

agreement passed to the bankrupt, and from him to his trustee, and that the pursuers have no right of claim for a preference.

**LORD CRAIGHILL**—I concur in the judgment which your Lordship has proposed, and my reasons for so doing are shortly these:—In the first place, the account-current, which has been the foundation of the argument on both sides, must be taken to be an account-current between the parties. It is so described by the pursuers themselves on the face of the account, and also in the affidavit which accompanied the claim lodged in the sequestration. Over and above, this appears to me to be its true description. In the next place, though a capital sum is the first entry in the account, yet the way in which the account is kept shows that these and all other items were dealt with as items in an account-current. Had the capital sum been the subject-matter of one account or of one part of an account, and items of income been the subject of another account, or of other parts of an account, the result of course would have been different; but as capital and income in this account are all made items of one account, and are all dealt with as an account-current, there is nothing in the specialty to which I have referred, and on which so much reliance is placed by the defenders. The common rule of law, therefore, as the Lord Ordinary has decided, must be applied. The circumstance that interest on the yearly balance was charged from the beginning of the year did seem at first to suggest that the principle thus followed was different from that which would have been followed had the account been an account-current; but on examination it appears that there is interest charged, at least at times, upon both sides of the account, and, besides, the variance in the amount on which interest was charged betwixt the sum as it stood at the beginning and as it stood in the course of the year was so little at any time, and so seldom occurred, that this specialty comes really to be immaterial. The thing was done obviously for the sake of conveniency rather than for any other consideration by which the character of the account could be affected.

**LORD RUTHERFURD CLARK**—I am also disposed to think that the Lord Ordinary's judgment should be affirmed. I concur in the observation of Lord Craighill that this account must be regarded as the pursuers' account. No doubt they say the account was actually rendered by the debtor Alexander, but whether that were so or not, the pursuers' author adopted the account alleging that his claim was due. Now, this account is what is commonly called an account-current, containing all sums which are credited.

I could quite have understood that the pursuers should have kept the capital account quite separate. I do not say it was too late for to have separated them when the account was rendered, but I think it was too late when the claim was lodged. All these sums were capital, and I must look at this as nothing but a current account, including all sums put to the credit of the pursuer's author, and all sums put to his debit, and whether any sums remain due or not depends on whether or not the payments have wiped out the debt.

The LORD JUSTICE-CLERK was absent.

The Court refused the reclaiming-note, and adhered to the Lord Ordinary's interlocutor.

Counsel for Pursuers (Reclaimers)—Mackintosh—Wallace. Agent—David Turnbull, W.S.

Counsel for Defender (Respondent)—Pearson—Dundas. Agents—Waddell & M'Intosh, W.S.

Friday, January 11.

## FIRST DIVISION.

[Lord M'Laren, Ordinary.]

HASTIE AND OTHERS v. THE FIRST EDINBURGH AND LEITH 415TH STARR-BOWKETT BUILDING SOCIETY AND ANOTHER.

*Building Society—Arbitration—Jurisdiction—Building Societies Act 1874 (37 and 38 Vict. c. 42), secs. 4, 34, 36.*

The rules of a building society provided that disputes with regard to certain matters should be referred to arbitration. Circumstances in which *held* that an award bearing to proceed on such a dispute must be set aside on the ground that there was no dispute properly before the arbitrators, since the whole parties appearing before them maintained the same view.

The Court has jurisdiction to give a remedy to a member of a building society registered under the Building Societies Act 1874, when it appears that the act complained of has been wholly outwith the provisions of the statute and the rules of the society.

The 4th section of the Building Societies Act 1874 provides that the expression "Court" as used in the Act means in Scotland the Sheriff Court of the county in which is situated the chief office or place of meeting for the business of the society.

The 21st section of the same Act provides that the rules of a society registered under the Act shall be binding on the several members and officers of the society.

The 34th section (which relates to the settlement of disputes by arbitration) provides that "Whatever award shall be made by the arbitrators, or the major part of them, according to the true purport and meaning of the rules of the society, shall determine the dispute; and should either of the parties to the dispute refuse or neglect to comply with or conform to such award within a time to be limited therein, the Court, upon good and sufficient proof being adduced of such award having been made, and of the refusal of the parties to comply therewith, shall enforce compliance with the same, upon the petition of any person concerned."

