they ought not to be called upon to decide them. I can only regard the frequency of these appeals as an abuse of the powers conferred by the Judicature Act.

LORD M'LAREN—We have been reminded that the Second Division of the Court has on different occasions sent back cases of small value which had been appealed for jury trial to the Sheriff Court. I readily admit that the course taken by their Lordships has much to be said for it; but we in this Division, looking to the clause of the Act (6 Geo. IV., c. 120, sec. 40) which allows appeals for jury trial in cases where the "claim" is in amount above £40, have held that the amount of the claim must be tested by the conclusions of the summons. We have remitted cases to the Sheriff on the ground that they were not suited for jury trial, but not on the ground that the claim was too small. I agree that a case has been made out for the revision of our procedure in the direction of giving the Court a larger discretion as to the disposal of cases as they arise.

LORD KINNEAR — I agree with your Lordships. I have no doubt about the competency of remitting cases which are appealed for jury trial back to the Sheriff, but in the exercise of our discretion we have never held it to be a sufficient ground for remitting to the Sheriff that the sum concluded for was not much higher than the £40 allowed by the Act of Parliament as sufficient in appeals for jury trial. In all these cases there have been grounds, connected either with the subject-matter or with the locality of the inquiry, for holding that the trial was less suitable for the Jury Court than for the local tribunal. But no ground of that sort has been suggested in the present case. The Act says that the right of appeal is to be measured by the amount of the claim and not by the value of the cause. I agree that even if the conclusions of the summons brought the pursuer within the Act of Parliament it might be possible to refuse the appeal for jury trial on the ground that there was no honest claim for the statutory amount, and that the sum of £40 was demanded only in order to have the case sent to a jury without any real intention of insisting for that amount. It may be that in certain circumstances the fact that the claim was originally made for a smaller sum might be reasonably brought forward as tending to show that the larger demand in the action was not an honest one. But in the present case there is no sufficient reason, to my mind, for saying that the claim for £50 is not perfectly honest, so far at least as the amount is concerned, if the averments as to the injury are well founded. For I agree with Lord Adam that if a jury finding these averments proved were to award £40 or £50 as damages, no one could say that that must be set aside as an extravagant verdict. I think therefore that the case must be sent to a jury if the parties insist on a trial. But no objection has been stated to us except as to the amount; and since that is the only question between the parties, and the difference cannot be a very serious one, I would venture to suggest that it might be settled without any trial either here or elsewhere.

The Court, on counsel for the respondents intimating that he disputed the relevancy of the action, sent the case to the Summar Roll.

Counsel for the Pursuer and Appellant—Pringle. Agents—Oliphant & Murray, W.S.

Counsel for the Defenders and Respondents—Guy. Agents—Clark & Macdonald, S.S.C.

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*Saturday, November 14.*

## FIRST DIVISION.

## SMITH'S TRUSTEES *v.* IRVINE AND FULLARTON PROPERTY INVESTMENT AND BUILDING SOCIETY.

*Company—Building Society—Unregistered Company—Illegal Association—Winding-up—Company Established under Repealed Statute—Companies Act* 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 4—*Building Societies Act* 1894 (57 *and* 58 *Vict. c.* 47), *sec.* 28.

The Companies Act 1862 enacts (sec. 4), after provisions relating to the formation of banking companies, "No company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of this Act, for the purpose of carrying on any other business than has for its object the acquisition of gain . . . unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament."

A building society consisting of more than twenty persons was in 1873 established and certified under the provisions of the Building Societies Act 1836. By the Building Societies Act 1894 (sec. 25, sub-sec. 2) (quoted *infra*) the Act of 1836 was repealed, as from 1st January 1897, as to all societies certified under the former Act after 1856.

To an application for the winding-up of the building society as an unregistered company, under section 199 of the Companies Act 1862, it was objected that, in consequence of the repeal of the Act of 1836 by the Act of 1894, the society had, under section 4 of the Companies Act, ceased to exist as a legal society and could not be wound up under the Act. *Held* that the society having originally been legal was not brought within the scope of the illegality constituted by section 4 of the Companies Act by the repeal of the statute under which it was consti-

tuted, and that it could therefore be wound up as an unregistered company under section 199 of the Companies Act 1862.

*Statute—Repealing Act—Rights under Repealed Enactment — Building Society under Repealed Act—Interpretation Act* 1889 (52 *and* 53 *Vict. c.* 63), *sec.* 38.

