interest *qua* Faculty in purging the roll of law-agents. The proper petitioners were the Incorporated Society of Law-Agents—*A.B.* v. *C.D.*, Oct. 28, 1899, 2 F. 67. (2) The verdict in the criminal trial, though it could not found a plea of *res judicata* in a charge of professional misconduct, was a sufficient answer to the charges made in the petition, because these practically amounted to a charge of embezzlement.

LORD PRESIDENT—The first objection stated by the respondent in the petition is that the Faculty of Procurators in Glasgow have no title to present it. I think that objection is not well-founded. We are told that the Faculty of Procurators have already exercised their disciplinary powers by expelling the respondent from their own body, but it does not follow from this that they may not also be well entitled, as a body of professional men practising in a particular locality, to bring under the notice of the Court conduct on the part of a fellow practitioner which they consider to be fitted to endanger the interests of clients, and to bring discredit upon an honourable profession. It therefore appears to me that the petitioners are acting within their powers, and that if they have satisfied themselves that the respondent has been guilty of the conduct which they allege, it is not only within their power, but also in accordance with their duty, to call the attention of the Court to it.

The respondent, in the second place, maintains that no relevant case is stated against him, and that, taken along with the statement as to the criminal trial, appears to amount to a plea of *res judicata*, in respect of the acquittal of the respondent on the criminal charge there made. The respondent was tried on certain criminal charges which are not before us now, and which we have no power in this Court to try. It is impossible to hold that an acquittal on a charge of embezzlement is such an answer to a petition like the present as should prevent the Court making inquiry into the facts now alleged. The averments here amount to a statement of a course of dealing having gone on for many years in the office of the firm of which the respondent was a partner of such a character that it is difficult to see how it could not have been known to both partners, unless one of them was guilty of complete and almost inconceivable neglect of the duties which he owed to the clients. That seems a fair summary of the statements made, and while we have, of course, at this stage no means of knowing whether they are or are not well-founded, they are perfectly relevant, and are proper subjects for investigation. I think therefore that we should allow to the petitioners the proof which they crave, and to the respondent a conjunct probation.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The following interlocutor was pronounced:—"The Lords . . . allow to both parties a proof of their respective averments on a day to be afterwards fixed."

Counsel for the Petitioners — M'Clure. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for the Respondent—Shaw, Q.C. —Deas—T. B. Morison. Agent—J. Gordon Mason, S.S.C.

Saturday, July 14.

SECOND DIVISION.

[Sheriff-Substitute at Aberdeen.

GALL *v.* LOYAL GLENBOGIE LODGE (ODDFELLOWS FRIENDLY SOCIETY).

Friendly Society—Action to Enforce Order to Reinstate Member—Jurisdiction—Competency—Friendly Societies Act 1896 (59 *and* 60 *Vict. c.* 25), *sec.* 68 (1)—*Process.*

In an action brought in the Sheriff Court against a lodge of oddfellows and the trustees of the lodge, the pursuer prayed the Court to ordain the defenders to implement a resolution or order pronounced by one of the superior courts of the defenders' society, whereby the defenders' lodge were directed to reinstate the pursuer in his membership of the lodge, and to admit him to all the rights and privileges of membership.

Held that the action was not competent either at common law or under the Friendly Societies Act 1896, section 68 (1), in respect that the Court could not enforce such a decree as the pursuer craved, and was not bound to pronounce a decree which it could not enforce.

James Gall, postman, Clatt, Aberdeenshire, raised an action in the Sheriff Court at Aberdeen against the Loyal Glenbogie Lodge, No. 1078 of the Keith

District of the National Independent Order of the Oddfellows Friendly Society, and the trustees of the said Lodge, in which the pursuer prayed the Court "to ordain the defenders to implement a resolution, order, judgment, or decision pronounced by the Keith District Committee at Dufftown in accordance with which the Glenbogie Lodge was directed to reinstate the pursuer in his membership of the said Lodge, and further to receive the pursuer's contributions as a member of the said Lodge, and to admit him to all the rights and privileges of membership."

