[HIGH COURT OF AUSTRALIA.]

HEYDON AND ANOTHER . . . APPELLANTS;
PLAINTIFFS,

AND

BRIDGET LILLIS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 12, 15, 16, 17, 19.

Griffith C.J., Isaacs and Higgins JJ.

Building and Co-operative Societies Act (*N.S.W.*), (*No.* 17 *of* 1901), *secs.* 20, 24, 58, 59——*Appointment of new trustees—Removal of trustee—Vesting of property of Society in succeeding trustee—Action of ejectment by trustees against mortgagor in default—Dispute between Society and members—Jurisdiction of Supreme Court.*

Supreme Court Procedure Act 1900 (*N.S.W.*) (*No.* 49 *of* 1900), *sec.* 7—*Motion to enter verdict—Abortive trial—Disagreement of jury—Power of Court.*

Sec. 59 of the *Building and Co-Operative Societies Act* 1902 provides that in all societies established under the Act all applications for the removal of trustees or for the settlement of disputes arising in any society, the rules of which do not prescribe any other mode of settling such disputes, or for any other relief, order or direction, shall be made in the District Court.

The trustees of a Building Society brought an action of ejectment as mortgagees against the executrix of a mortgagor a former member of the Society. At the trial the defendant disputed the accuracy of the mortgagees' accounts, but it appeared that even according to her accounts there had been a default in the payments such as would by the terms of the mortgage entitle the mortgagees to enter into possession.

Held, that the Supreme Court had jurisdiction to entertain the action inasmuch as there was no dispute between the parties the settlement of which was necessary or material to the plaintiffs' claim, and no assertion of any right to relief within the meaning of sec. 59.

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Sec. 20 provides that in the case of any vacancy in the office of trustee, a new trustee shall be elected by the members of the society and the appointment verified in a certain manner and forwarded to the Registrar appointed under the Act; but by sec. 13 this provision is only to apply in cases where the Society has not by its rules made other provision for such a case, inconsistent with the application of sec. 20 to the Society.

A society, in the exercise of the powers conferred upon such societies by Statute, provided by its rules that, on the death or retirement of a trustee, a new trustee should be elected in his place in a manner which differed materially from the manner prescribed by sec. 20, and that the appointment should be duly certified and forwarded to the proper officer. One of the trustees of the society having retired, a new trustee was elected in his place in the manner prescribed by the rules, but without the formalities prescribed by sec. 20.

Held, that the appointment was valid, and that, as the Act did not apply and the rules did not require that the appointment should be certified by any person in particular, it was sufficient that its authenticity was guaranteed by the signatures of the Board which elected the trustee and of the secretary of the Society, and the appointment forwarded to the Registrar, in accordance with the rules.

Sec. 24 provides (1) that the real and personal estate of a society "shall be be vested" in the trustees for the time being, and that of any branch of a society in the trustees of that branch, and shall be under their control; (2) that "upon the death or removal of any such trustee" the property shall vest in the succeeding trustee for the same estate and interest and subject to the same trusts "without any conveyance or assignment whatsoever"; and (3) that in all actions, suits and other proceedings the property shall be stated to be the property of the trustees as trustees of the Society.

Held, per *Griffith* C.J. and *Isaacs* J., (*Higgins* J. dissenting,) that the word "removal" was not to be restricted to compulsory removal by the Court or the Society, and that the acceptance of the resignation of a trustee by the Board and the due appointment of a new trustee in his place was a removal within the meaning of the section, and therefore that upon the appointment of the new trustee the property of the society real and personal vested forthwith in the new and continuing trustee without any conveyance or assignment by the retiring trustee.

Per Higgins J.—The real property did not vest without conveyance. Sub-sec. (1) is merely a general direction as to the persons in whom the property of the Society shall be vested, and does not operate to make it vest in them without appropriate conveyances where conveyances are required by the ordinary law, whereas sub-sec. (2) makes specific provision for vesting without conveyance in the case of death or removal, owing possibly to the impossibility or difficulty of obtaining a conveyance in such cases. Removal implies the exercise of compulsory power by some external authority, whether in the Society or the Courts, and does not include resignation or retirement.

The power given to the Supreme Court in Banco by sec. 7 of the *Supreme Court Procedure Act* 1900 to enter a verdict for the plaintiff or the defendant in any action, if it is of opinion that upon the evidence one party or the other is as a matter of law entitled to a verdict, may be exercised in a case where the jury have failed to agree and have been discharged without giving a verdict.

So, where the Supreme Court refused, on the ground that they had no jurisdiction, to entertain an application by the plaintiff for a verdict to be entered for him in such a case, the High Court on appeal, held that the refusal was wrong, and ordered a verdict to be entered for the plaintiff.

Decision of the Supreme Court: *Heydon and another* v. *Lillis*, (1906) 6 S.R. (N.S.W.), 677, reversed.

APPEAL from a decision of the Supreme Court.

The appellants were the trustees of the St. Joseph's Investment and Building Society, and the respondent was the executrix of the estate of Michael Lillis, a former member of the Society, who had mortgaged certain land to the Society. Default having been made under the mortgage, the appellants, as trustees, brought an action of ejectment against the respondent to recover possession of the mortgaged land. The respondent at the trial of the action disputed the amount alleged to be owing under the mortgage, and also disputed the right of the trustees to recover on several grounds which will appear more fully in the judgments.

The case was allowed to go to the jury, but they were unable to agree upon a verdict and were discharged.

The appellants then moved the Full Court under sec. 7 of the *Supreme Court Procedure Act* 1900 for a rule *nisi* calling upon the respondent to show cause why a verdict should not be entered for the plaintiffs in the action on the ground that on the evidence they were entitled to a verdict. The Court, being of opinion that they had no jurisdiction to enter a verdict under that section, or even to entertain such an application, where the jury had failed to agree, refused the rule, and struck the case out of the list: *Heydon* v. *Lillis* (1).

From this decision the present appeal was brought, by special leave. The question of jurisdiction to enter a verdict under such circumstances was first argued.

(1) (1906) 6 S.R. (N.S.W.), 677.

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Dr. Cullen K.C. (*Watt* with him), for the appellants. There is nothing in sec. 7 of the *Supreme Court Procedure Act* 1900 to suggest that it was only intended to apply to cases in which the jury had given a verdict. The words "In any action" are wide enough to cover all cases where there has been a trial at which evidence has been taken. The power given by similar provisions in the English *Judicature Act* has been exercised by the Divisional Court and the Court of Appeal in cases where there has been no verdict: *Bobbett* v. *South Eastern Railway Co.* (1); *Paquin, Limited* v. *Beauclerk* (2); *Peters* v. *Perry & Co.* (3).

[GRIFFITH C.J. referred to *Williams* v. *Mercier* (4).]

The legislature having before their minds the established practice under the English *Judicature Act*, and having used the widest terms possible, must be taken to have intended the power to extend to all cases in which the Court was in a position to judge whether there ought to be a verdict one way or the other, or a nonsuit. The Supreme Court had as much material before it after the abortive trial as it would have had if there had been a verdict. If the Court can enter a verdict in the face of a finding of the jury, *a fortiori* they should be able to do so when there is no finding in the way. The power can only be restricted by reading in something for which there is no warrant in the terms of the section or the purpose for which it was presumably passed. This Court, if it is of opinion that the Supreme Court was wrong, should consider the whole matter and make the order that the Supreme Court ought to have made.

Canaway, for the respondent. There being no Act in force in New South Wales analogous to the *Judicature Act*, the Court was bound by the procedure at common law, except so far as it was altered by Statute. There was a provision in force specially applicable to cases of disagreement, 11 Vict. No. 20, sec. 29, which provided that in such cases the cause might be set down for trial without any new process. That provision relegated the cause to the position of an action that had not yet been set down for trial, and obliterated the previous setting down.

(1) 9 Q.B.D., 424.
(2) (1906) A.C., 148.
(3) 10 T.L.R., 366.
(4) 9 Q.B.D., 337.

[GRIFFITH C.J.—That section merely did away with the necessity for a new *venire facias*.]

It rendered the case unripe for decision until again set down. [He referred to *Cohen* v. *Amos* (1).] In a similiar case, *Hargraves* v. *Cohen* (2), *Sir James Martin* C.J. said:—"How can the Court find a verdict for the defendant where the jury were unable to agree as to his liability?" That being the law by virtue of sec. 29 of 11 Vict. No. 20, the legislature has re-enacted that provision in the *Jury Act* 1901, thereby rebutting any possible implication of repeal by the *Supreme Court Procedure Act* 1900. The object of sec. 7 was only to get rid of the necessity for reserving leave at the trial, not to supersede the jury as arbiters of fact.

[HIGGINS J.—It is strange that, if that was the only object, it was not referred to in any way.]

