credit not being given on this letter, that is negatived by the evidence in regard to both sums, and the result is not affected by the pursuer's evident desire not only to have this guarantee but additional security, which is perfectly natural, for he knew nothing about the defender or his firm. Therefore I think the Lord Ordinary has come to the right conclusion.

Lord Salvesen was not present.

The Court adhered.

Counsel for the Pursuer (Respondent)—J. A. Christie—E. O. Inglis. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defender (Reclaimer)—Moncrieff, K.C.—M. P. Fraser. Agents—J. & R. A. Robertson, W.S.

Friday, October 19.

SECOND DIVISION.

[Sheriff Court at Kirkcaldy.

YOUNG *v.* WATERSON.

Succession—Friendly Society—Insurance—Life Assurance—Benefits Payable to Nominee on Death of Member—Deed of Nomination—Holograph Will.

A member of a mutual assurance association, which did not come under the Friendly Societies Acts, signed a nomination form in favour of his sister. He died leaving a holograph will whereby he bequeathed one-half of his property to his sister and the other half to his fiancée. His sister having, under the nomination in her favour, received payment of the sum of £45, his fiancée brought an action for payment to her as executrix of that sum, averring that it formed part of the estate which according to the deceased's will fell to be equally divided between them. *Held*, on a consideration of the rules of the association, that the nomination only entitled the nominee to collect the money payable in respect of the member's death, but that the property could not be disposed of otherwise than in accordance with the terms of the will.

Mary Young, *pursuer*, brought an action in the Sheriff Court at Kirkcaldy against Mrs Helen Tarrant or Waterson, *defender*, whereby she craved for an order for payment of the sum of £45 with interest to herself as executrix-dative *qua* legatee of the deceased David Tarrant, a private in the 1st Battalion, Cameron Highlanders, and a brother of the defender, the sum in question having been paid on his death by the Police Mutual Assurance Association.

The pursuer *pleaded*—"4. The said sum of £45 being part of the deceased's estate carried by his said holograph will, the pursuer as executrix is entitled to decree therefor with expenses."

The defender pleaded—"5. The sum in question not being part of the deceased's estate, and in any case not being carried by his will, the pursuer has no claim for the amount sued for, and the action should accordingly be dismissed, with expenses. 6. In any event the female defender is, under the will founded on by pursuer, entitled to one-half of the amount sued for."

The *facts* of the case are set forth in the Sheriff-Substitute's note as follows:—"The material facts of the present case are simple, and are, I understand, admitted. The late David Tarrant, private in the 1st Battalion of the Cameron Highlanders, was for some time in the Edinburgh Police Force. About the same time as he became a member of the police force (29th April 1913) he also joined the Police Mutual Assurance Association. The rules of the latter, *inter alia*, provide—'That every member of every police force in England, Wales, and Scotland, whose age does not exceed thirty years, may be admitted a member of this association on his submitting his name and that of his nominee in writing to the authorised officer of the force to which he belongs.' On joining the association in Edinburgh the deceased there signed a nomination form in favour of his sister, the female defender. He paid certain weekly contributions, and a sum of £45 was payable on his death, which took place on 29th September 1914 from wounds received in action. David Tarrant left a holograph will, dated 13th August 1914, by which he left his property equally to the pursuer and his sister, the female defender, who in the interval had duly intimated her brother's death and received payment of the £45. The question for decision is—Whether the sum of £45 forms part of David Tarrant's estate to be divided in terms of the will, or is the defender entitled to retain possession of it?"

The *rules* of the Police Mutual Assurance Association provide, *inter alia*—"XII. That as early as possible after the death of any member of the association, the chief or authorised officer of the force with which the deceased was connected at the time of his death shall forward to the secretary the succession number, name, rank, certificate of death, length of police service, time the deceased was a member of the association, the name and address of the nominee, and the last nominee form signed by the deceased member. The secretary shall give notice of the death in the next issue of the *Police Chronicle*, and shall, as early as possible after the death has been duly authenticated to him, send a cheque, with two receipt forms, to the authorised officer of the force with which the deceased was connected for the amount due to the nominee; the amount so forwarded shall be paid to such nominee, who shall give a receipt in duplicate; one of such receipts shall be filed and the other returned to the secretary. The secretary shall, as early as possible, publish his receipt in the *Police Chronicle*, and this publication shall be a sufficient receipt for the amount so forwarded. (*a*) That in case any nominee be insane or dead at the time when the money directed to be paid shall become due, the committee may pay the same to or amongst the relations or friends of the

deceased member in such manner as they in their absolute discretion may think fit. (*b*) That in case any nominee or other person proposed to be benefited by the association be a minor at the time the sum becomes payable, the committee shall be at liberty either to pay over the money to or apply it for the benefit of such minor, or at their discretion the money may be invested in such manner as the committee may think fit for the benefit of such minor, two members of the association to be appointed by the committee to act as trustees of such fund; and the association shall not in any case be liable to any further claim from any person or persons whatsoever on behalf of any relative or friend of such deceased member. (*c*) No nominee or other person who may be, or who may become, entitled to benefit under these rules shall assign or charge the same to or in favour of any other person, and the association, its committee and officers, shall not be bound by any notices of assignment, charge, or other similar dealing."

