LORD TRAYNER—It is contended for the pursuer that it is sufficient for the relevancy of his case to state that the place where the accident occurred was a factory within the meaning of the Workmen's Compensation Act. This is not so. The pursuer cannot prove more than he avers, and all that he avers is that he was employed in a store used for the purpose of bottling beer and washing beer bottles. Even if his averments were true they would not prove that the place in which he was working was a factory, and I am therefore of opinion that the Sheriff-Substitute was right in dismissing the action as irrelevant.

LORD MONCREIFF—I agree. It is not enough to say that the place where the pursuer was injured was a factory within the meaning of the Workmen's Compensation Act. All that the pursuer avers is that in connection with their shop the defenders have a store which is used for bottling beer, and which is a factory within the meaning of the Workmen's Compensation Act. Mr Munro maintained that this was a "bottle-washing work" within the meaning of the Factory and Workshop Act 1901, Sched. 6, Part II. (28). If this was his case it should have been stated on record. But even this averment would not have been sufficient, for by sec. 149 (1) (*b*) of the Act such works are not a factory unless steam, water, or other mechanical power is employed, and there is no suggestion here that any of these methods were in use. Sec. 149 (1) (*c*) does not aid the pursuer, for even if we hold that washing bottles is "adapting them for sale," there must still be an averment of the use of steam, water, or other mechanical power. On the whole matter I think that the Sheriff-Substitute has come to a right decision.

LORD YOUNG was absent.

The Court answered the question of law in the affirmative, and affirmed the dismissal of the claim.

Counsel for the Appellant—Salvesen, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondent—Galbraith Miller. Agents—Gill & Pringle, S.S.C.

Wednesday, July 15.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

THE EDINBURGH AND DISTRICT AERATED-WATER MANUFACTURERS' DEFENCE ASSOCIATION, LIMITED *v.* JAMES JENKINSON & COMPANY.

Trade Union—Restraint of Trade—Combination between Masters and Masters—Registration of Trade Union as Limited—Restrictions on Conduct of Trade—Company—Process—Instance—Title to Sue—Trade Union Act 1871 (34 *and* 35 *Vict. c.* 31), *secs.* 4 (1) *and* (2) *and* 5 (3)—*Trade Union Act Amendment Act* 1876 (39 *and* 40 *Vict. c.* 22), *sec.* 16.

An association was formed by several firms of aerated water manufacturers, and registered under the Companies Acts, its principal object being to protect the bottles and boxes of members from being used or dealt with by persons not having lawful authority. By the articles of association and certain bye-laws duly made prohibitions were imposed upon members with regard to the purchase and exchange of bottles and the employment of travellers formerly in the employment of other members, and there were provisions for fines for breach of the rules or bye-laws.

In an action brought by the association in its descriptive name for the recovery of a fine imposed on one of its members for breach of its rules, the defenders pleaded no title to sue. *Held* that the association was a trade union within the meaning of section 16 of the Trade Union Act 1876, as being a combination for regulating the relations between masters and masters, and a combination for imposing restrictive conditions on the conduct of a trade; that its registration under the Companies Acts was consequently void in terms of section 5 (3) of the Trade Union Act 1871; that it could not sue in its descriptive name, and that the plea of no title to sue must be sustained.

The Trade Union Act 1871 (34 and 35 Vict. cap. 31) enacts (section 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 the 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. (2) Any agreement for the payment by any person of any subscription or penalty to a trade union." . . .

Section 5 enacts—"The following Acts—that is to say, . . . (3) The Companies Acts 1862 and 1867 shall not apply to any trade union, and the registration of any trade

union under any of the said Acts shall be void." . . .

The Trade Union Act Amendment Act 1876 (39 and 40 Vict. cap. 22) enacts (section 16—"The term 'trade union' means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act [1871] had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

On 23rd April 1898 several firms of aerated-water manufacturers formed themselves into the Edinburgh and District Aerated-Water Manufacturers' Defence Association, Limited, and the association was incorporated under the Companies Acts 1862 to 1890, having its registered office at No. 57 York Place, Edinburgh.

