

Saturday, January 13

## FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

SYMINGTON'S EXECUTORS *v.* GALASHIELS CO-OPERATIVE STORE COMPANY, LIMITED.

*Provident Society—Jurisdiction—Dispute between Member and Society—Dispute whether Person Entitled to Rights of Member—Industrial and Provident Societies Act 1876 (39 and 40 Vict. c. 45), sec. 11, sub-secs. 6 and 7—Provident Nominations Act 1883 (46 and 47 Vict. c. 47), sec. 3.*

By sub-section 6 of section 11 of the Industrial and Provident Societies Act 1876, as amended by section 3 of the Provident Nominations Act 1883, it is provided that if any member of a society, entitled to an interest in the society not exceeding £100, dies intestate, and without having nominated his successor as authorised by that Act, such interest shall be payable without letters of administration among the persons who appear to a majority of the committee, upon such evidence as they may deem satisfactory, to be entitled to receive it. By sub-section 7 it is provided that any such payment shall be valid against any demand made upon the committee or society by any other person.

Section 14 provides that every dispute between a member or person claiming through a member and the society shall be decided in manner directed by the rules of the society.

The rules of a society registered under the above Act provided that in the event of any dispute between a member or person claiming through a member and the society, it should be referred to a committee, from whom an appeal might be made to a general meeting of the society.

A member of this society having died without disposing of her interest therein, her executor-dative sued the society for the alleged amount of that interest. The defenders answered that the committee of the society had paid the sum sued for to one of the deceased member's sons in accordance with directions received from a majority of the next-of-kin, and that such payment was protected from challenge by sub-section 7 of section 11 of the Act of 1876. They further pleaded that the dispute fell to be referred in terms of the society's rules.

*Held* (1) that the dispute was one for the Court to decide, in respect that the question raised was whether the pursuer had a right to claim as the representative of the deceased member; and (2) that as a majority of the next-of-kin had no right to dispose of the rights of the others, the defenders had

not paid the deceased member's interest to a person "entitled by law" to receive it, and decree *granted*.

*Opinion* by Lord Adam, that even assuming that the dispute was to be taken as a question between the society and a member, it fell to be determined by the Court and not by the society, as its solution depended on the construction of the Act of Parliament.

Mrs Symington died intestate at Galashiels on June 24, 1892. She was predeceased by her husband, and survived by several children. On 13th May 1893 Robert Symington, a son, obtained confirmation as her executor. Part of the deceased's estate consisted of a sum standing at her credit in the books of the Galashiels Co-operative Store Company, Limited.

This was an action by Robert Symington, as his mother's executor, against the said society for payment of £53, 13s., as the amount due to her by the society.

The defenders admitted that the Society was due the deceased the sum of £49 at the date of her death, but stated—"After Mrs Symington's funeral a meeting of her family was held, at which the pursuer was present. The whole of the other children of the deceased were also present, with the exception of two, one of whom was in New Zealand. . . . At said meeting it was proposed and agreed to by all the members of the family present that the whole sum standing at the credit of and belonging to the deceased in the books of the said Store, should be paid to her youngest son George, for his own exclusive use and behoof, he having contributed more largely than the others to the support of his mother. This arrangement was expressly sanctioned by the pursuer. Thereafter the eldest son of the deceased and the said George Symington came to the Store and explained to the secretary that an agreement had been made amongst the next-of-kin of the deceased whereby the said George Symington was to receive the money standing at his mother's credit in the books of the Store, and requested that it might be paid to him accordingly. The application was submitted to the committee, and as they were satisfied, from the statements made to them, that the said George Symington was entitled to receive the money, they sanctioned payment thereof to him. The money was accordingly paid to him upon 28th June 1892, and his receipt therefor is herewith produced." "The foresaid agreement was communicated to the two absent children, and was approved of by them. The whole of the next-of-kin of the deceased with the exception of the pursuer have now no desire to disturb the family arrangement above narrated."

The pursuer, while denying that any such arrangement had been made as the defender averred, also pleaded that the defence was irrelevant.

The defenders pleaded—(1) No jurisdiction. (5) The sum at the credit of the deceased in the books of the said Store having been properly paid by the defenders to the person who appeared to them to be

entitled to receive it, and who was in point of fact so entitled, the defenders should be assoilzied."