The *instructions* to authorised officers annexed to the rules provide, *inter alia*—"To prevent disputes after death each member should be most particular in seeing that the name of his nominee is correctly entered by the authorised officer on the association list. The nominee can be changed whenever the member pleases; and it should be clearly understood that even if a will is made assigning the subscription to some other person than the nominee, that even then the authorised officer must pay, not under the will, but under our rules, to the nominee."

On 3rd November 1915 the Sheriff-Substitute (ARMOUR-HANNAY) pronounced this interlocutor—"Finds that the pursuer sues as executrix of the late David Tarrant for the sum of £45 paid to the female defender under the form of nomination: Finds that the said sum of £45 formed part of the estate of David Tarrant on his death on 29th September 1914, and falls under his holograph will dated 13th August 1914: Therefore decerns in favour of the pursuer as executrix foresaid as craved, reserving to the defender to claim against the executry estate for one-half thereof, as provided by No. 7 of process."

Note.—"I was favoured with an excellent argument by Mr Johnston on behalf of the defender, and was impressed by the authorities cited, particularly the cases of *Craigie's Trustees* v. *Craigie* (1904, 6 F. 343, 41 S.L.R. 254) and *Struthers' Representatives* v. *Marshall* (1905, 21 Sh. Ct. Rep. 97). These decisions, however, appear to me to differ in important circumstances from those of the present case, and cannot in my opinion be held as ruling it. . . . [*After narrating the facts as above set forth*]. . . . For the defender it was contended that the £45 did not form part of the deceased's estate; that it was not, and could not, be carried by his will, and that accordingly the defender was entitled to retain possession of it. I am unable to give effect to these contentions.

"The Police Mutual Assurance Association is unregistered, and the nomination form has no statutory effect. Its purpose apparently was to facilitate payment by the association without production of a legal title, and the nomination was not intended to and did not in my opinion confer any indefeasible beneficial title upon the nominee in such a case as this where a subsequent will disposes of the deceased's whole property. This I think appears from the rules of the association, a copy of which is produced. Rule XII provides for the cases of a nominee being insane or dead, or a minor when the sum to be paid becomes due, and also declares that no nominee may assign his right in favour of any other person prior to the death of his nominator. In the case of a nominee being insane or dead when the money becomes payable, the committee of the association 'may pay the same to or amongst the relatives or friends of the deceased member in such manner as they, in their absolute discretion, may think fit.' And if the nominee be a minor the committee reserve a similar discretion either to pay the money over or apply it for the benefit of the minor through two members of the association acting as trustees. In the instructions to authorised officers it is also pointed out that the nominee can be changed whenever the member pleases; but that it 'should be clearly understood that even if a will be made assigning the subscription to some other person than the nominee, that even then the authorised officer must pay, not under the will but under our rules, to the nominee.' All this is quite consistent with the view that so long as the nominee is not dead or insane or a minor his title to the money payable will yield to a valid will such as that produced here. The association simply take up this position—'We won't be troubled with questions of title, and will only pay to the nominee, leaving him to make his title good as best he can.'

"There is this further serious objection to the defender's claim to retain this £45, that it involves setting up the nomination form as a testamentary writ, which, on the authority of *Morton* v. *French*, 1908 S.C. 171, 45 S.L.R. 126, appears to be clearly incompetent.

"For the defender an attempt was made to overcome these objections by arguing that the £45 never was part of the deceased's estate, and could not be carried by his will, and the cases of *Craigie's Trustees* and *Struthers' Representatives* were strongly founded on. As already said, these decisions do not seem to apply to the circumstances of this case. In the first the question was whether a widow's pension should be brought into account and set off against her claim for her legal rights. The pension was payable out of a fund known as the Bengal Military Fund, and was declared to be inalienable, any attempt to do so being declared as *ipso facto* forfeiting all right to benefit from the fund. One can quite well see why it was held that the pension was never part of the deceased's husband's estate.