The memorandum of association stated—"3. The objects for which the company is formed are—(*a*) To raise a fund or funds by annual subscriptions, entrance-fees, donations, fines, levies, loans on security, or otherwise. (*b*) To protect the bottles and boxes of members bearing their name or names, or trade-mark, or the name or trade-mark of the association, from being used or dealt with by any person or persons not having lawful authority for using or dealing with the same. (*c*) To punish, by fines or otherwise, and to prosecute by law, all persons found using, dealing in, selling, retaining, or destroying any bottles or boxes which are the property of members of the association or of the association itself. (*d*) To provide for and be a central medium of useful information available for every member of the association, and generally for the furtherance and promotion of their interests. (*e*) To suggest, adopt, support, and carry into effect any measures for the protection of the interests of the trade, and to initiate, alter, or improve the law in relation to such business. (*f*) To co-operate or communicate with any kindred association or society in any part of the United Kingdom or the colonies. (*g*) To do anything conducive or incidental to the attainment of all or any of the above objects."

The articles of association provided, *inter alia*—"(15) A bottle exchange or clearing-house shall be established for the collection, reception, and distribution of bottles and boxes at such place or places as the council shall determine. (17) The council shall have power to make and enforce bye-laws for the effectual carrying out of any or all of the objects of the association, and of the articles of association, and to make all business arrangements for the effectual performance and carrying out of such objects and articles. (22) The council shall have power to prosecute, bring, carry on or discontinue, or refer to arbitration or compromise, any criminal or other proceedings, actions, suits, claims, and demands or or against the association, or its own members. . . . (24) The council shall have power to impose fines or penalties on the members of the association for any infraction of the rules or bye-laws, and to enforce the payment of such fines or penalties by law or otherwise. (32) No person shall be permitted to become an ordinary member who is not a master mineral water manufacturer or beer bottler on his own individual account. (33) Every member on joining the association shall sign a declaration agreeing to conform to the rules and bye-laws for the time being. (39) No member shall buy or sell second-hand bottles bearing names or trade-marks from brokers, hawkers, or marine store dealers, or from any person whatsoever, nor shall any member purchase from such person any plain or trade-mark soda-water bottles (wine, spirit, or beer bottles excepted); and if any such bottles are offered for sale to a member he shall at once report the fact to the secretary, with particulars of the bottles offered and the name and address of the vendor; but a member may sell to or buy from an aerated-water manufacturer or bottler, bottles which are such member's or manufacturer's property; provided he does not sell or buy bottles bearing the name or trade-mark of or belonging to any other aerated-water manufacturer or bottler without his written authority. (42) No member shall employ any traveller or other person having the sale or the superintendence of the sale of goods to customers who shall have been in the service of another member in the same capacity until after the expiration of one year from his having left such service, unless the consent in writing of such other member to earlier employment be first obtained."

The bye-laws of the association enacted under authority of article 17 provided, *inter alia*—"(20) Members are prohibited from exchanging bottles, etc., with non-members, under a penalty not to exceed £5 (five pounds) for each offence. (24) Any member using, filling, or sending out bottles, syphons, boxes, or cases, belonging to another member may be brought before the council, and on the offence being proved to the satisfaction of the council, may be fined such sum as the council may determine, and such fine shall not be less than 6d., and not more than 10s., for each bottle, syphon, or box so used, filled, or sent out, but the council reserve the right of prosecuting at law such offender without calling him before them."

In 1903 the Association, in its corporate name, raised an action in the Sheriff Court at Edinburgh against James Jenkinson & Company, aerated-water manufacturers, Leith, one of its members, for payment of £43, 2s. 6d.

The pursuers averred that the defenders had infringed the twenty-fourth bye-law, and that the sum sued for was the amount of a fine imposed on them for doing so by the council under article 24, which the defenders refused to pay.

The defenders pleaded, *inter alia*—"(1) No title to sue. (2) The company and its

articles of association and bye-laws being in restraint of trade, and the company being a trade union within the meaning of the Trade Union Acts, the action falls to be dismissed.

On 30th March 1903 the Sheriff-Substitute (HENDERSON) repelled the defenders' pleas and allowed the parties a proof, and to the pursuers a conjunct probation.

The defenders appealed to the Sheriff (RUTHERFURD), but he on 27th May 1903 adhered.