Section 36 provides—"Every determination by arbitrators or by the Court, or by the Registrar under this Act, of a dispute, shall be binding and conclusive on all parties, and shall be final to all intents and purposes, and shall not be subject to appeal, and shall not be

removed or removeable into any court of law, or restrained or restrainable by the injunction of any court of equity."

These were conjoined actions at the instance of James Hastie and others against the First Edinburgh and Leith 415th Starr-Bowkett Building Society, incorporated under the Building Societies Act 1874, and Mrs Mary Hills (whose husband was called as her administrator-in-law). The earlier in date was an action of suspension and interdict for the purpose of interdicting an appropriation of part of the funds to Mrs Hills, and the other action was a reduction of an alleged award by arbiters in a dispute relating to the appointment of directors, the use of proxies at meetings, and the appropriation complained of in the suspension and interdict. The pursuers were members of the Society.

Rule 37 of the Society provides—"Arbitration.—Should any dispute or disputes arise respecting the construction of either of these rules, any of the clauses, matters, or things herein contained, or any addition, alterations, or amendments hereof, or on any ground whatever which would affect the interest of this Society, between any of the officers or any person or persons claiming on account of any member or members, and which cannot be satisfactorily settled by the board of management, or a majority of members present at a special or general meeting, such dispute or disputes shall be referred to arbitration in manner hereinafter mentioned."

The first annual general meeting of the Society to receive the accounts and fill up vacancies in the board of directors was held on 8th September 1883. A dispute arose at this meeting on the motion of a member relating to the management of the Society, and a motion was carried that the meeting adjourn till 19th September, and that the then directors hold office till that date. The pursuers belonged to the party in the Society who carried that motion. Meantime on the 9th the opposing party held a meeting and elected certain directors. On the 19th the adjourned meeting was held and directors were appointed, and they in February 1883 brought a declarator that they, and not those elected at the meeting convened by the opposite party on the 9th, had been lawfully elected. In this action they obtained the judgment of the Lord Ordinary (M'LAREN) at the same time with his judgment in the actions now reported. Meantime in December 1882 an "appropriation" meeting was called, when a motion was carried which was proposed by the pursuer Hastie, and was to the effect that it was inexpedient to make any appropriation pending the dispute as to who were the properly appointed directors. Another meeting was called for 20th February and another for 9th March, but at both those meetings Hastie renewed and carried this motion. At the last named meeting the secretary, who was of the party opposed to Hastie, produced certain proxies, and the question was raised whether voting might be by proxy, and the meeting adjourned for three weeks (30th March). Pending this adjournment the party opposed to the pursuers held an appropriation meeting on 16th March, and made that which was complained of in the suspension and interdict. On 23d April the party opposed to the pursuers having laid their proceedings before arbiters, before whom the

pursuers' party were not represented, the arbiters issued the award sought to be reduced in the action of reduction. It was to this effect:—  
"First, That the directors have been legally appointed in terms of the rules, and that the present directors form the board of management until the next annual general meeting in September 1883, unless vacancies in the meantime arise, to be supplied in manner provided by the rules. Second, That the appropriations referred to in the second question were legally balloted for and carried out in terms of the rules, and that the persons named are entitled to those appropriations. Third, That this Society having been constituted a corporate body under 'The Building Societies Act 1874,' and there being no exclusion of votes by proxy under the rules or otherwise, such voting is legal as well as equitable. The attention of the arbiters was called to proceedings of a meeting of a section of the Society held on 19th September 1882, and to the manner in which that meeting was called, and they have no hesitation in saying that that meeting was altogether irregular and its proceedings inept."

The pursuers pleaded—"The said pretended award not having been obtained upon a mutual reference of opposing parties, is illegal, and ought to be reduced. (3) There having been no dispute such as is contemplated by rule 37, the said award was *ultra vires* of the arbiters, and incompetently pronounced."