The Interpretation Act 1889 enacts (section 38)—"When this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not . . . . affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed."

The Building Societies Act 1894 (section 25) repeals the Building Societies Act 1836. *Held* that a building society, the legality of whose existence depended on the Act of 1836, remained a legal society after the repeal, for the purpose of being wound up in order to meet its liabilities.

This was a petition by John Smith and others, trustees of the late Hugh Smith, who resided at Saltcoats, for the winding up of the Irvine and Fullarton Property Investment and Building Society.

The petitioners averred that they were creditors of the society on a bond for £800, granted by the society in favour of the late Hugh Smith; that they had called up this bond and had been unable to obtain payment. They also averred that the society had ceased to transact business except for the purpose of enabling it gradually to realise the heritable subjects over which it had granted loans; and that the society was unable to pay its debts, and was in insolvent and embarrassed circumstances. They founded this petition on sections 199 to 204 of the Companies Act 1862.

Section 199, sub-section 3, enacts—"The circumstances under which an unregistered company may be wound-up are as follows (that is to say)—(*a*) Whenever the company is dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs; (*b*) whenever the company is unable to pay its debts; (*c*) whenever the Court is of opinion that it is just and equitable that the company should be wound-up." Sub-section 4—"An unregistered company shall for the purposes of this Act be deemed to be unable to pay its debts—(*a*) Whenever a creditor to whom the company is indebted, at law or in equity, by assignment or otherwise, in a sum exceeding fifty pounds then due, has served on the company by leaving the same at the principal place of business of the company, or by delivering to the secretary or some director or principal officer of the company, or by otherwise serving the same in such manner as the Court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has, for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same, to the satisfaction of the creditor . . . (*f*) Whenever it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts."

Answers were lodged for the Building Society, in which it was stated that in respect of the statutory provisions under mentioned, the society was an illegal body under the provisions of section 4 of the Companies Act 1862 (quoted in rubric), and therefore could not be wound up under the provisions of the Act. The answers also contained a denial that the company was unable to pay its debts if the heritable properties over which it held securities were judiciously realised. It was admitted that the society had ceased to carry on business, and only existed for the purpose of gradually realising its assets, and also that it was for the present unable to pay the petitioners' debt in full. They submitted that the prayer of the petition ought to be refused, in respect (*First*) that the society not being an unregistered company in the sense of the Companies Act 1862, the present application for an order to have it wound up was incompetent; (*second*) that it was not expedient in the interests either of the shareholders or of the creditors that the society should be wound up.

The following are the facts and statutory provisions relative to the legal position of the society:—The society was formed in 1873, and was enrolled, established, and certified in pursuance of the Building Societies Act 1836 (6 and 7 Will. IV., c. 32). It consisted of more than twenty persons, and was not incorporated under the Building Societies Act 1874 (37 and 38 Vict. c. 42).

The Building Societies Act 1894 enacted (section 25)—"(1) Section forty of the Building Societies Act 1874 shall apply to every society which has been certified under the Building Societies Act 1836 (that is to say, the Act of the Session held in the sixth and seventh years of King William the Fourth, intituled 'An Act for the Regulation of Benefit Building Societies'), and has not been incorporated under the Building Societies Act 1874, and exists at the passing of this Act; and if any such society fails to comply with the requirements of that section, the society and its members and officers shall be subject to the like penalties as if the society were a society under the Building Societies Acts." "(2) On the expiration of two years from the passing of this Act the said Building Societies Act 1836 shall be repealed as to all societies certified thereunder after the year 1856."

Argued for the respondents—If a company or association fell within the scope of section 4 of the Companies Act 1862 (quoted in rubric) it became an illegal association of individuals, and not an unregistered company, and could not be wound up under the Act—*In re Padstow Assurance Association*, 1882, 20 Ch. Div. 137; *in re Arthur*

*Average Association*, 1875, L.R., 10 Ch. Ap. 542. That was now the position of the respondent society. Its existence was legal until the Act on which it was founded was repealed by the Building Societies Act of 1894 (quoted *supra*), thereafter it was illegal—Lindley on Partnership, i. 185; *in re Ilfracombe Permanent Building Society* (1901), 1 Ch. 102.