The defenders appealed, and argued—This Association was in the sense of section 16 of the Trade Union Act of 1876 a trade union. It was a combination for regulating the relations between masters and masters. It was, further, a combination for imposing restrictive conditions on the conduct of a trade. It was such, because, by article 42, it restricted the right of the members to employ travellers—*Mineral Water Bottle Exchange Society* v. *Broatch*, 1887, 36 Ch. D. 465. It was also such, because by article 39 and bye-law 20 it prevented its members buying and selling bottles except under certain conditions and restrictions—*Glasgow and District Potted Meat Manufacturers' Society* v. *Geddes*, December 17, 1902, 10 S.L.T. No. 309; *Chamberlain Wharf Co. Limited* v. *Smith* [1900], 2 Ch. 605. Being a trade union its registration was void under section 5 of the Trade Union Act 1871, and it could not sue as a corporation. The association was illegal. Its power to fine was entirely contrary to the provisions of the statute. An agreement between members of a trade to combine for specified purposes tending to restrain trade was against public policy and illegal—*Hilton* v. *Eckersley*, 1853, 6 E. & B. 47, cited and recognised as establishing a rule of law in "*Mogul*" *Steamship Co.*, *infra*; *M'Kernan* v. *United Operative Masons' Association*, February 26, 1874, 1 R. 453, 11 S.L.R. 219. Where an association was illegal no agreement made by it could be enforced, whether its provisions were innocuous or not. One had not merely to look at the primary purposes of the association, but to the modes by which these purposes were to be given effect to. The association was tainted with illegality, and the Court would refuse to enforce its rules. When all the restrictions in its articles or bye-laws were taken into account, there could be no doubt that this association was in restraint of trade. No term of the agreement could therefore be enforced—*Cullen* v. *Elwyn* [1903], 19 T.L.R. 426. Even if the associatien was not illegal *in toto*, these rules which it sought to enforce were unduly in restraint of trade, and therefore illegal—*Chamberlain Wharf Co., Limited, supra*; *Amalgamated Society of Railway Servants for Scotland* v. *The Motherwell Branch of the Society*, June 4, 1880, 7 R. 867, opinion of Lord Young 873, 17 S.L.R. 607-611; *Rigby* v. *Connel*, 1880, 14 Ch. D. 482; *Aitken* v. *Associated Carpenters and Joiners of Scotland*, July 4, 1885, 12 R. 1206, 22 S.L.R. 796.

Argued for the pursuers and respondents—The association was not a trade union. The object of the Association was perfectly legal, viz., to enforce the provisions of the Merchandise Marks Act 1887 (50 and 51 Vict. c. 28). The Association was therefore carrying out a laudable purpose. A combination to prevent undue competition had been held legal—"*Mogul*" *Steamship Co.* v. *M'Grigor, Gow, & Co.*, 1889, 23 Q.B.D. 598, *aff.* [1891], A.C. 25. An association with a legal object, viz., to assist in suppressing trading under false pretences, should not be branded as illegal. To make a society an illegal association its main object must be fundamentally illegal. Although with a view to the attainment of their legal object some restrictions were placed upon members in the conduct of their business *inter se*, these did not affect the public, and could not be held as contrary to public policy as being in restraint of trade. Such slight restraints for a legal object were not illegal, and did not make associations that worked under them trade unions. Even if some of the rules or bye-laws of the association were held to be illegal as in restraint of trade, that would not prevent the Court upholding the rules which were legal, or prevent the association receiviug a sum of money payable under a rule to which no exception could be taken—*Collins* v. *Locke*, 1879, 4 App. Cas. 674; *Swaine* v. *Wilson*, 1889, 24 Q.B.D. 252.

At advising—

LORD TRAYNER—The first plea stated by the defenders in this case is that the pursuers have no title to sue, and this plea among others the Sheriff has repelled. The pursuers sue as an incorporated company, and if they are such the instance and title are not open to objection. But the defenders maintain that the registration of the pursuers' company under the Companies Acts is void, in respect the pursuers' company or association is a trade union. The first question therefore is, whether the pursuers' company is or is not a trade union. A trade union is defined by statute (39 and 40 Vict. c. 22), sec. 16, to be any combination, permanent or temporary, between masters and masters or for imposing restrictions on the conduct of any trade or business, whether such combination would or would not be deemed an unlawful combination by reason of some one or more of its purposes being in restraint of trade. If therefore the pursuers' company or combination imposes restraints on the conduct of any trade or business it is a trade union, although those restrictions are such as the law would compel the members thereof to observe. I am of opinion that the pursuers' company is a combination falling within the statutory definition. By its articles of association (which form the contract of copartnery among the members) there is by article 42 imposed on the members a restriction as to the employment of certain servants, and by article 39 there is a restriction imposed as to the purchase of certain bottles, which are necessary articles for carrying on or conducting the trade of the members of the combination. By the bye-laws issued by