The defenders pleaded—"The present action is excluded and incompetent in respect of the provisions of the Buildings Societies Act 1874, and of the rules of the said Starr-Bowkett Building Society."

The Lord Ordinary (M'LAREN), as already stated, found for the pursuers in the declarator. He pronounced this interlocutor in the reduction:—  
"The Lord Ordinary conjoins with this action the relative action of suspension and interdict at the instance of James Hastie and others against the present defenders and others, and having considered the conjoined actions, finds that the award libelled on was *ultra vires* of the arbiters so far as it finds 'That the directors have been legally appointed in terms of the rules, and that the present directors form the board of management until the next annual general meeting in September 1883, unless vacancies in the meantime arise, to be supplied in manner provided by the rules;' *quoad ultra*, finds that the said award was regular and within the powers of the arbiters; therefore reduces, decerns, and declares in the action of reduction in terms of the conclusions of the summons as regards the first finding of the award, and *quoad ultra* assilizes the defenders from the conclusions of the action, and decerns; and in the suspension and interdict recalls the interim interdict previously granted, refuses the prayer of the note of suspension, finds no expenses due to or by either of the parties, and decerns."

"Opinion.—. . . . It is pleaded that the action is excluded by the provisions of the Building Societies Act 1874, and by the rules of the Society. This was explained at the bar to mean that under the statute and rules of the Society the subject of the action ought to be determined by arbitration. But neither in the statute nor in the rules applicable to arbitration do I find any reference to such questions as the present. Rule 37, providing for the reference of disputes to arbitra-

tion, is set forth in the defenders' sixth statement. It provides for the reference of all questions between any of the officers, and any person or persons claiming on account of any member or members, to arbitration. Giving this rule a liberal interpretation, it will cover disputes between the officers as representing the Society, and a member or members, or his or their executors and assignees. But this is not a question between the Society and its individual members. It is a question as to the internal affairs of the Society. I do not think that questions as to the validity of the election of office-bearers are intended to be referred to arbitration, nor can I regard a reference to arbitration as the most fitting mode of disposing of questions of this kind.

"The action is one of reduction of an award pronounced by Messrs Robert Cranston, Robert Hay, and Alexander Henry, arbitrators appointed under the rules of the Society. By their award, which is dated 23d April 1883, these gentlemen gave their decision on three questions which were submitted to them by a member Mrs Hills, and the solicitor, secretary, and chairman of the board of directors; and the names of the parties represented the questions, and the arbitrators' decision are set forth in the condescendence. The arbitrators found (1) that the directors (that is, the gentlemen chosen by co-optation) were legally appointed; (2) that the appropriations (or advances of money) to Mrs Hills and another member were legally balloted for and carried out; and (3) that proxies are admissible.

"It follows from my judgment on the action of declarator that the decision on the first of these questions was *ultra vires* of the arbitrators, and as I am also of opinion that it was unsound, I consider that the pursuers are entitled to have it reduced. I think there may be a doubt, I do not say a serious doubt, whether Mrs Hills could maintain the appropriation in her favour, seeing it was made at a meeting called by directors not legally appointed. I am not prepared to say that the whole business of the Society is to stand still while a question as to the validity of an appointment of directors is pending. Mrs Hills' question was one between the office-bearers, as representing the Society, and an individual member, and I think that this question was lawfully referred to arbitration, and that the decision of the arbitrators must stand.

"On the third question I agree with the arbitrators, that as this is a Society carried on for profit, the absent members are entitled to vote by proxy. It does not distinctly appear who were the members who desired that the question of their right to use proxies should be referred to arbitration; but it is explained in the process of suspension that this question was in fact raised at one of the meetings called for the purpose of making an appropriation. Now, this is a question of the right of an individual member to give his vote in a particular way, and I think it fell within the jurisdiction of the arbitrators under rule 37. Therefore their decision on this point (which I think is quite sound) will stand. The common law of Scotland, as I conceive, allows members of societies and public bodies to be represented by their mandataries where the membership is in right of the members' property or individual interest. A member who holds an elective position, or is in the position of a trustee, can only

vote in person because he cannot delegate his trust; but I know of no general law which prevents an absent member of a private society from giving effect to his opinions by his vote in the forms required by law for that purpose, namely, by a stamped mandate or proxy.