The Glenbogie Lodge of Oddfellows was instituted in the year 1884, and formed one of about thirty lodges attached to the Keith District Branch of the National Independent Order of Oddfellows Friendly Society. The constitution, administration, management, and procedure of the Order, branches, and filiated lodges, were regulated by rules registered pursuant to the Friendly Societies Act 1875, now repealed but substantially re-enacted by the Friendly Societies Act 1896 (59 and 60 Vict. c. 25). By section 68 of the latter Act it is enacted—"(1) Every dispute between (*a*) a member or person claiming through a member or under the rules of a registered society or branch, and the society or branch or an officer thereof; or (*b*) any person aggrieved who has for not more than six months ceased to be a member of a registered society or branch, or any person claiming through such person aggrieved, and the society or branch or an officer thereof; or (*c*) any registered branch of any society or branch, and the society or branch of which it is a branch . . . shall be decided in manner directed by the rules of the society or branch, and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any court of law or restrainable by injunction, and application for the enforcement thereof may be made to the County Court." By section 102 it is enacted that in the application of this Act to Scotland the expression "County Court" shall mean "the Sheriff Court of the county."

The pursuer averred that he had for some years been a member of the Glenbogie Lodge; that at a meeting of the Lodge held on 25th September 1897 he had threatened to withdraw from membership in consequence of certain statements made regarding him; that although in point of fact he did not tender his resignation, the minutes of the Lodge bore that he resigned his membership on that occasion; that as the defenders thereafter refused to receive the pursuer's contributions tendered by him on 6th and 27th November and 4th December 1897, or to permit him to attend Lodge meetings, the pursuer on 31st December 1897 lodged an appeal with the Keith District Committee; that the appeal was duly heard and considered by the District Committee on 20th July 1898, when they pronounced the following order or decision:—"That the Glenbogie Lodge be ordered to reinstate Brother Gall in his membership, and that the matter be not further discussed;" that the defenders appealed to the Executive Committee of the National Order of Oddfellows Friendly Society, who confirmed the decision or order aforesaid; that the defenders did not appeal to the Annual Moveable Committee, which is the highest court of the Order; and that in spite of the order or decision pronounced by the Keith District Committee, and affirmed as aforesaid, and although the Keith District Committee through its officers had made repeated efforts to arrange the matter amicably, the defenders refused to reinstate the pursuer in his membership, to receive any contributions from him, or to accord him any of the rights or privileges of membership.

The pursuer pleaded—"(1) The Keith District Committee having ordained the defenders to reinstate the pursuer as a member of the Glenbogie Lodge, and the defenders having refused to implement the said order, the pursuer is entitled to decree as concluded for with expenses. (2) The defenders having failed to appeal to the Annual Moveable Committee, in terms of the rules of the Order, against the decision of the Executive Committee confirming the decision of the Keith District Committee, must be held to have acquiesced in the same, and are now barred from objecting thereto."

The defenders pleaded, *inter alia*—"(1) No jurisdiction."

The defenders also maintained that the pursuer had resigned his membership of the Glenbogie Lodge, and was not a member thereof, and also that the decisions arrived at by the Keith District Committee and the Executive Committee having been come to contrary to the rules of the Order, and being irregular and incompetent, were not binding upon the defenders.

On 11th April 1900 the Sheriff-Substitute (ROBERTSON) pronounced the following interlocutor:—"Finds the action as laid is incompetent: Therefore dismisses it, and decerns. . . .

Note.—"The prayer of this petition is to the following effect:—It asks the Court to ordain the defenders to implement a certain resolution or order pronounced by the Keith District of the N.I. Order of Oddfellows, directing the defenders, who are a lodge of Oddfellows in said district, to reinstate the pursuer in his membership of defenders' lodge, and to receive the pursuer's contributions as a member of the lodge, and to admit him to its rights and privileges. That is the whole conclusion except one for expenses; there is no alternative pecuniary conclusion.

"Under this conclusion the question that at once arises is whether it is one that this Court has any means of enforcing? For I imagine it is certain that no Court will pronounce a decree which it has no power to enforce. Now the conclusion here is purely one *ad factum præstandum*, and a decree in such a case can only be enforced by imprisonment. I must say the

compulsitor of imprisonment seems here out of the question. You could not imprison the lodge, with possibly a large minority in favour of allowing pursuer in; and it would be equally out of the question to imprison the trustees, who are called simply as trustees, and who may all be supporters of the pursuer.

"To inquire, as suggested, into the fact of what members were opposed to pursuer, and to imprison them, seems the most impossible course of all.

"My first strong impression, therefore, was against the competency of the application, on this ground, that if granted the Court could not enforce it.