It is the first enactment giving the Court power to enter judgment without the consent of parties, and, if it can be construed in such a way as to bring that about without affecting a class of cases for which express provision has been made, it should be so construed. [He referred also to secs. 3, 5, and 15 of the *Supreme Court Procedure Act* 1900.]

April 12.

GRIFFITH C.J. I can see no reason to doubt the jurisdiction of the Court under sec. 7 of the *Supreme Court Procedure Act* 1900 to grant the relief for which the plaintiffs ask in this case. Under the practice of the Supreme Court of New South Wales up to that time, which followed the old English common law practice, if a case was set down for trial by a jury, and either party was dissatisfied with the result, the dissatisfied party, if there had been a verdict, might move for a new trial. Later a form of procedure had been adopted by which a verdict was taken, leave being reserved to either party to move to have it set aside or a different verdict or a nonsuit entered. Then the Court in Banco on motion could make the appropriate order. But if no leave was reserved all that the Court could do was to grant a new trial, and if there was no verdict there was nothing to be done but to set the case down again for trial, because

(1) 6 N.S.W. L.R., 184. (2) 12 N.S.W. S.C.R., 310.

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nothing could be done except after a verdict, which was the foundation of the procedure. You could not depart from that rule, however plain the right might be, except by having leave reserved. Then the legislature, being no doubt aware of the change that had been effected in the law and practice in nearly all other parts of the British dominions, passed, amongst other enactments, sec. 7, which is in these words: [His Honor read the section and continued:] Bearing in mind the previous defects in the law, which had been remedied nearly everywhere else but in New South Wales, what was the intention of the legislature? *Primâ facie*, the words are to be construed literally, as they stand. They begin "In any action," and the succeeding words show that the provision is exactly applicable to every case where there has been an attempt to try a case with a Judge or a jury, where there has been a trial; they apply to all cases in which the plaintiff should have been nonsuited, or, on the evidence, the plaintiff or the defendant was entitled to a verdict as a matter of law. These words cover every case. Why then should they be cut down so as to exclude a case in which there has been no verdict? If the jury give a perverse verdict in favour of the defendant, the plaintiff may move to have a verdict entered for him; if they give a perverse verdict in favour of the plaintiff the defendant may have a verdict entered for him. If the plaintiff was entitled to be nonsuited and the Judge refused to nonsuit, the Court may enter a nonsuit. If the Judge ought to have directed a verdict for the plaintiff or the defendant, the Court may order a verdict to be so entered. In every case, except where the jury have failed to agree, the party aggrieved can obtain redress. But it is said that the legislature has not in express words said that this may be done where the jury have not returned a verdict, so that we have an opportunity to defeat the intention of the legislature and insist upon unnecessary and useless further litigation. I can see no reason for limiting the express words of the section in any such manner. I think they give the Court power to enter a verdict whether the jury have been able to agree upon a verdict or not.

ISAACS J. I entirely agree with what the Chief Justice has

said, and only wish to say this. It seems to me that the legislature, in framing that section, intended to give the Full Court at least as much power as a Judge had under the then existing law. He had power, if he thought right, to nonsuit the plaintiff. He would have the right to direct the jury, if the evidence justified that course, to return a verdict for the plaintiff or the defendant as a matter of law, and, if he did not take any of those courses, the legislature conferred the same power upon the Court in Banco. I cannot see, therefore, that there is any necessity for requiring what is, *ex hypothesi*, an immaterial element, namely, the opinion of the jury. The legislature has not thought fit to introduce any words limiting the power of the Court in this regard, and I therefore do not think the Court is at liberty to introduce any such words into the section.

HIGGINS J. I am of the same opinion.

Argument then proceeded on the motion for judgment.

Cullen K.C. and *Watt*, for the appellants. The plaintiffs were entitled to a verdict on the evidence. The Act which regulates the appointment of trustees and the vesting of the property of building societies is the *Friendly Societies Act* (37 Vict. No. 4), now consolidated in the *Building and Co-operative Societies Act* (No. 17 of 1902), Parts I. and III. By sec. 24 of the consolidated Act the real estate of the society is vested in the trustees for the time being. Sec. 13 provides that the succeeding sections, which include provisions for appointment of trustees, shall apply to all such societies unless the rules of the society make other provision in respect of the matters dealt with in those sections. Sec. 7 gives power to make rules for the mode of appointing and removing of officers, which includes trustees, and the manner of settling disputes between the society and a member or a person claiming through a member. Rule 10 of the society provides for the vesting of the property of the society in a new trustee in case of the death, discharge, &c., of a trustee. The evidence established the title in the appellants, by devolution from the original trustees who died or retired.

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[HIGGINS J.—Sec. 24 seems to provide for the vesting without conveyance only in case of the *death or removal* of a trustee. Under the first part of the section dealing with the original vesting, the words are "shall be vested," which are consistent with the execution of a conveyance. But what is the authority for saying that on the retirement of a trustee the property will vest in the new trustee by virtue of his office and without conveyance ?]

"Removal" covers every case in which a trustee is taken away from the trust, whether it is by his own wish or compulsorily. "Shall be vested" must be read as meaning "shall vest"; *Walker* v. *Giles* (1). The acceptance of a resignation is a removal.

[ISAACS J. referred to *Morrison* v. *Glover* (2).]

The other construction is a possible but not a reasonable construction. Instead of enabling persons to acquire properties more easily through such societies than independently of them, it would render it difficult and dangerous owing to the risk of some hidden flaw in the title, arising from informality on the part of the society in vesting the property in new trustees.

[HIGGINS J.—It may be that such a provision would have been expedient, but there must be some reason for the use of different words in the two sub-sections. (He referred to *Lewin on Trusts*, 10th ed., pp. 764, 1031, 1032).]

The Statute should be liberally construed.

[ISAACS J. referred to *Sharp* v. *Warren* (3).]

As to the jurisdiction of the Supreme Court to entertain this action, sec. 58 does not apply, because there is no rule of the society dealing with the matter. Rule 32 does not cover the case. The Supreme Court has jurisdiction unless it is excluded by secs. 59 and 60. It can only be excluded by express words or necessary implication. The words of sec. 59 are not apt to include the case of an action of ejectment by a mortgagee. Such an action is not a dispute within the meaning of the section. Apart from this Act, the District Court had no jurisdiction in ejectment except as between landlord and tenant where the term had expired. It could not entertain this action unless it had power to do so under sec. 59. That section should be construed in the

(1) 6 C.B., 662. (2) 4 Ex., 430, at p. 443. (3) 6 Price, 131.

light of sec. 60, which indicates the mode of enforcement of the decision of the District Court. The remedy provided in the latter section, an order for the payment of money, is inapplicable to ejectment, so that a plaintiff in ejectment who resorted to the District Court for relief could never recover his land. Sec. 59 should therefore be construed as only applying to cases where an order for payment of money would be adequate compensation. The District Court has no machinery for dealing with such matters. In England it has a more extensive jurisdiction by Statute in matters that could otherwise only be dealt with in a Court of Equity. [They referred to the New South Wales Act No. 4 of 1901, and the English Act 28 & 29 Vict. c. 99.]

[HIGGINS J.—In the Act 37 Vict. No. 4, sec. 15, the words "for any other relief order or direction" were clearly to be construed as *ejusdem generis* with internal disputes in the administration of the society.]

The consolidation should be construed in the same way. It has been held that under similar words in the English Acts disputes between mortgagor and mortgagee were not comprehended: *Municipal Permanent Investment Building Society* v. *Kent* (1); *Fleming* v. *Self* (2); *Mulkern* v. *Lord* (3).

[GRIFFITH C.J. referred to *The Queen* v. *Judge of the County Court of Surrey* (4); *In re Bassett's Plaster Co.* (5); *Linden* v. *Banks* (6).

ISAACS J. referred to *Municipal Permanent Investment Building Society* v. *Richards* (7); *Western Suburban and Notting Hill Permanent Benefit Building Society* v. *Martin* (8); *Hack* v. *London Provident Building Society* (9).]

[HIGGINS J. referred to *Doe* v. *Glover* (10).]

At any rate there must be a *bonâ fide* dispute before the jurisdiction of the Supreme Court can be ousted by the provision as to settlement of disputes. There is no relevant dispute here, because, even on the defendant's showing, there was a default. The mere raising of a defence is not sufficient.

(1) 9 App. Cas., 260.
(2) 3 De G. M. & G., 997.
(3) 4 App. Cas., 182.
(4) 13 Q.B.D., 963.
(5) (1894) 2 Q.B., 96.
(6) 30 L.J.Q.B., 102.
(7) 39 Ch. D., 372.
(8) 17 Q.B.D., 609.
(9) 23 Ch. D., 103.
(10) 15 Q.B., 103.

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[ISAACS J. referred to *London and North Western and Great Western Joint Railway Co.* v. *J. H. Billington Ltd.* (1).]

