

is able to see no cause in the circumstances of the present case for a departure from the general rule. The grounds of action are not exclusively for vindication of character, and the pursuers' case otherwise as disclosed in the record does not warrant the Sheriff-Substitute in allowing the defender to be involved in an expensive litigation without having security for the expenses of process."

On appeal the Sheriff (GLOAG) adhered.

When the period for finding caution had expired, the Sheriff-Substitute, in respect the pursuer had failed to find caution, dismissed the action, to which interlocutor the Sheriff adhered.

The pursuer appealed to the Court of Session, and argued that although divested of his estate, he was entitled to vindicate his character without finding caution although he was an undischarged bankrupt—*Bell v. Anderson*, February 25, 1862, 24 D. 603.

The respondent admitted that a defender in similar circumstances would not be bound to find caution—*Buchanan v. Stevenson*, Dec. 7, 1880, 8 R. 220, but argued that pursuer was bound to find caution for expenses—*Home v. Sanderson & Muirhead*, January 9, 1872, 10 Macph. 295. Even if the appellant got damages they would fall into his bankrupt estate—*Jackson v. M'Kechine*, Nov. 13, 1875, 3 R. 130.

At advising—

LORD PRESIDENT—Since this case was in the roll I have looked over the authorities bearing on the question, and I am satisfied that the general rule is well established, that where the pursuer of an action is an undischarged bankrupt he cannot sue an action, when the trustee has refused to take it up, without finding caution.

I was under the impression that there was one exception to this rule, namely, that if the action was one for vindication of character the pursuer was entitled to bring it without fulfilling the condition of finding caution for expenses. But I am satisfied that the exception has not been established. It is within the discretion of the Court to say whether in the circumstances of a particular case the pursuer may be allowed to go on without finding caution for expenses. That, however, is a discretion which is to be used very carefully, and it is only in very exceptional cases that the Court will dispense with the finding of caution.

Having considered the whole circumstances of the case, I am of opinion that it is not one in which the Court should use that discretion in favour of the pursuer.

The Court refused the appeal.

For the Appellant—Party.

Counsel for Respondent—R. V. Campbell.
Agent—A. Wylie, W.S.

Tuesday, January 15.

FIRST DIVISION.

[Lord Kinnear, Ordinary.]

FIRST EDINBURGH AND LEITH 415TH STARR-BOWKETT BUILDING SOCIETY v. MUNRO AND OTHERS.

(See *ante*, p. 6.)

Master and Servant—Servant's Remedy for Illegal Dismissal—Building Societies Act 1874 (37 and 38 Vict. c. 42)—Dismissal of Officer—Jurisdiction.

The secretary of a building society, registered under the Building Societies Act 1874, was dismissed from his office by a resolution of the society, which was notified to him. On the grounds that all disputes between him and the society should have been submitted to arbitration, and that he had been illegally dismissed, he refused to accept his dismissal, and continued to act as secretary. In an action of suspension and interdict at the instance of the society to have him interdicted from interfering with the management of, or collecting contributions on behalf of, the society—*held* that, assuming that the Court had no jurisdiction to decide the disputes between the respondent and the society, and that he had been illegally dismissed, the complainers were entitled to the interdict craved, since having been *de facto* dismissed, his remedy, if any, was by action of damages.

The facts out of which the present proceedings arose are fully detailed in *Munro v. First Edinburgh and Leith 415th Starr-Bowkett Building Society*, *ante*, p. 6. The First Edinburgh and Leith 415th Starr-Bowkett Building Society presented the present note of suspension and interdict against Munro and others, craving the Court (1) to interdict and prohibit the said Alexander Munro from interfering in any way with the management of or the affairs of the First Edinburgh and Leith 415th Starr-Bowkett Building Society, and from collecting or receiving payment of the weekly contributions or subscriptions of the members of the Society, or otherwise intruding with the funds thereof, or in any way acting as secretary of the Society. The complainers further (2) craved interdict against Munro proceeding to submit to arbitration any dispute or difference alleged to exist between him and the Society with reference to his dismissal; and (3) interdict against certain persons said to have been nominated as arbiters to decide a dispute between Munro and the Society, proceeding to act as such.

The complainers averred that at the first annual general meeting of the Society held upon 8th September 1882 a vote of no confidence in the respondent had been passed, and that at a meeting duly convened in terms of the laws of the Society upon 16th February 1883, subsequently adjourned till 27th April following, the respondent was removed from office, that intimation to that effect was duly given to him, and that he was requested forthwith to hand over all the books, papers, securities, and documents belonging to the Society then in his possession; that an action was

raised in the Sheriff Court to enforce compliance with the resolution passed by the Society upon the 27th April 1883, and that judgment was obtained, finding, *inter alia*, that the resolution to dismiss the respondent was competently and legally passed and was binding upon him.

