

the case, and the only case, averred by the pursuers, and I have already said that it has in my opinion no support from the evidence.

When the defender agreed to relieve Mr Jameson of the purchase which he had made, I think he was quite free to contract or not with the railway company, nor do I see any ground for holding that he was under a legal obligation or moral duty to transfer the whole to the company failing agreement for a part. It is, however, a satisfactory manifestation of his perfect integrity in the whole matter that in the course of his evidence he offered to surrender the whole purchase to the company at the price he paid for it, and that the offer was repeated by his counsel at the bar, and very emphatically rejected by the pursuers.

LORD CRAIGHILL — I entirely agree in the opinion which has been delivered by Lord Young. He was good enough to give me an opportunity of reading it, and I agree not only in the conclusion to which he has come, but in all the reasons he has given for that conclusion.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD JUSTICE-CLERK—I entirely agree in the opinion of Lord Young.

The Court recalled the Lord Ordinary's interlocutor, and assolizied the defenders from the conclusions of the action.

Counsel for Pursuers (Respondents)—J. P. B. Robertson — Jameson — Ferguson. Agents — Gordon, Pringle, Dallas, & Co., W.S.

Counsel for Defender (Reclaimer)—Mackintosh — Orr. Agent—John K. Lindsay, S.S.C.

Wednesday, February 6.

SECOND DIVISION.

[Lord Lee, Ordinary.]

DUNDEE PROVIDENT PROPERTY INVESTMENT COMPANY v. MACDONALD.

Jurisdiction — Statutory Exclusion — Building Societies Act 1874 (37 and 38 Vict. c. 42), secs. 16, 34, and 36—Prorogation—Clause of Reference to Arbitration.

The rules of a building society, incorporated under the Building Societies Act 1874, provided that all matters in dispute between the company and any member of it should be referred to the Registrar of Building Societies. A member of the society having fallen into arrear in repayment by instalments of an advance made by the society, the society, in terms of a rule providing for such a case, raised an action for the member's removal from the property disposed to the society in security of the loan. The defender stated no plea to the effect that the jurisdiction of the Court was excluded, and on the merits the Lord Ordinary decerned for removal. The defender reclaimed, and argued that the jurisdiction

of the Court was excluded. Held that, having taken a judgment on the merits without objection to the jurisdiction, the defender could not thereafter be allowed to maintain that the jurisdiction was excluded.

The Dundee Provident Property Investment Company, carrying on business in Dundee, was originally formed under the provisions of 6 and 7 Will. IV. cap. 32, and afterwards incorporated under the Building Societies Act 1874. Isabella Macdonald, the defender, was a member and shareholder thereof.

One of the main objects of the company was making advances of money to members or shareholders on the security of property belonging to them, these advances being made for such periods as the directors of the company might sanction, and repayable, principal and interest, by instalments, all according to the rules and tables of the company, which were binding on every member and shareholder. Rule 31 provided as follows—"When any shareholder who has obtained an advance upon property allows his repayment instalments and interest, or any disbursements made on his account, to fall into arrear to an extent equal to three months' instalments, it shall be in the power of the directors to remove him from the possession or occupancy of the property, to enter into possession thereof themselves, to let the same, and to draw the rents thereof, and that by a letter under the hand of the manager addressed to such shareholder, whether a female, or minor, or insane, or subject to any incapacity whatever, intimating the same, without any other warning or legal process whatever." . . . Rule 38 provided—"All matters in dispute between the company and any member thereof shall be referred to the Registrar of Building Societies in Scotland as sole arbiter."

The defender in 1874 applied for and received, in terms of the rules, an advance of £1100, repayable, principal and interest, by fortnightly instalments, on the twenty years' scale, in consideration of which she granted an *ex facie* absolute disposition in favour of the company in August 1875, a bond and back-bond being also entered into between the parties of same date. The subjects conveyed consisted of a piece of ground at Hilltown, Dundee, and certain dwelling-houses thereon, let chiefly to weekly tenants. The defender occupied one of the dwelling-houses, and collected the rents of the remainder.

The present action was brought in the Court of Session in February 1883 for declarator that the defender had failed to perform the obligations undertaken by her in her agreement with the company relative to the repayment of the advance of £1100, by having allowed the instalments to fall into arrear to the extent of three months' instalments, and that the pursuers were entitled to enter into possession of the subjects conveyed to them by the defender, and that the defender was bound to cede possession thereof. There was also a conclusion for interdict against the defender occupying or possessing the subjects or exercising any right therein or molesting the pursuers in their possession.

The defender stated no objection to the jurisdiction of the Court.

The Lord Ordinary (LEE) after a proof found, declared, and decerned in terms of the declaratory conclusions of the summons, and decerned

against the defender in terms of the conclusions of the summons.

The defender reclaimed.

The case was argued in the Inner House on the assumption that the defender had stated a plea disclaiming the jurisdiction of the Court, and the debate was confined to that question; the defender did not offer any argument on the merits.