Canaway, for the respondent. The matter was within sec. 59 and the jurisdiction of the Supreme Court was therefore ousted. There was a *bonâ fide* dispute between the respondent and the trustees. There was evidence of a tender of the amount which the respondent alleged to be due. There was therefore a question whether the respondent was not entitled to relief against ejectment by the appellants. The right of the mortgagees to possession is not unqualified. A mortgage is merely a pledge, and the mortgagor is entitled to relief on tendering the amount due: secs. 106 and 107 of *Real Property and Conveyancing Act* 1898. The respondent's contention was that the society's accounts had been improperly kept, and that the balance shown against the respondent was calculated on a wrong basis. There was therefore a question for the jury whether the defendant had tendered the proper amount. [He referred to *Municipal Permanent Investment Building Society* v. *Kent* (2).]

[HIGGINS J.—But surely the plaintiffs are entitled to a verdict unless the proper amount was actually paid. A tender would not affect the right to recover, and the fact that there is a defence raised at the trial would not make a dispute within the meaning of sec. 59. He referred to *Doe* v. *Clifton* (3).]

The case at any rate comes within sub-sec. (*c*). The words "applications for any order, relief, or direction" are wide enough to cover it, and sec. 60 should not be construed as cutting down their operation. Moreover, sec. 60 only refers to "orders"; it leaves the other headings untouched. "Application" is generally used in Statutes for the institution of all kinds of proceedings, *e.g.*, *Equity Act* 1901, 4th Schedule, Rule 11, applied to originating summons. It is applicable to the hearing of a suit as well as to interlocutory proceedings: *International Financial Society* v. *City of Moscow Gas Co.* (4). The legislature must be taken to have had in view the limitations upon the operation of the Statutes resulting from the decisions in England, and to have

(1) (1899) A.C., 79.
(2) 9 App. Cas., 260.
(3) 4 A. & E., 809, at p. 814.
(4) 7 Ch. D., 241.

inserted the more general words to cover every case. [He referred to 10 Geo. IV. c. 56, 6 & 7 Wm. IV. c. 32, 7 Vict. No. 10, and 11 Vict. No. 10.] In England the incompetency of the tribunal provided by the Act was an important factor in the decisions. That objection does not apply here. The District Court has more extensive powers, and has all the machinery and officers necessary to enforce its orders. The Judges have power to make rules to meet all cases within the jurisdiction. The argument as to these words being restricted by the maxim of *ejusdem generis* does not apply to the consolidated Act, as the scope of the preceding words has been extended by the presence of the words "in any Society." The object of the legislature was to ensure simplicity and economy in the settlement of such matters. Wherever questions arise as to the state of accounts they are withdrawn from the common law Courts.

Assuming that the jurisdiction of the Supreme Court was not ousted, the legal estate was not proved to be in the plaintiffs. Rule 10 provides for the appointment of new trustees, but the vesting of the property of the society depends upon sec. 24 of the Act of 1902. It is only on the death or removal of a trustee that the property vests in the new trustee without conveyance, and there was no conveyance in this case, and no removal of a trustee. There was merely a retirement. By the general law a trustee could not retire from his trust, but must be removed by the Court. Sec. 24 (1) is merely a direction as to the persons in whom the property is to be vested, and sub-sec. (2) does away with the necessity for an order of the Court for removal, but the necessity for a conveyance in the case of a retirement still remains. Even if the property could vest in the new trustees without conveyance, the appointment was not duly certified as required by rule 10. [He referred to *Walker* v. *Giles* (1).]

Dr. Cullen K.C., in reply.

Cur. adv. vult.

April 19.

GRIFFITH C.J. This is an appeal from the refusal of the Full Court of New South Wales to grant a rule *nisi* for entering

(1) 6 C.B., 662.

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judgment for the plaintiffs in an action of ejectment, after the jury had been discharged for disagreement. The Supreme Court held that they had no jurisdiction to entertain the application. This Court has already given its opinion that they had jurisdiction. The only question now is whether they ought to have exercised it.

The plaintiffs are the trustees of a building society. The defendant is the executrix of a deceased member of the society, who had mortgaged a piece of land to the society. By the terms of the mortgage the money was repayable by monthly instalments, and, if default was made in the payment of two such instalments, the mortgagees were entitled to enter upon the land. There is no question as to the execution of the mortgage or as to the default, or as to the plaintiffs' right to maintain an action of ejectment, unless there is something in the Act to prevent them. The defendant objects that the plaintiffs' title to sue has not been made out. She bases that objection on three different grounds: first, that the plaintiffs have not been properly appointed as trustees in terms of the constitution of the society; secondly, that if they have, nevertheless the property in question is not legally vested in them; and, thirdly—and this is the most important question of all—that under the provisions of the Statute law of New South Wales, such a question cannot be determined by the Supreme Court but must be determined by the District Court. I propose to deal with these contentions in the order in which I have stated them.

The first Act of New South Wales dealing with Friendly Societies is the Act 7 Vict. No. 10, passed in 1843. That Act recited:—"Whereas certain Friendly Societies have been established in the Colony of New South Wales and it is desirable to encourage the formation of others for raising by voluntary subscription of the members thereof separate funds for the mutual relief and maintenance of the members of such societies," &c.

The intention of the Act was to enable persons of comparatively small means to associate themselves together in order that they might obtain advantages which they could not otherwise enjoy by reason of their limited capital, and to enable them to avoid the expense involved under the general conveyancing law. It

enacted that "it shall and may be lawful . . . for the members of any such society from time to time to assemble together and to make . . . rules for the better government of the same as to the major part of the members of such society so assembled together shall seem meet so as such rules shall not be repugnant to the laws of this Colony nor any of the express provisions or regulations of this Act and . . . also from time to time to alter such rules as occasion shall require or to annul and repeal the same and to make new rules in lieu thereof."

The 9th section of the Act provided that: "Every such society shall and may from time to time at any of their annual meetings or by their committee if any such shall be appointed for that society elect and appoint such person into the office of steward president treasurer or trustee of such society as they shall think proper . . . and from time to time to elect and appoint others in the room of those who shall be absent from the Colony be removed vacate or die."

I take it that under the power to make rules for the better government of the society, societies constituted under this Act had power to make provision for the appointment and the removal of trustees. The Act 11 Vict. No. 10 authorized the establishment of building societies "for the purpose of raising by small periodical subscriptions a fund to assist the members thereof in obtaining a small freehold or leasehold property." Then it was provided how those building societies were to be formed. The 4th section provided that all the provisions of the Act 7 Vict. No. 10, so far as applicable to any building society and to framing, certifying, enrolling and altering the rules thereof, should extend and apply to such society and its rules in the same way as if that Act had been expressly re-enacted. I think, therefore, that by virtue of these Statutes this society, which was formed under them, had power to make rules as to the appointment and removal of trustees. They accordingly made rules, which have been altered from time to time, but are still substantially the same. Rule 10 provides that: "In case any trustee shall die or be desirous to be discharged from or shall become incapacitated to act in the trusts reposed in him . . . or refuse to carry out the directions of the Board, he shall thereupon cease to be a

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trustee of the Society, and the manager shall convene a special meeting of the Board, and at such special meeting a new trustee shall be elected in the place of such trustee; and the appointment of every new trustee shall be signed by the continuing members of the Board, and be forthwith duly certified and transmitted to the proper officer, according to law, and thereupon all the property of the Society vested in such retiring trustee, either alone or jointly with the continuing trustee or trustees, shall, by virtue of the Acts of Parliament in that behalf vest in the new trustee appointed in his place for the same estate and interest as the former trustee had therein, and subject to the same trusts, without any assignment or conveyance whatsoever; and all other property and effects (if any) which cannot be legally and effectually vested in the new and continuing trustees without a conveyance, assignment, or transfer, shall be conveyed, assigned, and transferred at the expense of the Society, so as to vest in such new and continuing trustee upon the trusts and with the powers under and subject to which the same ought to be held by the trustees of the Society."

The society could not by their rules alter the law of the devolution of property, so that, if this provision is in accordance with the general law in that respect, it is valid, if it is not, it is invalid. It therefore adds nothing to the law. So far as the rule relates to the mode of appointment and removal of trustees, I have no doubt as to its validity. I will deal now with the objection that the plaintiff trustees were not appointed according to law. What was done was this. A trustee sent in his resignation, whereupon a special meeting of the Board was called in accordance with the rules, for the purpose of accepting his resignation and appointing his successor. The minutes were put in evidence, in which it was recorded that, Larkin having resigned his office as trustee and director, it was proposed that Mullins, one of the plaintiffs, should be appointed in his place. It is contended that that is not sufficient, because the rule goes on to provide that the appointment shall be signed and shall be forthwith duly certified and transmitted. If there had been any law then in force requiring the appointment of a new trustee to be certified by any person in particular, those words would be con-

strued accordingly. But no such law has been brought to our notice, and I cannot see how any greater effect can be given to the word "certified" than is ordinarily attached to it. It means that the authenticity of the document transmitted must be guaranteed by some person's signature. The appointment was in fact signed by the Board, and countersigned by the Secretary. The appointment of the other plaintiff was made and certified in precisely the same manner. In my opinion the appointment was properly made under the rules of the society.