"A question was, however, raised by pursuer whether the terms of the 68th section of the Friendly Societies Act of 1896, sub-sec. 1, did not make it clear that this Court did have and must have jurisdiction. It is there said that the decision in certain disputes between parties there specified, given by the society in accordance with its rules, shall be binding and conclusive upon all parties, and not removable into any court of law or restrainable by injunction, and further, that applications for the enforcement thereof may be made to the County (in Scotland, Sheriff) Court.

"It is pleaded that this application is really one for the enforcement of a decision by a competent court of the Order, through the machinery of the Sheriff Court, and that this is undoubtedly competent in accordance with the last-mentioned provision.

"I have considered this view carefully, but I find I cannot adopt it. First—This does not seem to me to be the kind of dispute which is stated to be reserved for decision to the courts of the Society. The question practically is, whether the pursuer is a member of the Society or not, and that question it is settled can be competently and rightly tried by the ordinary civil tribunals. —*Palliser* v. *Dale* [1897], 1 Q.B. 257.

"If the dispute is one that can be competently tried in the ordinary courts (*i.e.* if raised in a competent form), then it does not in my view fall under the cases the decision of which by the courts of the Order may be enforced by the Sheriff Court.

"The enforcement of these decisions is purely mechanical, and will not involve the consideration of the correctness or otherwise of the decision to be enforced.

"Second.—Even if this case was one to which section 68 of the Act could be held to apply, this Court cannot be asked for a decree which it cannot enforce, and as I have already explained, in my opinion the decree asked here could not be enforced. Nothing is said in the section of the statute as to how the enforcement of the decision is to be carried out, and we must assume therefore that it is by the ordinary methods, and within the ordinary limitations. The section of the statute can therefore, in this case, give no assistance to pursuer's case. He must just take it that it means that where a decision is pronounced that a County or Sheriff Court can competently enforce, they may be asked to do so in a competent manner.

"I therefore hold that this action is incompetent."

The pursuer appealed, and argued—(1) The action was competent at common law. The only ground that the Sheriff gave for refusing the remedy asked was that the Court could not enforce the decree which it was asked to grant. Such a defence would have been equally good in the case of *Palliser*, but in that case it had never been suggested. The same difficulty would arise in every case where a decree *ad factum præstandum* was asked against a corporate body, as in the case of *Clippens Oil Company, Limited* v. *Edinburgh and District Water Trustees*, *December* 17, 1897, 25 R. 370. In that case if the order pronounced by the Court had been disobeyed, the question would have arisen—Who was to be imprisoned? Yet it was never suggested that the possibility of such a question arising was a reason for refusing decree. The defenders were able to implement the decree asked by the pursuer, and if they refused to do so they would be punished. If this defence were sustained, a corporate body would be able to set the courts of the country at defiance with impunity. A judgment requiring persons to do something else than make payment of money might be enforced in England by writ of attachment or by committal—Snow's Practice, p. 561. This was also the law in Scotland. Indeed, in this country the right to the remedy of specific implement was regarded as more absolute, and that remedy was more readily granted than in England—*Stewart* v. *Kennedy*, Feb. 17, 1890, 17 R. (H.L.) 1, opinion of Lord Watson, p. 9. (2) In terms of the Friendly Societies Act 1896, sec. 68 (1), the Sheriff was entitled on the application of the pursuer to enforce the order of the Keith District Committee. In the case of *Palliser*, on which the Sheriff-Substitute had proceeded, there was no resolution of the superior court of the Order which had been disobeyed by the lower court. That wholly differentiated the case of *Palliser* from the present. The question was, whether or not the order of the District Committee was to be carried out by the local court? Under the Act a decree of a court of the Order could be enforced in the Sheriff Court, and therefore the Act applied directly to the present case.

Argued for the defenders—(1) On the common law the jurisdiction of the Court was excluded by the nature of the case. The Court would not pronounce a decree *ad factum præstandum* against a private society to enforce the rights of members —*M'Millan* v. *Free Church of Scotland*, July 19, 1861, 23 D. 1314, opinion of Lord Deas, p. 1345. The Court always considered before pronouncing a decree of interdict or for specific implement whether such decree was an appropriate remedy—*Winans* v. *Mackenzie*, June 8, 1885, 10 R. 941, opinion of Lord Kinnear, p. 946. In the present case to order a society to reinstate a member whose resignation had been accepted was not a decree which the Court would pronounce. (2) The Friendly Societies Act did not apply. The question in the case was

whether the pursuer was to be reinstated. That implied that he was not at present a member. The question was not as between persons who were admittedly members of a society, and therefore the case of *Palliser* directly applied. They also maintained that the appeal to the superior court and the subsequent proceedings had been incompetent and irregular, and that consequently the decision of the superior courts was invalid.