Argued for defender—This being a dispute between the society and one of its members, the jurisdiction of the Court was excluded by the rules of the society (rule 38), under section 16, sub-section 9, of the Building Societies Act 1874 taken along with sections 34, 35, and 36. It was the duty of the Court, where there was a statutory exclusion of its jurisdiction, to refuse to entertain the case even where no objection was made—*Shotts Iron Company v. Kerr*, December 6, 1871, 10 Macph. 195; *Morton v. Gardner*, February 24, 1871, 9 Macph. 548—and the jurisdiction in such case could not be prorogated; it was not in the power of the parties to do so in face of a statutory exclusion of this kind—*Munro v. Starr-Bowkett Building Society*, October 17, 1883, ante, p. 6. It was *pars judicis* to note the exclusion and at once dismiss the case. If the jurisdiction did not exist, it could not be created by a failure to plead it in the first instance, or by any consent of parties—*Ersk. i. 2, 29*; *Hamilton v. Murray*, December 7, 1830, 9 S. 143. Whenever the exclusion came to the Court's knowledge there was an end of the case—*Forrest v. Harvey*, 4 Bell's App., per Lord Brougham, p. 206. This was also the practice in England in cases of the same kind—*Wright v. Monarch Investment Building Society*, L.R., 5 Chan. Div. 726; *Thompson v. Planet Benefit Building Society*, L.R., 15 Eq. Cas. 333; *Huckle v. Wilson*, L.R., 2 Com. Pleas Div. 410. The case of *Mulkern* relied on by the pursuers was not under the Act of 1874, but under 6 and 7 Will. IV. c. 32; had it been under the Act of 1874 the decision must have been different. The clause in the Act of 10 Geo. IV. c. 35, sec. 27, incorporated in 6 and 7 Will. IV., was not meant to apply to a dispute about a mortgage, for the form in the schedule was inconsistent with a mortgage. The clause of the present Act (1874) applied to all disputes, and gives no form. The House of Lords in *Mulkern's* case proceeded on a peculiarity in the statute of Geo. IV., which limited the arbitrators to a decerniture for money only, and not for removal, and was thus in marked contrast to the corresponding clause in the Act of 1874, which contained no such limitation.

Replied for pursuers—This was not a dispute within the contemplation of the rules of the society, and therefore the jurisdiction of the Court was not excluded. Assuming the case was a dispute within the rules, the only effect of that view would be to require the Court to make a remit to the registrar to pronounce on the facts, and the case would require to come back to the Court for decision. This was a dispute between the society and a member, not as a member, but as a mortgagee, and therefore in the same position to the society as any member of the public, being a mortgagee of the society, would be. Where the society and its member came into the ordinary position of debtor and creditor the ordinary rules of law applied. It had been decided by the

House of Lords that the jurisdiction of a court of law was not excluded in such a case—*Mulkern v. Lord*, L.R., 4 App. Cas. 182—and there were other cases—*Morrison v. Glover*, 19 L.J., Ex. 20, and 15 Ad. & Ell. 103; *Fleming v. Self*, 24 L.J., Chan. 29; *The Queen v. Trafford*, 24 L.J., Mags. Cas. 20; *Farmer v. Giles*, 30 L.J., Ex. 65. In any case, it was too late for the defender now to take the plea of no jurisdiction, since by appearing and taking judgment in the Outer House he had prorogated the jurisdiction of the Court, and could not now decline it—*Ersk. i. 2, 27*.

At advising—

LORD JUSTICE-CLERK—We have had a very able argument on this question, namely, whether, in the first place, the Court has jurisdiction to entertain the case at all, and, in the second place, whether, if jurisdiction did not exist in the first instance, it could be prorogated by the parties. I have no doubt that it can be prorogated. In that view no proper question of jurisdiction arises. This is a provision embodied in an Act of Parliament, by which the jurisdiction of the Court may be absolutely excluded. But if it is not so excluded—and I do not think it is excluded here—and the parties go on to plead in this Court—they must be held to have consented to its jurisdiction. I do not think it is necessary to go on to the other point, but if we had to go on to decide that point, I am of opinion, on the grounds so clearly and forcibly stated in the authorities which governed under the earlier statutes, that this is not a dispute of the class from which it is contemplated that the jurisdiction of this Court should be excluded. I do not think that in the recent Act there is any extension of the powers of societies to make rules or any extension of the jurisdiction of the arbitrators.