I pass to the second objection, that, assuming the appointment of these two gentlemen to have been properly made, nevertheless the lands of the society are not vested in them. That is said to result from the general law of conveyancing, regarding the transmission of property from one trustee to another as part of the law of the devolution of property and conveyancing. It is, of course, competent for the legislature to alter that law if it thinks fit, but it is said that in the present case the plaintiffs have not brought themselves within the strict terms of the altered law. Before I refer to the objection I would make this observation. *Interpretatio chartarum benigne facienda est ut res magis valeat quam pereat.* I think these words should be written in letters of gold in every Court that is called upon to administer laws made in Parliament, so that the Court may remember that they are a co-ordinate branch of the Government, not sitting for the purpose of frustrating, but for that of giving effect to the wishes of the legislature. In the present case the Court has to give effect to express statutory provisions. Since the Act 7 Vict. No. 10, the law has been consolidated. The first Act passed for that purpose was in 1873, and the law was finally consolidated in 1902. That Act contains a series of provisions relating to the property of societies. The legislature desired to encourage the formation of these societies and to do away with the necessity for many forms which involved expense.

Sec. 13 of the *Building and Co-operative Societies Act* 1901 (No. 17 of 1902), provides as follows:—"The provisions of the nineteen next succeeding sections of this Act shall be applied to every society established for any of the purposes hereinbefore in this Part of this Act mentioned or referred to unless the rules of

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such society make other provision in respect of the several matters in the said sections contained inconsistent with the application thereof to such society." I apprehend that that assumes that the rules of the society are not otherwise *ultra vires*. The section relevant to appointments is sec. 20, which was sec. 28 of the Act of 1873. That provides that:—"Every society established under this Part of this Act shall, at some meeting of its members, and by a resolution of a majority of the members then present, nominate and appoint one or more person or persons to be trustee or trustees for the said society, and the like in case of any vacancy in the same office, and a copy of the resolution so appointing such person or persons to the office of trustee, and signed by such trustee or trustees, by the secretary, and three members of the said society shall be sent to the Registrar to be by him deposited with the rules of the said society in his custody." That mode of appointment is different from that provided for by the rules of the plaintiff society, which require the appointment to be made by the members of the Board. The operation of section 20 is therefore excluded by the words of sec. 13 so far as regards the mode of appointment. And I think that the same consequence follows as to the mode of certification. I think, therefore, that no question arises under that section.

Sec. 24 provides that—"(1) All real and personal estate whatsoever belonging to any such society established under this Part of this Act, shall be vested in the trustees for the time being for the use and benefit of such society and the members thereof and the real or personal estate of any branch of a society shall be vested in the trustees of such branch, and be under the control of such trustees, their respective executors or administrators, according to their respective claims and interests. (2) Upon the death or removal of any such trustee the same shall vest in the succeeding trustees for the same estate and interest as the former trustee had therein, and subject to the same trusts without any conveyance or assignment whatsoever. (3) In all actions and suits or indictments or summary proceeding before magistrates touching or concerning any such property, the same shall be stated to be the property of the persons holding the said office of

trustees in their proper names as trustees of such society without any further description."

The legislature has there stated in the plainest language, as it seems to me, that the property of the society shall be vested in the trustees for the time being. It is said that that enactment is capable of two meanings, one being that it is a direction to the trustees to take the necessary steps to have formal legal conveyances executed in order that the property may become vested in them, the other that it is a statement of the law as to the property. No doubt property not previously in the hands of the society must be conveyed to the trustees. Then, as to the provision in the case of a vacancy owing to the death or removal of a trustee, it is said that the words "upon the death or removal of any such trustee" only apply to cases where a trustee is removed by some adverse proceeding in a Court of Justice, and that they do not cover the case of retirement, for which the legislature has not made express provision as being a case which is less likely to arise. So that the legislature, with the admirable intention of making provision for the various contingencies which were in their opinion likely to arise, have succeeded in baffling their own intention. But, accepting the strictest construction, let us see how the matter stands. By the old law a trustee's office could only be vacated by death or removal. He could not divest himself of it by voluntary resignation. Although therefore the rules purport to say that the office may become vacant by resignation, that is a mistake. So soon as a successor is appointed, as both cannot occupy the same office, the first trustee's office really becomes vacant by his removal. It is conceded that if the wording of the resolution of the Board had been that Mullins be appointed a trustee and director in place of Larkin "resigned and removed," or the word "removed" had been otherwise inserted, everything would have been in order, and the plaintiffs' title would have been perfect. What difference is there, as a matter of common sense, in the case of an operation to be carried out by laymen in the working of a society of this kind, between that and a resolution passed by a meeting accepting a resignation, and appointing a successor in the place of the man just described as the person whose resignation is accepted? The resignation cannot take effect without

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being acted upon by some other person. If you want to use the word "removal," in its most precise sense it means this: the vacation of an office arising from the act of some person other than the holder of the office. And I apprehend that the term removal covers every such case. In this case the removal of these two gentlemen was effectuated by the Board appointing their successors. I think, therefore, that the case is within the literal meaning of the words as well as the obvious intention of the legislature, and that the title of the trustees is complete. Sec. 24 expressly provides that the trustees may bring and defend actions concerning the property of the society.

The word "removal" is, of course, capable of bearing a more limited meaning and of being construed so as to make it serve as a trap to lead these societies into confusion, but, for the reasons I have given, I think that even on technical grounds these technical arguments fail.

I come now to another question of much more importance —whether such an action as this can be brought at all in the Supreme Court. In the very earliest of these Acts provision has been made for preventing unnecessary legal expense in connection with conveyancing and litigation. The earlier Acts provided generally that all disputes between members of the society and the trustees or the governing body should be referred either to arbitration or to justices. I need not trace the series of decisions extending over a period of years, but they continued, I think, up to 1878, when the case of *Mulkern* v. *Lord* (1) was decided. It has been decided in a series of cases that this provision for the case of a dispute arising between the members of a society and the governing body did not apply to a controversy between a mortgagor and a mortgagee. That was the recognized construction up to 1878 in England, and in New South Wales up to 1873, when the Act was passed which is now contained in the Act of 1902. That Act contained a series of provisions taken from the Act 18 & 19 Vict. c. 63, which was passed at a time when it was understood that provisions of this sort in reference to Friendly Societies did not apply to, and that the provisions in the Acts originally relating to Friendly Societies and incorporated in the

(1) 4 App. Cas., 182.

Building Societies Act, did not include disputes between mortgagor and mortgagee. That was the language used in the Statutes, and the state of the law as declared by the Courts up to 1855. I think that, as the legislature of New South Wales adopted the law of England in 1855 in identical language, it is fair to infer that the words were intended to be construed in New South Wales in the same sense as they had been in England. It is a common practice in British dependencies to adopt Imperial laws in the same language, one of the reasons being that they will thus have the benefit of the views of English Courts on the construction of the language used. I will refer now to the express provision under which this question arises. Sec. 58, sub-sec. (1) provides that disputes between an officer or member, or person claiming through a member of a society and the society or trustees, treasurer or committee of management shall be decided in the manner prescribed by the rules, and the decision so made shall be binding and conclusive on all parties without appeal. The controversies referred to are disputes between individuals and the society collectively. Then there is a provision as to what is to happen if the disputes are referred to justices, but limiting the powers of justices to all such powers as may be exercised by justices in summary proceedings. Then comes sec. 59 (sec. 15 of the Act of 1873) which provides: "In all societies established under this Act all applications—(*b*) for the settlement of disputes that may arise or may have arisen in any society, the rules of which do not prescribe any other mode of settling such disputes; or (*c*) for any other relief, order, or direction, . . . shall be made to the District Court of the district within which the usual or principal place of business of the society is situate. (2) Such Court shall, upon the application of any person interested in the matter, entertain such application and give such relief and make such orders and directions in relation to the matter of such application as hereinafter mentioned, or as might before the commencement of the *Friendly Societies Act* of 1873 be given or made by the Supreme Court or any other Court, and the decision of such District Court upon and in relation to such application as aforesaid shall not be subject to any appeal." It is conceded that this action,