"In *Struthers'* case I admit the circum-

stances at first sight look a good deal like those of the present case. There was, however, no will, and the fund from which the members of the association were paid was raised on a totally different way to that of the Police Mutual Assurance Association. The right of the nominee was simply to call upon the various members of the society on the nominator's death to make certain payments as provided by the rules. It was held that these payments were never part of the nominator's estate.

"In this case it appears to me the £45 was equivalent to a policy of insurance paid for by the deceased David Tarrant's yearly contributions, and that its actuarial value was at every moment a part of his estate. Accordingly the £45 not having been made over *habili modo* to the defender, it was carried by the will, and falls to be dealt with as part of the deceased's estate."

The defender appealed to the Sheriff (FLEMING), who, on 9th November 1915, recalled the interlocutor of the Sheriff-Substitute, and assoilzied the defender.

Note.—"The facts of this case are fully stated in the Sheriff-Substitute's note.

"In my opinion the sum of £45, payable by the association on Tarrant's death, did not then, and never did, form part of his estate.

"The contract between Tarrant and the association was that Tarrant should make a weekly contribution, and that on his death the association should pay a certain sum, not to Tarrant or his heirs or representatives, but to an individual nominated by him. This nomination, according to the contract, was made at the time he applied for admission as a member of the association, and was a condition-precedent to his admission. It is true that he had power to recall this nomination, but only by making a new nomination of some other individual. In no circumstances could he make the sum payable to himself or to his heirs generally. It could only be payable to a named individual. Such a contract seems to me to be indistinguishable from the contract by which a man makes periodical contributions to a fund from which a pension to his widow will be paid, or the case of a man insuring his life and making the policy payable to a third party. In neither case is the sum ultimately payable, or even its actuarial value, ever *in bonis* of the contributor. The creditor in the obligation is the widow or the third party, and if there can be computed any actuarial value, which seems doubtful, what is thus ascertained is the value, of the interest to them, but not to the contributor (see *Craigie's Trustees* v. *Craigie*, 6 F. 343, 41 S.L.R. 254).

"It was argued, that even if the nomination be held not to have been revoked by the will, the nomination itself did not create any beneficial interest in the nominee, who remained merely a trustee for the member's estate, empowered to grant to the association a good discharge for all concerned. I cannot accept this view. It seems to me that the whole scheme of the rules is formed on the idea that not only should the nominee have power to discharge the association, but that he should be the person entitled to benefit.

"The provisions in Rule XII as to the disposal of the moneys in the event of the nominee being dead, or insane, or a minor, seem to me quite inconsistent with the view that the nominee himself, if alive, sane, and *sui juris*, has no beneficial interest and is merely a trustee. Further, the prohibition of assigning points the same way, and the words in which that prohibition is expressed —'No nominee or other person who may be entitled to benefit under these rules,'—seem capable of only one interpretation, namely, that the nominee is a person entitled to benefit.

"I was referred to the cases of *Biggs* v. *Lewis* (1890, 89 L.T. (O.S.) 47) and *Hughes* v. *Parry* (1892, 93 L.T. (O.S.) 131), in support of the proposition that a subsequent will revokes any existing nomination. These decisions cannot stand with the later decision in *Bennett* v. *Slater* ([1899] 1 Q.B. 45). These cases were all concerned with associations registered under the Friendly Societies Acts, whose constitution was therefore regulated by the statutory provisions, and were or should have been decided upon the clause in section 15 (3) of the Act of 1875—'may from time to time revoke or vary such nomination by a writing under his hand similarly delivered or sent'—and especially the four words at the end of that passage. No plea is taken on this proposition, but if there had been I should have been prepared to repel it on the ground that the will is not a nomination as prescribed by the contract between the contributor and the association. The pursuer's plea No. 3 was supported by reference to the case of *Morton* v. *French* (1908 S.C. 171, 45 S.L.R. 126). All that that case decides is, that a nomination being testamentary in nature may, *if ineffectual as a nomination*, be given effect to as a testamentary deed, following, though with a different result, the English case of *Baxter* ([1903] P. 12)."