The complainers also averred that the resolution to dismiss Munro was confirmed at a special general meeting held on 20th July 1883, called in terms of the Society's regulations on a requisition signed by twenty of its members.

They also alleged that Munro's estate had been sequestered upon 21st July 1883, and that as his shares in the said Society had been thereby transferred to his trustee under the rules of the Society he thereby became incapacitated, under the rules, from holding the office of secretary; further, that in spite of his dismissal from office Munro still persisted in acting as secretary and in interfering in the management of the Society's general affairs; that he received payments from members of their weekly contributions, and failed to account to the board of management therefor, and that he was proceeding with a pretended submission to arbiters of the dispute with the Society.

The respondent averred that he had never been legally dismissed from the Society, and that he was still its secretary; that it was incompetent at the meeting at which these matters were disposed of to deal with it at all, as it was an annual general meeting, and not a special meeting as required by the Society's laws.

The respondent also alleged that the mode of voting adopted at the meeting gave no opportunity for scrutinising the votes or for determining their validity.

The complainers pleaded—“(1) The respondent Alexander Munro having been legally dismissed from office as secretary of the said Society, suspension and interdict ought to be granted against him interfering in the management of the Society's affairs, as prayed for. (2) The said Alexander Munro having been legally dismissed from his office foresaid, there is no subject for reference to arbitration, and it is *ultra vires* of the respondents Robert Cranston, Robert M'Dougald, and Alexander Henry to entertain and decide any alleged question as to said dismissal submitted to them *ex parte* by the said Alexander Munro, and suspension and interdict ought to be granted as craved.”

The respondent pleaded—“(1) The action is incompetent by the provisions of the Building Societies Act 1874, and by the rules of the Society. (2) The respondent Alexander Munro has not been legally dismissed from the office of secretary, because of, *inter alia*, the following reasons:—(1) The meeting being annual instead of special, was incompetent to entertain the question; (2) the person who gave notice of the business was disqualified to do so; (3) the majority necessary to carry the motion was wanting.”

Upon 15th December 1883 the Lord Ordinary pronounced the following interlocutor:—“Interdicts, prohibits, and discharges the respondent Alexander Munro from interfering in any manner of way with the management of or the affairs of The First Edinburgh and Leith 415th Starr-Bowkett Building Society, and also from collecting or receiving payment of the weekly contributions or subscriptions of the members of the Society, or otherwise intruding with the funds thereof, or

in any way acting as secretary of the Society, and to that effect declares the interim interdict perpetual: *Quoad ultra* refuses the interdict and decerns.

“*Opinion*.—The jurisdiction of the Court to entertain this action is not, in my opinion, excluded either by the 37th rule of the Society or by the Act of Parliament.

The complainers are a Building Society who allege that they have dismissed the respondent from the office of their secretary, and that, notwithstanding his dismissal, he persists in acting as the secretary of the Society, and interfering in that character with the management of their affairs, to their great detriment.

“The secretary is a salaried officer of the Society, and by the 8th rule it is provided that he shall hold office ‘during the pleasure of the members.’ As to the fact of the dismissal there can be no question, because it is the Society itself which sues; and this action at their instance would operate as a dismissal (whether rightful or wrongful) if no other step had been taken for that purpose. The only respondent who has put in answers is the dismissed secretary, who admits that he insists upon still acting as secretary against the will of the complainers. That appears to me enough for the decision of this case, because under a contract of employment for continuous services, if the servant be dismissed wrongfully, his remedy is to sue for the breach of the contract if he has suffered damage, but he cannot continue the employment against the will of the employer.

“It is said that since by rule 13 the respondent is appointed by name to be the managing secretary of the Society, he cannot be removed from office except by following the procedure prescribed by rule 40 for the alteration of the rules. I think this contention untenable. It is true that the respondent is nominated by rule 13; but the term of his employment is not regulated by that rule but by rule 8th, which provides that he shall retain office ‘during the pleasure of the members,’ and no longer. His dismissal, therefore, involves no alteration of the Society's rules, but a mere application of rule 8. But then it was maintained that the terms just quoted are qualified by the concluding words of the sentence, ‘unless they wish to resign or be removed as per rule 41.’ Rule 41 has no bearing upon the matter; but the respondent's counsel says, very plausibly, that 41 must be a mere misprint for 40, and that the meaning is that the officers mentioned in rule 8 shall retain office during the pleasure of the members or be removed by the procedure prescribed in rule 40, so that the mode in which the members, if they desire to remove an officer, are to express their pleasure to that effect is by a majority of nine-tenths at a meeting specially called. Now, if this were a question between a majority and a minority of the members, one section maintaining that they had retained the respondent in office, and the other that they had dismissed him, it would be necessary to determine whether that is a sound construction, and if so, whether the procedure prescribed by rule 40 has not in fact been followed. It would be necessary also to consider whether these are proper questions for the Court or for the arbitrators under rule 37. But I do not think that any of these points require to be considered in the present question between the Society on the one hand and the secretary

alone upon the other. Whether the dismissal of the respondent has been right or wrong, or whether the mode of his dismissal was in accordance with the rules or otherwise I cannot but hold, as between him and the Society, that he has been dismissed, and therefore that he cannot be permitted to continue in the performance of the employment from which he has been discharged. Nothing could be more embarrassing or more detrimental to the interests of the Society, than that a person whom they decline to recognise as their secretary should be allowed to levy the contributions of the members, or to interfere in any other way in the management of their business.