the pursuers' company, which the whole of its members are bound to observe, and which by the articles of association the company is authorised to make, there are further restrictions, such as (art. 20) the prohibition of members exchanging bottles with anyone not a member. There are other restrictions on the conduct of business, but it is sufficient to instance those I have referred to. Whether those restrictions are lawful or are unlawful as in restraint of trade need not be considered; they are restrictive conditions on the conduct of trade, and therefore bring the pursuers' combination or company within the statutory definition of a trades union. That being so, the registration of the pursuers' company under the Companies Acts is void (34 and 35 Vict. c. 31), sec. 5. If the pursuers' company is not an incorporated company it cannot sue in its descriptive name without the addition of the names of at least three of its members. The pursuers sue here in their descriptive name only, and such an instance is radically defective. I think therefore that the plea of no title should be sustained and the action dismissed.

LORD MONCREIFF—The pursuers design themselves as "The Edinburgh and District Aerated Water Manufacturers' Defence Association, Limited, incorporated under the Companies Acts 1862 to 1890."

Now the Trade Union Act 1871, sec. 5, sub-sec. 3, enacts—"The Companies Acts 1862 and 1867 shall not apply to any trade union, and the registration of any trade union under said Acts shall be void."

Therefore if the pursuers' Association is a trade union the only title which they put forward is bad, and the first plea-in-law for the defenders, no title to sue, must be sustained.

The question therefore is whether the pursuers' Association is a trade union. I have anxiously considered this question, because the leading object of the Association appears to be not merely lawful but laudable, viz., to protect the bottles and boxes of members bearing their name or trade-mark from being used or dealt with by persons not having lawful authority. But looking to the very wide terms of the definition of a trade union in section 16 of the Trade Union Act 1876, I am unable to hold that the pursuers' Association does not come within the definition. I am unable to say that it is not a combination for regulating the relations between masters and masters, or that it does not impose restrictive conditions on the conduct of the trade or business in question. The regulation of relations between masters and masters and the restrictive conditions on the conduct of the trade may be, and so far as I can at present see, are no more than are necessary to secure results beneficial to the general body of aerated water manufacturers. But according to the definitions in the Act of 1876 that is not the test. The articles of association and byelaws for the purpose of securing the objects of the Association do impose certain restrictions upon the way in which the manufacturers shall carry on their business, and do so under sanction of certain heavy penalties which the council of the Association are empowered to impose.

That being so, I am unable to hold that the pursuers' Association is not a trade union in the sense of the Acts; and accordingly the registration of the Association under the Companies Acts is void.

That is sufficient for the decision of the case and the first plea-in-law for the defenders must be sustained; but I express no opinion as to whether if the pursuers sue as a voluntary association they may or may not be entitled to recover the penalties in question.

The LORD JUSTICE-CLERK—The Trade Union Act is precise that the Companies Acts shall not apply to a trades union.

The objects of this Association in this case are most proper, but I agree with your Lordships that the conditions imposed are restrictive in the sense of the statute and fenced by heavy penalties. I therefore agree that the plea of no title to sue must be sustained.

LORD YOUNG was absent.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutors appealed against: Sustain the first plea-in-law for the defenders; dismiss the action; and decern."

Counsel for the Pursuers and Respondents—Jameson, K.C.—A. A. Fraser. Agent—George Arnott Eadie, S.S.C.

Counsel for the Defenders and Appellants—Guthrie, K.C.—M'Lennan. Agents—Dalgleish & Dobbie, W.S.

Thursday, July 16.

FIRST DIVISION.

[Sheriff-Substitute at Alloa.

RANKINE *v.* ALLOA COAL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 2—*Notice of Injury—Prejudice to Employer—Appeal—Question of Fact or Law—Remit to Sheriff to State Case.*

The Workmen's Compensation Act 1897 enacts (section 2)—"Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof. . . . Provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or