"I shall reduce to the extent of the first head of the award, and assoilzie the defenders as regards the second and third heads. Expenses in the declarator. No expenses to either party in the reduction."

The pursuers reclaimed, and argued—There was no arbitration within the meaning of rule 37, because there was no dispute; the parties merely wished an opinion. Even if it was to be held that the so-called directors were in dispute with Mrs Hills, it had now been settled by the judgment in the declarator (which was not now challenged) that they were not directors at all. No proper notice was given of the meeting of 16th March, which was therefore illegal.

The defenders replied—By section 34 of the Building Societies Act 1874 the jurisdiction of every Court except the Sheriff Court is excluded—*Dave and Others v. Colinton Friendly Society*, Nov. 10, 1870, 9 Macph. 96; *Hackie v. Wilson*, 2 C.P.D. 410; *Wright v. Monarch Investment Building Society*, 5 Ch. Div. 726.

At advising—

LORD PRESIDENT—It appears that there were two sections amongst the members of this Society who did not agree as to the manner in which the affairs were to be managed, and that the controversy began at the first annual general meeting, which was held on the 8th of September 1882. One of the purposes of that meeting was to receive the accounts, and another was to fill up certain vacancies in the directorate, which occurred, in terms of the rules, at the termination of the first year of the Society's existence. It is stated in the condescendence that four members fell to retire at that date, and their places required to be filled up. The meeting received the balance-sheet of the Society, and approved of it, and after some discussion upon other matters of business, it was resolved to adjourn the meeting till Tuesday the 19th of September 1882, and that the then directors should continue to hold office till their successors had been appointed. Accordingly a meeting was held on the 19th September, at which certain gentlemen were appointed to fill up the vacancies. But in the meantime some of the members of the Society, acting along with the directors who were going out of office, held a meeting on the 9th of September—held without any notice—and there they proceeded to elect directors, notwithstanding that the election of directors had been adjourned till the 19th.

The Lord Ordinary has already held that that intervening meeting was altogether illegal, and it is quite obviously so. On 19th September Messrs Urquhart, Gear, Davidson, Steele, and Robertson were elected directors, and they accepted office. The election of these gentlemen did not pass without challenge, and their right to act as directors was disputed by the opposite party, and in consequence the action of declarator was raised, which the Lord Ordinary has disposed of by a judgment not brought under review by this reclaiming-note. On the 5th December 1882 an "appropriation" meeting of the Society was called,

and a motion was then made by Mr Hastie—“That whereas no appropriation can take place without the concurrence of the board of management, and as it is still an undecided dispute who are the gentlemen who compose that board, it is ill-advised and illegal for any number of gentlemen to ballot the funds of the Society, whose position as directors is not established beyond the possibility of dispute.” That motion was carried at the meeting of 5th December by 47 to 3 votes, and again at a meeting held on the 20th of February 1883—when it was proposed again to proceed with an appropriation—it was carried by a large majority.

The next meeting was held on the 9th March 1883, which was a special general meeting of the Society called for a special purpose, and there Mr Thomas Thomson moved—“That the board of management appoint to take place on Friday, 16th March 1883, the ballot which was stopped on 5th December 1882 and 20th February 1883 illegally.” Mr Hastie again appeared, and moved the motion which he made at the previous meeting as an amendment, which was carried by 108 to 31 votes of the members present. The chairman, Mr Cochrane, who was in the same interest as Mr Thomson, then stated that he held 114 proxy votes, which he proposed to use as votes for the motion; this, however, was objected to, and a long discussion ensued as to voting by proxies. The proxies were not received; but the result of the discussion was that it was unanimously resolved that the meeting adjourn for three weeks in order to discuss the subject of proxy voting, and any other competent business, and that no appropriation take place till then. That adjourned the meeting till the 30th of March, and there stood this unanimous resolution of the special general meeting of 9th March—that no appropriation should take place till the 30th of March.