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being an action of ejectment, only falls within the jurisdiction of the District Court if it comes within this section, for otherwise the action will not lie in that Court. The Supreme Court has decided in this very case that that section does not apply to an action of ejectment by a mortgagee. Perhaps their decision went rather further than necessary. The words "make such orders and directions . . . as hereinafter mentioned," may relate to the succeeding section—orders that the Supreme Court would not have made in its ordinary jurisdiction. But the question is whether the action of ejectment by a mortgagee against a mortgagor falls within that section. So far as the provision as to disputes is invoked, I am of opinion that the section has no application. For in this case there is no dispute. The main facts were never really disputed. There is some dispute as to how much is actually due, but, in my opinion, a dispute, in order to be relevant for this purpose, must be a dispute relevant to the existence of the right to the relief claimed by the plaintiff. In this case there is no dispute as to any fact affecting the plaintiffs' right to recover. The only question in the action is whether they are entitled to recover possession of the land. If any part of sec. 59 can be invoked, it is that referring to applications "for any other relief, order, or direction." The provision was originally in these words, sec. 15 of the 37 Vict. No. 4 :—"In all societies established under this Act or any of the said repealed Acts all applications for the removal of trustees or for any other relief order or direction or for the settlement of disputes . . . shall be made to the District Court of the district within which the usual or principal place of business of the society shall be situate," and then come the same words as in sub-sec. (2) of sec. 59 of the Act of 1902. In what sense would these words have been construed in England when they were passed ? Were they words likely to have been used by the legislature or any lawyer to describe an action of ejectment in 1855 ? It is quite clear that they would not. Relief is a term used in equity, but I do not know that any instance can be found of a person in possession asking for relief from an action of ejectment being spoken of as seeking relief. At any rate some sensible meaning must be given to the words. I confess that I felt a

difficulty for some time on the point, but after further consideration I think there are many kinds of relief which might be granted by the District Court under that provision. For instance, suppose the question were raised whether the funds of the society were properly invested, or the trustees were about to invest them in a way that was thought to be improper, the District Court would, I think, have power to entertain a suit to compel proper investment. That is only one instance. Considering that these societies are in many respects analogous to joint stock companies, and putting aside disputes amongst individual members, I think that this construction gives ample meaning to the words without straining them to give them a sense which I am sure they could not have borne when introduced in 1855. The practice of New South Wales in respect of actions of ejectment was exactly the same as it had been in England.

I have, therefore, come to the conclusion that the jurisdiction of the Supreme Court is not ousted by sec. 59. The most that can be said in favour of that contention is that the words are not quite clear.

In my opinion the order the Supreme Court ought to have made was to order judgment to be entered for the plaintiffs. I have not, so far, expressed any opinion as to the jurisdiction of the District Court over the controversy about the amount due on the mortgage. I have, however, formed an opinion, and it is perhaps as well that I should express it. I see no reason why a dispute of this kind between mortgagor and mortgagee should not fall within the terms of the section in question. According to the plain language of the legislature, and applying the rule of construction to which I have already referred, I think the District Court has jurisdiction in such matters.

ISAACS J. The first question I shall consider is, had the Supreme Court jurisdiction to hear and determine this action? The answer depends upon the construction to be placed on sec. 59 of the *Building and Co-operative Societies Act* 1901, which was assented to on 24th January 1902, and is No. 17 of that year.

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Assuming that a dispute within the meaning of the Act, the settlement of which was necessary or material to the plaintiffs' claim, existed before writ issued, the plaintiffs' claim would not in my opinion be cognizable by the Supreme Court, but would have to be determined by the District Court. The action is one of ejectment, that is to say, the claimants ask for possession of the land claimed, in accordance with the terms of the mortgage deed, and not for any declaration of title independent of the contract. According to the provisions of the mortgage, default in payment of two monthly instalments entitles the mortgagees to enter upon the premises and to exercise other rights immaterial to the present question. Had there been any real dispute that such default had occurred, I should have thought that that was a matter which by the Act was left to the decision of the District Court, and that, until the rights of the parties were ascertained by that tribunal, no power existed elsewhere to make any order in the plaintiffs' favor.

Having regard to the importance of the subject and to the fact that I have arrived at a conclusion opposed to that taken by the Supreme Court of New South Wales, I shall state the reasons for my opinion.

It has been argued that, by analogy to a number of decisions in England, it ought to be held that a claim by a mortgagee building society under this Act, arising by virtue of a mortgage given by one of its members, is not a dispute within the meaning of the Act. Those decisions culminated in the case of *Mulkern* v. *Lord* (1). In that case it was held, in substance, that an action by a mortgagor for accounts was within the jurisdiction of the ordinary Courts notwithstanding the legislative application to building societies of the provision for settlement of disputes in friendly societies. But the real ground of decision was this, that the same meaning had to be given to those provisions when applied to building societies as they bore when applied to friendly societies, and when applied to friendly societies, they did not include disputes between mortgagee and mortgagor: see *per* Lord *Blackburn* in *Municipal Permanent Investment Building*

(1) 4 App. Cas., 182.

Society v. *Kent* (1). In 1874 the *Building Societies Act* was passed and a new line of cases was decided upon it. I shall refer only to two. In *Hack* v. *London Provident Building Society* (2), the plaintiff sued for an account in respect of a mortgage transaction with the defendant, and the Court of Appeal held that the Court's jurisdiction was ousted. *Jessel* M.R., in the course of his judgment, expressed himself in terms which I think are very apposite in the present case. He said (3):—"I have said, not only in the cases which have been referred to, but I have said very often in this Court, that it is the duty of the Court first of all to find out what the Act of Parliament under consideration means, and not to embarrass itself with previous decisions on former Acts when considering the construction of a plain Statute framed in different words from the former Acts.

"Now we have first to see what this Act of Parliament says, and we must recollect this, that it is an Act of Parliament referring to building societies and to building societies only, and the provisions applicable to building societies in the older Acts, as I shall presently show, were only extensions to building societies of some former Acts relating to friendly societies." He held also that the dispute to be within the Act must be a dispute in respect of a society transaction, and he held that the dispute in question, being between a member and the society and between the society and a member in reference to securities given by him for his subscriptions and fines, was a dispute regarding a society transaction. He then proceeded to say (4):—"You have a new Act providing in the most careful manner for everything that remains to be determined by arbitration, and so far from there being anything detrimental in referring these things to arbitration, it is a most desirable course. I am quite aware that at the time when the Court of Exchequer decided *Morrison* v. *Glover* (5) the opinion was the other way. The Judges did all they could to defeat the legislative provisions of these Acts; but of late years the tide has turned, and now Judges endeavour, where the legislature has directed references to arbitration, to

(1) 9 App. Cas., 260, at pp. 276, 277.
(2) 23 Ch. D., 103.
(3) 23 Ch. D., 103, at p. 108.
(4) 23 Ch. D., 103, at p. 111.
(5) 4 Ex., 430.

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carry them out. Moreover it appears to me the words are plain." He further goes on (1):—"I think it leads to great mischief, when an Act of Parliament is plain and clear, for Judges to refer to decisions on older Acts and then say they cannot distinguish sufficiently the new Act from the old, and that therefore the decisions are binding. Of course you may look at them with a view of seeing what the interpretation is, but I prefer to read the modern Act, find out what its meaning is, and if it is plain, to act according to its plain construction, without troubling myself with the decisions of the Courts on earlier Acts the provisions of which are not the same."

Lord Justice *Lindley* expressed himself substantially to the same effect.

In *Municipal Permanent Investment Building Society* v. *Kent* (2) the House of Lords by a majority affirmed *Hack's case*, and held that the High Court of Judicature had no jurisdiction to entertain an action by the society against a member for moneys due to it under a covenant in a mortgage deed. Great stress is laid in that case upon the fact that the statutory provisions for settlement of disputes were now part of the *Building Societies Act*, that a building society, unlike a friendly society, lent money on mortgage as an essential part of its business, and that in the new provisions the power of dealing with disputes was considerably enlarged. Lord *Watson* said (3):—"I do not think it can be inferred from the character of the tribunals thus constituted, and the nature of the powers conferred upon them, that it is impossible that the legislature should have intended to commit to their determination questions or disputes arising between an advanced member and the society in their relative characters of mortgagor and mortgagee. In 1865 the legislature had already conferred upon County Courts (28 & 29 Vict. c. 99, sec. 1) jurisdiction to exercise the power and authority of the High Court of Chancery in all suits for foreclosure or redemption, or for enforcing any charge or lien, when the mortgage, charge or lien does not exceed in amount the sum of £500. There does not appear to me to be any *à priori* improbability that the

(1) 23 Ch. D., 103, at p. 112.
(2) 9 App. Cas., 260.
(3) 9 App. Cas., 260, at p. 281.

legislature should in 1874 either intrust to those Courts the duty of determining such questions between a benefit building society and its advanced members, or authorize them to pronounce, when requisite, an order for foreclosure or redemption after the rights of the parties had been ascertained by arbitrators or by the registrar." He then examined the Act with a view of determining the dispute as to whether the liability of an advance to a member under a mortgage is a dispute within the meaning of the Act, he thought it was, and said (1):—"I am unable to regard the liability of an advanced member under such a mortgage as the liability of a stranger, and not as the liability of a member." The *Earl of Selborne* L.C., who dissented, thought that disputes of that character were not disputes between the society and a member as such; he said (2) after speaking of the change of language in the latter enactment. "The sense of the shorter form of expression, 'disputes' is the same. It cannot possibly be supposed to extend to questions between the society and strangers; and the repeated reference to the rules appears to me also to show that disputes arising under the rules must be extended.