By section 11 of the Industrial and Provident Societies Act 1876, it is provided registered societies shall be entitled to the following privileges:—“(6) If any member of a society entitled to an interest in the society not exceeding £50 dies intestate, and without having made any nomination under this Act, which remains unrevoked at his death, such interest shall be transferable or payable without letters of administration to or among the persons who appear to a majority of the committee, upon such evidence as they may deem satisfactory, to be entitled by law to receive the same; (7) it is provided—Whenever the committee, after the decease of any member, make any payment or transfer to any person who at the time appears to them to be entitled under this section, the payment or transfer shall be valid and effectual against any demand made upon the committee or the society by any other person.”

By section 3 of the Provident Nominations and Small Intestacies Act 1883, it is, *inter alia*, provided that “Sub-section 6 of section 11 of the Industrial and Provident Societies 1876 shall be read as if in the said section of the said Act the words £100 were substituted for the words £50.” By section 9 of the said Act it is further provided—“All payments made by directors under the powers aforesaid shall be valid with respect to any demand of any other person as next-of-kin of a deceased member or as his lawful representative, or person claiming to be such representative, against the society or savings bank or the directors, but such next-of-kin, representatives, or claimant shall have remedy for recovery of such money so paid as aforesaid against the person or persons who shall have received the same.”

By section 14 of the statute first above quoted it is provided—“With respect to disputes concerning registered societies the following provisions shall have effect:—(1) to be decided by rules of society—Every dispute between a member or person claiming through a member, or under the rules of a registered society, and the society or an officer thereof, shall be decided in manner directed by the rules of the society if they contain any such direction, and the decision so made shall be binding and conclusive on all parties without appeal, and shall not be removable into any court of law or restrainable by injunction, and application for the enforcement thereof may be made to the county court.”

By rule 28 of the rules and regulations of the defenders' Society, which were registered according to the provisions of the first mentioned statute, it was provided that “In the event of any dispute between a member or person claiming through a member and the Society, or an officer thereof, it shall be referred to a committee, from whom an appeal may be taken to a general meeting of the company. In the event of the dispute not being settled by

the meeting recourse shall be had to arbitration as follows:—Three neutral individuals shall be chosen by each party, whose names shall be written on pieces of paper and placed in a box or glass, and the three first drawn out by the complaining party or by some one appointed by him shall be the arbitrators to decide the matter in difference.”

On 10th November 1893 the Lord Ordinary (KYLACHY) pronounced this interlocutor—“Finds that the question at issue between the parties involves a dispute between the Society and a person claiming through a member in the sense of the Society's rules, and that in terms thereof the said dispute falls to be determined in manner provided by the said rules: Therefore sists process *in hoc statu* to enable the pursuer to take steps, if so advised, for the purpose of having the said dispute determined in terms of the rules, reserving to either party to move, on such determination being obtained, to have such decree pronounced as may be necessary for enforcing the same, and reserving also in the meantime all questions of expenses: Grants leave to reclaim.”

“*Opinion.*—The pursuer in this case is the executor-dative of the late Mrs Symington. The defenders are a provident society registered under the Industrial and Provident Societies Act of 1876. The object of the action is to recover a sum of £52, 10s. said to be standing at the credit of the deceased in the books of the Society, she having been a member of the Society at her death. The defence is that to the extent of £3, 10s., there was a counter debit of the deceased in the books, and that as regards the balance of £49, it was paid away to certain relatives of the deceased in conformity with certain powers vested in the committee of the Society by the Industrial and Provident Societies Statutes. In short, the defence is that the Society has been well discharged of all sums due to the deceased, so that the pursuer as her representative has no claim upon the Society's funds.”

“Such is on the merits the dispute between the parties, but what I have at present to decide is, whether that dispute falls to be determined in this Court, or falls to be referred to what is called arbitration, in terms of a rule of the Society duly made under the Act, and which rule is in the following terms:—“In the event of any dispute between a member or person claiming through a member and the Society, or an officer thereof, it shall be referred to a committee from whom an appeal may be taken to a general meeting of the company. In the event of any dispute not being settled by the meeting, recourse shall be had to arbitration as follows—“Three neutral individuals shall be chosen by each party, whose names shall be written on pieces of paper and placed in a box or glass, and the three first drawn out by the complaining party, or by some one appointed by him, shall be the arbitrators to decide the matter in difference.”