At advising—

LORD JUSTICE-CLERK—The pursuer in this case, who had been removed from his position as a member of a friendly society called the Oddfellows Friendly Society, by the Glenbogie Lodge, to which he belonged, appealed his case to the Keith District Committee, which sustained his appeal and directed that he be reinstated. This order by the District Committee the local lodge decline to obtemper, and the pursuer has applied to the Sheriff to exercise his power to give executorial effect to the order of the District Committee. This demand is made under the authority of the Friendly Societies Act, sec. 68.

The enactment implies that the duty of the Sheriff is not to review the decision, but only to make it judicially effectual. The purpose is, I think, to enable the Society's courts to enforce their decisions. But evidently the Sheriff's authority cannot be invoked to enforce anything that such a court may order, but only such things as are proper to be ordered and can be carried out legally otherwise, such as decisions in regard to contributions to be made, fines to be paid, and the like. But here what was asked was of a different nature. It was that the Sheriff should give executorial authority to an order by a Society tribunal to reinstate a member of the Society in his Lodge who had been removed from it. That, as it appears to me, is not a thing which the Sheriff could enforce. This Society branch cannot be compelled to reinstate the pursuer by the Sheriff giving judicial authority to such an order as was pronounced here by the District Committee. Whatever consequences may legally follow the refusal of the Lodge to accept the pursuer as a member, they have to submit to. The powers that the other courts of the Society may have over them for contumacy in refusing to obey orders under their constitution we do not know. But in my opinion the Sheriff-Substitute was right in holding as he did that the action should be dismissed, the procedure not being taken in such a form as that any operative judgment could be pronounced. Any such question as the pursuer really desires to raise, if it can be settled by a court of law at all, should be raised directly by the ordinary legal procedure, and cannot be dealt with under sub-sec. 1 of section 68 of the Friendly Societies Act, the procedure under which is not appropriate for the disposal of any such matter.

LORD YOUNG, who had not been present at the hearing, gave no opinion.

LORD TRAYNER—The petition presented by the appellant to the Sheriff of Aberdeen prays for a decree against the respondents ordaining them to implement a resolution or order pronounced by the superior courts of the respondents' Society, whereby the respondents were directed to reinstate the appellant in his membership of their Lodge, and to admit him to all the rights and privileges of membership. The Sheriff-Substitute has dismissed the petition as incompetent, and I think he was right. We cannot by any order (nor can the Sheriff) place the appellant in the position of a member of the Lodge in question or of any other private society or association against the will of the society itself. If he has been wrongfully expelled or excluded from the Society, we can give him compensation for any injury or loss such expulsion or exclusion may infer. More than that we cannot do.

The appellant referred to the 68th section of the Friendly Societies Act 1896 in support of the competency of his petition, which provides that where such a resolution or order as the appellant asked the Sheriff to ordain the respondents to implement has been pronounced, "application for the enforcement thereof may be made to the County Court." But that provision does not extend the jurisdiction of the County Court, or make it competent to pronounce any order not otherwise within its competency. There are some conceivable orders or resolutions which under that provision it might be competent to and incumbent on the County Court to enforce. But the resolution or order here in question does not seem to me to be one of them. The Sheriff's order on the respondents to reinstate the appellant in the membership of the respondent's Lodge would be no more effectual than the resolution which it was intended to enforce. The Sheriff could not, I think, enforce his own order if the respondents refused obedience to it, and in my opinion he is not bound to pronounce any decree which may be disobeyed without his having the means of enforcing obedience to it. The suggestion that the Sheriff's decree could be enforced by imprisonment of the whole members of the respondent's Lodge is out of the question. Nor would it be competent or right to select the office-bearers or certain individual members of the Lodge and ordain them under the sanction of imprisonment to reinstate the appellant. That would be ordaining them to do what they cannot do. The office-bearers of the Lodge cannot reinstate the appellant however willing they might be. That must be done by the Lodge itself if it is done at all. I think therefore the Sheriff-Substitute was right in dismissing this application as one which he could not grant with the effect which the appellant desires to accomplish.