The pursuer appealed, and argued—In making the nomination, which was not a testamentary writing, the deceased only complied with the rules of the association to which he belonged. It merely constituted a title to collect the amount, and it did not confer on the nominee an exclusive right to the payment out of the fund. Even if the nomination could be held to be in the nature of a testamentary writing, the subsequent will, dealing as it did with the whole of the deceased's estate, revoked it. Any statutory privileges enjoyed by friendly societies could not apply to this association, as it was not a registered friendly society. Any nomination which was to be admitted as a will ought to comply with the formalities which were necessary for the execution of testamentary writings—*Morton* v. *French*, 1908 S.C. 171, 45 S.L.R. 126. Even if the Friendly Society Acts did apply to this case, the payment out of the association's funds to the nominee formed a portion of the deceased's personal estate—*Biggs* v. *Lewis*, (1890) 89 L.T. (O.S.) 47. In the case of *in re* Griffin, [1902]

1 Ch. 135, it was held that policies effected under the Friendly Societies Acts 1875 and 1896 could be assigned in the customary manner as well as by nomination under the Acts. The case of *Baxter*, [1903] P.12, decided that an invalid nomination was testamentary and admissible as a will. Hence it followed that the payment out of the funds ought to be administered in terms of the deceased's will. *Bennett* v. *Slater*, [1899] 1 Q.B. 45, did not apply to the present case.

The respondent argued—The nomination, having been made according to the deceased's contract with his association, was valid. The nominee was invested with a beneficial interest in the fund, the nomination constituting an *inter vivos* gift in her favour, and the benefits were payable to her on the nominator's death free of any legal claims by the latter's wife or children. — *Campbell* v. *Campbell*, (1917) 1 S.L.T. 339. The defender was entitled both to receive the payment out of the association's fund and also to benefit from any claims she could, in virtue of his will, put forward to the deceased's estate—*Craigie's Trustees* v. *Craigie*, (1904) 6 F. 343, 41 S.L.R. 254. A nomination could only be revoked in the mode provided by the Friendly Society Acts and not by will—*Bennet* v. *Slater*, [1899] 1 Q.B. 45. The payment out of the fund to which the nominee was entitled did not form a part of the deceased's estate—*Ashby* v. *Costin*, (1888) 21 Q.B.D. 401. Under rule 5, which here constituted the contract, the money, payable out of the fund at death, was not the property of the member of the association. Revocation not having been made, the defender was entitled to the whole fund.

Lord Justice-Clerk—I have come to be of opinion that the view taken by the Sheriff-Substitute is correct. It appears to me that the purpose of the nomination was that when a member died the association should not be troubled by any claims other than the one based upon the nomination, and the only person they were bound or entitled to recognise, except in cases where express provision otherwise is made, was the person whose name appears in the nomination paper. But that paper only purports to name the person who is to receive the money, and in my opinion the nomination is not intended to have the effect of declaring that the nominee is to have the sole beneficial interest in the amount payable by the association. Rule XII (*a*) clearly shows that the nominee may have no beneficial right or interest in the money due by the association on the death of a member. Moreover, the nominee can be changed whenever the member pleases, and I think the nomination is only intended to facilitate proceedings on the death of a member so far as to prevent the association from being disturbed by any question as to who is the person entitled to receive payment, but it goes no further. Accordingly in this case, when this soldier-constable died, the association having a nomination in their hands were entitled—as they did—to pay the money to the nominee, but the nominee having got the money, in my opinion was bound by any disposition which the member of the association had made by any writing valid according to law. He had made a valid settlement of his property, and that was sufficient to determine how the £45, which the association were bound to pay to his nominee, was to be ultimately distributed. In my opinion the £45 was the property of the deceased to the effect of entitling him to dispose of it by his will, and he did effectually dispose of it by the will.

I am impressed by the instructions annexed to the rules. The first instruction runs thus—"To prevent disputes after death each member should be most particular on seeing that the name of his nominee is correctly entered by the authorised officer on the association list. The nominee can be changed whenever the member pleases; and it should be clearly understood that, even if a will is made assigning the subscription to some other person than the nominee, that even then the authorised officer must pay, not under the will but under our rules, to the nominee." In my opinion that imports that the member might make a will disposing of the sum due on death, and that the nomination does not in the least affect the question what the nominee, who has properly received the money from the association, is bound to do with it.

In the same way Rule XII. (*c*) says—"No nominee or other person who may be or may become entitled to benefit under these rules shall assign or charge the same to or in favour of any other person, and the association, its committee and officers, shall not be bound by any notices of assignment, charge, or other similar dealing." That does not apply to the member himself, and is merely for the protection of the association, and in my opinion does not affect the rights of assignees of the member himself except as against the association.

The English cases to which we were referred proceeded on a construction of rules differing from those we are considering, and the Lord Ordinary's judgment (Lord Anderson) in a similar case to the present, to which we were referred, seems to be founded on a misunderstanding of the facts.

I am therefore of opinion that the judgment of the Sheriff was erroneous, and that the Sheriff-Substitute arrived at the right result, practically for the reasons he has stated; and that we should sustain the appeal and revert to the Sheriff-Substitute's judgment.