In the meantime, Mr Munro, the secretary, and the other gentlemen who wanted to bring on an appropriation, held a meeting on 16th of March, and it has been found—and there could be no doubt of the fact—that that meeting was held without the requisite notice, and was an illegal meeting, and of no avail whatever. At that meeting they proceeded to make the appropriations complained of in the suspension and interdict, viz., £200 to Thomas Catto, and £100 to Mrs Mary Hills. On 30th March the adjourned meeting took place, but before that the whole matter was rendered litigious, because on the 24th of March, as soon as parties came to the knowledge of the illegal meeting held on the 16th, they presented a note of suspension, and obtained interdict, so that at that point the question had been raised whether the appropriations made upon the 16th of March was a legal proceeding upon the part of the members of the Society who met on that occasion and proceeded to make the appropriation? After this, and notwithstanding that the matter had been brought into Court, and the resolution-challenged in a process of suspension and interdict, it appears that there was a meeting before the arbitrators.

The Court were not informed how that meeting was brought about—on whose application or in what form—and that is certainly a singular omission on the part of those who found on the award as excluding the suspension and interdict;

but we saw distinctly from the minute of the proceedings that there was no dispute referred to these gentlemen at all, and that there were no opposite parties before them in any sense whatever. The proceedings before them just took the shape of those gentlemen who were supporting the appropriation to Mrs Hills, asking the advice or opinion of the arbitrators as to whether what had been done was or was not illegal. That being so, the question was whether this so-called award was of any value in this case at all? and that question has been raised in the reduction process.

The Lord Ordinary has held that this award of the arbitrators was *ultra vires* in so far as regards one portion of it, that is, in so far as they decided or give their opinion that the directors who were appointed at the illegal meeting of the 9th of September were duly and lawfully appointed, and accordingly to that extent he has reduced the award; and *quoad ultra* found that said award was regular and within the powers of the arbitrators.

Now, observe what the remainder of the award determined; it finds, second, that the appropriations were legal and in terms of the rules, and that the persons named are entitled to the appropriations; and, third, that voting by proxy was regular. As regards that third finding, it was no award at all, because there was no meeting brought before them which raised the question of proxies—the meeting at which these proxies were received having been adjourned and never taken up again. As regards the legality of the appropriations, I do not see how the Lord Ordinary could sustain that consistently with what was found in the declarator, for in that action it was found that the meeting at which the appropriation was resolved upon was illegal. But putting that aside, the reason why I think that this award must be set aside *in toto* is simply on the ground that there was no dispute before the arbitrators at all. There was nothing to let in the action of the arbitrators, for in order to do that it was necessary that there should be a dispute between the Society and office-bearers on the one hand, and one of its members, or a person claiming through one of its members, on the other. But here there was no dispute at all; the parties were all maintaining the same pleas on which they consulted the arbitrators. It is not an award in terms of the rules of the Society, and there was no reference in terms of those rules. The whole proceedings were null and futile, and I am for reducing out and out, as I do not see how any part of the award can stand. There was no arbitration in the sense of the rules of the Society.

It necessarily follows that when we come back to the note of suspension and interdict we must interdict the payment of this money to Mrs Hills, because the meeting at which that payment was ordered to be made was utterly illegal and void—that is, the meeting of the 16th of March—which proceeded to do the very thing which had been adjourned till the 30th of March, and to do that without the notice of the meeting having been sent out or posted in terms of the rules. It is said, however, that the Court has no jurisdiction to entertain this application, and that we cannot grant it. No doubt the ordinary rule is that disputes of this nature are referred to arbitration or decided in the Inferior Court. But that rule

is subject always to the qualification that the parties have proceeded in terms of the rules of the Society. When the parties have violated not only the terms of the statute but also their own rules, there can be no doubt that any party who considers himself injured has a right to come to this Court for a remedy. Then the matter is not one for arbitration, but for the ordinary tribunals, and if there be any question fit to be decided by arbitration, then it will be sent back to be decided in terms of the rules. It will not do for members of the Society to hold illegal meetings—hole-and-corner meetings—without notice, and then to have their proceedings confirmed by an *ex parte* reference to arbitration. I cannot hold that the jurisdiction of this Court is excluded in a matter of that sort by any provisions such as we have in the statute. I am therefore for decerning in terms of the conclusions of the reduction, and granting interdict as craved.