The LORD JUSTICE-CLERK read the following opinion of LORD MONCREIFF, who had been present at the hearing, but was absent at advising:—I agree in the result at which the Sheriff-Substitute has arrived, though

not in all the grounds of his judgment. This application was made by the appellant to the Sheriff Court in terms of section 68, sub-section 1, of the Friendly Societies Act 1896. The object of the application was to get the Court to enforce a decision pronounced by the Keith District Committee of the defenders' Society ordering the Glenbogie Lodge to reinstate the appellant in his membership.

While under the Act the Sheriff Court is bound to enforce the decisions of the Committees or other tribunals who are authorised by the rules of the Friendly Society to decide disputes, and while review on the merits is entirely excluded, the Court is entitled to take cognisance of the character of the decision or order for which executorials are desired, and it is not bound blindly to pronounce a decree which cannot be carried into effect. The kind of order or decision for which application to the County Court is authorised, is, I apprehend, one attended with certain patrimonial consequences, the recovery of a penalty, or the payment or repayment of a subscription, and so forth, as to which the Sheriff can pronounce an operative decree.

But the order in the present case is to have the Glenbogie Lodge ordained to reinstate the pursuer in his membership of the Lodge. Now, in the first place, that is not a matter in which the Civil Court is in use to interfere, and accordingly even if decree in terms of the prayer were pronounced, I do not at present see how or against whom it could be enforced if the defenders refused to obtemper it. I therefore agree that this appeal should be dismissed.

The Court dismissed the appeal.

Counsel for the Pursuer—Guthrie, Q.C.—Munro. Agents—Sim & Garden, S.S.C.

Counsel for the Defenders — Salvesen, Q.C. — Glegg. Agents — Macpherson & Mackay, S.S.C.

Tuesday, July 10.

SECOND DIVISION.

[Sheriff-Substitute at Edinburgh.

DOYLE *v.* WILLIAM BEATTIE & SONS.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *First Schedule* (1) (*a*) (i)—*Amount of Compensation—Injury Resulting in Death—Minimum Sum of* £150.

The dependants of a deceased workman are not entitled under the Workmen's Compensation Act 1897 to the minimum sum of £150, referred to in the First Schedule 1 (*a*) (i), unless the workman has been for three years or more in the employment of the employer.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *First Schedule* (1) (*a*) (i)—*Amount of Compensation—Injury Resulting in Death—Average Weekly Earnings—Period of Employment from which to Calculate Average Weekly Earnings — Employment after Injury.*

Where a deceased workman has been at the time of his death for less than three years in the employment of his employer, in order to calculate his average weekly earnings during the period of employment, so as to fix the compensation due to his dependants under the Workmen's Compensation Act 1897, it is necessary that the workman should have been in the employment for at least two weeks, but it is not necessary that he should have been in the employment for every day of these weeks, and it is competent to take into account a period of employment by the same employer subsequent to the date of the injury.

The First Schedule appended to the Workmen's Compensation Act 1897 provides—(1) The amount of compensation under this Act shall be (*a*) where death results from the injury (1) if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of £150, whichever of those sums is the larger, but not exceeding in any case £300, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer."

Mrs Mary Sullivan or Doyle, widow of the deceased Thomas Doyle, labourer, Leith, appealed from the decision of the Sheriff-Substitute at Edinburgh (HAMILTON) in an arbitration under the Workmen's Compensation Act 1897 between her and William Beattie & Sons, contractors, Edinburgh, in which she claimed £219, 14s. as compensation for the death of her husband.

In the case stated for appeal the Sheriff-Substitute stated that the parties concurred in admitting the following facts:—The work was an engineering work, and the defenders were the undertakers thereof, both in the sense of the statute founded on. The deceased Thomas Doyle was a labourer employed by the defenders by the hour, and paid at so much an hour. His services began about one o'clock on Monday, 18th December 1899, on which day he worked 3½ hours, and continued during Tuesday, Wednesday, and Thursday, on each of which days he worked 9½ hours. On Friday he worked from the usual starting hour until about three o'clock on the afternoon, when he was injured. He worked on that day 7½