"This being so, I cannot assent to the opinion that the decisions under the earlier Act, so far as they depend upon the meaning of the words by which the subject-matter of arbitration was therein defined, are displaced or rendered inapplicable by the use of words of either larger or clearer, or in any way different signification, in the later Act.

"And it also appears to me that this is really the point on which the decision of the House in the present case ought to depend; because neither the better means provided by the later Act for enforcing an award, nor the more extended powers thereby given to arbitrators, nor the introduction of the County Court instead of justices as an authority which, in some cases, may itself arbitrate, can require, or by reasonable implication justify, a wider construction of the 'disputes' to be referred than that word otherwise ought to receive."

In my judgment, reading the Act 17 of 1902, which differs from both the English Acts, and endeavouring to collect from

(1) 9 App. Cas., 260, at p. 283. (2) 9 App. Cas., 260, at p. 271.

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itself the true intention of the legislature, I entertain no doubt that a dispute between the society and its mortgagor as to the rights of the society under one of its mortgages from a member is a dispute as to a society transaction, or, as Lord *Blackburn* says, "a dispute between the society and him as a member of the building society as such," and is within the meaning of sub-paragraph (*b*) in the 1st sub-section of sec. 59. Certainly *primâ facie* it is within the words. What is there that militates against this view? Reference to sec. 6 shows that the very object of the society's existence is to create a fund by the subscriptions of its members so as to lend to its members, but only upon the security of a mortgage to be given by the borrowing member to the general body of members. The mutual rights and liabilities of the lending members and the borrowing member are created and evidenced by the mortgage; how then can it be said that a dispute between lenders and borrower in relation to this transaction is not essentially a society dispute? If it is, why are the provisions of sec. 59 inapplicable? By sec. 6 the society may make any rules subject to the provisions of the Act for the better carrying out of its purposes. By sec. 7 it is provided that the rules shall provide, *inter alia*, for the manner of settling disputes between the society and a member or a person claiming on account of a member.

By sec. 58 every dispute between a member or a person claiming through or under such member and the society or the trustees shall be decided in manner directed by the rules, and the decision is binding and conclusive. If the rules direct that the dispute shall be referred to justices, the justices are empowered to inquire, and to hear and determine the matter.

Sec. 59 provides that certain applications shall be made to the District Court.

Sub-par. (*b*) of that section relates to applications for the settlement of disputes that may arise or have arisen in any society the rules of which do not prescribe any other mode of settling such disputes. The section goes on to provide as follows:—"Such Court shall, upon the application of any person interested in the matter, entertain such application and give such relief and make such orders and directions in relation to the matter of such applica-

tion as hereinafter mentioned, or as might before the commencement of the *Friendly Societies Act* 1873 be given or made by the Supreme or any other Court, and the decision of such District Court upon and in relation to such application as aforesaid shall not be subject to any appeal."

The District Court is a legal tribunal presided over by a Judge, and by the *District Courts Act* it has jurisdiction in "personal actions" up to £200 with certain exceptions, and also has jurisdiction in certain cases of partnership account, or claims of a distributive share under an intestacy, or any legacy under a will not exceeding £200. It has also jurisdiction by consent to try any action that might be brought in the Supreme Court. It has power to decide certain actions of ejectment, namely, where landlords claim possession from a tenant or person claiming under him who continues in occupation of land notwithstanding the termination of the tenancy. The Judge may order possession to be given to the plaintiff, and, if necessary, the Registrar of the Court issues a warrant authorizing and requiring the bailiff of the Court to give possession of the premises to the plaintiff. To such an action of ejectment a claim for rent or mesne profits not exceeding £200 may be added, and certain other cases of ejectment, that is in the case of small tenements held under lease, are within the jurisdiction of the District Court. Bailiffs are to be appointed by the Judge and are removable by him; provision is made in the *District Courts Act* for the duties and remuneration of bailiffs. There are other powers both of jurisdiction and enforcement to which I need not refer, but it is plain from what I have already said that ejectment as between landlord and tenant is no novel jurisdiction of the District Court, and there is no lack of legal machinery to deal with it.

But, in addition to what has already been said, the legislature has expressly conferred upon the District Court for the purpose of this jurisdiction the power to give such relief and make such orders and directions as the Supreme or any other Court could give or make before the commencement of the *Friendly Societies Act* 1873.

For myself I cannot conceive any wider powers capable of being conferred by the legislature, and without doing extreme violence

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to the wording of this section, I fail to see how the suggested limitation can be placed on it. It is, however, said that the generality of this section is controlled by sec. 60. I do not agree with this contention.

The first sub-section of sec. 60 makes four provisions:—

(1) That an order of the District Court for the payment of money, though not an ordinary judgment of that Court, is to be enforced as if it were.

(2) That where that Court orders the doing of some act, not being for the payment of money, the Judge may (not must), that is, of course, in appropriate cases, order the payment of a certain sum of money in default of the doing of the act.

(3) If such an alternative order is made, then again, though the order is not a judgment, it may be enforced as if it were.

(4) *Certiorari* is taken away with regard to such order.

I can therefore see no limitation by reason of sec. 60 upon the extremely large words of sec. 59. Indeed, as suggested by the Chief Justice during the argument, I regard the first sub-section of sec. 60 as simply the full explanation of what is meant by the words "as hereinafter mentioned" in sec. 59. I should add at this point that the case quoted by the Chief Justice; *Reg.* v. *Judge of the County of Surrey* (1), is so close in its resemblance to the present case as to be practically decisive of this point.

Sub-sec. (2) of sec. 60, particularly in its concluding words, strengthens the view that the costly and sometimes tedious course of litigation in the Supreme Court was intended to be avoided in these matters. The decision of the Supreme Court in this case, *Heydon* v. *Lillis* (2), cannot now be relied on as law.

The question still remains whether there was in fact in this case any dispute as above interpreted between the parties necessary or material to the plaintiffs' claim before these proceedings commenced. The existence of such a dispute was essential to give the District Court jurisdiction and oust that of the Supreme Court: *London and North Western and Great Western Joint Railway Cos.* v. *J. H. Billington Ltd.* (3). Such a dispute may in

(1) 13 Q.B.D., 963.

(2) (1906) 6 S.R. (N.S.W.), 453.

(3) (1899) A.C., 79.

some cases appear from the statement of claim itself, as in *Huckle* v. *Wilson* (1). The facts of the case may show that such a dispute existed either by express words or by conduct (see *Clemson* v. *Hubbard* (2)), or the facts may establish, as in *Billington's Case*, that no dispute had arisen before action. In this case I am clear that, although there is ground for contending that the defendant did dispute the accuracy of the society's accounts, yet there is no trace of any suggestion on her part of the non-existence of the two months' default, which in itself was sufficient to entitle the plaintiffs to possession under the terms of the mortgage. For the purposes of this action, therefore, there was no dispute within the meaning of the Act.

Relief, order or direction in sub-paragraph (*c*) of sec. 59 must have some limitation, and though not necessary to finally determine that, they mean, I think, relief, order or direction with reference either to matters of internal management, of which sub-paragraph (*a*) is a type, or to a dispute within the meaning of sub-paragraph (*b*). This case does not fall within either class. The Supreme Court, therefore, in my opinion had jurisdiction, and it now becomes the duty of this Court to adjudicate upon the matter in controversy.

Upon this branch of the case I shall address myself only to one contention on behalf of the defendant. It was urged that the plaintiffs, although appointed trustees according to the rules of the society, had not the legal estate in the property in question vested in them, and therefore could not maintain this action. It was said in the first place that sec. 24 applied only to trustees appointed in manner prescribed by the Act, that is to say, by sec. 20, and that, inasmuch as the present trustees had been appointed not at a meeting of members but by the Board of Directors, their appointment, though valid as an appointment, did not carry with it the vesting provisions contained in sec. 24. But that is a fallacy, because sec. 13 allows the provisions of the nineteen next succeeding sections to be modified by the rules, that is, to the extent that rules may be lawfully made.

The next argument was this:—Assuming sec. 24 applies, the trustees nevertheless have not the legal estate, because there has

(1) 2 C.P.D., 410. (2) 45 L.J.M.C., 69.

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been no actual conveyance to them to satisfy sub-sec. (1), nor did they succeed trustees who died or were removed, and consequently do not come within the requirements of sub-sec. (2).

In my opinion this argument is also untenable. The enactment that all real and personal estate belonging to the society shall be vested in the trustees for the time being means the same thing as if instead of "shall be vested" the words were "shall vest." It will be observed that the property also "shall . . . be under the control of such trustees," &c., clearly evidencing, to my mind, that the verb "be" is used to denote an actual estate or condition and not a direction to perform an act in the future. The provision is a self-executing enactment, or in other words a legislative conveyance and transfer of the property.