Argued for the petitioners—The society was originally legal, as it was founded under an Act of Parliament, the Building Societies Act 1836. It did not therefore fall under section 4 of the Companies Act, and at the passing of that Act could have been wound up as an unregistered company. The Building Societies Act 1894, by repealing the Act of 1836, may have deprived the society of any right to carry on business, but did not deprive its creditors of the right to have it wound up. That appeared not only on a construction of the Companies Act 1862 (sec. 4), and the Building Societies Act 1894 (sec. 25), but followed from section 38 of the Interpretation Act 1889 (quoted in rubric). A building society could be wound up by the Court as an unregistered company—*In re Midland Counties Benefit Building Society*, 1864, 4 De G. J. & S. 468; *Shaw* v. *Simmons*, 1883, 12 Q.B.D. 117. In the circumstances of the society the petitioner was entitled to an order for its winding up—*Gardner & Company* v. *Link*, July 11, 1894, 21 R. 967, 31 S.L.R. 804.

At advising—

LORD KINNEAR—The only point which requires consideration is a short one, but it is attended with some difficulty. It is maintained, oddly enough by the society itself, that it cannot be wound up because it is an illegal association. It was admittedly formed lawfully and regularly in 1873, under the Building Societies Act of 1836, 6 and 7 Will. IV., cap. 32. But that Act was repealed by the Building Societies Act 1894, as from 1st January 1897; and the argument is that immediately on the repeal taking effect at the latter date, the respondent society became an unlawful association, because it was then struck at by the 4th section of the Companies Act 1862, which prohibits, after the commencement of the Act, the formation, for purposes including those of this society, of any "company, association, or partnership consisting of more than twenty persons, unless it is registered under the Act of 1862 or is formed in pursuance of some other Act of Parliament." If this section applies, it follows, on the authority of *in re Padstow Assurance Association*, 1882, 20 Ch. Div. 137, that the Court cannot make the winding up order asked. The Master of the Rolls points out that the 199th section, under which the order for winding up a company not registered under the Act must be made, if it is made at all, "must apply to something lawfully formed." If the case falls within the terms of the 4th section, the formation of the company is prohibited, and it is impossible to suppose that the Legislature could have intended that a company which is prohibited from being formed under the 4th section can be wound up under the 199th. The question, then, is whether the 4th section prohibited this society from being formed; and I am of opinion that it did not, because although the society was formed after the commencement of the Act, it was in terms exempted from the prohibition by reason of its being "formed in pursuance of another Act of Parliament," to wit, the Building Societies Act of 1836. I agree that this other Act of Parliament must be an existing Act at the time when the prohibition operates, but that is the date of the formation of the company; and it is admitted that this society was perfectly well formed in pursuance of an Act in force at the date of its formation. The 4th section is a prohibitory enactment and nothing more. It peremptorily forbids certain things to be done; and it follows that anything that is attempted to be done in the face of that prohibition is of course unlawful. But if what is done is not forbidden, but on the contrary is sanctioned by an express exemption from the prohibition, I cannot see that it is struck at by the 4th section at all. A company that is well formed under the Act of 1836 may be lawful or unlawful on other grounds. It may be made illegal, or it may be prevented from carrying on its business by subsequent legislation. But it is not, in my opinion, unlawful by reason of its transgressing the Act of 1862. It may labour under some other disability, but it is "lawfully formed." The question therefore comes to be, what is the effect of the repeal contained in the Act of 1894. That statute, by the 25th section, sub-section 2, repeals absolutely, on the expiration of two years from its passing, the Building Societies Act of 1836 as to all societies certified thereunder after 1856. It contains no provision such as is to be found in the Building Societies Act of 1874 for the continuance of subsisting societies formed under the repealed Act. But by sub-section 1 of section 25 it applies to every such society which had not been incorporated under the Act of 1874, the 40th section of the latter Act, which provides for certain annual audits and statements, and imposes penalties for failure to comply with the requirements of that section. It is said that the effect of this statute was to put an end altogether to the respondents' society as a legal entity which can be recognised by the Court, because nothing gave it any legal existence but the Act of 1836, and the Act of 1836 is repealed. The argument, as I understand it, is that the statutory foundation of the society being gone it cannot exist for any legal purpose unless it be formed anew in accordance with the existing law, but its new formation cannot be in pursuance of a repealed Act, and therefore it will be struck at by the 4th section of the Act of 1862, unless it is either registered under that Act or incorporated under the Building Societies Act of 1874. I cannot accept that view. If the first sub-section of section 25 of the Act of 1894 can be supposed to remain in force after the