“The defenders say that the rule excludes the jurisdiction of this Court. The pursuer,

on the other hand, contends that the dispute in question is not a dispute falling under the rule. I have not been able to find any sufficient ground for holding that the rule is inapplicable. I think that the pursuer is undoubtedly a person claiming through a member, and that there is here a dispute between him and the Society, that dispute being whether the Society has been well discharged of the sums due to a deceased member. That being so, I think the rule is in terms applicable, and I do not feel justified in passing it by, because the mode of settlement of the dispute provided is cumbersome and scarcely appropriate. I do not say the action is necessarily excluded. It may remain in Court for the purpose of enforcing the decision when the decision is obtained, but, in my opinion, I have no power to decide the dispute, and all I can do is to sist process that the pursuer may betake himself to the remedy afforded by the rule. When he has got a decision, and requires to enforce it, he may come back and obtain decree in terms of the decision. That is the procedure which has been recognised in various decisions in this Court, and I therefore do not dismiss the action, but simply make a finding to the effect that the dispute falls under the clause in the rules, and sist process accordingly."

The pursuer reclaimed, and argued—*On the question of jurisdiction*—The Lord Ordinary was wrong. The question between the parties was not a question between a member or a party claiming through a member and the Society, for the defenders denied that the pursuer was entitled to claim as the representative of a member. The arbitration clause in the rules of the Society consequently did not apply—*Industrial and Provident Societies Act 1876*, sec. 14 (1); *Prentice v. Loudon, &c.*, L.R., 10 C.P. 679; *Willis v. Wells, L.R.*, Q.B.D. 1892, ii. 225. Further, the committee to whom the dispute would be referred under the rules could not decide in favour of the pursuer without incurring personal liability for the sums paid away. Their right of arbitration accordingly was excluded, for no person could be judge in his own cause—*Mackenzie v. Clark*, December 19, 1823, 7 S. 215; *Tennant v. Macdonald*, June 16, 1836, 14 S. 976; *Dickson v. Grant, &c.*, February 17, 1870, 7 Macph. 566. *On the merits*—The defenders had on their own showing paid the amount of the deceased member's interest to a person not entitled by law to receive it, for the majority of next-of-kin could not deprive a minority of its rights. They had thus acted *ultra vires*, and were not protected by either section 11 (6) of the *Industrial and Provident Societies Act 1876*, or by section 9 of the amending Act of 1883.

Argued for the defenders—The pursuer claimed as the executor of a deceased member; he was therefore a person claiming through a member—*Industrial and Provident Societies Act 1876*, sec. 3. The dispute must consequently be decided by arbitration in terms of rule 28, and section 14 of the Act of 1876—*Hack v. London Provident*

*Building Society*, L.R., 23 Ch. Div. 103; *ex parte Payne*, 1849, 5 Dowling & Lowndes, 679. It was not necessary under rule 28 that the committee should decide in every case. Recourse might be had to neutral arbiters. The argument that a case could only be decided one way was not valid to exclude arbitration—*Magistrates of Glasgow v. Caledonian Railway Company*, June 17, 1872, 19 R. 874. The intention of the Legislature was to exclude the jurisdiction of the Court of Session, the provision being that application for enforcement of the award should be made in the county Court. *On the merits*—The committee were entitled to pay to George Symington, the next-of-kin in this country having taken the burden upon them of appointing him to receive it, and were protected by sub-section 7 of section 11 of the Act of 1876.

At advising—

LORD PRESIDENT—Mrs Symington was at the date of her death a member of The Galashiels Co-operative Store Company, Limited. There is no dispute as to her having been entitled at her death to the sums mentioned on record. The pursuer is her executor; he claims the money, and has brought this action to recover it. The answer made to this claim on its merits is that the Society has already paid away the money to some one else, and that they were entitled to do so under section 11, subsection 6, of the *Industrial and Provident Societies Act 1876*.

The defenders first pleaded that the dispute between them and the pursuer is one from which the jurisdiction of courts of law is excluded; and the soundness of this plea is what we have to determine.

Now, the *Industrial and Provident Societies Act 1876* allows each society to set up a particular mode of determining disputes between the society and its members, and the decision arrived at in this manner is to exclude the jurisdiction of the courts of law. According to the rules of this particular Society the dispute would first be considered by a committee, on appeal by a general meeting of the Society, and if the dispute was not settled by the meeting, then arbiters are appointed in a specified way, and they finally decide the dispute. The question then is, whether the dispute between the pursuer and the defenders is one to be settled in this way?