LORD DEAS concurred.

LORD MURE—On the first question raised in these actions, namely, as to the illegality of the proceedings on the 9th of September 1882, I am of the same opinion as the Lord Ordinary. But on the second question I am unable to come to the same conclusion as his Lordship. There was no legal appropriation to Mrs Hills and the other party named at the meeting of 16th March 1883, and I am also of opinion that there was no legal arbitration.

If there had been a legal and regular arbitration arising out of a proper dispute, then this Court would have no jurisdiction, but the question is whether there was any dispute which could be referred to arbitration. With reference to the provision in the 37th rule, I am unable to find evidence of any averment of a dispute, or minute that shows there was a dispute, in the sense of the regulations.

The provisions of the statute 35 and 36 Vict. c. 42, are quite distinct, and sections 34, 35, and 36 are quite clear as to the way in which it is to be gone about, and that there must be evidence of some dispute, but here there is a total blank. We have a letter, sent by Mr Munro, secretary, on the 25th of April, stating what the arbitrators had done; but we have no letter asking the arbitrators to take up this matter, or any letters between members of the Society, or calling a meeting or anything else, to Messrs Cranston and others, the arbitrators. The award states that Mr Munro appeared as secretary of the society, and Mr Robert Menzies, S.S.C., for the society, Mr Murray for Mrs Hills, and Mr Cochrane, chairman of the Society. It is admitted that Mrs Hills and the Society were on the same side. They seemed to have gone there anxious to find out whether they were doing right on certain points as to which they were not in dispute. I agree with your Lordship's opinion on that point.

LORD SHAND—I am of the same opinion. As to the question of jurisdiction, the case of the pursuer, if well founded, is one in which it is evident that an award has been obtained in direct violation of the provisions of the statute. If that is so, it cannot have the protection of the statute, and the clause excluding the jurisdiction

of this Court in certain cases cannot apply. Where members of a society like this proceed to violate the terms of their own rules and of the statute, there must be a legal remedy in such a case, and I think that the proper tribunal to set aside such proceedings is this Court.

Assuming, then, the question of jurisdiction, I am of opinion that this decree-arbitral is of no value whatever, and must be set aside. I adopt the view that there was no proper dispute before the arbitrators; there was no proper reference and no real contraditors before them. It was not a dispute between Mrs Hills on the one hand, and the proper directors of the Society on the other, for both parties were desirous of obtaining from the arbitrators the same opinion. As there was no dispute, so there were no contraditors, and I am therefore of opinion that the arbitration was bad. If the decree-arbitral is set aside, then we have a resolution of the Society that there should be no appropriation, and yet, in the teeth of that resolution, an appropriation made at a subsequent meeting convened without due notice as required by the rules. Together, therefore, we look to the decree-arbitral, or to the appropriation. I am of opinion that each is bad.

The Court pronounced this interlocutor:—

“The Lords having considered the conjoined actions and heard counsel for the parties in the reclaiming note for James Hastie and others against the interlocutor of Lord M'Laren of 19th July last, Recal the said interlocutor, and in the action of reduction, reduce, decern, and declare against the comparing defenders in terms of the conclusions of the summons of reduction; and in the action of suspension and interdict, sustain the reasons of suspension, suspend the proceedings complained of, interdict, prohibit, and discharge in terms of the prayer of the note of suspension, and interdict and decern: Find the comparing defenders in the reduction, and the respondents in the suspension and interdict, liable in expenses in the Outer House: Find the comparing defender, Mrs Hills, liable in expenses in the Inner House, allow an account of the expenses to be lodged, and remit the same to the Auditor to tax and report.

Counsel for Pursuers—Lord Adv. Balfour, Q.C.  
—Brand. Agent—R. Ainslie Brown, S.S.C.

Counsel for Defenders—Rhind—A. J. Young.  
Agent—Robert Menzies, S.S.C.