LORD YOUNG—I agree with your Lordship that when the parties to a dispute have agreed to refer it to arbitration, the jurisdiction of the Court is excluded—that is to say, if the parties follow out their intention. In this respect there is nothing peculiar in the case of a friendly society. Where they—that is, the members—agree to refer all their disputes to arbitration, the jurisdiction of this Court would be excluded, and either of the parties to the dispute may enforce this contract upon the other—that they shall go to arbitration. Mr. Rhind, according to the view of the case he has presented us, supposes that friendly societies are under a statutory necessity of referring all disputes to arbitration. They are nothing of the kind. Section 34 of the Building Societies Act of 1874 provides—“Where the rules of a society under this Act direct disputes to be referred to arbitration, arbitrators shall be named and elected in the manner such rules provide, . . . and 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 then it provides how the arbiters shall proceed. That is merely for shortening the clause of reference, which the society may have or not in its rules as it pleases. That is a gain to convenience. Then, to apply the clause to the case in hand—“Where the parties to any dispute arising in a society under this Act agree to refer the dispute to the registrar, or where the rules of the society direct

disputes to be referred to the registrar, the award of the registrar shall have the same effect as that of arbitrators." Then 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 removable into any court of law, or restrained or restrainable by the injunction of any court of equity." And then, again, the arbiters or registrar are empowered, if so requested, to state a Case for the opinion of the Supreme Court. But all that is conditioned on the perfectly voluntary arrangement of the parties themselves to submit the dispute to the arbiter or registrar. The adoption of rule 39 of the society's rules, which provides that any dispute between the company and its members shall be referred to the registrar, was quite a voluntary arrangement among the members. There might have been no reference to an arbiter at all. That is as much within the power of the parties as any other clause in a contract. Now, if the parties with such a clause in their contract come into Court without pleading that clause, then the Court into which they come is a Court of competent jurisdiction, and if no objection to the jurisdiction is stated, then it is a plain case for prorogation—indeed, it would be a model case for an illustration of prorogation. But the case here is not proper prorogation; it is omitting to state an objection. The case is not a whit less one of private contract because the parties are members of a friendly society. They may make what rules they please, and it is reasonable for them to agree, and say, "Now, there is a difficulty on the authorities on the point here in dispute, and we will not plead the arbitration clause in our rules, but take the judgment of the Court of Session." I think the case is not stateable on the question itself (though it is not necessary to decide it), whether, if they had not waived the arbitration clause, our jurisdiction would have been excluded. I am not for allowing the defender to state such a plea now; I think we should decide the case as it came originally before the Court.

LORD CRAIGHILL—I am entirely of the same opinion.

LORD RUTHERFURD CLARK—I am also of the same opinion. No plea having been stated on record objecting to the jurisdiction of the Court, and no argument having been advanced against the Lord Ordinary's interlocutor on the merits, I think we must affirm that interlocutor, for I see no reason why the defender, who has submitted to the judgment of the Court, should now be permitted to add a plea declining its jurisdiction.

The Court adhered.

Counsel for Pursuers (Respondents)—Kennedy.
Agent—John Macpherson, W.S.

Counsel for Defender (Reclaimer)—Campbell Smith—Rhind. Agents—Sutherland & Clapperton, W.S.

Wednesday, February 6.

SECOND DIVISION.

[Sheriff of the Lothians.

CAMPBELL'S TRUSTEES v. HENDERSON.

Property—Support—Right of Natural Support from Ground belonging to Adjacent Proprietors—Operations in suo.

Lands belonging to A were divided from those of B by a wall built on the verge of A's land. The ground, which was of a sandy nature, sloped down towards B's land, and there was a bank of sand behind the wall on A's side of it. The wall was old and defective in structure. B excavated some sand for building purposes from his ground several feet from the foot of the wall, the result of which was that part of the wall fell. The manner in which B's operations were conducted was not proved to be of such a nature as would have impaired the wall if it had been of a substantial character. *Held* that the wall having fallen from a legitimate operation of B *in suo*, he was not liable in damages caused by its fall.

The parties to this action were owners of adjacent lands, the lands of Murrayfield which belonged to the pursuers, Campbell's trustees, being to the north of the lands of Coltbridge which belonged to the defender Henderson, and being separated from the latter by a wall of stone and lime. For a distance of several hundred yards the pursuers' lands were on a higher level than those of the defender. The wall was the property of the pursuers, and was placed against a perpendicular bank of sandy soil on their ground of an average height of about 5 feet. The wall itself was 8 feet high, and to the extent of 5 feet was a retaining-wall of the bank on the pursuers' side, against which it stood, the ground on the defender's side of it sloping away from it at a steep gradient. Between August 1881 and September 1882 the defender proceeded to excavate sand on his side 5 or 6 feet from the wall, and as the wall shortly after the operations were conducted gave way the pursuers raised this action of damages on the ground that the defender had, in making the excavation, acted negligently, recklessly, and without exercising due and reasonable care and caution. They averred that it was his duty in making the excavation to have taken all due and proper precautions for the safety of their wall, and to have taken care that their wall was not deprived of its adjacent support, and of the requisite adjacent support on the south side of it. The defender replied that he was quite entitled to excavate on his own ground in the manner and to the extent he had done. He explained further that the wall was old and insecurely built, and that the pressure of the large quantity of soil behind it was quite sufficient, especially after heavy floods, to push the wall outwards.

The pursuers pleaded—"The pursuers having suffered loss, injury, and damage by and through the fault of the defender, or those for whom he is responsible, are entitled to reparation as concluded for, with expenses."

The defender pleaded—"(1) The pursuers'