"I shall therefore give interdict in terms of the first conclusions of the note; but the remaining conclusions are too wide. I am not in a position to say that, apart from the question I have decided, there cannot be any dispute or difference with reference to the dismissal which could be submitted to arbitration. If any such dispute should be raised, it will be for the arbitrators—at all events in the first instance—to say whether it ought to be entertained."

The respondent Munro reclaimed, and argued—By the laws of the Society, Munro was wrongfully dismissed. It required a vote of nine-tenths of the membership effectually to remove him from office, and this vote was not obtained. The matter in dispute should not have been brought before the Court of Session, as the Sheriff Court had final jurisdiction in all cases arising under the Building Societies Act of 1874. But if it was held that this Court had jurisdiction, some proof on the matter at issue should have been allowed by the Lord Ordinary. In any view, the terms of the interdict craved were too wide.

Authorities—Building Societies Act 1874; *Davie and Others v. Colinton Friendly Society*, November 10, 1870, 9 Macph. 96; *Leitch v. Scottish Legal Burial Society*, October 21, 1870, 9 Macph. 40; *Johnston*, 24 D. 973; *M'Kernan v. Greenock Masons Association*, March 19, 1873, 11 Macph. 548.

Counsel for the suspenders were not called upon.

At advising—

LORD PRESIDENT—I think that the view which the Lord Ordinary has taken of this case is the right one, and I am for adhering to the interlocutor reclaimed against. There are two facts in this case which are, I think, beyond dispute; the first of these is, that Munro was *de facto* dismissed by the Society in virtue of the resolution passed at the meeting of 27th April 1883; and the second fact is, that in spite of this dismissal he continued to act as secretary of the Society in the way of receiving contributions from the various members. Now, taking these two facts together, I do not see how we can refuse to give this Society the remedy of the interdict which it here seeks. Munro, no doubt alleges that he was dismissed illegally, and he further adds that by the laws of the Society this Court has no jurisdiction to decide any dispute arising between him and the Society. I assume that this Court has not jurisdiction to decide whether or not Munro was regularly dismissed, and that as alleged by Munro the arbitrators nominated and

appointed by the laws of the Society are the only parties entitled to decide this question. Had the matter been decided by the arbitrators, and after their decision was obtained had the dispute then been brought here, a question of jurisdiction might have arisen. But Munro has been a party to the proceedings in this Court, and he has not established any irregularity in the proceedings attending his dismissal. The only facts therefore before us are his dismissal, and his continuing to act as secretary by receiving contributions from the members. In these circumstances I am not disposed to refuse to this Society the remedy of interdict which it seeks.

LORD DEAS—I am of the same opinion, and in arriving at this conclusion I have proceeded upon the same assumptions as your Lordship. That will not, however, entitle us to refuse to this Society its remedy, but in granting this interdict craved, I am for reserving to the respondent in the fullest way all questions which may arise relating to claims of damages and arrears of salary against the Society.

LORD SHAND—I agree in the opinion expressed by your Lordships. As Munro has been dismissed by the Society, it is clear that he cannot be permitted to retain his office as secretary to the effect of interfering with the work of the Society.

An employer of labour is entitled to dismiss his servant if he is so disposed, while the servant on his part has a money claim for wages, and for damages if he can make out a case of wrongous dismissal, but he cannot claim to remain in the office from which he has been dismissed, or to continue to do the work of that office. Upon that ground alone I am for adhering to the Lord Ordinary's interlocutor, all the more as I think it unnecessary in the present case to consider the question of jurisdiction.

LORD MURE was absent on Circuit.

The Court adhered.

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

Counsel for Respondent—Campbell Smith. Agent—Donald Macpherson, L.A.

Tuesday, January 15.

FIRST DIVISION.

MOLLESON (LIQUIDATOR OF THE EDINBURGH AND GLASGOW HERITABLE COMPANY, LIMITED) *v.* LECK AND OTHERS.

Public Company—Voluntary Liquidation—Payment of Dividend—Secured and Unsecured Creditors—Principles of Ranking—Companies Act 1862—Supreme Court of Jurisdiction Act 1875 (38 and 39 Vict. cap. 76).

Held that in the winding-up of a public company under the Companies Acts, the creditors fell to be ranked according to the rules of the common law, and not the rules of the Bankruptcy Acts, and therefore that secured credi-