Now, this scheme of the statute and its words make it plain that the tribunal is a domestic tribunal, for the settlement of questions within the Society. Given a member (or a person claiming through a member) and the Society as disputants, and they are not to go to a court of law for the settlement of their relative rights. But then the contention of the Society here is that the pursuer is not a member, and has no claim through a member—in short, they deny that they have any relation to him at all. Now, I do not see how they can at one and the same time assert him to be a stranger and hale him into their domestic tribunal in order to establish this against

him. The two cases of *Prentice* and *Willis* cited for the pursuer show that the English courts hold that the exclusion of the courts does not apply where the substance of the question is whether the litigant opposed to the society has or has not the rights of a member. In my opinion this principle is sound, and applies to the present case.

Holding, then, that we are to judge of the dispute, I proceed to consider it.

Now, as I have said, there is no question as to the rights of the deceased member; and the only question is, who has now got them? The case of the defenders is rested solely on section 11, sub-section 6, of the Act of 1876, and what they say they have done under it. That provision is plainly intended to save the expense of requiring strict legal evidence of propinquity or title in the case of small successions which could not well afford such expense. It in no way at all alters the legal succession, or allows the society to alter it, or authorises them to pick and choose among those known to them to be the legal successors of the deceased. If they find the legal representatives, or think they have found them, on such evidence as satisfies a majority of the committee, then they may pay to those persons without liability to pay over again in case of mistake. But if they first find the legal representatives, and then do not pay to them, but only to some of them, without authority of the rest, such a proceeding is, in my judgment, wholly unauthorised by the section.

Yet this is exactly what the defenders say that they did. They begin by saying that the committee knew that one of the next-of-kin of Mrs Symington was in New Zealand, and then they go on to say that those of the next-of-kin who were at home, save one who was absent, decided that one of themselves should get the whole, and on those *media* the committee paid over the whole to this person four days after the death. In my opinion this cannot be brought under the section, and was quite illegal.

In the only dispute, therefore, between the parties which we have heard of, my judgment goes to the pursuer. I do not observe any plea for the defenders which would remain standing; and apparently it may not be necessary to send the case to the Outer House as we could now give decree. But counsel will tell us.

LORD ADAM—I agree with the conclusion at which your Lordship has arrived, and on the same grounds, but I also think that there are reasons for coming to the same result, even assuming that the pursuer was to be treated as a member of the defenders' Society.

In order to ascertain whether the question or dispute between the parties is one which ought to be determined in the manner provided by the Society's rules, it is necessary to see what the question is. The pursuer as Mrs Symington's executor sues the Society for payment of £53, which he alleges is due to him by the Society. The defenders seek

to discharge themselves from liability by saying that they have paid the sum sued for to Mrs Symington's son George. They do not say that they paid to him because he was the representative of the deceased, or otherwise entitled by law to receive the money, but because some members of the family at a meeting agreed that it should be paid to him, and they say that whether the money was rightly or wrongly paid the payment is protected from challenge by the provisions of the 6th and 7th sub-sections of section 11 of the Provident Societies Act 1876, and also by the Amendment Act of 1883. I think the construction of these Acts is for the Court and not for the Society. If it appears that the payment in question is not protected by the clauses of these statutes, then it is a merely gratuitous payment by the Society, and must be so treated in this case.

I agree with your Lordship as to the true construction of the 6th sub-section of section 11 of the Act of 1876. It is clear that the payment protected is a payment made to the person entitled by law to receive it, or who produces satisfactory evidence to the Society that he is the person so entitled by law. It is also clear that the person entitled by law to receive payment is the legal representative of the deceased, and as your Lordship has said, the object of the sub-section is simply to enable the Society, on production of evidence satisfactory to them of the right of the party claiming, to dispense with the necessity of a formal title. That that is the purpose of the Act becomes still clearer when we turn to the Amending Act of 1883, for section 9 of that Act assumes that the claim has been made by a person as "next-of-kin of a deceased member, or as his lawful representative, or person claiming to be such representative," and says that if any other person comes forward to claim in such character, such person shall not be entitled to recover from the Society. A payment made to a person claiming in any other capacity is not within the protecting clauses of the Acts.

Now, the payment made here was not a payment made on the ground that satisfactory evidence had been produced to the Society that the claimant was the party entitled by law to receive the money. What is said is that he was entitled to receive it in virtue of an agreement made among the members of the deceased's family. It was never intended to make the Society the judge of whether such an agreement was valid or not. If that is so, the question is, what is the dispute proposed to be referred to the Society? There is no dispute about the sum having been due to the deceased. That is admitted on record. Is it a dispute as to whether or not this is a valid claim? But, as I have pointed out, the question depends for its solution entirely on the construction of the statute, and therefore it is one to be decided by the Court and not by the Society.