Apart altogether from authority, the necessities of the case require this construction. If a formal conveyance of land is necessary a formal assignment of personal property is equally necessary, and to apply this process continually to every shilling of subscriptions paid to the society by its members month by month or day by day would be plainly unworkable. No case has been cited which construes the Act in accordance with this argument of the defendant, but there are weighty judicial opinions to the contrary. In *Sharp* v. *Warren* (1), decided as early as 1818, an action was brought by the plaintiffs to recover a sum of money constituting the funds of the society which had been placed in the hands of the defendant by them for safe custody, and which the defendant had applied to his own use and refused to pay over. For the purpose of that action the plaintiffs were previous to its commencement appointed treasurers to the society to enable them to sue under 33 Geo. III. c. 54, sec. 4. Several objections were taken, of which one only is now material to the present case, that was, that the defendant being a member of the society was a partner, and could not be sued by the other members in this form of an action.

Sec. 11 of the Act just mentioned provided "that all moneys belonging to such society shall be vested in the treasurer or treasurers, trustee or trustees for the time being for the use and benefit of such society and from and after the death or removal

(1) 6 Price, 131.

of any treasurer or treasurers, trustee or trustees shall vest in the succeeding treasurer," &c., without any asssignment or transfer whatever, and the section went on to provide substantially as in sub-sec. (3) of sec. 24 of Act No. 17 of 1902. It was held that this section was a complete answer to the objection, and *Graham* B. (1), treated the section as "enacting that the property of the society shall vest in the proper officer, for all purposes of action and suit in anywise touching the same."

In *Morrison* v. *Glover* (2), decided in 1849, there was an action on a covenant in a mortgage given by the defendant to the then trustees of a building society; changes had taken place in the personnel of the trustees, and sec. 21 of 10 Geo. IV. c. 56, so much referred to in the present case, was extensively discussed. In answer to an objection that the plaintiffs were not entitled to sue as trustees, *Parke* B. said (3) :—"Surely the society has power to invest their funds from time to time; and if they do so upon real security, is that not a security belonging to the society, which, under the 21st sec. of 10 Geo. IV. c. 56, vests in the trustees ?"

In Victoria the same construction was placed on similar words as far back as 1879. The *Friendly Societies Statute* 1865 (No. 254) provided by sec. 16 :—"All real and personal estate . . . shall be vested in the trustees for the time being," &c., and then went on to make provisions substantially similar to those contained in secs. 24 and 25 in the Act now under consideration.

In *Colonial Bank of Australasia* v. *Draper* (4), *Stawell* C.J. said, "The 16th section vests all the property of the society in trustees."

It therefore seems plain to me that even resting upon sub-sec. 1 of sec. 24 the defendant's argument must fail. Equally, in my opinion, is her argument as to sub-sec. 2 unsustainable.

The expression "shall be vested" is not unfrequently used in this way. See *Westminster Corporation* v. *Johnson* (5) where "shall be vested" in an Act of Parliament was acted on as equivalent to "vest."

I am unable to give to the word "removal," as it is used in this

(1) 6 Price, 131, at p. 135.
(2) 4 Ex., 430.
(3) 4 Ex., 430, at p. 441.
(4) 4 V.L.R. (L.), 527, at p. 532.
(5) (1904) 1 K.B., 19 ; (1904) 2 K.B., 737.

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Act, the restricted signification sometimes attached to it in equity. The removal of a trustee of a building society must be made by someone other than the trustee, as the society itself or the Court; but the removal may be either with the consent or, in proper cases, against the will of the trustee, and in either case it is, I think, a removal of the trustee. What is called a resignation of his office is in truth nothing more than an expressed desire to be discharged, and if acceded to he is removed.

I cannot bring myself to think that the legislature as far back as the time of Geo. III. in the year 1793 used in relation to friendly societies the word "removal" as contradistinguished from the term "retirement" or "resignation" in relation to trusteeship. It will be observed also that the expression "removal" is used in the 11th section of Geo. III. with reference to the treasurer or treasurers just as much as with reference to the trustee or trustees, and this seems to me a strong circumstance to show that the legislature was not confining itself to technical terms of Chancery practice.

The view I have taken is supported by authority. In *Morrison* v. *Glover* (1) already quoted *Alderson* B. said:—"Probably the construction of the 21st section is, that securities taken in the name of the treasurer vest in his successors, and if taken in the name of the trustee or trustees, they vest in the succeeding trustee or trustees.

Walker v. *Giles* (2) is a clear example of a trustee sending in his resignation and the society thereupon removing him and appointing another person in his place. The proceeding was not hostile, and yet he was held to succeed to the legal title of his predecessor by mere force of the Statute.

I am further in accord with what has fallen from the Chief Justice, regarding the effect of the third sub-section of sec. 24 and sec. 25. Their mere appointment as trustees constitutes them trustees of the society within the meaning of the Act, and attracts to them the provisions of the enactments just referred to. I see no reason for reading into the sections words which the legislature has not inserted, and which would destroy much of the simplicity of procedure aimed at by the Statute. It would moreover impose

(1) 4 Ex., 430, at p. 443. (2) 6 C.B., 662.

a serious limitation on the express words of sec. 25, which empowers trustees to sue at law or in equity in respect not only of property of the society, but also of a right or claim to property of the society which certainly might include cases where no legal vesting in the trustees of the property claimed could be possible unless and until the action proved successful.

HIGGINS J. On two of the three objections raised by the defendant to this action I concur with my colleagues; and, inasmuch as they have so well expressed the reasons of the Court, I do not propose to say anything on these objections, but to confine my remarks to the one point on which I venture to differ.

This is an action of ejectment brought by Heydon and Mullins, describing themselves as trustees of St. Joseph's Investment and Building Society, against the executrix and the devisee of Michael Lillis. Michael Lillis on the 26th of September 1887 executed an indenture of mortgage in favour of Tierney, Larkin, and Butcher, who were at that time the trustees of the society. In October 1888 Butcher died, and no one was appointed in his place. The legal estate thereupon became vested in Tierney and Larkin. On the 13th of April 1892 Larkin resigned his trusteeship as in pursuance of a power in that behalf contained in the rules; and the plaintiff Mullins was appointed in his place; but no conveyance was made to Mullins, or to Mullins and Tierney. On the 19th of April 1892 Tierney resigned, and as in pursuance of the rules the plaintiff Heydon was appointed in his place; but no conveyance was made to Heydon or to Heydon and Mullins. It is conceded that there is no objection to the appointments on the ground of reduction of the number of the trustees from three to two; but the question arises, has the legal estate in the land passed to the plaintiffs. If the legal estate has passed to the plaintiffs, the plaintiffs have the right to recover possession. The plaintiffs rely on sec. 33 of the *Friendly Societies Act* 1873. By this section it is provided:—(*a*) that all real and personal estate belonging to any society shall *be vested* in the trustees for the time being for the use and benefit of the society and the members thereof; and (*b*) that "upon the death or removal of any such trustee the same shall *vest* in the succeeding trustee or trustees

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for the same estate and interest as the former trustee or trustees held therein and subject to the same trusts *without any conveyance or assignment whatsoever*." The provision (*a*) is a corollary of sec. 28 of the Act of 1873, which renders it imperative on the society to appoint trustees. It amounts to a direction that the property of the society shall be so vested in the trustees; it does not say that the property is vested without appropriate conveyances, where conveyances are required by the ordinary law. The idea is that, if the society purchase land for its offices, the land is to be conveyed to the trustees; and that if the society take a mortgage, the trustees are to be the mortgagees named in the deed. But provision (*b*) goes further. It provides that "upon the death or removal" of a trustee, the property is to vest in the successors without conveyance. This provision is, however, confined to the case of "death or removal"; and the plaintiffs are successors by resignation. So the legal estate does not pass to the plaintiffs.