lapse of the two years allowed before the repeal should take effect, the continued existence of the society even after the repeal is recognised by the statute itself, because every such society is still required to make up annual statements and accounts and submit them for audit. But apart from any inference which might be drawn from a construction which may perhaps be open to question, the Act of 1894 does not declare that societies founded under the repealed Act and not otherwise incorporated shall henceforth be deemed to be illegal, nor does it nullify their original legal constitution. By repealing the Act of 1836 it deprives them for the future of all the powers and benefits conferred by that Act, and it may probably disable them from carrying on their business. But the consequence of that will be that they must wind up. This society was properly established under the Act of 1836; and thereafter it has carried on business as a legal society, and rights and liabilities which are still unsettled have arisen out of its transaction of its lawful business. It cannot be presumed, if it is not expressed, that Parliament intended to disturb or destroy these perfectly legal obligations, by an *ex post facto* exclusion of the society from the cognisance of the courts of law; and therefore even if it must be deemed to be no longer in existence for other purposes, it must still exist for the purpose of winding up its business. I should come to this conclusion on a consideration of the Act of 1894 alone. But in connection with the repealing clause of that statute it is necessary to read the Interpretation Act of 1889. By the 38th section of that Act it is provided that where any Act passed after its commencement "repeals any other enactment, then, unless the contrary intention appears, this repeal shall not . . . affect the previous operation of any enactment so repealed, or anything duly done . . . or any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed." This society must therefore still be held to have been properly constituted; and if its rights and liabilities, which have also been duly constituted, are not to be affected, they must be still enforceable according to law notwithstanding the repeal. But if rights and liabilities are enforceable at law, it follows that the courts must take judicial notice of the society in which they inhere. I am therefore unable to sustain the respondents' plea that they form an association forbidden by law whose very existence cannot be recognised by the Court. They may be incapacitated, if so be, from carrying on business; but they are in no worse position than any dissolved company, and still exist for the purpose of winding-up.

It appears to me, therefore, that the petition cannot be dismissed on the ground of incompetency. The respondents' society is not struck at by the 4th section of the Act, it is not registered under the Act, and it is not alleged that the other condition of section 199 is not satisfied by reason of its consisting of fewer than seven persons. It is therefore liable to be wound up as an unregistered company.

If the winding-up order is competent, I think a sufficient *prima facie* case is made for granting it. According to the respondents' statement, they have taken up a proper position since the passing of the Act of 1894, because they say that since then they have engaged in no business except such as is incidental to the winding up of their affairs. But after that process has lasted for so long a period of years, I think a creditor whose debt is still unpaid is well entitled to bring matters to a point by applying for a judicial order.

I am therefore for granting the prayer of the petition.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

The Court pronounced an order for the winding up of the Society, and appointed a liquidator.

Counsel for the Petitioner—Clyde, K.C.—Wilton. Agent—George A. Munro, S.S.C.

Counsel for the Respondents—Salvesen, K.C.—Hunter. Agent—Wm. Croft Gray, S.S.C.

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*Tuesday, November* 17.

## SECOND DIVISION.

## GUNNIS'S TRUSTEES *v.* GUNNIS.

*Fee and Liferent—Company—Conversion of Profits into Capital—Bonus Paid from Reserve Funds — Reserve Funds Derived from Profits but Employed as Capital—Option to Take Bonus in Shares or Cash — Issue of New Shares in respect of Capitalisation of Profits.*

Certain trustees, under trusts for beneficiaries in fee and liferent respectively, in accordance with their powers held shares in a steam navigation company which had power to increase its capital, and the directors of which had power to carry profits to reserve, and to use sums so carried in the business, and, with the sanction of a general meeting, for payment of a bonus.

The company resolved to increase its capital by the addition of part of reserve funds which under the articles had been created out of profits and had been employed as capital in the company's business. The increase of capital was effected (1) by the creation of new preference shares, (2) by the allotment of these shares to the holders of existing shares, and (3) by declaring and paying a bonus of 100 per cent. out of the reserve funds in order to enable the shareholders to pay for the shares allotted to them. The shareholders were given the option of payment of the bonus in cash or of accepting an allotment of the new preference shares, the bonus being applied in payment of these shares.