On these grounds, if necessary, I would be disposed to conclude that assuming the pursuer was to be treated as a member, there is here no dispute between him and

the Society which falls to be decided by the Society.

LORD KINNEAR—I have come to the same conclusion. The executor of a deceased member of this Society claims from the Society the money due to the deceased. The only answer made by the Society is, that the money has already been paid to some-one else; that the provisions of the Act of Parliament entitled the Society to make the payment; and that according to their own rules passed according to the provisions of the Act, they are the final judges whether they were right or wrong in so doing. Now, before we give effect to that argument, we must be satisfied that the Legislature intended to give the defenders this arbitrary power of judging in their own cause, and determining the extent of their own liabilities. I think with your Lordship that the clause on which they found has no application to a controversy of this kind, but that it is intended to provide a method for the regulation of internal disputes between members of this Society as such and the Society or the governing body of the Society. But before that clause can be brought into operation it must first be shown that the controversy to which it is proposed to apply it is really a dispute between a member of the Society as such and the Society.

Now, I agree with your Lordship in the chair that the first question in controversy here is, whether the pursuer has or has not the rights of a member of the Society—whether he is entitled to claim in the right of the deceased member or not? That is not a dispute between a member and the Society, but a question whether the person claiming is or is not entitled to the rights of a member. I think the case of *Prentice* is directly in point, and concurring entirely with the reasoning of the learned Judges in that case, and with the observations of your Lordship in the chair, I have no difficulty in reaching the same conclusion.

Upon the merits of the question—the construction of the 11th section of the Act of 1876—I also concur. I do not think that that Act was intended to give to this Society a power to select among the representatives of the deceased person, and to pay to one of them to the exclusion of another. That is exactly what they say they have done, because they set out quite clearly that they knew that the deceased had died leaving various children, but that they, in consideration of the statement of certain members of the family that one of them had a better claim than the others to the money left by his mother, gave effect to that consideration, and conferred a benefit upon this favoured brother without the consent or knowledge of the pursuer. I think in doing so they were going entirely beyond their powers. They were bound to pay to persons having a legal right as representatives of the deceased member. They may in certain circumstances be protected against defects in title in the persons to whom they have paid in that character, but that

does not entitle them to pay to one money which they know belongs to another.

LORD M'LAREN was absent.

The Court recalled the interlocutor of the Lord Ordinary, and decerned against the defenders for £50, 3s.

Counsel for the Pursuer—A. S. D. Thomson—M'Lennan. Agent—Richard Lees, Solicitor.

Counsel for the Defenders—Guthrie—Cook. Agents—Kinmont & Maxwell, W.S.

Wednesday, January 10.

FIRST DIVISION.

COX v. "GOSFORD" SHIP COMPANY, LIMITED.

*Company — Winding-up — Petition by Shareholder for Winding-up Order—Companies Act 1862 (25 and 26 Vict. c. 89), sec. 7, sub-sec. 9.*

A shareholder of a company, incorporated to purchase and work a particular ship and no other, applied to the Court for a winding-up order on the ground that the ship had been abandoned as a total loss. The petition was opposed by the company. It appeared that notice of abandonment had been given to the underwriters, but that the negotiations for payment of the insurance money had not been completed. No meeting of shareholders had been held to consider the question of a voluntary winding-up. The Court refused the petition on the grounds (1) that it was not definitely ascertained that the ship was a total loss, and (2) that if and when that was established, it would be for the shareholders to decide whether the company should be wound-up voluntarily.

The "Gosford" Ship Company was incorporated and registered under the Companies Acts on December 18, 1891. By article 3 of the memorandum of association the objects for which the company was established were defined as follows:—"The purchase, owning, and working of a steel sailing ship, intended to be called the 'Gosford,' built by Messrs Scott & Company, shipbuilders, Greenock, . . . and of no other ship." By sub-section D of the same article the company were empowered "to carry on the business of a shipowner in all its branches with respect to the said ship only."

On 13th December 1893 Robert Cox, who held 10 shares in the company, presented a petition stating that the "Gosford" had been totally destroyed by fire in November 1893 off the Pacific coast of North America, and craving the Court to order the company to be wound-up by the Court.

Answers were lodged for the company by Briggs, Harvie, & Company, the mana-