Lord Dundas—I am of the same opinion. It is natural and proper that the rules should provide for a nominee in every case, for the convenience of the society, and in order that there should be a person in each case having a formal title to receive payment on the death of the member, but it does not by any means follow that nomination necessarily confers a beneficial right upon the nominee. I notice that by rule

12 (*c*) the association disclaims all concern with any assignation made by a nominee, but I do not find anywhere in these rules any indication that a member himself cannot validly assign his own beneficial right to a third party. On the contrary, I think the language of the instructions, to which your Lordship has alluded—and I may say that I think we must consider these instructions to be part of the rules we are bound to examine—seems to show plainly that a will may validly be made by a member so as to dispose of his money in favour of someone other than the nominee, though even in that case the society naturally enough provides that they are to pay the money to the nominee, whom alone they recognise. On the whole matter I think the learned Sheriff-Substitute was right and that we ought to revert to his judgment.

LORD GUTHRIE—I agree. The case must be decided on the terms of the particular rules of this society, which is not a registered friendly society, and I think that that is enough to distinguish the case from the English case of *Bennett* v. *Slater*, [1899] 1 Q.B. 45, supposing that case to be still law in England. There the special provisions of the Friendly Society Acts may well justify the result. In the case of marriage, for instance, the nomination would be revoked, and section 15 (4) of the Friendly Societies Act 1896 seems to point in the same direction. But here we have got a nomination which on the face of it seems merely to be a warrant to receive the money. We have also got the rules of the society, and I agree that the instructions must be taken as part of these rules. On the rules of the society it seems to me clear that the view adopted by your Lordships is correct. While the nominee cannot assign, there is nothing to prevent the member assigning to anyone he pleases.

We were referred to the case of *Campbell* v. *Campbell*, 1917, 1 S.L.T. 339, at present under reclaiming note. If the rules here had contained the rule, which seems to have been assumed in that case, the result might have been different. Lord Anderson says that "by contract the member obliged himself not to deal with the said sum by will or to allow it to form part of his moveable succession *ab intestato*." But in the rules submitted to us there is no such provision.

The Court recalled the interlocutor of the Sheriff and reverted to the interlocutor of the Sheriff-Substitute.

Counsel for Pursuer—Scott. Agent—W. K. Lyon, W.S.

Counsel for Defender—E. O. Inglis. Agent—W. M. Ross, S.S.C.

Friday, October 26.

FIRST DIVISION.

[Sheriff Court at Paisley.

GAUNT *v.* BABCOCK & WILCOX, LIMITED.

Workmen's Compensation — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising out of the Employment*"—*Disobedience to Instructions.*

A moulder was supplied by his employers with a wooden scraper to remove loose sand from the top of a moulding box which was pressed by a hydraulic press against a stationary plate. It was his duty to remove the loose sand with the scraper, and he was instructed so to do by his employers. It was, however, quicker to remove the loose sand by the hand and the moulders were paid by the piece. Using his hand and not the scraper one day, his hand was caught in the press and crushed. The scraper was known to the workman to be available and at hand. *Held* that the accident did not arise out of the employment.

George Gaunt, *appellant*, being dissatisfied with an award of the Sheriff-Substitute (BLAIR) at Paisley in an arbitration by him against Babcock & Wilcox, *respondents*, for compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), appealed by Stated Case.

The Case stated—"I found the following *facts* proved or admitted—1. That George Gaunt, the appellant, aged thirty-eight, is a moulder, and for ten years prior to 29th November 1916 (with an interval of about twelve months, during which he worked elsewhere, and which interval ended when he returned nine months before the accident) he worked as a moulder in the employment of Babcock & Wilcox, Limited, the respondents. 2. That on 29th November 1916 he was working at a hydraulic moulding machine in respondents' employment along with Alan M'Swan, another employee. 3. That part of the process consists in pressing hydraulically the moulding box containing the moulding sand against a stationary plate. 4. That in connection with this operation it is the duty of the machine moulder (in this case the appellant) to remove loose sand from the top of the moulding box. 5. That a wooden scraper is provided for the purpose of removing the sand, which it was the duty of the appellant to use, and which he failed to do. 6. That M'Swan's duties, on the other side of the moulding machine, and from which place he cannot see his mate the appellant, are to work the hydraulic levers so as to open and close the hydraulic press in which the moulding box is placed, and that this operation frequently requires a double application of the hydraulic press to be given. 7. That on the occasion in question a first ramming had been given, which in M'Swan's judgment was unsatisfactory. 8. That while the press had been lifted after the first ramming, Gaunt, the appellant, proceeded to clear away the loose