This would seem to be at first sight a sufficient answer to the plaintiffs' claim. The estate has not been conveyed to the plaintiffs, and therefore they have not the legal right to possession. It may seem curious, however, that the legislature should have provided for the divesting of the legal estate without conveyance in cases where a trustee has been removed, and not in cases where the trustee has merely resigned. Of course, the defendant is not bound to explain the reasons of the legislature, she has simply to say that there has been nothing done, by Act or by instrument, to vest the property in the plaintiffs. Yet it is interesting to note that the section in question appeared originally in sec. 21 of the English Act 10 Geo. IV., c. 56; and that at the time of that Act, 1829, there was no general statutory power enabling a trustee to get rid of his trust by resignation. Once a trustee, always a trustee—until completion of the duties of the trust, or death. It became the practice to insert such a power in instruments creating trusts; but even Lord Thurlow, the great Chancery lawyer, omitted to insert it in his will; and Lord Eldon and the other trustees had to get a special Act of Parliament enabling them to resign. In 1860 *Lord Cranworth's Act* directed that a power to resign, when a trustee "desires to be discharged," should be

implied in any instrument of trust. Another reason that may have influenced Parliament in 1829 may have been that it is in the cases of death and of removal that the difficulty generally arises in getting a conveyance. It was often difficult to find the heir of the dead trustee, or to induce him to join in conveyances; and if a trustee has been removed, he is generally adverse, or perhaps, has left the country, or is under some disability such as lunacy. On the other hand, a resigning trustee is generally friendly, and willing to get rid of all responsibility; and nothing would be simpler than to get him to execute one conveyance in general terms, with or without reference to a schedule, of all the properties of the society vested in him. Whatever may have been the reason for the omission in England, they recognized it as a defect when Parliament consolidated and amended the law as to friendly societies in 1875; for by the Act 38 & 39 Vict. c. 60, sec. 16 (4), the provision for the vesting of property in new trustees was made applicable to the case of resignation as well as to the case of removal. Unfortunately, the New South Wales Parliament did not follow a similar course in their Consolidating Act of 1902. But whatever may have been the reasons, or the omissions, of the legislature, the simple position of the defendant is that the legislature has said nothing which would operate to divest a retiring trustee of the society's property without conveyance; and it is no answer to this point to show the inconvenience which results from the omission of the legislature. Such considerations become of importance when the meaning of the Act is otherwise doubtful, not where the meaning is otherwise clear.

It is said, however, that for some reason the word "removal" in sec. 33 includes the case of resignation or retirement. Under ordinary circumstances the distinction is, of course, perfectly obvious. In removal the right to make the change, the operative will, belongs to some one other than the trustee; in resignation or retirement the right to make the change, the operative will, belongs to the trustee. Of course a trustee may consent to removal; or the donee of the power of removal may allow resignation instead of removal; but these facts do not affect the essential distinction between the two courses. Rule 10 of the

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rules of this society deals with all cases of change of trustees, whether under circumstances of resignation or circumstances of removal; but it does not affect to create, nor could it create, a mode of passing property by other than the methods prescribed by law. The distinction between these two modes of making a trustee cease to be a trustee, removal and resignation, is fully maintained by the text writers, and in the cases collected by them (see *Lewin on Trusts*, 10th ed., p. 764; *Godefroi*, 2nd ed., p. 596; and *Underhill*, 5th ed., pp. 290-1). Is there anything in the New South Wales Act of 1873—the Act which was in force when the retirement of Larkin and Tierney took place—tending to alter the ordinary meaning of "removal"? The word occurs again in sec. 15, which prescribes that all applications "for the removal of trustees" shall be made to the District Court. This certainly does not favour the view that "removal" includes "retirement"; on the contrary, "removal" in sec. 15 can only refer to an application which is, to say the least, adverse in form. But it is not necessary, for the purposes of my opinion, to hold that a removal by the Court is the only kind of removal contemplated by sec. 33. I rather think that the legislature meant that societies should govern their own affairs, as far as possible, in their own way; and that there is nothing to prevent the society from making any rule that it likes, fixing the conditions on which a meeting of the committee, or of the society, may remove a trustee. As for the case of *Walker* v. *Giles* (1), it is not in any way an authority to the effect that "removal" in 10 Geo. IV. c. 56, includes resignation or retirement. The point is not adverted to in the judgments; but incidentally, in the course of the argument, it was urged that no conveyance had been shown from one trustee of a friendly society to another. From p. 692 of 6 C.B., it appears that counsel merely urged that the Act of Geo. IV. applied only to the case of a single trustee; and this point was overruled. That was all. The point raised in the present case could not arise; for, as appears from p. 673 of the report of that case, the operative resolution purported to "remove" the trustee as well as to accept his resignation. This simply serves to show that those who framed the resolution came to

(1) 6 C.B., 662; 18 L.J.C.P., 323.

the same conclusion as I have come to—that without removal they could not get the benefit of the clause which divests without conveyance. In the present case, the draughtsman of the rules of this society seems to have recognized the fact that the property would not pass, or might not pass, to new trustees on a resignation; for he has referred in rule 10 to the vesting without conveyance so far as the Act of Parliament allows it, and has directed a conveyance in cases to which the Act does not extend.

The next argument of the plaintiffs is that, whether the plaintiffs have the legal estate or not, they can bring the action. For this argument they rely on the final clause of sec. 33, which provides that in all actions &c. touching or concerning the property of the society the same shall be stated to be the property of the persons holding the office of the trustees in their proper names as trustees of the society without further description; and on sec. 34 which provides that the trustees of the society are authorized to bring or defend actions or suits touching the property of the society "for which they are such trustees as aforesaid" &c. Such provisions are familiar to us in Bankruptcy Acts, although under such Acts the trustees in bankruptcy have unquestionably the title to all the bankrupt's property vested in them. These provisions in secs. 33 and 34 obviously assume that the trustees have been duly and fully constituted—that all the steps rendered necessary to vest the property in them have taken place. A man cannot be accurately called a trustee of property unless he hold the property—unless it be vested in him. The trust is not "perfectly created," the trustee is not fully constituted, unless the legal interest be actually vested in the trustee: (See *Lewin on Trusts*, 10th ed., p. 70, and cases cited.) It is a mistake to call the plaintiffs trustees of the society's properties before the property has been conveyed to, or otherwise vested in, them. They are not trustees; the retiring trustees still remain liable for any breaches of trust with regard to the property. They do not lose their responsibilities until the trust estate has been divested from them; and Messrs. Heydon and Mullins have been appointed to be the trustees of the property, but they are not the trustees of the society until the property has been

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vested in them. It has been suggested that the trustees—or trustees designate—of the society are like the public officers of unincorporated banking, insurance, and other companies—officers who were entitled to sue and liable to be sued on behalf of the company during the era which preceded the general Companies Acts. There is, no doubt, an analogy—a close analogy; but what of it? The case of a trustee in bankruptcy is also analogous. In all such cases the appropriate Acts gave power to sue and be sued; but it was also the usual—if not the universal practice—to vest the property in the public officer or in the trustee. These instances are not instances of persons enabled to sue in their own names without having the legal estate. In the case of companies, under the English *Companies Act* 1862, the official liquidator could bring actions; but as the property of the company was not vested in him, he had to sue in the name of the company (sec. 95). In the present case, sec. 34 follows the provisions of sec. 33, which directs the vesting of the property in the trustees of the society. It assumes that the vesting has taken place. The persons empowered to sue are the persons who have the legal title. It cannot be too clearly apprehended that a trust, in the true sense, is a trust of property — just as in olden times a "use" (*Lewin*, 10th ed., p. 11). As *James* L.J. said in *Smith* v. *Anderson* (1):—"A trustee is a man who is the owner of property, and deals with it as principal, or owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*." In my view, Heydon and Mullins are not yet the trustees of the society. The trust is not yet perfectly created. In England, Parliament has provided for the difficult case of a trustee appointed to whom conveyance has not yet been made, by providing expressly that he may in the meantime exercise powers (*Conveyancing Act* 1881, sec. 31 (5)). I do not deny that the new trustees have so far a standing, by virtue of their appointment, as to be entitled to sue retiring trustees for a transfer of the property. But, unless some Act gives the power expressly or by necessary implication, persons not having the legal estate in land have not, as against strangers, the right to sue for possession of

(1) 15 Ch. D., 247, at p. 275.

that land. It cannot be called a mere technical view of the position to think that a party who does not own property cannot get that property from strangers.

For these reasons, my view is that the present plaintiffs cannot succeed in ejectment until they become the owners of the land by appropriate conveyance of the society's property; and that the plaintiffs ought to fail in this action. According to my view, if they got a conveyance from Tierney and Larkin, or their representatives, their action of ejectment could then be brought to a successful issue.

Cullen K.C. asked for an order under sec. 228 of the *Common Law Procedure Act* 1899 fixing a time within which execution should issue, and referred to *Commercial Banking Co.* v. *Alexander* (1).

[GRIFFITH C.J.—The word "within" in that section should be read as if it were "after."

ISAACS J.—The concluding words of the section show that that must be so.]

If that is so the appellants are not entitled to issue execution before the expiration of the time fixed by the section, whereas, in the view taken by the Supreme Court in the case referred to, execution could not be issued after that time had expired.

PER CURIAM. We fix no time because, in our opinion, no such order is necessary. The plaintiffs may issue execution at any time after the expiration of fourteen days from entering the verdict, or on or after the fifth day in term after the verdict, whichever shall first happen.

Appeal allowed. Order appealed from discharged. Verdict to be entered for plaintiffs.

Solicitors, for appellants, *Makinson & Plunkett.*

Solicitors, for respondent, *H. C. G. Moss.*

C. A. W.

(1) 12 N.S.W. W.N., 91.